The U.S. SUPREME COURT and the ELECTORAL PROCESS

Second Edition, Revised and Updated

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Foreword by
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Foreword to the Second Edition

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In my foreword to the first edition of this volume I opened with the following:

Let me begin with an experiment readers can easily conduct: Go to a library shelf, pull off a constitutional law casebook, and count the number of Supreme Court cases that involve matters of elections and representation. If your results are anything like mine, dozens will appear on your list—from cases decided well before the turn of the [twentieth] century, such as United States v. Reese, 92 U.S. 214 (1876), to Rehnquist Court decisions in Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994), and U.S. Term Limits v. Thornton, 514 U.S. 779 (1994).

Now consider the location of these cases. Again, if your findings are similar to mine, no part of the book is untouched; the cases you find likely involve the president’s ability to make appointments,1 the judiciary’s authority to resolve disputes,2 and Congress’s power to enforce amendments,3 to name just a few—and not even to mention the obvious (such as material on discrimination and voting).

By now I suppose you have discovered the point of this experiment: It is my way of suggesting that the Supreme Court, which we still occasionally deem the “apolitical” branch of government, has played a major role in defining the way our most political of processes works—and has been doing so since its formative years....
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Of course at the time I wrote these words—especially the last sentence—I had no idea how true they would ring today, in 2002. In fact, if anything, I underestimated the Court: No longer can we say that it plays merely a supporting role in "defining the way our most political of processes work." With its decision in Bush v. Gore, 531 U.S. 98 (2000), it actually determined the outcome of the most visible of all electoral contests—the race for the presidency of the United States.

Not surprisingly, Bush has generated an extraordinary amount of scholarly interest. Since the Court handed down the Bush decision, nearly a half-dozen books have appeared—most of which take a stand on the case, one way or another, and all of which focus directly on it.

That is why this volume retains its importance and distinctiveness. Although many of the books (not to mention the scores of articles) published in the wake of Bush are worthwhile reads, most are too focused on that particular (though certainly consequential) decision to provide a comprehensive examination of the general subject at hand. Thus, they continue a long tradition in which scholars (and perhaps the justices themselves) rarely piece together the many parts of the election and representational puzzle. This much readers would be able to determine for themselves if they conducted the experiment I set out above: In constitutional law books, cases involving reapportionment usually end up in the "Voting and Representation" chapter; campaign finance litigation decisions may appear in "Freedom of Speech"; cases about qualifications for membership in the legislature likely fall under "Congressional Powers."

The point that The U.S. Supreme Court and the Electoral Process drives home with force is that although these sorts of cases may involve distinct substantive issues, at their core they implicate fundamental notions of representation in democratic societies. Moreover, when scholars and judges fail to take account of this fact—when they treat these cases in isolation, as they so often do—their writings may be seriously flawed: replete with contradictory assumptions and "solutions" that may be impractical or unwise to implement.

More recognition of this fact, on the part of editor David Ryden and his talented contributors, makes this volume worthy of careful consideration. Ryden and company go well beyond simple recognition, however; they attempt to continue where judges and other scholars have left off. They ask the hard questions—from whether it is realistic to expect judges to develop a coherent and integrated theory of representation to the extent to which current doctrine adequately solves contemporary problems regarding the role the Supreme Court should (or should not) be playing in this overarching legal area.

Obviously, no single volume can provide comprehensive responses to all of the relevant questions—but this one comes close. At the very least, because Ryden did not steer his contributors toward particular answers, we readers are treated to a range of plausible responses. Consider the question of whether the Supreme Court should develop a theory or jurisprudence of representation. To Nancy Maveety, the answer probably is yes; in fact, she argues that the Burger court, at least, had developed such an approach. To Daniel Lowenstein, however, the answer probably is no. As the title of his chapter ("The Supreme Court Has No Theory of Politics—and Be Thankful for Small Favors") makes clear, he is entirely skeptical about whether the Court can or even should develop a representational jurisprudence.

Ultimately, I am impressed with The U.S. Supreme Court and the Electoral Process not simply because I walked away a more informed scholar but also because I believe Ryden and his colleagues have produced a volume that will be useful to the very actors who must decide these cases: our nation's judges and justices. Whether they agree with Maveety, Lowenstein, or scholars whose opinions fall somewhere in between may be less important than the fodder this volume gives them to chew as they confront the difficult, yet critical, questions that electoral disputes raise.

Such issues will be apparent to most readers. What may be less so are the implications The U.S. Supreme Court and the Electoral Process has for judges elsewhere. To be sure, American jurists continue to struggle with matters of representation on a regular basis; the decisions in Buckley v. American Constitutional Law Foundation, 119 S. Ct. 636 (1999), and Department of Commerce v. U.S. House of Representatives, 119 S. Ct. 765 (1999), provide particularly relevant examples. U.S. judges, however, need not make "new law out of whole cloth"—which is exactly the task that confronts many of their counterparts in emerging democracies all over the world, especially in Eastern Europe. A few recent examples suffice to make the point:

- The Constitutional Court in Armenia ruled that it lacked jurisdiction to hear a case involving voting discrepancies in the 1996 presidential election.
• The Azerbaijan Constitutional Court confirmed the reelection of the country’s incumbent president amid charges of voting rigging.
• The Bulgarian Constitutional Court, at the request of a government prosecutor, may consider the legitimacy of a referendum conducted in 1946 that abolished the monarchy. It has been suggested that the referendum was invalid because the vote was held while the republic was under Soviet occupation.
• The Hungarian Constitutional Court struck down a legislative rule that required political parties to capture at least fifteen seats to form a parliamentary faction.
• The Constitutional Court in Russia ruled that President Boris Yeltsin was in his second term of office and thus could not run for reelection in 2000.
• The Slovakian Constitutional Court held that the Minister of the Interior had violated the constitution by interfering with a referendum on direct elections.
• The Constitutional Court of Ukraine decided that certain provisions of an electoral law—challenged as granting parties too many rights and individuals too few—were unconstitutional.

The list is practically endless, but the general point should not be missed: How these courts answer questions pertaining to representation and the electoral process may have important implications for their own credibility and legitimacy, not to mention the ongoing democratization efforts in their nations.

If these courts are looking for guidance, as so many scholars say they are, then The U.S. Supreme Court and the Electoral Process is the ideal place to start. It may not provide all the answers, but at the very least it clearly lays out the sorts of disputes they will, in all likelihood, eventually confront and the options available for resolving them.

NOTES

Preface

The first edition of this book reached the shelves in August 2000, in the midst of a hotly contested presidential campaign. The book's basic aim was to explore the underappreciated reality of the formative impact the U.S. Supreme Court brings to bear on the practical operation of the American electoral process. Several months later, the book's thesis was played out in the most dramatic and forceful way imaginable when the Court intervened in Bush v. Gore to bring the historic election of 2000 to a long-delayed close. The decision prompted an outpouring of commentary, much of it decidedly negative. Yet although the case brought the Court out of the shadows, it by no means clarified the nature of the Court's role in electoral matters. For some Americans, the decision was an aberration, the result of a bizarre set of circumstances and an inconceivably close election that simply could not be resolved through the customary political channels. For others, the decision manifested an arrogant and imperial Court that was dismissive of the representative institutions of government.

Although Bush v. Gore dominated the headlines, however, it was only one piece of the story surrounding the Court and the electoral arena. In other less-heralded cases—invoking campaign finance regulations, primary election voting requirements, and racial redistricting—the Court was compiling a record of unprecedented involvement in the electoral process. The flurry of cases that postdated this book's first edition made it clearer than ever that the electoral process was now fully institutionalized. The Court had proven itself willing to weigh in on virtually any aspect of election law, with often dramatic consequences.

All of this is by way of explanation for a second edition that follows closely on the heels of the first. Added to this edition is a section devoted exclusively to Bush v. Gore; that section consists of four diverse viewpoints (including legal and political science perspectives) on the case and its implications for the Court's role in electoral politics. In addition,