

# Election Law

Professor Doug Spencer  
Yale Law School

## **Class**

Spring 2022  
Room TBD  
Monday: 8:10-10:00a

## **Contact**

Office: TBD  
E-mail: douglas.spencer@yale.edu  
Office Hours: Mondays 10:15a-12p

## Course Description

This course introduces some of the central issues in the law governing the democratic process in the United States. It will cover, first, the development and nature of the right to vote under the U.S. Constitution, including limits on the franchise; second, the relationship between majority rule and minority representation, as reflected in the 15th Amendment to the U.S. Constitution and the federal Voting Rights Act; third, thorny questions about equality and due process in the administration of elections; fourth, the constitutional fault lines of campaign finance regulation; and fifth, the regulation of political parties.

The next several months will be very interesting for election lawyers and I may diverge from the syllabus from time to time to respond to current events. For example, the Supreme Court is likely to issue an opinion in *FEC v. Cruz* on the constitutionality of loan repayment limits for federal candidates. Sixteen states have yet to complete their congressional redistricting process and litigation is pending in several states that have completed the process. Congress is likely to debate revisions to the Electoral Count Act and a handful of lawsuits related to the 2020 election are still pending in the courts.

The law of the electoral process is a challenging and exciting topic of study. The cases we will read are anything but tidy; we are dealing with an area of law that, doctrinally, is very unsettled. The course will teach the close reading of appellate opinions and the formulation of arguments during periods of legal change. This course will be fun as well as challenging, and it should serve you well if you're interested in a career in politics—be it at the local, state, or national level—or as a lawyer for advocacy groups, political parties, or candidates for elected office.

## Required text

JAMES GARDNER & GUY CHARLES, *ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM*, Aspen Casebook Series, **2d ed. 2018**. (ISBN-13: 978-1454883319)

Links to additional readings for the course are embedded in the syllabus below and also available on **Canvas**.

## Diversity

The diversity of experience and perspective that students bring to this class is one of our strongest resources and benefits. It is my intent that students from all backgrounds and with varying perspectives be well-served by this course, and that students' learning needs be addressed both in and out of class. I encourage your feedback if I ever fall short of this standard.

## Requirements for COVID-19

As a matter of public health and safety due to the pandemic, all members of the Yale community and all visitors to campus must follow university, department and building requirements, in addition to public health orders in place to reduce the risk of spreading infectious disease. According to [Yale's vaccine policy](#) all eligible students should be fully vaccinated and boosted "by the time they return to campus for the Spring 2022 semester." We anticipate meeting in person beginning Monday, February 7. You may upload proof of compliance [here](#) (some exceptions apply).

## Student Accessibility

If you qualify for accommodations because of a disability, please submit your accommodation letter from Disability Services to me in a timely manner so that we can work together to address your needs. Disability Services determines accommodations based on documented disabilities in the academic environment. Information on requesting accommodations is located on the [Student Accessibility Services website](#).

## Preferred Student Names and Pronouns

Yale Law recognizes that students' legal information doesn't always align with how they identify. Students may update their preferred names and pronouns via the student portal; those preferred names and pronouns are listed on instructors' class rosters. In the absence of such updates, the name that appears on the class roster is the student's legal name.

## Sexual Misconduct, Discrimination, Harassment and/or Related Retaliation

Yale Law School is committed to fostering an inclusive and welcoming learning, working, and living environment. YLS will not tolerate acts of sexual misconduct (harassment, exploitation, and assault), intimate partner violence (dating or domestic violence), stalking, or protected-class discrimination or harassment by or against members of our community. Individuals who believe they have been subject to misconduct or retaliatory actions for reporting a concern should contact Dean Ellen Cosgrove or, if preferred, a [Title IX Coordinator](#) outside the law school, or a member of Yale's [SHARE Center](#).

Please know that faculty and graduate instructors have a responsibility to inform a Title XI Coordinator when made aware of incidents of sexual misconduct, dating and domestic violence, stalking, discrimination, harassment and/or related retaliation, to ensure that individuals impacted receive information about their rights, support resources, and reporting options.

## Grading

Your grade in this class will be based on three factors:

### 1. Legal Writing (30%)

For this assignment you will **work with a partner** to produce a legal document related to a contemporary election law issue. For example, you may choose to draft a complaint seeking relief against a group or individual that has (allegedly) acted in violation of the law. Or you may choose to draft a response to a claim currently pending in federal court. Or you may choose to draft a litigation strategy memo in anticipation of legal action. A description of the available projects, fact patterns, relevant laws/regulations, and templates will be posted to **Canvas** on Feb. 4. The assignment is due, via upload on **Canvas** on Monday, March 14 by 8:10am.

### 2. Response Paper (60%)

The second assignment is a response paper (1,500 words) that evaluates one or more of the secondary sources listed on the syllabus. Your goal will be to produce a short piece of legal scholarship. As a general matter, your paper should not read like a book report or an encyclopedia entry but should, instead, follow a cohesive narrative arc that amplifies your voice. I will discuss the expectations for, and answer questions about, the papers during class on March 28. Final drafts should be uploaded to **Canvas** by Monday, April 25 at 8:10am. Extensions will be granted only in exceptional cases that receive approval from the Associate Dean of Students.

### 3. Class Participation (10%)

Regular attendance and class participation are required. In addition to marking your attendance on the attendance sheet, each student should actively participate in all group exercises and also contribute to the larger class discussion several times during the semester. I appreciate that because of other pressures in your lives, complete preparation may not be possible for every class. If you are not ready to respond on a particular day, simply let me know at the beginning of class, and I will not call on you that day.

### Alternative: Research Paper

In lieu of the response paper and legal writing assignment, you may choose to write a research paper on an election law topic of your choice. The paper must be at least 6,000 words, excluding footnotes, and be written in the style and quality of a law review Note. If you would like to earn credit for a Substantial Paper, you must submit a 250-word topic proposal by Feb. 21. Due to the size of the class, **I will only be able to accept a limited number of proposals for Substantial credit**. In order to earn credit for a Substantial Paper, you will need to submit a first draft to me before March 28 and incorporate my feedback into your final draft. The final draft of all papers is due April 25.

## Assignment Schedule

---

	<b>Due dates</b>
Legal Writing	2/4 – Assignment posted on <b>Canvas</b> 3/14 – Final draft due by 8:10 a.m. (upload to <b>Canvas</b> )
Response Paper	3/28 – Discuss assignment in class 4/25 – Final draft due by 8:10 a.m. (upload to <b>Canvas</b> )
Research paper (optional)	2/21 – Approve topic with professor (for Substantial) 3/28 – First draft due (for Substantial) 4/25 – Final draft due by 8:10 a.m. (e-mail to professor)

---

## Course Overview

Page numbers from the casebook are listed under CB, additional readings will be posted to Canvas on the weeks marked with a check (✓), and the total number of combined pages is listed.

Date	Topic	CB	Canvas	# pages
1/24	Intro & Indep. State Legislature Doctrine	—	✓	10
1/31	Elections, Liberalism, & Democratic Backsliding		✓	45
2/7	Limits on Voting	115-136 142-152 158-180		55
2/14	Apportionment & Electoral College	207-235	✓	51
2/21	Redistricting, part I	268-296	✓	85
2/28	Redistricting, part II	315-330	✓	68
3/7	Voting Rights Act, part I	344-369	✓	92
3/14	Voting Rights Act, part II	369-400	✓	64
3/21	NO CLASS: Spring Break			
3/28	Voting Rights Act, part III	401-459	✓	81
4/4	Election Administration	934-947 960-963 968-983	✓	63
4/11	Candidates & Parties	466-484 525-546 562-600		94
4/18	Campaign Finance Law, part I	710-723 729-752	✓	69
4/25	Campaign Finance Law, part II	825-888	✓	105

## Schedule of Topics and Readings

I am committed to following the schedule below. However, it may be the case that our discussions move faster or slower than I anticipate. If it is necessary to revise this schedule, I will make an announcement and also circulate an updated syllabus at that time.

### Jan. 24: Introduction & Independent State Legislature Doctrine

- Expectations for the course
- Overview of writing assignments
- Constitutional foundations of election regulation
- Independent State Legislature Doctrine

#### Reading

1. Independent State Legislature Doctrine (on Canvas)

### Jan. 31: Elections, Liberalism, & Democratic Backsliding

- What is a liberal democracy?
- Competitive Authoritarianism & Autocratic Legalism
- Does election law remain a meaningful field of law, with a legal structure and jurisprudence that can be taken seriously?

#### Reading

1. CB Supplement (on Canvas)
2. [Reinventing Liberalism for the 21st Century](#), THE ECONOMIST (Sept. 13, 2018)

#### Additional Materials

- James A. Gardner, *Illiberalism and Authoritarianism in the American States*, 70 AM. U. L. REV. 829 (2021)
- Jacob M. Grumbach, *Laboratories of Democratic Backsliding*, working paper (2021)
- Kim Lane Scheppele, *Autocratic Legalism*, 85 U. CHI. L. REV. 545 (2018)
- Joshua A. Douglas, *Foreword: Election Law Stories, or an Election Law Story?*, ELECTION LAW STORIES (Foundation Press) (2016)
- Robert Kagan, *The Strongmen Strike Back*, WASH. POST, Mar. 14, 2019.
- Mark Tushnet, *Constitutional Hardball*, 37 JOHN MARSHALL L. REV. 523 (2004).

## Feb. 7: Limits on Voting

- Residency requirements
- Poll taxes
- Literacy tests
- Age qualifications
- Felon Disenfranchisement

### Reading

1. CB 115-136, 142-152, 158-180
2. Katarina Sostaric, *One Year After Executive Order Restored Voting Rights to Iowans With Felony Convictions, Most Haven't Registered to Vote*, Iowa Public Radio (Aug. 5, 2021)

### Additional Material

- ALEXANDER KEYSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (revised ed.), pp. 258-302
- *Farrakhan, et al. v. Gregoire, et al.*, 623 F.3d. 990 (9th Cir. 2010)
- Eugene D. Mazo, *Residency and Democracy: Durational Residency Requirements from the Framers to the Present*, 43 FLA. ST. U. L. REV. 611 (2016)
- Joseph Fishkin, *Taking Virtual Representation Seriously*, 59 WM. & MARY L. REV. 1681 (2018)
- Joshua A. Douglas, *In Defense of Lowering the Voting Age*, 165 U. PA. L. REV. ONLINE 63 (2017)
- CATHERINE PRENDERGAST, LITERACY AND RACIAL JUSTICE: THE POLITICS OF LEARNING AFTER BROWN V. BOARD OF EDUCATION, 2003
- JEFF MANZA & CHRISTOPHER UGGEN, LOCKED OUT: FELON DISENFRANCHISEMENT AND AMERICAN DEMOCRACY, 2006, pp. 95-112
- Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate Over Felon Disenfranchisement* 56 STAN. L. REV. 1147 (2004)
- Alan S. Gerber, et al. *Does Incarceration Reduce Voting? Evidence About the Political Consequences of Spending Time in Prison*, 79. J. POL. 1130 (2017)
- The Sentencing Project, *Felony Disenfranchisement: A Primer* (June 27, 2019)

## Feb. 14: Apportionment & the Electoral College

- The “political thicket”
- One person, one vote
- The relevant population base
- Census, citizenship, and “differential privacy”
- National Popular Vote Interstate Compact (NPVIC)

### Reading

1. CB 207-235
2. *Evenwel v. Abbott*, 126 S.Ct. 1120 (2016) (on Canvas)
3. [Federalist 68](#)
4. *Chiafalo v. Washington* (2020)

### Additional Material

- BRUCE E. CAIN, THE REAPPORTIONMENT PUZZLE (1984)
- Jeffrey W. Ladewig, *One Person, One Vote, 435 Seats: Interstate Malapportionment and Constitutional Requirements*, 43 CONN. L. REV. 1125 (2011)
- Pamela S. Karlan, *Reapportionment, Nonapportionment, and Recovering Some Lost History of One Person, One Vote*, 59 WM. & MARY L. REV. 1921 (2018)
- Roy Elis, Neil Malhotra, and Marc Meredith, *Apportionment Cycles as Natural Experiments*, 17 POL. ANALYSIS 358 (2009)
- Justin Levitt, *Citizenship and the Census*, 119 COLUM. L. REV. 1355 (2019)
- *Can a Set of Equations Keep U.S. Census Data Private?* SCIENCE (Jan. 4, 2019)
- “A History of Census Privacy Protections”, U.S. CENSUS BUREAU (Oct. 10, 2019).
- “Agreement Among the States to Elect the President by National Popular Vote,” NPVIC
- Michael C. Dorf, *Could a Faithless Elector Ruling Doom an Attempt to Circumvent the Electoral College?* VERDICT (Sept. 4, 2019)



## Feb. 21: Redistricting, part I

- Competition, polarization, and alignment
- Incumbent protection vs. party power maximization
- Natural vs. artificial geographic sorting
- Individual rights vs. structural regulation

### Reading

1. CB 268-296
2. Samuel Issacharoff and Richard Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (pp. 643-652, 668-690)
3. Nathaniel Persily, *In Defense of Foxes Guarding Henhouses*, 118 HARV. L. REV. 649 (2004) (pp. 649-673)
4. Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283 (2014) (pp. 283-291)

### Additional Material

- Moon Duchin, *Gerrymandering Metrics: How to Measure? What's the Baseline?*, ARXIV (Jan. 2018)
- Nicholas O. Stephanopoulos & Christopher Warshaw, *The Impact of Partisan Gerrymandering on Political Parties*, 45 LEG. STUD. Q. 609 (2020).
- Seth Masket, Jonathan Winburn & Gerald Wright, *The Gerrymanders are Coming! Legislative Redistricting Won't Affect Competition or Polarization Much, No Matter Who Does It*, 45 PS: POL. SCI. & POLITICS 39 (2012).
- Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q. J. POL. SCI. 239 (2013).

## Feb. 28: Redistricting, part II

- Manageable judicial standards
- Independent redistricting commissions

### Reading

1. CB 315-330
2. *Rucho v. Common Cause*, 588 U.S. \_\_\_ (2019) (on Canvas)
3. Guy Charles & Doug Spencer, "The Law of Gerrymandering," in POLITICAL GEOMETRY (forthcoming 2022) (on Canvas)

### Additional Material

- Samuel S.-H. Wang, Richard Ober Jr. & Ben Williams, *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymandering*, 22 U. PA. J. CONST. L. 203 (2019).

- Daniel Hessel, *Litigating Partisan Gerrymandering Claims Under State Constitutions*, CAMPAIGN LEGAL CTR. (July 2018)
- Note, *Political Gerrymandering: A Self-Limiting Enterprise?*, 122 HARV. L. REV. 1467 (2009)
- James A. Gardner, *Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering*, 37 RUTGERS L.J. 881 (2006)
- Guy-Uriel Charles & Luis E. Fuentes-Rohwer, *Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236 (2018)
- Vladimir Kogan and Eric McGhee, *Redistricting California: An Evaluation of the Citizens Commission Final Plans*, 4 CAL. J. POL. & POL'Y 1 (2012)

## Mar. 7: Voting Rights Act, part I

- Geography of discrimination
- Scope of congressional authorization
- Bail out and bail in

### Reading

1. CB 334-369
2. Nathaniel Persily, *The Promise and Pitfalls of the New Voting Rights Act*, 117 YALE L.J. 174 (2007) (pp. 176-207)
3. *Amicus Brief of Political Science and Law Professors*, Shelby County v. Holder
4. H.R. 4, *John R. Lewis Voting Rights Advancement Act of 2021*

### Additional Materials

- Leah M. Litman, *Inventing Equal Sovereignty*, 114 MICH. L. REV. 1207 (2016)
- Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 DUKE L.J. 1087 (2016)
- Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA "Preclearance" After Shelby County*, 102 CAL. L. REV. 1123 (2014)
- Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State's Rights, Last Rites, and Voting Rights*, 42 CONN. L. REV. 481 (2014)
- Travis Crum. Note. *The Voting Rights Act's Secret Weapon: Pocket Trigger Litigation and Dynamic Preclearance*, 119 YALE L.J. 1993 (2010)

## Mar. 14: Voting Rights Act, part II

- Results test
- *Gingles* factors.

### Reading

1. CB 369-400
2. *Brnovich v. Democratic National Committee*, 594 U.S. \_\_\_ (2021) (on Canvas)
3. Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377 (2012) (pp. 377-409)

### Additional Materials

- Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the VRA After Shelby County*, 115 COLUM. L. REV. 2143 (2015)
- Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019)
- Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001)
- Franita Tolson, *What is Abridgment? A Critique of Two Section Twos*, 67 ALA. L. REV. 433 (2016)
- D. James Greiner, *Re-Solidifying Racial Bloc Voting: Empirics and Legal Doctrine in the Melting Pot*, 86 IND. L.J. 447 (2011)

## Mar. 21: NO CLASS (Spring Break)

## Mar. 28: Voting Rights Act, part III

- Race and redistricting
- Race as the predominant factor

### Reading

1. CB 401-459
2. Ellen D. Katz, “Race and Redistricting: The Legal Framework,” in POLITICAL GEOMETRY (forthcoming 2022) (on Canvas)

### Additional Materials

- *Alabama Legislative Black Caucus v. Alabama*, 135 S.Ct. 1257 (2015)
- Travis Crum, *The Superfluous Fifteenth Amendment?*, 114 NW. U. L. REV. 1549 (2020)
- Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WM. & MARY L. REV. 1837 (2018)
- Daniel Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S. CAR. L. REV. 689 (2006)

- Dale E. Ho, *Something Old, Something New, or Something Really Old? Second Generation Racial Gerrymandering Litigation as Intentional Racial Discrimination Cases*, 59 WM. & MARY L. REV. 1887 (2018)

## Apr. 4: Election Administration

- *Bush v. Gore* (2000)
- Recounts and remedies
- Partisan election administration
- Voter ID requirements

### Reading

1. CB 934-947, 960-963, 968-983
2. Edward Foley, "Recounts: Elections in Overtime," in LAW & ELECTION POLITICS (2013) (ch. 7) on Canvas
3. Benjamin Highton, *Voter Identification Laws and Turnout in the United States*, 20 ANN. REV. POL. SCI. 149 (2017)

### Additional Materials

- HEATHER K. GERKEN, THE DEMOCRACY INDEX (2009)
- EDWARD FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE U.S. (2016)
- Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737 (2008) (pp. 1737-1760)
- Michael Tomz & Robert P. Van Houweling, *How Does Voting Equipment Affect the Racial Gap in Voided Ballots?* 47 AM. J. POL. SCI. 46 (2003)
- Ariel White, Noah Nathan & Julie Faller, *What Do I Need to Vote? Bureaucratic Discretion and Discrimination by Local Election Officials*, 109 AM. J. POL. SCI. 129 (2015)
- LORRAINE C. MINNITE, THE MYTH OF VOTER FRAUD (2010)
- Michael D. Gilbert, *The Problem of Voter Fraud*, 115 COLUM. L. REV. 739 (2015)
- Robert S. Erickson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification-Voter Turnout Debate*, 8 ELECTION L.J. 85 (2009)
- Charles Stewart, *2016 Survey of the Performance of American Elections*, pp. 1-41.
- Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. CHI. L. REV. 655 (2017)
- Keith Chen, Kareem Haggag, Devin Pope, & Ryne Rohla, *Racial Disparities in Voting Wait Times: Evidence from Smartphone Data*, NBER Working Paper (Nov. 2019)

## Apr. 11: Candidates & Parties, An Overview

- Term limits and other qualifications for office
- State institutionalization of two-party system
- Ballot access

### Reading

1. CB 466-484, 525-546, 562-600
2. *Utah Republican Party v. Cox*, 885 F.3d. 1219 (10th Cir. 2018), cert. denied, 586 U.S. \_\_\_ (2019) (parts I, III and IIIa)

### Additional Materials

- Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1740 (1993)
- Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUM. L. REV. 1225 (2018).
- Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L. REV. 1013 (2011)

## Apr. 18 : Campaign Finance, part I

- History of campaign finance
- Justifications for campaign finance regulations
- Bribery and corruption

## Apr. 25: Campaign Finance, part II

- Independent expenditures
- Corporations and “distortion”
- *Citizens United v. FEC* (2010)

### Reading

1. CB 825-888
2. Richard L. Hasen, *Citizens United and the Illusion of Coherence*, 109 MICH. L. REV. 581 (2011) (Introduction)
3. John Paul Stevens, *Oops!*, Harold Levanthal Lecture to the Administrative Law Section of the D.C. Bar (2014) (on Canvas)

## Additional Materials

- *SpeechNow.org v. FEC*, 599 F.3d. 686 (D.C. Cir. 2010)
- *Amicus Brief of Legal Scholars of Campaign Finance*, Lieu v. FEC (2020)
- *McCutcheon v. FEC*, 572 U.S. 185 (2014)
- DANIEL P. TOKAJI & RENATA E.B. STRAUSE, THE NEW SOFT MONEY (2014)
- Tabatha Abu El-Haj, *Beyond Campaign Finance Reform*, 57 B.C. L. REV. 1127 (2016)
- Michael S. Kang, *The End of Campaign Finance Law*, 98 VA. L. REV. 1 (2012)
- Douglas M. Spencer & Abby K. Wood, *Citizens United, States Divided: An Empirical Analysis of Independent Political Spending*, 89 IND. L.J. 315 (2014)
- RICHARD L. HASEN, PLUTOCRATS UNITED (2016)
- ROBERT C. POST, CITIZENS DIVIDED (2014)
- Bertrall Ross, *Addressing Inequality in the Age of Citizens United*, 93 N.Y.U. L. REV. 1120 (2018)
- Abby K. Wood, *Campaign Finance Disclosure*, 14 ANN. REV. L. & SOC. SCI. 11 (2018)