Election Law

SYLLABUS

FALL 2016

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Introduction

This course is designed to give students an understanding of the dominant themes surrounding the legal regulation of elections in the United States. We will cover many of the major Supreme Court cases on voting rights, minority vote dilution, ballot access, redistricting, partisan gerrymandering, the regulation of political parties, campaign contributions and expenditures, public financing, disclosure, and election administration. Throughout, we will also examine the role that federal and state courts, our legislatures, and direct democracy play in our electoral system.

The goal is for each student to develop a basic understanding of the structure, mechanics, and history of election law in the United States, some knowledge concerning the empirical assumptions that underlie the reasoning of courts when they are asked to adjudicate indeterminate electoral contests, and an appreciation both of the complexities of the right to vote and of the difficulties involved in regulating the behavior of our politicians and their political campaigns.

The casebook for our course will be Daniel Lowenstein, Richard L. Hasen, & Daniel P. Tokaji, Election Law: Cases and Materials (5th ed. 2012). In the syllabus, this book is referred to by its acronym “LHT.” Election law is an extremely dynamic and quickly evolving area of the law. Keeping up with its most recent developments can be a challenge. To help us meet that challenge, I will also assign readings from the 2016 Supplement to Lowenstein, Hasen, and Tokaji, which contains many important recent election law cases. It is referred to in our syllabus as “Supp.”

I will sometimes assign optional readings from Joshua A. Douglas & Eugene D. Mazo, Election Law Stories (2016) (“D&M”), which contains the histories of the field’s most important cases. I will also post materials on TWEN, including articles that elaborate on the themes we are covering in class. Finally, during our first weeks together, I will assign readings from an excellent paperback, Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States (revised ed. 2009), which you will find to be not only informative but also well-written. It contains an intelligent summary of much of the material that we will cover this term.

Students often ask about other books that can help them understand election law. There are many. In 2014, one of our casebook’s authors published an Examples & Explanations book for election law. This is Richard L. Hasen, Legislation, Statutory Interpretation, and Election Law: Examples & Explanations (2014). It summarizes some of the material we will cover, in addition to providing extraneous information on legislation and statutory interpretation. There are two other books which, while they are again not required, you may wish to look at on your own. The first is Richard L. Hasen, The Voting Wars: From Florida 2000 to the Next Election Meltdown (2012). The second is Lawrence Lessig, Republic, Lost: How Money Corrupts Congress—And a Plan to Stop It (2011). If you have the inclination, you are encouraged to look at these on your own.
Administrative Matters

Two Credits: This is a two-credit lecture course. Your grade will be determined by your performance on a final examination. The final exam will be administered on December 8, 2016.

Class Schedule: Our class will meet on Wednesdays from 2:00 p.m. to 3:50 p.m. in Hazel Hall. I will start class promptly at 2:00 p.m. and will do my best to end class by 3:50 p.m. Please be on time when class starts. One of the hallmarks of a good lawyer is consistent timely performance.

Attendance and Participation: I expect that all members of the class will attend our class and participate regularly. If you need to be absent or late, please send me an email ahead of time to let me know the reason. Given that this is a course which for the most part will be run like a seminar, your attendance and active participation will be crucial to making it a success.

In normal lecture classes, professors often call on members of the class randomly and ask them to answer questions about the readings. I may do that in this class, but to the extent I do, it is only in an effort to get discussion going. If you are called on and do not know the answer, you may simply say “pass” or “I don’t know the answer” and I will then call on someone else. However, if you take too many “passes,” I may ask that we speak outside of class. If two students in a row take a “pass,” the third person I call on will not be able to use this exit and must answer the question. So, please be considerate of your colleagues in the room. If you are making a serious effort, I don’t care what you think about the material, but I will care that you think something. I want you to articulate that something and elaborate on it. I will be interested in the position you are taking and in your ability to make a thoughtful argument, no matter what side of the debate you are on.

Office Hours: My office hours are Mondays from 4:00 p.m. to 6:00 p.m. I generally have an open-door policy and you are welcome to see me any time I am in my office, although if I happen to be preparing for class I may ask you to come back at a later time. You are also welcome to schedule an appointment by emailing me. This will guarantee that I will be in my office and can see you whenever it might best for you. My office is in Hazel Hall, Room 306. My e-mail address is emazo@gmu.edu. My office phone number is (703) 993-8291. Please feel free to contact me at any time with your questions about our class and/or about what we are reading and learning.

Laptop Policy: Professors find that class momentum is harmed when they call on a student unexpectedly and he or she has no idea what the question is because he is distracted by a computer screen. Thus, while I will allow the use of laptops for taking notes, organizing them, and assisting in a student’s preparation for the final exam, I reserve the right to ban the use of laptops in our classroom if I find students using them for inappropriate purposes during class time. You are all being put on notice that your use of a laptop in this course depends on not abusing this privilege.

TWEN: This is a service hosted by Westlaw that will function as our class listserv and webpage. I will post additional course materials on TWEN for the whole class from time to time, which you can download and read on your own. This syllabus will be posted on TWEN as well. You should learn how to use this service. The law library can provide you with a tutorial.

Grading: Most of your course grade will be based on the final examination, which will be approximately two-and-a-half hours in length, and will consist of multiple choice questions and of
essays questions, with each comprising roughly half of the examination. Exactly 90% of your grade will be based on the final examination and exactly 10% will be based on your class participation.

The Readings

When doing the readings, please focus on the principle cases that follow each assignment. Following each case in the text are notes and questions, and you may read through them as well. I reserve the right to change the readings and alter the syllabus throughout the semester, if it becomes evident that certain readings should be added (or omitted) for pedagogical purposes.

In addition to the readings from LHT and the Supplement, I will assign optional outside reading from time to time. These will come from The Right to Vote, from Election Law Stories, or from outside articles posted on TWEN. Following my usual practice, at the beginning of class, I will generally post on the board and in our class slides the assigned reading for the next class.

I. Voting and Representation


            Keyssar, xvix to xxvi, 1-21

Week 2: The Constitutional Right to Vote

A. A Brief History of the Right to Vote in the United States

Readings: LHT, 25-39
            Keyssar, 22-42

B. Court Review of Limitations on the Right to Vote

Readings: LHT, 40-63
            D&M, 63-85 (chapter by Tolson) (optional)
            Keyssar, 43-60 (optional)

II. The Right to an Equally Weighted Vote

Week 3: Reapportionment and Districting

A. “One Person, One Vote”

Readings: LHT, 65-78
            Supp., 3-16 (Evenwel v. Abbott)
            Keyssar, 205-257 (esp. 230-246) (optional)

B. Localities and Special-Purpose Entities
III. Partisan Gerrymandering and Political Competition

Week 4: Gerrymandering

A. Defining and Identifying Gerrymanders

Readings: LHT, 109-117

B. Constitutional Limits on Gerrymandering

Readings: LHT, 117-138
D&M, 179-231 (chapter by Manheim) (optional)
LHT, 138-144 (optional)

A. Political Competition

Readings: LHT, 144-154
LHT, 154-163 (optional)

IV. Majority Rule and the Minority Vote

Week 5: Minority Vote Dilution

A. Beyond the Right to Cast a Ballot

Readings: LHT, 165-171

B. Section 5 of the Voting Rights Act

Readings: LHT, 171-179 (n. 5)

C. The Constitutionality of Section 5

Readings: Supp., 32-52 (*Shelby County v. Holder*)
Supp., 52-56 (optional)
Week 6: Minority Vote Dilution (continued)

A. Section 2 of the Voting Rights Act

Readings: LHT, 201-218
LHT, 218-228 (optional)
LHT, 229-236

B. Racial Gerrymandering

Readings: LHT, 236-245
LHT, 249-256 (optional)

V. Election Administration

Week 7: Counting the Votes

A. Equal Protection Claims and Issues

Readings: LHT, 267-283
LHT, 283-293 (optional)

B. Voting Technology and Voter Identification

Readings: LHT, 293-298
LHT, 302-316
LHT, 316-323
D&M, 453-504 (chapter by Douglas) (optional)

Week 8: Encouraging Turnout, Remedying Defects

A. Laws Affecting Political Participation in the United States

Readings: LHT, 323-340

B. Remedies for Defective Elections

Readings: Steven Huefner, “Remediing Election Wrongs” (TWEN)

VI. The Rights of Political Parties

Week 9: Major Political Parties

A. Political Parties and the Constitution

Readings: LHT, 413-417
B. The Associational Rights of Parties
Readings: LHT, 443-447
LHT, 454-473

C. Ballot Access for Minor Parties
Readings: LHT, 495-514,
LHT, 514-522
LHT, 522-524 (optional)

VII. Regulating Political Campaigns

Week 10: Campaigns

A. Introduction
Readings: LHT, 535-540

B. Campaign Speech
Readings: LHT 541-549
LHT, 549-552 (optional)

C. Judicial Elections
Readings: LHT, 552-555
LHT, 557-570
LHT, 574-586
Supp., 96-117 (*Williams-Yulee v. Florida Bar*)

VIII. Campaign Finance

Week 11: The Law of Campaign Finance

A. The Buckley Framework
Readings: LHT, 641-662
LHT, 672-676

B. Campaign Spending Limits After Buckley
Readings: LHT, 701-713; 717-733
D&M, 287-312 (chapter by Hasen) (optional)
Week 12: The Law of Campaign Finance (continued)

A. The Citizens United Revolution

Readings: LHT, 735-756
D&M, 359-404 (chapter by Gerken & Newland) (optional)

B. Testing Contributions Limits

Readings: LHT, 768-791
Supp., 146-170 (McCutcheon v. FEC)

Week 13: The Law of Campaign Finance (continued)

A. The Emergence of Super PACs

Readings: LHT, 818-825

B. The Future of Public Financing

Readings: LHT, 849-874

IX. Direct Democracy in the United States

Week 14: Referenda and Ballot Initiatives

A. Pros and Cons; Content Restrictions

Readings: LHT, 341-350
LHT, 362-368

B. The Single Subject Rule

Readings: LHT, 378-380
LHT, 380-383 (n 3)
LHT, 388-391