In 2000, the presidential election came down to one state, Florida. Out of 5.96 million votes cast, the margin was almost unbelievably narrow, with George W. Bush declared the winner by 537 votes (a victory margin of 0.008%). There were many irregularities: 54,000 registered voters were removed from poll lists because they were declared to be ineligible ex-felons (over half of those purged were African American, and most of these removals were erroneous); a poorly designed ballot in Palm Beach County which resulted in thousands of voters who intended to vote for Gore mistakenly casting their ballots for other candidates and many other voters invalidating their own ballots when they tried to correct their votes but wound up voting for multiple candidates; faulty punch-card voting equipment that failed to accurately record voter choices. When the U.S. Supreme Court stopped the recount process in December, the decision had the effect of making Bush the President, in what critics called the most partisan Supreme Court opinion in U.S. history.

Since then, interest in election administration has exploded. Over the past few years, controversies over the Voting Rights Act, gerrymandering, voter ID, the integrity of the electoral process, and the ease of voting (or barriers to participation) have dominated discussions of how we conduct elections in the U.S. That 2016 was the 2nd presidential election in 16 years where the winner of the presidential election lost the popular vote (prior to 2000, the last time it happened was 1888) has raised questions about representational structures.

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, and 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. However, there are many other ways to do this, and 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

1 Full disclosure: I was an expert witness for plaintiffs in two legal challenges to Wisconsin’s voter ID law: one in state court (NAACP of Milwaukee, et al. vs. Walker, et al. 2012), and one in federal court (One Wisconsin Institute v. Thomsen, 2016). In those cases, I testified that hundreds of thousands of registered voters did not have a form of ID that would permit them to vote. I was also an expert witness for plaintiffs in a challenge to Wisconsin’s 2011 state legislative redistricting, in which a district court held that the plan was an unconstitutional gerrymander (Whitford v. Gill, 2016; the Supreme Court is hearing oral arguments in the case on October 3rd)
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. And we expect “administration” to be fair, so that results are not determined by process.

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. “Administration,” moreover, can never be purely neutral, as even ostensibly impartial administrative decisions – holding elections on Tuesdays, different rules for casting absentee ballots, early voting rules, registration requirements, voter ID requirements, and on and on – can have an impact on outcomes by imposing barriers that make it easier/more difficult for some people to vote.

Ultimately, 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.

We will also investigate election administration, involving a complex (and surprisingly casual) process of actually conducting voter registration, running polling places, and tabulating ballots. Over the last few years, many states have adopted more restrictive voting rules that require voters to show government-issued photo identification in order to cast a ballot. Proponents justify these laws as a way of making elections more secure, and raise the specter of fraud (noncitizens voting, voter impersonation, multiple voting, etc.). But the evidence of material levels of voter fraud is nonexistent.

Most of the readings come from the following texts:

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 seminar. 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, Instagram, 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 once observed students in a physics course watching videos and texting while the professor was talking about quantum chromodynamics and Feynman diagrams. Needless to say, I bet these students couldn’t tell the difference between the Large Hadron Collider and Hello Kitty.

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, iPads, iPads, 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 video on CollegeHumor.com at the time.

Your grade will be based on four elements: attendance and participation (20%), 3 short papers assigned as noted in the syllabus (10% each); a presentation on redistricting (10%) and a take home final (40%).

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 (9/7) – Introduction. Theories of politics. How to read a court decision.
Casebook, chapter 1

Weeks 2-4 (9/14, 9/21, 9/28) -- The Intersection of Law and Democratic Politics: Who gets to vote? Fulfilling the Promise of the 15th Amendment
Casebook, chapter 2

Alabama Literacy Test
*Giles v. Harris 189 U.S. 475 (1902)

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 48 states, you lose your right to vote while in prison for felony offenses. In 35 states, felons on parole or probation lose the vote. In 11 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 5.85 million disenfranchised felons, 2.2 million, or 38%, are African American (who comprise about 10% of the adult population in the U.S.). 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”?

In addition, 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, Southern 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, it did not end every dispute about how different forms of discriminatory rules could diminish that right.

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?

Short paper #1 (due 9/21): Should people who do not now have the right to vote be able to vote? Children? Noncitizens? Other questions to think about: Should it be harder to vote? Should there be a knowledge test?
Week 5 (10/5) – Rights of Association: The role of Political Parties
Casebook, chapter 8

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 6 (10/12). The Reapportionment Revolution. What is a “meaningful” vote?
Casebook, chapter 3
*Colegrove v. Green* 328 U.S. 549 (1945)

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 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: 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 7 (10/19) – Partisan Gerrymanders
Casebook, chapter 4


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 about anything, as long as district populations are equal. 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.

Week 8-9 (10/26, 11/2) – Minority Vote Dilution and The Voting Rights Act
Casebook chapter 5

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 Supreme 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.

Paper: results of redistricting exercise, due November 2nd.

Week 10-12 (11/9, 11/16; 11/23) Election Administration and Disputes
Casebook, chapter 6
Hasen, The Voting Wars, entire

Comment: nobody cared about election administration until 2000, when the presidential election debacle in Florida laid bare all of the problems of how we conduct elections: poorly administrated voter registration lists, unfair purges, appallingly unreliable 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 (in Washington, thousands of ineligible ex felons had been sent absentee ballots and encouraged to vote), a lack of clear guidance on how to conduct a recount. Concerns span the political spectrum. On the Left, that electronic voting machines allow corporations to steal elections; on the Right, that close elections are routinely decided by fraudulent votes cast by thousands or millions of dead people (all of whom are from Chicago and belong to a union).

Current disputes center around allegations that elections are vulnerable to fraud, via voter impersonation and ineligible voters casting ballots. One proposed solution to some of these problems is voter ID, which requires prospective voters to show government issued photo ID at the polls. Most scholars who have looked at the issue have concluded that allegations of fraud are vastly overstated, that there are no indications that it is a problem, and that most forms of voter irregularities (ex-felons voting, voting in two separate jurisdictions, absentee ballot fraud, old fashioned ballot-box stuffing) have nothing to do with voter ID. Allegations of noncitizens or dead people voting almost invariably turn out to be the result of poor record keeping or administrative errors.

Despite recent improvements, the election administration process remains relatively loose, poorly funded, and often unreliable. Again, this has little to do with fraud, and more to do with the inherent difficulties of counting hundreds of millions of votes across thousands of jurisdictions, using poorly trained poll workers and often-informal administrative processes.

Paper: What does “election integrity” mean? Does the definition of the concept alter the way we think about how to protect the electoral process? What is the balance of harms? (another way to ask this, does it make sense to ask which is more of a threat to electoral legitimacy: preventing an illegal vote, or blocking a qualified voter from voting?). Due December 5.
Week 1 (11/30) – The conduct of elections, and candidate behavior
Casebook, chapter 10

Comment: for all of the attention devoted to election administration, far less has been directed at the conduct of candidates themselves (apart from laws against electoral fraud). One interesting way to approach this is to ask the question: is there a constitutional right to lie during a campaign? Or should candidates be liable to prosecution for objectively false statements? This turns out to be a surprisingly uncomfortable question. You might say that it should be left up to voters to impose consequences, but that places a high burden on many voters who are either marginally attentive, or don’t care as long as it’s their candidate doing the lying. It doesn’t say much for democratic accountability, moreover, if you construct an electoral system based on rampant falsehoods. At the same time, punishing candidates for lying opens up an entirely different set of problems: who decides what a “lie” is? Who applies those standards and determines whether a candidate has lied? Is there a difference between a candidate falsely claiming to be a Medal of Honor winner, and a candidate saying “my tax plan will produce a balanced budget” when 100% of academic economists say that’s not true? What are the justifications for, say, removing an incumbent because they have been found guilty of campaign lies?

Or consider a different problem: the consequences of elected judges (fairly common at the state and local level). On the one hand, judges should be impartial and insulated from public opinion. But on the other, that doesn’t mean that judges should be entirely unaccountable to the public. But what happens when a judicial candidate accepts large campaign contributions (or benefits from large independent expenditures on her behalf), and then presides over a case involving that contributor? As you’ll see, there are different standards for judges and judicial campaigns, covering both what candidates can say and how they behave once on the bench.

Weeks 14-15 (12/5; 12/12)– Campaign Finance and Democratic Accountability
Casebook chapters 11,12,16

Comment: Somebody has to pay for all of this. In the U.S., most federal campaigns are funded through private contributions (although there is an increasingly irrelevant 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, in this view, 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, they argue, 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?