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ELECTION LAW
in the American Political System

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Aspen Casebook Series

Election Law
in the American Political System

James A. Gardner
SUNY Distinguished Professor
Joseph W. Belluck and Laura L. Aswad
Professor of Civil Justice
SUNY-Buffalo Law School

Guy-Uriel Charles
Charles S. Rhyne Professor of Law
Duke Law School

Wolters Kluwer
Law & Business

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Preface

Democracy does not implement itself. Offices do not spontaneously appear, along with election districts, political parties, polling places, ballots, and administrators. Eligible voters and qualified candidates do not sprout from the ground like mushrooms. A society's commitment to govern itself democratically can be effectuated only through law.

This simple observation is the starting point for our approach to the field of election law for, notwithstanding its banality, it yields several significant insights. First, it demonstrates why the study of law is important to any contemplation of democracy and democratic politics. Democracy does not take place upon some featureless plain of political contestation. To the contrary, it exists only upon landscapes that have been deeply structured by legal rules. Since in a democracy these rules themselves ultimately bear a democratic provenance, a people that aspires to self-rule cannot merely command itself to have democracy; it must also specify for itself the institutions within which the aspiration to democratic self-rule is to be fulfilled. Law and democracy are thus inseparable, and one cannot understand the latter without paying attention to the former. This linkage provides an important reason to study election law, the body of law that structures democracy.

Second, a recognition of the place of law in structuring democracy also helps dispel a common misconception about politics. Politics is often portrayed in the popular media, and even in many professional and academic settings, as a kind of raw struggle for power in which political outcomes are settled by the tactical moves and countermoves of immediately interested political actors. This view is not entirely inaccurate, but it must be qualified significantly in light of the role that law plays in structuring political contestation. No aspect of democratic politics is unconstrained to some degree by law. There is no arena in which raw power struggles against raw power in an unmediated contest for political ascendency. Rather, legal rules and legally created institutions powerfully influence the way in which political contestation occurs. Because law establishes the ground rules for success, political actors who wish to be effective must therefore act in the political arena in ways that help them succeed under the particular set of legal rules and constraints that happen to control. Law thus shapes political behavior.

Third, law also shapes the relationships among various democratic actors and institutions. Institutions — legislatures, courts, election officials, political parties, for-profit corporations, public interest groups, and the like — operationalize democratic

practices. They offer competing visions of democracy. It is law that settles the boundary disputes among these institutions. Law directs their roles; it facilitates or hinders their effectiveness. A study of election law is also a study of the rules that govern the interaction of various democratic actors and institutions.

Finally, once it is acknowledged that democracy cannot exist without law, it becomes immediately clear that a society's effort to implement its commitment to democratic self-rule requires it to make significant choices. There is no single way to "do" democracy; societies that wish to rule themselves democratically may choose from among many possible institutions, ground rules, and regulatory regimes. This proposition has an important corollary: If we as Americans do not have the democracy or the democratic politics to which we aspire, it is fair to ask whether our choice of laws and legal institutions might bear some responsibility, and whether altering the law might conduce to better and more desirable outcomes.

Acknowledgment of these simple truths, we believe, casts election law in its appropriate role as neither more nor less than the handmaiden of well-articulated democratic ideals. It reminds us that laws structuring the democratic process are not features of the natural world, to be unquestioningly accepted or venerated, but on the contrary embody a series of contingent choices made by a succession of human beings for a variety of purposes. As we conceive it, election law as a discipline thus bridges the gap between our aspirations for, and the frequently messy reality of, our political lives. It is the middle term in an equation that specifies whether and to what extent we realize perhaps the most significant dream of contemporary human beings: to live well under a just and lasting democracy. That is why we love the field, and we hope our particular brand of affection comes through in these materials.

General approach of the book

These basic premises have fundamentally shaped our approach to the field of election law, and to the design and structure of this book. Because the study of election law, as we understand the subject, requires contemplation of the choices that our laws have made in seeking to structure a workable system of democratic self-rule, it is necessary for students of the subject to have the tools they need to identify, understand, and evaluate those choices. For that reason, we have committed ourselves in this book to embedding the field of election law in a broader context that reveals its connection to two fields with which it is very closely allied: democratic theory and empirical political science.

Democratic theory provides at the front end an account (actually numerous competing accounts) of what democracy is, the benefits it is capable of providing, and the forms in which those benefits may be delivered. At the back end, empirical political science provides tools that, in the right circumstances, may be used to test the extent to which some particular legal regime or institution actually achieves the goals it was created to accomplish. Indeed, if this book has a single aim, it is primarily to help ameliorate the frequently underdeveloped ability of legal actors to identify, articulate, and evaluate the assumptions upon which they base their political opinions and actions. It does so by providing students with a vocabulary and a stock of concepts

drawn from democratic theory and empirical political science, and by setting the legal doctrine at every opportunity in its theoretical and practical contexts.

We also begin from the assumption that somewhere between none and virtually none of our students will actually practice election law. Notwithstanding the recent growth in election-related litigation, few practicing lawyers will ever have a candidate or political party for a client, or will ever advise or represent a voter challenging some electoral law or a government defending one. This assumption has two important consequences for the shape of the course. First, it permits us throughout the book to focus on the most general (and also, in our view, the most interesting) aspects of the field. Second, it means that the function of the course in the law school curriculum, in our view, is less to prepare students for the actual field of practice they will enter than it is to build a more general kind of legal and democratic citizenship. Our main goal in presenting the material is to help our students become savvy consumers and users — and informed judges and critics — of democratic laws and practices.

In this sense, our approach to Election Law is not all that different from our approach to the basic course in Constitutional Law, which both of us also teach. Few lawyers will ever come within sniffing distance of a constitutional issue. For all but a very few, the course serves instead as a building block of general legal citizenship by educating lawyers in the larger structures of their universe and inculcating the values of sound legal citizenship. Indeed, Election Law is in most respects essentially an advanced, very challenging, upper-level course in Constitutional Law. Although some significant subfields, such as the Voting Rights Act, revolve around statutory issues, most of the recurring problems in the field — franchise restrictions, redistricting, ballot access, candidacy requirements, and the regulation of political parties, campaign speech, and campaign finance — all involve issues of constitutional law. The complexity of these issues and the controlling judicial analyses is what makes the field so endlessly challenging and stimulating.

Specific choices

Every casebook author faces a fundamental choice: include more cases, aggressively edited, or include fewer cases, more lightly edited. We have opted for the latter, and in consequence many of the cases in the book (as well as some of the non-case readings) are on the longer side. We have done this because we believe that this approach, on balance, provides (1) a more realistic picture of the state of advocacy and judicial analysis in the field; (2) a richer and more sophisticated environment for exploring the details of arguments and analyses that have been made and accepted or rejected, and in consequence the kinds of considerations to which courts are sensitive; and (3) a better and more complete overall comprehension for students, whose attention is necessarily focused on working intensively through a small number of rich analyses instead of being spread over many cases that have been edited down to sometimes misleadingly superficial distillations.

Consistent with a preference for fewer but longer cases, we also have chosen to include a good deal of original, direct exposition where, in our view, that provides a better and more efficient vehicle of instruction than reading cases. Casebook authors

sometimes seem to believe that because a work is denominated a "casebook" it must therefore contain essentially nothing but cases. Sometimes this leads authors to accomplish what are essentially expository or narrative tasks by excerpting from cases. We think that tactic is unproductive. Where a good deal of information must be conveyed compactly, we have simply written it up ourselves. If this means giving brief descriptions of cases in lieu of providing the cases themselves, we have done so.

Consistent with our aims, the book also contains a wider variety of reading materials than is found in most casebooks. Although most of the contents of the book consist of traditional, core legal materials such as cases and statutes, we have included readings drawn from political philosophy, democratic theory, political science, and history, as well as the standard commentary from secondary legal sources. Some of this material is presented in the form of featured readings; much is presented in a more condensed form in order to present a large amount of information as compactly and efficiently as possible.

This brings us to the role of these non-case materials in the pedagogical structure of the book, and the course it is designed to support. Even where such materials are presented in a condensed or highly excerpted format between cases, we most emphatically do *not* think of them as "notes" in the sense in which the term is generally used. Often the notes in the standard legal casebook read like a series of unrelated observations or afterthoughts, stuffed into the spaces between cases, which in such books are often presented implicitly as the only material worth focusing on, for students and professors.

In contrast, we do not understand the teaching of election law to consist of the teaching of cases "enriched by" "note materials." Insights gleaned from democratic theory, empirical political science, historical accounts, and even descriptions of developments following judicial decisions are *part* of the course. We think of the book as containing instructional material of many types, requiring different kinds of teaching, as appropriate. That said, it is certainly possible for an instructor to teach only the cases, or to teach the material as though it were a collection of cases strung together with some awfully weird connective tissue, but we think that would be a mistake.

To this end, we have distinguished our non-case material from standard casebook notes in two ways. First, we've used this symbol ≫ to indicate the introduction of a significant concept, whatever its topic and whatever its source. Second, we have generally given these interpolations subject headings so that students know what's coming, why they should be reading it, and how to approach it. In this way, we hope to defend against what we believe to be the predisposition of some upper-level law students to treat numbered notes as a random assembly of afterthoughts that can safely be ignored.

Organization

The book begins with some introductory material exploring several overarching themes. This material is designed to set the stage, and to introduce a vocabulary and a stock of concepts that can then be invoked as the course progresses. The introductory subjects include democratic theory; the sometimes distinctly anti-democratic, republican structure of government under the U.S. Constitution; the prominent and

recurring problem of race in the field of election law; and the unusual distribution of power to regulate elections under the federal structure of U.S. government.

From there, the book is organized according to a very simple conceptual heuristic. It begins at the place where all contemplation of politics must necessarily begin: with the political subject, the citizen and voter, the one who is democratically represented. It then goes on to consider the nature and legal significance of political representation; turns its attention to the official and candidate — the one doing or offering to do the representation; and then proceeds to examine three institutions that play a hugely important role in the way that the representation relationship is established: political parties, campaigns, and electoral administration. To put this progression in the terminology of legal doctrine, the substantive coverage begins with a thorough examination of the right to vote and the bases on which it may be restricted. It then examines the constitutional framework governing representation of voters in legislative bodies. Coverage includes the nature and basis of political representation, how the law defines the community represented, the problem of virtual representation, the many questions associated with drawing legislative districts, and constitutional treatment of discrimination in representation through racial or partisan manipulation of the methods of election or the boundaries of election districts. Before leaving representation, the book devotes significant coverage to federal statutory regulation of the representation relationship in the form of the Voting Rights Act.

From there, the book moves on to consider the legal treatment of candidates for office, including the establishment of qualifications for and conditions upon the holding of elected office. This section also devotes attention to the unusual nature of candidates for judicial office, and the special rules that apply to judicial elections. Coverage moves next to the party system, including principles of ballot access, the constitutional status of the two-party system, regulation of primary elections, and political patronage. It then proceeds to consider election campaigns in chapters covering constitutional treatment of the regulation of campaign speech — a feature we believe is unique to this text — and issues relating to campaign finance. The book concludes with a chapter devoted to the newly emerged topic of election administration, which it considers alongside the body of law governing remedies for electoral mistakes and maladministration.

James A. Gardner
Guy-Uriel Charles

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