Political Science 401- Election Law II, 10-11
Professor Mayer 1270 Grainger

Seminar: Election Law

If we think about it at all, we generally consider "politics" and "law" to be separate domains. Politics, after all, is about organizing (or, to put a less positive spin on it, manipulating, coercing, lying, misrepresenting) in order to obtain power and the benefits of power; representation and promotion of interests; log-rolling and compromise. There are any number of rules that determine who wins any particular dispute – most often, we use some form of majority rule, with elections run in a single-district winner take all format, but proportional representation, cumulative voting, at-large districts, and supermajorities exist in many democratic systems. Politics is not a neutral process, even though we can articulate some normative standards of fairness, equality, and free choice that separate democracies from dictatorships.

We expect law, on the other hand, to be neutral and objective. Or, to put in less stark terms, we expect legal disputes to be resolved through a process that is *more* neutral and objective than the political process, without the overt bias and raw struggle for power that can characterize political disputes. Judges aren't supposed to make decisions based on who gave them campaign contributions (neither are Senators, for that matter, but that's another story . . .). In theory, courts should articulate general rules and judicial doctrines that provide a coherent analytical framework; legislatures and other representative institutions do not face the same pressure to be consistent.

But the two worlds are not so far apart. We rely on the courts to adjudicate disputes that arise in the political process, and the connections have become more robust as the courts have entered into areas it previously had avoided – such as the "apportionment revolution" in the 1960s, in which the Supreme Court abandoned its earlier position that the drawing of political districts was a nonjusticiable political question – and as legislatures became more aggressive in promoting and protecting specific rights. Our ideas of what constitutes a "fair" election process have changed over 200 years, and manner in which elections are conducted have changed as well.

Moreover, the basic procedural requirements of democratic processes require judges and courts to adjudicate disputes. These disputes and questions can emerge from the most basic tasks of vote-counting and election administration (what counts as a "valid" vote? Who is eligible to appear on the ballot? Who is eligible to vote, and how do we protect the integrity of the voting process? What systems can be used to cast ballots? What happens when there is a disagreement over who actually won? You get the idea. . .) to the more difficult questions of how to interpret complicated voting rights legislation or the free-speech implications of campaign finance regulation. Perhaps few people realized the connection prior to the 2000 election, but everybody recognizes it now. Election law-related disputes routinely come before both state and local courts, and "election law" has become a recognized discipline both within the legal profession and among political scientists.

In this class, we will study this intersection, and consider both the specific legal principles that govern judicial interpretations and decisions, as well as the philosophical aspects of fair democratic systems. The major theme will be how democratic systems use rules and procedures to implement the principles of democratic politics and government. Many of the readings will involve court cases, and it will be a challenge to adapt to the case-rule-interpretation-case technique.

Most of the readings come from the casebook, Issacharoff, Karlan, and Pildes, *The Law of Democracy: The Legal Structure of the Political Process*. This is an experiment, and you'll get far more exposure to caselaw and legal principles that you would in a typical political science course. I'll supplement the casebook with some additional readings. You should bring the book to class every day.

Three are three important things to keep in mind:

1. There are often (usually?) no "right" answers. The key is to understand the issues and questions in play.

2. Words of Caution: Do Not Fall Behind. I will run this class as a lecture/seminar. Even with 40 people, it should be possible. That means that you must come to class prepared, having read *and thought* about the materials for that lecture. The reading load is not huge, averaging less than 100 pages a week, but it is dense. Participation makes up a significant part of the grade, so be prepared to offer your thoughts.

3.

FDA BLACK BOX WARNING ABOUT THE DANGERS OF WIRELESS INTERNET

It has become almost universal for laptop users to connect to Facebook, email, Youtube, Yahoo, fantasy sports, and all manner of distracting non-class related surfing during lecture. While you may think that you can do 3 things at once, you can't. You simply cannot follow a lecture while engaged in outside discussions, not to mention that surfing is a distraction to those around you. I have observed students in a physics course watch videos and text while the professor was talking about quantum electrodynamics and Feynman diagrams. Needless to say, I bet these students couldn't tell the Large Hadron Collider from a box of kitty litter.

So here's the deal: There is no internet use during class, unless I specifically ask you to read or search for something. None. No cell phones, texting, email, blackberries, iPods, or the like. Offenders will be asked once to stop, and then to leave. It will be hard to do at first, but I ask you to trust me: you will be amazed at the difference.

The Dalai Lama once said to me: If you're here, be here. Or maybe it was Justin Bieber. Can't remember. I was watching this hilarious Jake and Amir video at CollegeHumor.com at the time.

Your grade will be based on four elements: attendance and participation (20%), a midterm exam on March 10 (20%), a 2 short papers, one on citizenship and voting, and one on redistricting, assigned as noted in the syllabus (10% each), and a take home final (40%).

I have engaged the Writing Fellows program for the class. Writing Fellows are experienced, trained writers who will provide help on paper organization, clarity, and structure (they do not have any substantive expertise). I will ask you to meet with a Fellow at least once for each paper, and to pay attention to the advice they offer.

The seminar format requires you to make a commitment to prepare for each session; the class will simply not work if you take a passive approach and expect me to give you the answers (hint: there

aren't any easy ones, and even if there were, I could not claim to have them, which is why the whole subject is so interesting). We will work through the questions and issues together.

I have set the schedule, but I am certain that this will change – some topics will require additional time to consider, and we'll see what happens.

Week 1 (1/18 and 1/20) – Introduction. How to read the case book and court opinions.
LOD, chapter 1
Pamela S. Karlan, "Ballots and Bullets: The Exceptional History of the Right to Vote," ***University of Cincinnati Law Review*** **71:1345-1372**

Exercise: read the Constitution. Identify all of the provisions that address voting. What do you notice about them? Why is the right to vote important?

Week 2 (1/25 and 1/27) -- The Intersection of Law and Democratic Politics: Who gets to vote?
LOD, chapter 2

Comment: Why is voting the cornerstone of democratic politics? What are the valid reasons for regulating the right to vote? One current controversy surrounds the disenfranchisement of felons and ex felons. In most states, you lose your right to vote while serving time (or probation/parole) for felony offenses. In 15 states, ex-felons who have completed their sentence remain disenfranchised. Is this fair? Critics of disenfranchisement note that it has a disproportionate impact on minorities; according to the Sentencing Project, of the 3.9 million disenfranchised felons, 1.4 million, or 36%, are Black men. What democratic theory can justify this exclusion from voting? What of the 14th Amendment's specific language, which reduces congressional representation of states that disenfranchise males over the age of 21, "except for participation in rebellion, or other crime"?[1]

Exercise: Should people who do not now have the right to vote be able to vote? Children? Noncitizens? Should it be harder to vote?

Paper: citizenship and voting, due February 10.

Week 3 (2/1 and 2/3). The Reapportionment Revolution. What is a "meaningful" vote?
LOD, chapter 3

Comment: The right to vote encompasses more than simply the right of qualified voters to cast a ballot without interference. As we'll see, there are many strategies that the "ins" can use to diminish the voting power of political minorities (apart from explicitly exclusionary strategies such as overt discrimination against Black voters, to give the most glaring historical example). Until the 1960s, one common method was to create districts with unequal population. Voters in a small district had more voting power than those in large districts (1 vote out of 100 is more influential than 1 vote out of 10,000) Historically, the Supreme Court stayed out of these disputes, concluding that they were political questions not amenable to judicial intervention. But in the 1960s, this changed. In *Baker v. Carr* and subsequent decisions, the Supreme Court moved toward the "one person-one vote" rule that requires equal populations in nearly all political districts.

But what does it mean to have one's vote "counted" equally or to say that some individuals have more influence than others? Can it really be said that unequal populations are really unconstitutional, given

[1] The sex and age conditions have been superseded by the 19th and 26th amendments

the structure of the U.S. Senate? What theories of representation underlie the one person-one vote rule. Are there other valid representational bases? Consider a basic problem of winner-take-all voting rules: by definition, votes for the losing candidate are "wasted," since they have no impact on the decision (as they would, say, under a proportional representation rule that counts statewide or nationwide vote splits). Does this violate the rule that every vote have equal influence?

Exercise: Identify other examples of "political questions," that is, disputes that the courts will not resolve. No. 2: the Supreme Court requires equal population as a constitutional principle, even though there is a glaring contradiction in the fact of the U.S. Senate. Was the reapportionment revolution a massive act of judicial activism?

Week 4 (2/8 and 2/10) – Rights of Association: The role of Political Parties
LOD, chapter 5
Thurgood Marshall, "The Rise and Collapse of the White Democratic Primary," *Journal of Negro Education* 26:249-254 (Summer 1957)

Comment: The question of how the state regulates political associations (mostly, but not exclusively, parties) is interesting for two reasons. First, parties are quasi-public entities that exercise an important function in the political process; in our system, the major parties play a central role in nominating candidates, organizing officeholders, and orchestrating national campaigns. In that respect, they run parallel (sort of) to official election administrators. But, at the same time, they have been used to perpetuate electoral discrimination and circumvent prohibitions on exclusionary voting rules. We thus are introduced to one way of using voting rules and election procedures to continue racial disenfranchisement.

Smith v. Allwright put an end to the White Primary; in general, party elections are held to be a public function that is subject to legal regulation. But tensions remain. Parties are allowed to organize themselves around whatever principles might bind their members together. And they have, within some limits, the right to exclude from their ranks people who do not share their views. But many states have "blanket primaries," or laws that permit non-party members to vote in party primaries. Wisconsin, which does not have party registration, allows voters to choose which party primary they want to vote in, on election day. Do these rules interfere with the parties' right of association? Minnesota prohibits ballots from listing multiple party endorsements for candidates (so-called "fusion" party endorsements). *Timmons* upheld this practice. Do these laws unfairly entrench the two major parties?

Week 5 and 6 (2/15 through 2/24)– Campaign Finance and Democratic Accountability
LOD, chapter 6
Samuel Issacharoff, "Throwing In The Towel: The Constitutional Morass of Campaign Finance," *Election Law Journal* 3:159-264 (No. 2, 2004)

Comment: Somebody has to pay for all of this. In the U.S., most federal campaigns are funded through private contributions (although there is a public funding component to the presidential election process). Critics claim that the need to solicit private contributions – overwhelmingly from people who are relatively wealthy, or from organized interests with a direct stake in legislation – distorts the policy process. Legislators and other officials, the argument goes, make decisions based on who gives them the money, rather than on what they think is in the national interest. Critics of campaign finance regulation argue that restrictions impermissibly burden first amendment rights. If

you have the right to speak, the argument goes, then you should have the right to spend money communicating your message.

Is there a way to reconcile these tensions? The premise of this course is that it is hard to regulate politics, because often you are forced to make the very kinds of decisions that might be better left to the political branches to decide. But if you leave it to the political branches, you might wind up with a distorted and unfair process. How do we proceed?

Week 7 (3/1 and 3/3) – Introduction to The Voting Rights Act
LOD, chapter 7
Note, "The Voting Rights Act of 1965," *Duke Law Journal* 1966:463-483

Comment: 100 years after the 15th Amendment, racial discrimination in voting was still rampant. Despite decades of litigation, and federal efforts to insure that Blacks were not barred from the electoral process, particularly in the South, states continued to use different ruses to maintain the color barrier: white primaries, literacy tests, poll taxes, refusals to register, intimidation, redrawing of municipal boundaries; there were many ways to structure the voting process to exclude African Americans. The 1957 Civil Rights Act, which gave the Attorney General the authority to take action against election authorities, did not solve the problem (one common strategy was the consequence of a requirement that any lawsuits against election administrators be against a specific person. Often, as soon as a lawsuit was filed, the official would resign, which meant that the whole process would have to start over). The Voting Rights Act put a stop to all of this. It had two main components. Section 2 restated the 15th Amendment prohibition against denying the right to vote on account of race or color. Section 5 suspended all tests or devices used to qualify voters, and required jurisdictions with a history of discrimination to obtain prior Department of Justice approval before changing any of their voting rules or procedures. The act was remarkably successful in eliminating overt discrimination in voting. But, as we'll see, that did not end every dispute about how different forms of discriminatory rules could.

Week 8
March 8 – Voting Rights Act, Continued
March 10 - Midterm (in class)

Week 9 – Spring Break (be safe)

Weeks 10 and 11 (3/22 through 3/31) The Voting Rights Act Continued
LOD Chapter 8 and 9

Comment: OK. We've ended the odious practice of making it harder for people to vote because of their race or color. Does that ensure equality? In the first wave of VRA litigation, the courts settled questions about who was covered under the law, and what a covered change was. Litigants next turned their attention to other questions about voting equality, especially what constituted retrogression, or reductions in minority voting influence. This was a natural extension of VRA litigation, because once you provide for equal access to the polls, there are other ways to try to hang on to political power. Possibilities include: eliminating offices, changing from elected to appointed positions; moving to multi-member or at large elections; changing municipal boundaries or annexing new areas; changing candidate qualifications; redistricting with the goal of packing or cracking. Addressing these practices requires a shift from looking at voting as a mere individual right, to looking at voting from the perspective of group influence. If Blacks are permitted to vote without hindrance,

but their votes are diminished because of rules that give them less influence over outcomes, then inequality persists.

Moreover, in a key 1980 court case, the Supreme Court held that a VRA plaintiff had to show an *intent* to discriminate, not simply that a new rule had the *effect* of discriminating (*Mobile v. Bolden*). This change made it almost impossible to succeed with voting discrimination lawsuits. One response was the 1982 extension to the VRA, in which Congress made several changes designed to force state and local governments to consider group influence in the political process. It also reversed the rule on intent, restoring the old interpretation that one must merely show that a law has the effect of discriminating in order to prevail. This, in turn, made the whole area much more complicated. What does it mean to have a meaningful opportunity to elect a candidate of choice? What happens when the Department of Justice says you have to create 2 majority minority districts to get preclearance, but the Supreme Court says you can't draw districts relying too much on race? The Surpeme Court issued a series of unclear, and even inconsistent decisions in several cases, leading to enormous confusion among election officials and legislatures, which often confronted conflicting and contradictory legal mandates.

The 1982 amendments extended section 5 of the VRA for 25 years, and made section 2 permanent. In 2007, it was extended another 25. Will there ever be a time when Section 5 is unnecessary?

Week 12 (4/5 and 4/7) – Redistricting Again. Partisan Gerrymanders and the Difficulty of Identifying Vote Dilution

LOD, chapter 10

Richard L. Hasen, "Looking for Standards (in All the Wrong Places): Partisan Gerrymandering Claims After *Vieth*," *Election Law Journal*, 3:626-642 (No. 3, November 2004)

Exercise: Redistricting Simulation http://www.redistrictinggame.org/index.php?pg=game

Comment: here is where politics and law intersect in their rawest form. The act of redrawing district lines is inherently political, and legislators can do just . One of the most difficult – and interesting – contemporary problems involves the decennial reapportionment and redistricting process, in which states redraw their congressional and legislative district lines to insure that each district has equal population (a requirement stemming from the 1960s reapportionment revolution). With modern computing capacity and mapping software, it is a simple process to draw these lines in a way that gives either Democrats or Republicans a significant advantage. So far, the courts have been reluctant to step in and stop even overtly partisan redistricting plans. Is there a way to resolve an explicitly political dispute through a "neutral" procedural rule (let's leave aside, for the moment, the fact that there's no such thing)? That, as much as anything else, defines the problem of election law.

Paper: results of redistricting exercise, due April 28

Week 14 (4/12 4/14) – When Elections Go Bad

LOD, chapter 12

Comment: nobody cared about election administration until 2000, when the Florida debacle laid bare all of the problems of how we conduct elections: poorly administrated voter registration lists, unfair purges, lousy voting equipment (the flaws of which had been known for decades), thoughtless ballot designs, unclear and wildly varying standards for recounts and figuring out what is, and what is not, a valid ballot. Subsequent election disputes in the 2006 Minnesota Senate race and the 2004

Washington state gubernatorial election highlighted the same sorts of problems: poor ballot security, shoddy absentee ballot practices, a lack of clear guidance on how to conduct a recount.

The theologian Reinhold Neibuhr is credited with the famous Serenity Prayer: "God grant me the serenity to accept the things I cannot change. . ." There's a variant among election officials, which begins "Dear Lord, please let it not be close. . ."

Week 13 (4/19 , 4/21) Direct Democracy and Election Administration

LOD, chapter 11

Richard L. Hasen, "Beyond the Margin of Litigation: Reforming Election Administration to Avoid Electoral Meltdown, *Washington and Lee Law Review* 62:937-999

Comment: one consequence of the 2000 election was the Help American Vote Act (HAVA), an effort to use federal money to pressure states to improve their voting systems and registration processes. We now pay far more attention to the details of election administration – the nuts and bolts of registration, ballot design, security, and the myriad street-level tasks required to actually run an election

A separate question is whether direct democracy – not the republican system we have, with elected representatives and intentional insulation of governing institutions from public opinion – is a workable system.

Week 15 (4/26, 4/28) – Are there other ways of doing it? Comparative Electoral Processes

Readings: TBD (but it will have something to do with Australia)

April 16 (5/3, 5/5) – Alternative Democratic Structures

LOD, chapter 10

Comment: we take it for granted that majority vote is the best way to resolve political disagreement. When faced with a political dispute, the end result is a vote – an election, a roll call vote in Congress. The person or proposal with the most votes wins, and we're on to the next dispute. The particular American variants of this, including single-member winner take all legislative districts, and the Electoral College, are actually unusual. The far more common pattern is the parliamentary model, in which the executive branch is selected by the party or coalition that controls the legislature.

It's easily shown that majority rule systems are actually very bad at making choices that a majority of voters or legislators actually approve. And there are lots of proposals to do things in a different way: cumulative voting, approval voting, proportional representation, the single-transferable vote, and many other ways designed to insure that outcomes reflect true majority preferences.