ROUTLEDGE

LAW AND ELECTION POLITICS

The Rules of the Game | Second Edition

Edited By **Matthew J. Streb**

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PREFACE AND ACKNOWLEDGMENTS

As is true for many books, the idea for *Law and Election Politics* emerged during lunchtime conversations with colleagues. On the face of it, elections and constitutional law seem like two entirely separate topics, although certainly anyone who teaches either subject is aware of the relationship between the two. Just how much overlap exists, though, became apparent from my discussion with one colleague in particular: Evan Gerstmann. I teach political behavior and elections; Evan teaches constitutional law. Over sandwiches, we would pick each other's brains to get a different perspective on our current research or the topics we were covering that week in our classes. A discussion of the role of money in elections would lead me to ask Evan to explain more clearly the Supreme Court's rationale in *Buckley v. Valeo* (1976), one of the most important election-related court cases in U.S. history. A discussion of a recent court ruling regarding a redistricting plan would lead Evan to quiz me on the politics behind the redistricting process and the kind of representation that emerged as a result. I quickly realized that one cannot truly understand elections without being aware of election law, nor can one fully grasp the importance of election-related court rulings without an understanding of the political aspect of elections.

My students have also challenged me to think about how election law and electoral politics are intertwined. Because many political science majors are blossoming lawyers, they often hunger to learn more about the law as it relates to elections—and are disappointed to discover that their assigned books rarely expend more than a sentence or two addressing significant court rulings. As a result, questions in class inevitably revolve around the rules of the electoral game and why those rules are constitutional or not.

I became convinced that a clear assessment of election law as it relates to the political aspects of elections would be indispensible for me, my students, and my colleagues. Certainly there are many books on election law, but they are designed primarily for advanced law students and are usually devoid of any discussion of the political aspect of elections, nor are they easily digestible for most people. And there are myriad books on elections but, as noted, these books rarely analyze elections from a legal standpoint. The goal of *Law and Election Politics*, then, is to bridge the legal and the political, to help readers realize and appreciate the interconnectedness of the legal and the political in a way that is both engaging and understandable.

The chapters in this book cover a wide range of subjects, all of which are essential to understanding elections in the United States. And, since the publication of the first edition, much has changed regarding election law and electoral politics. A new redistricting cycle has started; the Supreme Court made the most important—and controversial—ruling on campaign finance in the last quarter century; issues such as voter identification, voting machines, and early voting have become prominent; recounts were needed for two high-profile elections, proving that *Bush v. Gore* may not have been an isolated incident; and judicial elections have taken on the traits of elections for other offices. All of these subjects are controversial, but all contribute to the kind of electoral democracy in which we live. It is my hope that students of elections—whether those taking their first election course or those teaching elections for the hundredth time—will be captivated by the issues in the book and will come away with a greater understanding of how politics and laws shape the kind of democracy we have and the government we live under.

There are several people to whom I owe a great deal of gratitude. First and foremost, the contributors to this book all shared their expertise and passion for the topics at hand. One of the great joys of editing a book such as this is that, if you pick the right people to contribute, you will walk away learning far more than you could have imagined. That was the case with this impressive group of scholars. Every chapter I read, I learned something new. I very much appreciate their providing their time and talents. I am honored to have them associated with this book.

I owe a great deal of thanks to Evan Gerstmann, Brian Schaffner, Lee Goodman, Chris Shortell, Seth Thompson, and Michael Genovese, all of whom were willing to be sounding boards when I was thinking through the first edition of this project. It is a much better book because of their suggestions and insight. Michael Kerns at Routledge is not only a great editor, but he is an even better friend. This is my second book on which I have worked with Michael, and both times the book was improved markedly because of his insight and advice. I thank John Peterson and Mark Jerkatis for their research assistance. Finally, my wife Page and my sons, Logan and Alex, constantly remind me what is really important. According to Logan and Alex, that is Hoosier basketball.

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INTRODUCTION

Linking Election Law and Electoral Politics

Matthew J. Streb

After thirty-five days of madness, confusion, legal wrangling, and political posturing, the Supreme Court finally brought the spectacle of the 2000 presidential election to an end with their decision in *Bush v. Gore*. In a highly controversial 5-4 ruling, the Court voted to end all recounts, arguing that the various standards used by Florida counties for recounting punch-card ballots violated the Equal Protection Clause of the Fourteenth Amendment. Headlines across the country, such as the *Boston Globe*'s "Supreme Court Compromises Its Legitimacy,"[1] the *New York Daily News's* "High Court's Integrity at Risk,"[2] and the *San Francisco Chronicle's* "Turbulent Election Taints Top Court's Reputation for Neutrality,"[3] condemned the Court's ruling and raised questions about its involvement in the electoral process. In his national column, journalist E. J. Dionne simply asked, "Supremely Partisan, Will the High Court Besmirch Itself?" Even Supreme Court Justice John Paul Stevens recognized the danger of the Court's ruling. "Although we may never know with complete certainty the identity of the winner in this year's presidential election, the identity of the loser is perfectly clear," wrote Stevens in his dissenting opinion. "It is the nation's confidence in the judge as an impartial guardian of the rule of law" (quoted in Walsh 2000).

Though the country was surprised by—and often extremely critical of—the Court's role in the election outcome, federal courts have always played a pivotal part in interpreting the laws governing elections. Certainly, no decision was more covered or scrutinized than the *Bush v. Gore* ruling, but it would be wrong to conclude that the courts rarely involve themselves in matters concerning the conduct of federal—and, in many cases, state and local—elections. Indeed, for decades, the courts have played a major role in deciphering such contentious

issues as campaign finance, voting rights, redistricting, party primaries, and campaign advertising.

The case of *Bush v. Gore* clearly illustrates the important role that courts (and election law in general) play in elections. And it is certainly not the only case to do so. Though the courts have been extremely active in interpreting the rules of the electoral game, this role is misunderstood and understudied—as, in many cases, are the rules themselves. *Law and Election Politics* analyzes what the rules of the game are and some of the most important—and most controversial—decisions the courts have made on a variety of election-related subjects, including campaign finance, political parties, voting, campaigning, election recounts, redistricting, and judicial elections. The book is much more than a typical law book, however. Instead, it examines how election laws and electoral politics are intertwined; you cannot understand one without understanding the other. The contributors look at how the law and judicial interpretation of the law shape politics.

Politics is often murky; the rules are sometimes unclear, and the winners are often surprising. Law should not be; the rules should be explicit, and these rules should—in theory, anyway—allow us to easily predict the winners. Because of the differences, too often we ignore how election law and electoral politics interact. *Law and Election Politics* addresses this vital subject head on.

The subjects covered in this book are incredibly important because they all shape the U.S. government and the strength of its democracy. One cannot truly analyze how well our "great democratic experiment" is working without thinking about topics such as the ones addressed in this book. What is the quality of candidates we get to chose from when voting? Are there drawbacks to the two-party system? What role do money and campaign advertising play in terms of which types of candidates win? Should citizens play a direct role in legislating and, if so, what should the rules be for getting possible legislation on the ballot? What kind of voting equipment should be used, and are some people's votes more likely to count than others? How is the Internet changing the way candidates campaign, and what kind of voice does it give to the people? Do current laws adequately protect voters? How does the drawing of congressional and state district boundaries affect the kind of representation we get? Are judicial elections promoting judicial accountability or threatening judicial independence? Each of these questions has a profound impact on the quality of U.S. democracy, and the answers to these questions are provided here.

The Format of the Book

The book addresses several major, contemporary issues—although certainly not all issues—dealing with elections. It is essentially divided into three sections: campaign finance law and campaigns; voters; and institutions.

In the first chapter, Michael M. Franz discusses the evolving nature of campaign finance law and how that has affected the influence of political parties. Like many political scientists, Franz believes that parties play an important role in a democracy and argues that recent court rulings related to campaign finance may undermine their influence instead providing more power to interest groups and organizations whose purpose is often unclear.

In Chapter 2, Peter L. Francia discusses the evolution of publicly-financed elections and argues that the viability of such programs are threatened at both the federal and state levels. At the federal level, recent presidential candidates have been able to raise so much money that there is no incentive for them to accept public financing. That is unlikely to change in the future. At the state level, recent court rulings have potentially undermined so-called clean elections legislation by limiting the incentive for candidates to participate in such programs.

Chapter 3 looks at elections from a campaign's perspective. Lee E. Goodman writes about the newest campaign tool that candidates, interest groups, and citizens have at their disposal: the Internet. Goodman argues that the Internet is revolutionizing campaigning and opens the door for the voices of many people to be heard in the democratic arena. As Goodman notes, however, the Federal Election Commission spent the 1990s and early 2000s trying to fit the square peg of Internet political activity into the round hole of old campaign finance regulations, often with illogical results, before deciding to leave most Internet speech unregulated. According to Goodman, this move toward deregulation has empowered citizens.

In Chapter 4, the focus turns toward voting and voters. Thad Hall and Lucy Williams Smoot document the increased scholarly interest on voting machines after the problems that emerged in Florida during the 2000 presidential election, discuss how voting technologies have changed since that point, and examine potential equal protection concerns that exist based on the type of technology used. Hall and Williams close with a brief discussion of the future of Internet voting and equal protection issues that remain with this newest technology.

In Chapter 5, Lorraine C. Minnite tackles perhaps the most contentious recent election law–related issue: voter identification. Minnite highlights the arguments for and against requiring voters to show a form of photo identification at the polls. Minnite believes that such laws are unnecessary because concerns over voter fraud are greatly exaggerated and because they prevent some people from casting votes legally.

The focus of Chapter 6 is early voting, an increasingly common method for citizens to cast their ballots. Paul Gronke explains different kinds of early voting and arguments for and against the idea. Additionally, he documents the legal requirements and administrative procedures associated with each method of balloting. Gronke closes by making a provocative argument in favor of an

election week where citizens would not only vote but participate in civic-related activities.

Chapter 7 explores another issue that has received more attention in recent years: election recounts. Edward B. Foley traces the history of how recounts have evolved and the issues they present today, especially in light of the *Bush v. Gore* case discussed at the beginning of this introduction.

In Chapter 8, Daniel A. Smith examines the legal and political issues related to direct democracy. In particular, Smith focuses on legal challenges to the initiative process both in terms of getting initiatives on the ballot and financing them once they have made the ballot. As Smith notes, because the public generally supports the concept of citizen lawmaking and legislatures are, not surprisingly, skeptical of it, legal battles over regulating the process are not likely to be settled any time soon.

In Chapter 9, the chapter subjects turn toward institutions, specifically political parties, Congress, and the judiciary. Kristin Kanthak and Eric Loepp examine party primaries, specifically the different types of primaries and how the type of primary can influence the election outcome. They then focus on the relevant case law dealing with primaries and explore how the courts have balanced the parties' rights to freedom of association with the states' rights to regulate elections.

In Chapter 10, Marjorie Randon Hershey chronicles the obstacles that third parties have faced in getting on the ballot and winning elections. As Hershey notes, the rules of the game—rules usually made by the two major parties—are stacked against third parties, and the courts have been reluctant to come to their rescue.

In Chapter 11, the focus is on one of the most controversial and complex aspects of election law: redistricting. Charles S. Bullock III looks at the politics behind the redistricting process. Few issues are dominated by politics as much as redistricting because of the incredible effects the drawing of districts lines have on who controls the city councils, state legislatures, and the House of Representatives and the types of representatives we elect. Likewise, few aspects of elections have seen more legal challenges than the redistricting process. Bullock clearly explains how the Voting Rights Act (and its extensions) have guided the redistricting process and brings the reader up to date on the courts' most recent decisions regarding the extremely important process of drawing district lines.

Finally, in Chapter 12, I examine judicial elections, an often-less-studied but increasingly controversial topic. Judicial elections are fascinating because, in theory, they are supposed to be different than most elections in this country. The laws regarding campaigning and fundraising are different than the rules for other offices, and judicial elections are often subjected to certain norms not found in other elections. However, these laws and norms have recently come

under attack and, as I note, because of recent court rulings, the landscape of judicial elections is changing immensely.

Notes

1 Jack M. Balkin, *Boston Globe*, December 12, 2000, A23.
2 *New York Daily News*, December 12, 2000, 50.
3 Marc Sandalow, *San Francisco Chronicle*, December 12, 2000, A1.

1

CAMPAIGN FINANCE LAW

The Changing Role of Parties and Interest Groups

Michael M. Franz

Current campaign finance laws in the United States are a puzzle. The rules as they apply to candidates and parties are far more restrictive than the rules for anonymous interest groups, many of whom have no reporting or disclosure mandates. This incentivizes political actors to form outside groups to fund and sponsor pro-candidate messages with donations of unlimited size. It is arguably more advantageous for candidates currently to rely on wealthy friends and allies to aid independently a candidate's efforts than it is to draw on the support and expertise of the formal party organizations, whose primary purpose is exactly such support. For example, while the Democratic Party worked hard to reelect Barack Obama in 2012, his former deputy press secretary, Bill Burton, formed Priorities USA, an independent group free to raise unlimited funds from any corporation, union, or wealthy citizen. The Democratic Party is forced in contrast to raise funds from individuals and political action committees (PACs), both capped at $31,000 and $15,000 per year, respectively. Though the value of a democratic system based on "small donor contributions" is apparent and not debated or challenged here, one ponders the logic of disadvantaging parties in this obvious way. Moreover, party leaders are increasingly outsourcing some of their campaign functions and data collection to for-profit groups so as to sidestep financing barriers. We are left with what might be termed an ascendant "interest group-centered" campaign finance system.

This is not irrelevant or harmless. As Rozell, Wilcox, and Madland (2005) argue:

> Although political scientists disagree strongly about whether policy messages should be shaped by the parties or by candidates, few would argue that interest groups should dominate the dialogue. When interest

> groups frame the issues, attack the character of candidates, and otherwise run shadow campaigns, accountability suffers. Candidates are not responsible for the claims and attacks in the advertisements, and it is more difficult to hold candidates to campaign promises when those promises are made by interest groups and not by the candidates themselves (p. 163).

There is, indeed, a long history in political science debating the value of a party-centered system. In 1942, E. E. Schattschneider argued that "political parties created democracy and ...modern democracy is unthinkable save in terms of the parties" (p. 1). He championed a "party cartel" vision where leaders organized and laid out a platform and voters chose among the two major options given them, with candidates going along for the ride.

As technology developed in the second half of the twentieth century, candidates branched out on their own, using television to run campaigns increasingly independent of party bosses or platforms (Salmore and Salmore 1989). This resulted in a noted decline in the role of parties in elections. Some lamented this change, while voting for "the person, not the party" became a common rallying cry of voters. To the extent that parties adapted after the 1960s, they reinvented themselves as "service organizations" that supplied the candidates—now the center of the system—with the materials for a good campaign (i.e., money, polling, expertise; Herrnson 1988, 2000). Such adaptation occurred alongside the expansion of interest groups into the electoral realm, who leveraged candidates' need for campaign contributions to become central players.

Curiously, the dimensions of campaign finance rules in contemporary American politics are not the product of a single vision. It is a system cobbled together from (changing) congressional intent layered on regulatory interpretation and judicial revision. No one would likely design the system we have today from scratch, and it seems uncontroversial to say so. Liberal reformers want more regulation, perhaps a whole new system that "cleans" money; conservatives want no system at all.

How did we get here, however—to a system where the formal party organizations compete for attention in an increasingly crowded electioneering and issue space? What are the implications? The goal of this chapter is to review the changes in campaign finance laws as they apply to parties and interest groups and to show evidence that interest groups are growing in prominence, with no abatement in sight.

It should be noted that this chapter considers the impact on the formal party organizations. A growing literature, which will be reviewed later in the chapter, reconsiders the party as a "network" of allied groups and formal party organizations. This is insightful and likely true: The party is no longer (and may never have been) represented by the chair of the Democratic or Republican

national committees. It is not the president alone, nor the presidential candidate for the opposition. It is not the leaders of the parties in Congress. It now includes labor affiliates and environmental activists for the Democrats (among others) and business groups and social issue advocates for the GOP. However, is this good? What value-added do we have with a party that may no longer have an identifiable core?

It is relatively straightforward to argue, in fact, there is real normative value in having stronger party organizations. The legacy of Schattschneider's (1942) argument looms large. Parties are well known to voters, unlike many interest groups. They have the goal of winning majority support nationwide, unlike the more particularistic policy goals of interest groups. And they can make elections easier to engage with and understand. To that effect, strong party organizations ideally pose a set of policies to the American people that stand in contrast to the other major party. Are you too busy to learn the policy positions of the dozens of candidates running for the presidency, the Senate, and the House, and are there too many interest groups vying for your attention and support? One answer is look to the party platform and pick one of the two options, with your candidate selections matching your party preference. Fostering such a reality is a controversial claim in contemporary American politics, but it is not without its attractive features.

The chapter is organized as follows. It begins with a discussion of parties and the campaign finance regulations governing their electioneering. There may be some exaggeration in what has been laid out earlier, for there is evidence that parties have consistently adapted to circumstance and are hardly lacking in resources. However, to consider parties in isolation misses the larger story. The second section builds on this point and considers the rules for outside groups as they have evolved in the last forty years. This is a story of restrictive rules that gave way in recent years, resulting in an onslaught of outside spending. The third section puts these stories together, comparing interest group activity with party adaptation. How have the formal party organizations fared in an environment of expanding group participation? What happens to these party organizations in a party redefined as a "network," one with no obvious leading element? The chapter concludes with some consideration of reform.

Parties: Hard Money, Soft Money

The impact of campaign finance laws on parties could be considered in three phases, which might be termed: the down-and-out phase (1970s–1980s), the central-hub phase (1990s–2002), and the adaptation phase (2004–present). These phases are likely contested both in timing and meaning, but they correspond to major changes in the way parties participated in elections. Congress passed major campaign finance reform in 1971 (the Federal Election Campaign Act) and in