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The Endless Election Law War

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Abstract

Since the 2000 presidential election, Republicans and Democrats have been locked in a seemingly endless war over our nation's election laws, constantly proposing and challenging reforms. Despite studies showing that these laws offer little to no partisan advantage at the ballot box, high-volume conflict persists. This essay explores three reasons for the ongoing election law war: (1) the low costs and political benefits of engaging in the war, (2) the strategic disadvantages of unilateral withdrawal, and (3) obstacles to negotiating a ceasefire, such as credible commitments and constituency pressures.

Introduction

Since the nation's founding, major political parties have clashed over the rules that govern our elections.[1] The intensity of these conflicts has fluctuated, with some periods marked by subdued disputes and others by fierce legislative battles and litigation. Over the past few decades, particularly since the 2000 presidential election, the parties have been engaged in an all-out war over election laws. This war has been extensively chronicled in legal scholarship, most notably in Professor Richard Hasen's work on the "voting wars."[2]

In more recent years, scholars have been interested in when and how this war could end. For instance, Professor Daniel

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1. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (rev. ed. 2009).

2. *See generally* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

Tokaji suggested that the Supreme Court's ruling in *Shelby County v. Holder*[3] created an opportunity for a bipartisan grand bargain on election rules.[4] Similarly, after the 2020 election, Professor Derek Muller called for a bipartisan agreement that would set uniform ceilings and floors for election laws.[5] More recently, Professor Nicholas Stephanopoulos discussed how shifting party demographics might create new incentives for compromise.[6] Additionally, Hasen has advocated a "pro-voter" approach to election laws that could decrease the partisan intensity of these disputes.[7]

The calls for a ceasefire in the election law war may also receive a boost from studies showing that the laws at the center of the war, such as early voting expansion or stricter voter ID requirements, have minimal effects on voter turnout and rarely provide a partisan advantage at the ballot box.[8] Even sweeping reforms intended to suppress or facilitate voting tend to have only marginal effects.[9]

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3. 570 U.S. 529 (2013).
4. Daniel P. Tokaji, *Responding to* Shelby County: *A Grand Election Bargain*, 8 HARV. L. & POL'Y REV. 71, 73 (2014).
5. Derek T. Muller, *Reducing Election Litigation*, 90 FORDHAM L. REV. 561, 576 (2021).
6. Nicholas Stephanopoulos, *Election Law for the New Electorate* 1–3, 19–20 (Harv. Pub. L. Working Paper No. 24-02, 2024), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4871529 [https://perma.cc/R57J-J2PY].
7. *See generally* Richard L. Hasen, *The Stagnation, Retrogression, and Potential Pro-Voter Transformation of U.S. Election Law*, 134 YALE L.J. 1673 (2025).
8. *See generally* Justin Grimmer & Eitan Hersh, *How Election Rules Affect Who Wins*, 16 J. LEGAL ANALYSIS 1, 1 (2024), https://doi.org/10.1093/jla/laae001 [https://perma.cc/X47Z-7DBW] (concluding that "the reality of research on election administration does not support the dire rhetoric from either side").
9. *See id.* at 1 (discussing how the law allowing for voter registration at departments of motor vehicles resulted in "basically no change" in voter turnout).

Despite this scholarship and data, the election law war persists. The Brennan Center for Justice, which tracks proposed and enacted election law legislation, observed that "2024 was another extremely active year for voting legislation, and early indicators suggest little signs of a slowdown in 2025."[10] Democracy Docket, which tracks voting rights and other election-related litigation, called 2024 "the most litigated election cycle in history."[11]

Why do the political parties continue to invest time and resources in election reforms that provide scant electoral advantage? This essay offers three complementary theories: (1) an expected value theory, (2) an equilibrium strategy theory, and (3) a negotiation problem theory. First, while the electoral benefits of these reforms are small, the costs of waging the election law war are low, and there are ancillary political benefits. Second, neither party can unilaterally withdraw from the conflict without suffering strategic disadvantages. Third, bargaining barriers, such as credible commitment issues and constituency pressures, hamper efforts at a negotiated resolution. To provide some context, this essay begins with a brief section on the origins of the election law war before turning to sections on each of these theories.

I. The Origins of the Election Law War

The standard narrative is that the disputed 2000 presidential election helped transform what had been a relatively low-level

10. *Voting Laws Roundup: 2024 in Review*, BRENNAN CTR. FOR JUST. (Jan. 15, 2025), https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-2024-review [https://perma.cc/BT6N-C28K].

11. *2023–2024 Litigation Report: The Most Litigated Election in History*, DEMOCRACY DOCKET (Dec. 11, 2024), https://www.democracydocket.com/analysis/2024-litigation-report/ [https://perma.cc/8SH7-5SF4].

conflict into a full-blown war over election laws.[12] The Supreme Court's decision in *Bush v. Gore*[13] halted the Florida recount and ensured the Republican candidate won the presidential election.[14] In the years that followed, states enacted election laws along party lines, prompting waves of court challenges.[15] Today, the parties are in a state of permanent litigation.[16]

While the *Bush v. Gore* decision signaled that the Court's conservative majority was willing to bend legal doctrine to serve partisan ends,[17] it was not the sole impetus for the election war. Power shifts in the 1990s and 2000s played a crucial role. In the 1980s, Democrats controlled most state legislatures[18] and held a majority of seats on the Supreme Court.[19] That changed in the early 1990s, with Republicans gains in many state legislatures and the appointment of Justice Clarence Thomas.[20] By the 2000s, Republicans had secured significant control over the key

12. *See, e.g.*, Richard L. Hasen, *The 2016 U.S. Voting Wars: From Bad to Worse*, 26 WM. & MARY BILL RTS. J. 629, 630 (2018).

13. 531 U.S. 98 (2000).

14. *Id.* at 100, 110.

15. Hasen, *supra* note 12, at 630–31.

16. *See generally* Richard L. Hasen, *Research Note: Record Election Litigation Rates in the 2020 Election: An Aberration or a Sign of Things To Come?*, 21 ELECTION L. J. 150, 150 (2022) ("[T]here is reason to believe that the rates have not peaked, given what Justin Riemer, chief counsel of the Republican National Committee, called the parties' current state of 'permanent litigation.'" (citation omitted)).

17. *See* Jack M. Balkin, Bush v. Gore *and the Boundary Between Law and Politics*, 110 YALE L.J. 1407, 1408 (2001).

18. Nick Hillman, *Party Control in Congress and State Legislatures (1978–2016)*, UNIV. OF WIS.-MADISON: FACSTAFF DEV. (Feb. 1, 2017), https://web.education.wisc.edu/nwhillman/index.php/2017/02/01/party-control-in-congress-and-state-legislatures/ [https://perma.cc/7386-TV5L].

19. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045, 1052 (2001).

20. Hillman, *supra* note 18. For a discussion of the impacts of Thomas replacing Marshall, see also Balkin & Levinson, *supra* note 19, at 1052–53.

institutions shaping election law—state legislatures and federal courts. These shifts enabled Republicans in state legislatures to enact their preferred voting laws, which were largely upheld by the increasingly conservative federal judiciary.[21]

II. Expected Value and the Election Law War

One of the main takeaways from the recent literature on the election law war is that the reforms at the center of the war do not matter all that much when it comes to producing partisan advantages at the ballot box.[22] These reforms may matter a whole lot from the perspective of voting rights or different conceptions of justice. But the empirical and theoretical scholarship shows that the war itself has little to no impact on electoral outcomes because modern election reforms tend to target narrow shares of the population and affect voters from both major political parties.[23]

Why, then, do the parties continue to wage such an intense war? One answer is that, while the benefits are low, so are the costs. Muller points out that the combined expenditures on election law litigation for the Republicans and Democrats exceeded $65 million in 2020.[24] While this may sound like a lot, in the scheme of election spending and given the political power at stake in a presidential election year, $30 million per party is not large. It represents less than 4% of the parties' total spending that year,[25] and an infinitesimal amount of the overall $14.4 billion in political spending in 2020.[26] As for legislating in the election law

21. *See generally* Richard L. Hasen, *The Supreme Court's Pro-Partisanship Turn*, 109 GEO. L.J. ONLINE 50 (2020); *see also* Nicholas Stephanopoulos, *The Anti-Carolene Court*, 2019 SUP. CT. REV. 111, 178 (2020).

22. Grimmer & Hersh, *supra* note 8, at 3.

23. *Id.* at 18, 25.

24. Muller, *supra* note 5, at 566.

25. *Id.*

26. Karl Evers-Hillstrom, *Most Expensive Ever: 2020 Election Cost $14.4 Billion*, OPEN SECRETS (Feb. 11, 2021, 1:14 PM),

war, the primary cost comes from the lost opportunity to use legislative committee and floor time on other topics. While not insignificant, this opportunity cost is not sufficiently high to deter the parties' combative behavior.

The parties may rationally calculate that continuing to invest these relatively small amounts in legislation and litigation is worthwhile, even if the odds are exceedingly small that any particular action will have a determinative effect. Consider the litigation that led to the Supreme Court's decision in *Brnovich v. Democratic National Committee*.[27] That case involved the Democratic National Committee's challenge to a couple of Republican-backed election-law provisions in Arizona—one that invalidates ballots cast in incorrect precincts and another that restricts who may return mail ballots for a voter.[28] The Ninth Circuit enjoined application of the provisions, finding they violated the Voting Rights Act (VRA), but the Supreme Court reversed.[29]

One empirical study estimated that Arizona's out-of-precinct provision deterred 1,988 Democratic votes and 1,812 Republican votes, netting the Republicans 177 votes statewide.[30] This may seem infinitesimal. But the U.S. has a history of swing states deciding important elections by several hundred votes or less, such as Bush's victory over Gore in Florida in 2000 and Al Franken's victory over Norm Coleman for a Minnesota U.S. Senate seat in 2008.[31] Arizona is a purple state. It is not hard to

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https://www.opensecrets.org/news/2021/02/2020-cycle-cost-14p4-billion-doubling-16/ [https://perma.cc/965L-QH5B].

27. 594 U.S. 647 (2021).

28. *Id.* at 654–55.

29. *Id.* at 655.

30. Grimmer & Hersh, *supra* note 8, at 10.

31. *See* Bush v. Gore, 531 U.S. 98, 100–01 (2000); *On This Day, Bush v. Gore Settles 2000 Presidential Race*, NAT'L CONSTITUTION CENTER (Dec. 12, 2023), https://constitutioncenter.org/blog/on-this-day-bush-v-gore-anniversary [https://perma.cc/K4PW-YURD]; Sheehan v. Franken (*In re* Contest of General Election Held on Nov.

imagine a statewide election there turning on several hundred votes. Even if the odds of such a close race in Arizona are small, it is still in the parties' interests to devote an equivalently small amount of time and money to enact or defeat a couple of election provisions that could prove determinative in such a race.

Additionally, election law battles serve political functions beyond direct electoral gains. Messaging from the war helps the parties build and maintain support among their core constituencies. For Democrats, litigating or legislating to remove restrictions on access to the ballot can appeal to a base that cares about voting rights and certain democratic principles; for Republicans, messaging around the risk of election fraud may galvanize their base.[32] For example, in 2020, Trump declared that Detroit was one of "the most corrupt political places anywhere in our country, easily" and should not be allowed to "engineer[] the outcome of a presidential race, a very important presidential race."[33] Trump made this statement shortly before a group of Republican voters brought a lawsuit claiming they were harmed by voter fraud in Michigan.[34] The orchestrated rhetoric and litigation served to rally supporters around a narrative of voter fraud.

4, 2008 for the Purpose of Electing a U.S. Senator from the State of Minnesota), 767 N.W.2d 453, 457 (Minn. 2009).

32. *See, e.g.*, Jason Marisam, *Fraudulent Vote Dilution*, 2 FORDHAM L. VOTING RTS. & DEMOCRACY F. 197, 215 (2024) (discussing how Republicans have used election litigation to advance messages that racial minorities are committing fraud).

33. Daniel Dale, *Fact Check: Trump Delivers the Most Dishonest Speech of His Presidency as Biden Closes in on Victory*, CNN (Nov. 6, 2020), https://www.cnn.com/2020/11/05/politics/fact-check-trump-speech-thursday-election-rigged-stolen/index.html [https://perma.cc/7DLG-5TR6].

34. *See* King v. Whitmer, 505 F. Supp. 3d 720, 725 (E.D. Mich. 2020).

III. Equilibrium Strategies in the Election Law War

The persistence of the election law war can also be explained using game theory concepts.[35] Each party faces a choice: continue fighting or withdraw. If both parties cease hostilities, they can reallocate resources to other priorities. However, if one party unilaterally withdraws while the other continues fighting, the withdrawing party suffers politically. It gives the other side the sole opportunity to craft an election rule that may have a small but determinative effect in a race or to experiment and perhaps stumble on an election rule that could have a sizeable impact. The party continuing to fight also sees more unchallenged victories, and it alone receives the messaging benefits from election law warfare. The strategic equilibrium, therefore, is mutual engagement in continued conflict.

The payoff matrix below illustrates this dilemma, with the numbers reflecting the degree of payoff or benefit that each party receives in different scenarios:

Republicans/Democrats Continue to Fight Ceasefire

Continue to Fight	(2,2)	(4,1)
Ceasefire	(1,4)	(2,2)

The matrix shows two equilibrium positions—both parties continuing to fight or both parties agreeing to a ceasefire. (The payoffs for both positions are (2,2)—that is, a payoff of 2 for each political party.) If one party ceases fighting while the other continues, the payoffs heavily favor the party still fighting.

This is a simplistic matrix that misses plenty of real-world nuances. For example, if the Republicans are winning the

35. For a useful primer on these concepts, see generally Ian Ayres, *Playing Games with the Law*, 42 STAN. L. REV. 1291 (1990).

election war, as they likely are given their hold on state legislative chambers and the federal judiciary, the payoff of a continued war is greater for the Republicans than the Democrats. Despite these disparate payoffs, though, the Democrats probably would be worse off if they unilaterally withdrew than if they continued to wage a war tilted against them. It is also possible that the parties could find a settlement that leaves them both better off than they currently are in this state of persistent warfare. (This could be modeled by changing the payoffs to 3 in the matrix for Ceasefire/Ceasefire.) In this scenario, though, the parties still would not have an incentive to unilaterally step away from the war. They would have an incentive to negotiate to reach a joint ceasefire but not to hold their fire unilaterally.

IV. Negotiation Problems in the Election Law War

Power imbalance, credible commitments, and constituency approval complicate efforts to reach a grand bargain. Because the balance of power tilts toward the Republicans, they might perceive the status quo working to their advantage and hesitate to come to the bargaining table or eagerly break any agreement that is reached.[36] Even assuming they were interested in a negotiated end to the war, settlement talks would run into significant credible commitment issues.

A credible commitment problem in negotiation theory is a situation where parties cannot reach a mutually beneficial agreement because they lack the ability to credibly promise to uphold their side of the deal.[37] Credible commitment problems can arise because of distrust between the parties or structural barriers,

36. *See* Jens David Ohlin, *Nash Equilibrium and International Law*, 96 CORNELL L. REV. 869, 894–95 (2011) (discussing how differences in bargaining power can create bargaining difficulties).

37. *See generally* Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163 (2022) (discussing the credible commitment problems inherent in corporate governance and stakeholderism).

both of which are at play here. In the current political environment, affective polarization—that is, the tendency of Americans to distrust members of the other political party—is a significant feature of our politics.[38] This distrust can lead to a lessened expectation that the other side will reciprocate cooperative behavior and make it more difficult to reach a deal. The power imbalance in the election law war may exacerbate this problem, if the Democrats perceive a likelihood that the Republicans will have an incentive to break any agreement and return to a war that favors them.

The decentralization of our election system also contributes to the credible commitment problem.[39] State legislatures are the primary source of election laws, even for federal elections, and local officials are the main actors who implement those laws.[40] While the national political parties exert influence over state and local co-partisans, they lack perfect control over them.[41] Even if the national parties had a meeting of the minds on the content of election laws, they could not credibly promise that the states would enact the laws as agreed.

One solution is to look to Congress to enact a statute that would mandate uniform floors and ceilings.[42] This move,

38. *See generally* Scott Abramson & Dot Sawler, Distrust, not Dislike (Nov. 8, 2024) (unpublished manuscript), https://ssrn.com/abstract=4893164 [https://perma.cc/2GWG-UY6L] (finding that affective polarization is best characterized by distrust rather than dislike through a behavioral experiment).

39. *See* Daniel P. Tokaji, *The Future of Election Reform: From Rules to Institutions*, 28 YALE L. & POL'Y REV. 125, 127 (2009) (discussing the extent of decentralization in our system).

40. *See* Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571, 575–76 (2022).

41. On the relationship between national and state parties and how it affects concepts of federalism and democracy, see generally David Schleicher, *Federalism and State Democracy*, 95 TEXAS L. REV. 763 (2017).

42. *See* Muller, *supra* note 5.

though, would have significant problems of its own. Congress's bicameral structure has multiple veto points where politicians can reject proposals with provisions they dislike, and the increased partisan polarization of congressional members makes it more difficult to build coalitions of sufficient size to overcome those veto points.[43] And, even if Congress enacted federal legislation, credible commitment problems could arise again because implementation would fall to state and local officials who have a history of noncompliance with federal election laws.[44]

In negotiating, the parties would also want to avoid provisions that would alienate their key constituencies. For Republicans, the MAGA wing of the party wields considerable influence under a Trump presidency and has embraced conspiracy theories of widespread fraud.[45] MAGA supporters may balk at any agreement that does not include stringent measures to combat perceived fraud, such as purging voter rolls and restrictions on mail or absentee voting. On the other hand, voting rights advocates who are part of Democratic constituencies might balk at the inclusion of such provisions. Any perceived concession from one side or the other could spark a backlash, deepening internal divisions and making bipartisan negotiation difficult.

Conclusion

We are in an era of high-volume partisan conflict over our nation's election laws. Despite repeated calls for a ceasefire and negotiation of a grand bargain, no such settlement appears on the horizon. It will likely require a major shift in the political landscape, similar to the Republican takeover of the Supreme Court

43. Sarah Binder, *The Dysfunctional Congress*, 18 ANN. REV. POL. SCI. 85, 95 (2015).

44. *See* Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747, 764 (2016).

45. *See generally* Jason Marisam, *Election Obstruction*, 71 UCLA L. REV. DISCOURSE 50 (2023).

and multiple state legislatures in the 1990s and 2000s, to change the dynamics. Until then, continued election law warfare will remain the parties' dominant strategy in this seemingly endless war.