



Introduction: Legislation and the Law of Politics (Symposium: Election Law)

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SYMPOSIUM INTRODUCTION

LEGISLATION AND THE LAW OF POLITICS

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On March 6, 2008, the Harvard Journal on Legislation held a public symposium addressing election law issues, in anticipation of the elections that were to take place later that year. This piece briefly presents the importance of election laws to legislation in a broad sense, discusses paradoxes unique to the intersection of politics and substantive legislation, and introduces two articles by symposium panelists that address some of these issues in greater depth.

Perhaps it should go without extended discussion, but an introduction seems an appropriate place for a few words on why a journal on *legislation* would hold a symposium on *the law of politics*—campaign finance rules, legislative districting, voter identification rules, and the like. The law of politics provides the structure for the operation of our political system, and the operation of that system is the essential predicate for the adoption of legislation of any sort. Moreover, different structures of politics—which is to say, different incarnations of the law of politics—systematically produce different legislative outcomes. Anyone interested in legislation—whether generally or in some specific subject area—must be interested in the law of politics.

Yet, the connection between the law of politics and substantive legislation creates some paradoxes. Here I sketch some paradoxes of legislation and litigation and suggest that the articles that follow this Introduction be read with them in mind.

The first paradox of legislation emerges directly from the connection I have identified. Casual observers can see that changing the rules by which politics operates affects substantive outcomes.¹ But, if casual observers can see this, how much more obvious it is to the politicians who create the law of politics. It is now commonplace to observe that legislatively enacted campaign finance rules favor the major parties.² Similarly, recently adopted

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¹ For example, proportional representation systems provide a different structure for coalition building than do systems in which legislators are elected from single districts in which the candidate with the highest number of votes wins, even without a majority of the district. For a description of this phenomenon, see Maurice Duverger, *Factors in a Two-Party and Multiparty System*, in PARTY POLITICS AND PRESSURE GROUPS 23–32 (David Wagoner trans., Crowell 1972).

² See Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN L. REV. 643, 688–89 (1998) (describing the ways in which existing campaign finance rules entrench the two major parties). I should emphasize that here and throughout I describe tendencies, not inevitabilities. Parties favored by campaign finance

stringent voter identification laws are believed to produce more Republican office holders,³ as shown by their tendency to be adopted or rejected on strictly partisan lines.⁴

With this as the simple background, suppose you are dissatisfied with some public policy such as the existing policy on income security.⁵ How can you change that policy? Putting aside some complexities that do not affect the basics of the analysis,⁶ you must replace some legislators who support the existing policy with new legislators who support the policy change. Here, though, you might worry about the implications of incumbent-protecting laws of politics: you will not be able to replace those legislators unless you change the laws of politics.

This leads to the first paradox of legislation.⁷ Given the connection between the laws of politics and substantive policy outcomes, why should it be any easier to change the laws of politics than to change the substantive policies?⁸ That is, if you are able to mobilize enough voters to convince legislators, who understand the connection between those laws and substantive outcomes, to modify the laws of politics, why wouldn't you thereby have mobilized enough voters to change the substantive outcomes directly?⁹

One possible response relies on making the "model" of politics a bit more complicated. So far I have been assuming that voters (and legislators) are interested only in substantive policies. Suppose, though, that there is a third group whose members are indifferent to substantive policies, or at least to the particular substantive policy around which the reform mobilization

rules might lose their positions because of forces outside the politicians' control, such as a bad economy or a war that goes well or badly; however, even if they do not provide complete immunity, incumbent-protecting finance rules provide politicians with some degree of insulation from those outside forces.

³ See Joyce Purnick, *Stricter Voting Laws Carve Latest Partisan Divide*, N.Y. TIMES, Sept. 26, 2006, at A1 ("Democrats . . . accuse Republicans of suppressing the votes of those least likely to have the required documentation—minorities, the poor and the elderly—who tend to vote for Democrats.").

⁴ See Linda Greenhouse, *In a 6-to-3 Vote, Justices Uphold a Voter ID Law*, N.Y. TIMES, Apr. 29, 2008, at A1 (observing that the statute upheld in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), was "adopted by the Republican-controlled legislature in 2005 without a single Democratic vote").

⁵ I use an example that can be given both a conservative and a liberal political valence.

⁶ For example, legislative inertia may mean that it takes more than simply a majority to change an existing policy.

⁷ The argument I sketch here is at least a cousin to that made by Adrian Vermeule in *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 637–38 (2006).

⁸ Reformers who note the self-interest incumbents have in the laws of politics that has led them to where they are sometimes propose other reform strategies, such as enacting changes in the laws of politics by direct voter legislation (through an initiative or referendum), or replacing the enactment of the laws of politics by self-interested legislators with the administration of such laws by expert agencies exercising delegated authority that sets only the broadest of limits on what the agencies can do.

⁹ For a good presentation of this paradox, see Louis Michael Seidman, *Democracy and Legitimation: A Response to Professor Guinier*, 34 LOY. U. CHI. L.J. 77 (2002).

occurs, but who do want to achieve “good government.”¹⁰ You might be able to persuade them to support your ideas about changing the laws of politics by making good-government arguments, and then having changed the laws of politics, you might be able to elect new legislators who support the substantive outcomes you prefer (as to which, again, the good-government voters are indifferent).

Perhaps this “model” of politics dissolves the initial paradox of legislation, but it generates other questions, if not quite paradoxes. First, it is not clear to me on what basis a person could be interested in good government in the abstract, or good government as such. Generally, government is good to the extent that it produces good policies.¹¹ If so, a person who favors good government as such, indifferent to policy outcomes, is simply confused about what “good government” means.¹²

Second, even if we can make sense of the idea of a preference for good government as such, it is not clear how this preference could be mobilized in the reform campaign I have described. Many of those supporting the change in the laws of politics will do so because they believe that the change will produce new substantive outcomes. The electoral campaign for the change then faces a serious rhetorical problem: those leading the campaign will have to say to the supporters of a change in substantive outcomes, “vote for this reform of the laws of politics because it will lead to the changes you want in income security policy,” while saying to the good-government voters, “vote for this reform because it embodies good government.” This dual strategy will open the campaigners up to the charge of insincerity: “You don’t really care about good government, do you?”

Third—related and perhaps even more problematic—the good-government versions of the laws of politics are all quite contestable, in the sense that a reasonable case can be made in support of particular laws of politics that fall within a wide range. Stringent voter identification laws, for example, serve the ends of good government to the extent that they prevent in-person voter fraud, but less stringent ones serve the ends of good government by making it easier for some people to exercise their responsibility as

¹⁰ For ease of exposition I include within this group voters who are interested in good government and have some interest in substantive outcomes but are unaware of the connection between the laws of politics and the outcomes they care about (and who will not become informed of that connection by those who are better informed).

¹¹ While I put aside here laws that serve “merely” expressive purposes, my instinct, uninformed by serious consideration, is that the argument in the text holds true as to them as well.

¹² Lurking in the back of my mind is the possibility that an interest in good government as such might precipitate out of interests different groups have in different policy domains. But even if it does, it does not seem to me that the reform strategy I have described in the text could succeed to the extent that it is motivated by concern about outcomes in a particular policy domain.

Adrian Vermeule suggested to me that there might be another group of good-government supporters: those who are more certain about what constitutes good government than they are about which policies are good. I suppose so, although I remain puzzled about the basis on which such people determine that something actually embodies good-government principles.

citizens to vote. Given the availability of reasonable arguments for sharply contrasting rules of the laws of politics, on what basis can a person with a preference for good government make her choice? The most plausible answer, I think, is: on the basis of the outcomes that will result from one or the other rule.¹³ If so, we have simply returned to our original proposition: an electoral campaign seeking to change the laws of politics so as to change substantive outcomes, with no reason to think that it is any easier to accomplish the change in outcomes through a two-step process than through a one-step one.

Influenced by Supreme Court decisions from *Baker v. Carr*¹⁴ and its progeny, today's lawyers—perhaps believing that self-interested legislators will not change the laws of politics and perhaps understanding the paradoxes of legislation I have sketched—sometimes seek to change the laws of politics through litigation rather than legislation.¹⁵ This method, too, presents paradoxes.

One paradox of litigation is that litigation over the laws of politics is most likely to mobilize judges' partisan affiliations. As members of the informed political elites, judges are likely to be aware of the partisan effects of what they hold the laws of politics to be. When legal materials make it possible to construct decent arguments either way—as will quite often be the case—judges will be inclined to believe that the best construction is the one that conforms to their partisan presuppositions. Litigation that seeks to displace the partisan “distortions” of the laws of politics may then simply lead to validation or invalidation of those distortions on partisan lines, “distorting” judicially developed law with personal political inclinations.

A second and more interesting paradox of litigation arises directly from the many reasonable specifications of what the laws of politics should be in a well-functioning democracy.¹⁶ Constitutional litigation calls on the courts to choose one of many such specifications in the name of democracy. Courts are many things, but democratic voices—even voices for democracy—they are not. Certainly, though, courts can police the outer boundaries of the laws of politics, to purge the statute books of laws that are in no sense democracy-

¹³ Louis Michael Seidman has regularly pressed on me the tension between the argument sketched here and my “advocacy” of the abolition of judicial review on good-government grounds, to the extent that I have so advocated. For a recent exchange, see Louis M. Seidman, *Can Constitutionalism be Leftist?*, 26 QUINNIPIAC L. REV. 557 (2008); Mark Tushnet, *Response*, 26 QUINNIPIAC L. REV. 727 (2008).

¹⁴ 369 U.S. 186 (1962).

¹⁵ See, e.g., *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (seeking unsuccessfully to overturn a state law banning “fusion” candidacies in which a named candidate appears on the ballot under two parties' names, with all votes for the candidate counted).

¹⁶ Recast in terms made familiar by more recent discussions, this is the core of Justice Frankfurter's dissent in *Baker v. Carr*. See *Baker v. Carr*, 369 U.S. at 301 (Frankfurter, J., dissenting) (“The notion that [proportional representation] is so universally accepted as a necessary element of equality . . . —that it is . . . ‘the basic principle of representative government’—is, to put it bluntly, not true.”).

promoting.¹⁷ But, the case for judicial selection of one law of politics over another, so long as each is reasonable, is less than compelling.

The Symposium articles that follow deal with the laws of politics at the stages of both legislation and litigation. Heather Heidelbaugh and her co-authors emphasize the reasons for adopting poll watcher laws and then turn to litigation over the constitutionality of such laws. Laughlin McDonald describes the possibility that partisan gerrymandering will affect redistricting after the 2010 census and then emphasizes the need for doctrines that can be used effectively in litigation as well as other legislative responses. Whether, or to what extent, the problems the authors address implicate the paradoxes of legislation and litigation is for the reader to decide.

¹⁷ Examples are hard to come by precisely because a wide variety of laws can reasonably be described as democracy-promoting. Campaign-finance regulations, the regulation of the content of cable programming, and hate-speech regulation are good examples of regulations that reasonable people could reasonably think are democracy-promoting. The best examples of regulations that are extremely difficult to defend as democracy-promoting may be First Amendment decisions barring the government from punishing people for expressing disagreement with government policy. *See, e.g.,* *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (invalidating a state law making “criminal syndicalism” unlawful).

