
PREFACE TO THE THIRD EDITION

The 2020 election cycle marked a radical departure from any prior regime of American election law. In our view, there is election law before 2020 and election law after 2020, and a new edition is necessary to make sense of, and coherently to present, the new regime.

This edition of *Election Law in the American Political System* is guided by three foundational premises. First, as the title of the book indicates, we believe that election law cannot be meaningfully studied as an isolated body of legal doctrine. On the contrary, because election law is the way by which societies operationalize their commitment to democratic, popular self-rule, it cannot be fully understood unless it is examined in the context of the political system in which it is embedded. This commitment has guided the book since its first edition and is the reason why it contains what is, for a law book, an unusual amount of contextual material drawn from political and democratic theory, history, empirical political science, and sociology.

The other two premises of the edition are new, and respond directly to the radically changed political context in which American election law now finds itself. Our second premise is that liberal democracy—the form of democracy that has guided the United States and most of the free world since the conclusion of the Second World War—is in decline around the globe, and that the United States has recently become an active participant in this trend. In its place, populist authoritarianism has proven itself a vigorous competitor for dominance at home and abroad. This development puts democracy itself—and thus the practice of meaningful elections, conducted under a firm commitment to the rule of law—in severe jeopardy.

Our third premise is that this is a very bad development. Liberal democracy, to be sure, has its warts. Liberal democracies have done an unconscionably poor job of responding to urgent contemporary problems such as growing economic inequality and climate change. In many liberal democracies, unintended connections between capitalism and democracy have over the last half-century transferred a great deal of political power from ordinary citizens to the economically well-off. These are problems that demand solutions, but we do not believe that abandoning liberal democracy altogether—especially in favor of authoritarianism—is a wise or promising approach. Liberal democracy, we believe, is at bottom a good form of government—perhaps the best that human ingenuity has ever devised, or at the very least, in Winston Churchill’s famous formulation, the least bad.¹ And it is surely the only form of government that can be relied on to any significant degree to protect fundamental rights of political participation and basic human dignity.

1. Churchill is reputed to have remarked: “Democracy is the worst form of government—except for all the others,” or words to that effect.

As a result, we do not in this edition follow the traditional practice of legal casebooks of formal neutrality in the evaluation of legal developments (as superficial as this neutrality sometimes actually is). The book, to be sure, is *even-handed* in that we aim to present the current trend of populist authoritarianism in its own best light, but it is not *neutral*. Our position is clear: illiberalism is a profoundly distasteful aspect of the American inheritance that must be overcome, not capitulated to; that the establishment of liberal democracy has long been, and remains, the right aspiration for the United States (and quite possibly for any modern polity); and that any steps taken in that direction, no matter how incomplete or imperfect, represent significant political and human achievements that demand the greatest possible respect.

In taking this position, we follow the evidence wherever it leads. One place it leads is to the conclusion that Donald Trump, though not our first populist president (Andrew Jackson holds that position), was our first authoritarian president, placing him wholly outside more than two centuries of inherited political tradition—a kind of anti-George Washington. A second conclusion to which the evidence inexorably leads is that support for populist and authoritarian alternatives to liberal democracy is not randomly distributed in the American polity. Rather, it is concentrated in the Republican Party, and in states and government institutions controlled by Republicans.

This is by no means to suggest that every rank-and-file member of the Republican Party, or even every member of the party leadership, supports the direction in which the party has moved. Clearly, many Republicans dislike Donald Trump, some abhor him, and some refuse to vote for him under any circumstances. Ten Republican members of the House voted to impeach Trump following the January 6, 2020 insurrection at the Capitol, and Rep. Liz Cheney of Wyoming, a lifelong conservative and former member of the House Republican leadership, called Mr. Trump “a domestic threat that we have never faced before.” Nevertheless, it is equally clear that a far-right faction of the Republican Party now controls it, and that faction supports Trump, in many cases with a degree of zealotry that is deeply alarming.

The Democratic Party, in contrast, still appears to adhere to long-standing, inherited principles of liberal democracy. As a result, the United States is no longer a nation characterized by competition for power among two major parties committed to liberal democracy; it is now a polity in which a liberal democratic party competes against an illiberal and authoritarian party. This is an entirely new development in the history of American politics.

To confront these dramatic changes, we have completely reorganized substantial portions of the book to place it firmly in the deeply disorienting new context. New material considers the declining condition of democracy around the world. We focus much more closely than in prior editions on the political inheritance of contemporary Americans, beginning with liberalism and democracy and moving on to consider directly some of the long-standing illiberal strands in American political thought. The book now devotes significant and explicit attention to the contemporary wave of populism, taking it seriously as a competing conception of democracy, albeit, we believe, an illiberal one. Throughout the book, we address several questions that are critical to any meaningful study of election law in the contemporary context: Do the conditions upon which a successful liberal democracy

depends presently exist in the United States? Does election law even remain a meaningful field of law, with a legal structure and jurisprudence that can be taken seriously? Or has it become little more than a political football, to be manipulated cynically by those to whom holding power in a superficially democratic regime is the only goal, and thus about which not much more can or need be said?

To put this even more directly, the field of election law requires both meaningful elections and the rule of law. Whether these foundational conditions still exist is precisely what developments since 2020 have called into question. Users of the book will have to decide for themselves. Our goal in this edition is nothing more than to put them in a position to reach their own conclusions.

James A. Gardner
Guy-Uriel Charles

November 2022