

Seminar: Election Law and the Supreme Court

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Overview:

Election law cases have made up a large portion of the Supreme Court's docket for the last forty years, and many key questions about our democracy are resolved at 1 First Street. This class will examine how the Court resolves election law disputes and will discuss the underlying theories about whether and how the Court should address these questions.

In each class, we will read 1 or 2 cases and then a number of scholarly articles on the topics raised by the cases. You should focus your attention on both – this class is as much about the theoretical and normative arguments raised in the scholarship as it is about what the Court has actually done thus far. The readings will be a bit different from your other classes. There is no casebook, and all the readings will either be cases you will read in full (or in large part) or articles that will be linked off TWEN.

You will be asked to write 2 reaction papers and 1 final paper during the semester. You can write a reaction paper for any class, except that it cannot be about the same topic as your final paper. Reaction papers must be turned in to me by Monday at 9am, the day before class, by email (DSchleic@gmu.edu). These papers will be 5 pages long and will address directly the arguments raised by one or more of the articles for that day.

The final paper will be a case comment on one of four big election law cases heard by the Supreme Court (or the Supreme Court of Minnesota) last term -- *Caperton*, *NAMUDNO*, *Citizens United*, or *Sheehan v. Franken*. The essays should be 15-20 pages. I will explain more about the final paper assignment during class. It will be due the first day of finals.

Office Hours: Rather than holding formal office hours, I will be available after class for follow-up discussions and questions.

Grading: The reaction papers are each worth 1/5 of your grade and the final paper is worth 3/5 of your grade.

Readings and Class Outline

Note: Where there are cases, you should pull them off Westlaw or Lexis and read either the whole case or the assigned part. All scholarly articles come with links on version of this syllabus on the TWEN website.

I. Section 1: The Supreme Court and Election Law: Theory and Practice

Classes 1 and 2: How Should the Court Address Election Law Disputes: Does the Supreme Court Need a Theory of Politics to Decide Election Law Cases

1. *Colgrove v. Green*, 328 U.S. 549 (1946)
 - a. Read Frankfurter Opinion and Black's Dissent
 - b. Read for first class
2. *Baker v. Carr*, 369 U.S. 186 (1962)
 - a. Read Intro and Part IV
 - b. Read Frankfurter's dissent – Intro, Part II(1-3), Part III)
 - c. Read for first class
3. Richard Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004).
 - a. Read pages 31-35, 41-55
4. Daniel Ortiz, *Got Theory* 153 U. PA. L. REV. 459 (2004).
 - a. Read pages 459-75.
5. Chris Elmendorf, *Representation Reinforcement through Advisory Commissions: The Case of Election Law*, 80 N.Y.U.L. REV. 1366 (2005).
 - a. Read pages 1366-1385.
6. Dan Lowenstein, *The Supreme Court Has No Theory of Politics-and Be Thankful for Small Favors*, in THE U.S. SUPREME COURT AND THE ELECTORAL PROCESS (Ryden, ed., 2002) (Review Excerpt)
 - a. Attachment available in Course Documents Section

Class 3: Political Market Regulation v. Rights' approaches

1. Timmons v. Twin City Area New Party, 520 U.S. 351 (1997)
 - a. Read the majority opinion.
2. Burdick v. Takushj, 504 U.S. 428 (1992)
 - a. Read the majority opinion)
3. Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 Stan. L. Rev. 643 (1998).
 - a. Read pages 643-652, 668-690
4. RICK HASEN, THE SUPREME COURT AND ELECTION LAW (EXCERPT)
 - a. Attachment available in course documents section

5. David Schleicher, *'Politics as Markets' Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 15 Sup. Ct. Econ. Rev. 163 (2007).
 - a. Read pages 1-8, 33-41.

Class 4: Political Market Regulation: Gerrymandering

1. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).
 - a. From the Plurality Opinion
 - i. Intro, Part I, Part III.
 - b. Justice Kennedy's Concurrence
 - i. Skim
 - c. Justice Breyer's Dissent
 - i. Parts I-IV
2. Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 593 (2004).
 - a. Read Pages 593-601, 641-45
3. Nathaniel Persily, *Reply: In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 Harv. L. Rev. 649 (2004).
 - a. Read Pages 649-50, 661-78
4. Samuel Issacharoff, *Surreply: Why Elections?*, 116 Harv. L. Rev. 684 (2004),
 - a. Read Pages 684-93

Class 5: Party Autonomy and Brand Names

1. *Washington State Grange v. Washington State Republican Party*, 128 S. Ct. 1184 (2008)
 - a. Read majority opinion and Scalia's dissent.
2. *California Democratic Party v. Jones*, 530 U.S. 567 (2000)
 - a. Read majority opinion plus Stevens dissent
3. Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms and Partisan Competition*, 101 Colum. L. Rev. 274 (2001),
 - a. Read Pages 274-81, 298-304, 308-33
4. MORRIS FIORINA, *RETROSPECTIVE VOTING IN AMERICAN NATIONAL ELECTIONS (REVIEW EXCERPT)*
 - a. Available in the Course Documents Section of the TWEN site.
5. Ilya Somin, *Political Ignorance and the Counter-majoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory*. 89 Iowa L. Rev. 1287 (2004).
 - a. Read Pages 1298-1300, 1304-1313

Class 6: Campaign Finance and Competition

1. *Buckley v. Valeo*, 424 U.S. 1 (1976)
 - a. Read Intro and Part I
2. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006)
 - a. Majority Opinion, Thomas's Concurrence and Stevens' dissent.

3. Rick Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 Ohio St. L.J. 849 (2007).
 - a. Read Pages 849-877
4. Steven D. Levitt, *Using repeat challengers to estimate the effect of campaign spending on election outcomes in the US house*. 102 J. Pol. Econ 777–798 (1994)
 - a. Don't worry about the math. Just get the point.

II. Section 2: Last Term at the Supreme Court (and the Supreme Court of Minnesota)

Class 7: Understanding Citizens United I: The Case of Corporate Money

1. *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)
 - a. Intro, Parts II and III of the Majority opinion. Scalia's Dissent)
2. *McConnell v. FEC*, 540 U.S. 93 (2003)
 - a. Only a short passage, beginning with "BCRA § 203's Prohibition of Corporate and Labor Disbursements for Electioneering Communication" on page 203 of the U.S Reporter going through page 211 of the U.S. Reporter
3. *FEC v. Wisconsin Right to Life, Inc.* 551 U.S. 449 (2007)
 - a. Read Intro, Part III through Footnote 7 and beginning again at "A second possible compelling interest" through the end of the majority opinion)
4. Rajesh K. Aggarwal, Felix Meschke and Tracy Wang, *Corporate Political Contributions: Investment or Agency?* (2007) (Don't worry about the math)
5. Stephen Ansolabehere, John M. de Figueiredo, and James M. Snyder, Jr. *Why Is There So Little Money in U.S. Politics?*, Journal of Economic Perspectives (2003)

Class 8: Understanding Citizens United II: The Case Itself

1. Citizens United v. FEC Summary, SCOTUS Blog
 - a. http://www.scotuswiki.com/index.php?title=Citizens_United_v._Federal_Election_Commission
2. Citizens United Supplemental Briefs
 - a. Just the appellants.
3. Richard Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court*
 - a. Read the Intro and Part IIB.

Class 9: Understanding NAMUDNO I: What Happened?

1. *NAMUDNO v. Holder*, 557 U.S. (2009)
2. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 Yale L.J. 174 (2007).
 - a. Parts I, II and III
3. Richard Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court (Part IIa)*

4. Optional:
 - a. Ellen Katz, *Congressional Power to Extend Preclearance: A Response to Professor Karlan*, 44 Houston L. Rev. 33 (2007)

Class 10: Understanding NAMUDNO II: What Will Happen if the Court Overturns Section V?

1. Heather Gerken, A Third Way For the Voting Rights Act: Section 5 and the Opt-In Approach
2. Richard H. Pildes, The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote
3. Samuel Issacharoff, Is Section 5 of the Voting Rights Act a Victim of Its Own Success, 104 Colum. L. Rev. (2004)

Class 11: Understanding Caperton v. Massey

1. *Caperton v. Massey*
 - a. <http://www.supremecourtus.gov/opinions/08pdf/08-22.pdf>
2. *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002)
 - a. Majority opinion;
 - b. Skim O’Conner’s concurrence and the dissents
3. David Pozen, *The Irony of Judicial Elections*, 108 Columbia L. Rev. 265 (2008)
 - a. Read pages 265-70, 306-328.
4. David Klein and Lawrence Baum, *Ballot Information and Voting Decisions in Judicial Elections*, Political Research Quarterly, Vol. 54, No. 4
5. Chris W. Bonneau, The Effects of Campaign Spending in State Supreme Court Elections, 60 Pol. Research Q. 489 (2007)

Class 12: Understanding Sheehan v. Franken

1. Bush v. Gore, 531 U.S. 98 (2000)
2. *Sheehan v. Franken*
 - a. Parts I and II
3. Richard Pildes, Democracy and Disorder, 68 U. Chi. L. Rev. 695 (2001)
4. Richard Hasen, A Critical Guide to Bush v. Gore Scholarship
5. Richard Hasen, The Untimely Death of Bush v. Gore
 - a. Read Parts I and III.

III. Section 3: Other Issues in Election Law:

Class 13: Local Elections

1. *Lopez Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d. Cir. 2006)
 - a. Just Section I
2. *N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008)
3. David Schleicher, *Why Is There No Partisan Competition In City Council Elections* (Just Intro)

4. Rick Hills, *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 *Theoretical Inq. L.* 113 (2005)

Class 14: TBD