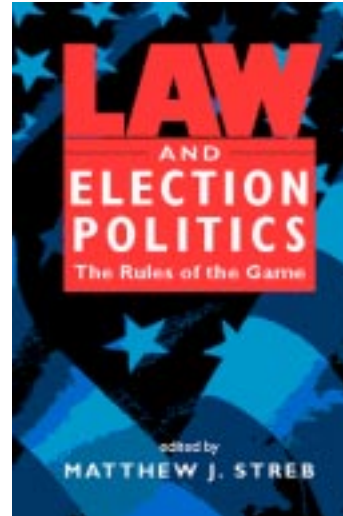


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Law and Election Politics:
The Rules of the Game

edited by
Matthew J. Streb



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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 its 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*' “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?”⁴ 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.”⁵

Although 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 importance of the rules of the game and the courts' interpretations of those rules was again thrust into the spotlight with the recall of California governor Gray Davis in 2003. Amid the media's obsession with the circuslike atmosphere of the campaigning were serious questions about California's election laws regarding the recall of a governor. California law states that, in order for the recall to occur, recall supporters must obtain the signatures of registered voters equal to 12 percent of the previous gubernatorial election turnout (in this case, close to 900,000 signatures). But once the recall makes the ballot, potential candidates have an extremely low threshold to meet in order to be placed on the ballot. The low threshold led an unprecedented 135 people to throw their hats into the ring.

Many were upset with the limited requirements to run for office in a recall election. California law was surprisingly ambiguous regarding the rules of a gubernatorial recall, and the state was forced to rely on the interpretation of the law by Secretary of State Kevin Shelley. Shelley followed a standard used in two recall elections for offices other than governor. Critics of Shelley's interpretation argued that the rules were unconstitutional. The California Supreme Court refused to hear the case, arguing that the law had ambiguities and required Shelley to use his discretion. According to the court, Shelley's interpretations did not violate state law.

The argument against the low threshold for candidates to be put on the ballot was certainly not the only case challenging the recall. In all, there were close to two dozen lawsuits filed. Perhaps the most controversial law regarding the recall kept Davis from being a candidate to replace himself if he were recalled. It was possible (and most scholars studying the election thought most likely) that Davis would be recalled but would still receive around 45 percent of the vote. Because of the large number of candidates on the second question, many thought it would be difficult for one candidate to win a large percentage of the vote. In other words, Davis could be recalled by only receiving 45 percent of the vote (he needed a majority to vote against the recall to remain in office) but still win more votes than the person who would replace him.⁶ The court unanimously agreed not to hear the case.

The election also forced the courts to revisit the controversial *Bush v. Gore* ruling. Six counties in California, including Los Angeles and San Diego, were still using the antiquated punch-card machines that were responsible for many of the problems in Florida during the 2000 presidential election. If the recall were to take place in March of the following year—a time that most analysts believed would benefit Davis because the recall would be held in conjunction with the Democratic presidential primaries—instead of October, the six counties would have new voting systems in place. The American Civil Liberties Union (ACLU) filed suit arguing that, if the election were held in October, voters in those six counties (many of which had large minority pop-

ulations) would be more likely to be disenfranchised, thus violating the equal protection provision enunciated by the Supreme Court in *Bush v. Gore*. Initially, the Ninth Circuit Court of Appeals delayed the recall, citing *Bush v. Gore* in their ruling. The Ninth Circuit then heard the case *en banc* and unanimously (11–0) ruled that the recall should proceed as scheduled. “Interference with impending elections is extraordinary, and interference with an election after voting has begun is unprecedented,” the court ruled.⁷ “Investments of time, money, and the exercise of citizenship rights cannot be returned.”⁸ Again, the courts were at the center of a controversy regarding an election.⁹

The cases of *Bush v. Gore* and the California recall clearly illustrate the important role that courts (and electoral law in general) play in elections. 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, issue advocacy electioneering, voting, campaigning, 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 choose 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? How do the media cover campaigns, and how does that influence the amount and quality of the information we bring into the voting booth? 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 giving us strong candidates from which to choose, or are the elections being sold to the highest bidder? 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. We begin with a discussion of political parties. In Chapter 2, Kristin Kanthak and Jeffrey Williams 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 3, 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 Chapters 4 and 5, the focus turns to the important role that money plays in elections. In Chapter 4, Victoria Farrar-Myers examines the issues of representation and the First Amendment as it relates to the current campaign finance debate. She provides a historical overview of the Federal Election Campaign Act and the *Buckley v. Valeo* ruling. She then discusses the recent campaign finance legislation passed by Congress and signed by George W. Bush, the Bipartisan Campaign Reform Act (BCRA), as well as the Supreme Court's 2003 ruling in *McConnell v. Federal Election Commission* on the legislation. In Chapter 5, Allan Cigler focuses on the increasingly prominent role that organized interest money has played in recent elections, specifically through the use of issue advocacy ads. He analyzes how BCRA and the Court's recent ruling in *McConnell* will affect organized interests' abilities to run issue advocacy ads in the future.

In Chapter 6, we turn to the role of the media in elections. Brian Schaffner looks at the changing nature of the local media resulting from recent legislation, changes in Federal Communication Commission (FCC) regulations, and court rulings that allow companies to own stations reaching a greater share of the population. Schaffner argues that the consolidation of media outlets has the potential to seriously change how (or whether) the media cover local campaigns. These changes may have important consequences for the amount of information citizens have available to them when casting their ballots in local elections.

Chapter 7 looks at elections from a campaign's perspective. Lee Goodman writes about the newest campaign tool that candidates, interest groups, and citizens have at their disposal: the Internet. Goodman argues that the Internet has the potential to revolutionize campaigning and opens the door for

the voices of many people to be heard in the democratic arena. As Goodman notes, however, Internet technologies stress old campaign finance laws designed for more expensive media, and election law regarding the use of the Internet is still in its infancy stages and is often unclear.

In Chapters 8 and 9 we move away from the candidate and campaign aspects of elections, instead focusing on voters. In Chapter 8, Evan Gerstmann chronicles the infamous 2000 presidential election that culminated with the controversial Supreme Court decision in *Bush v. Gore*. Gerstmann dissects the Court's ruling and discusses the effect the ruling could have on elections in the future, arguing that the decision sets a dangerous precedent. In Chapter 9, Antonio Brown continues the discussion of voters' rights under the law with an examination of the Voting Rights Act and the effect it has had on protecting minority voters. He focuses, specifically, on possible violations of the Voting Rights Act in the 2000 presidential and the 2003 California recall elections. He concludes by arguing that new voting technology has the potential to further disfranchise some voters.

In Chapter 10, the focus is one of the most controversial and complex aspects of election law: redistricting. Charles Bullock 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 district lines has on who controls the city councils, state legislatures, and the House of Representatives as well as on 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 11, I examine judicial elections, an often less-studied but increasingly controversial topic. Judicial elections are fascinating because they are unlike most elections in this country. The laws regarding campaigning and fund-raising are different than the rules for other offices, and judicial elections are often subjected to certain norms not found in other elections. These laws and norms have recently come under attack, and, as I note, because of recent court rulings the landscape of judicial elections may change immensely.

Notes

1. Balkin, "Supreme Court Compromises Its Legitimacy."
2. "High Court's Integrity At Risk."
3. Sandalow, "Turbulent Election."
4. Dionne, "Supremely Partisan."
5. Quoted in Walsh, "Ruling Marked by the Words of a Dissenter," p. A32.
6. In reality, Republican Arnold Schwarzenegger won more votes on the second question than Davis received on the first.


7. Several thousand people had already cast their votes via absentee ballots at the time the court issued its ruling.

8. Quoted in Weinstein, "Courts See Delay as Too Disruptive," p. A22.

9. In its ruling, the Ninth Circuit did not actually make a decision on whether the use of punch-card machines in the six counties violated the Fourteenth Amendment. Instead, it focused on the much narrower, and less controversial, question of whether a U.S. District Court judge clearly misinterpreted the law in his earlier ruling dismissing the ACLU's lawsuit.

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