

Exam No. _____

Election Law
Professor Michael Kang
Fall 2004

Return this exam and your answers between 5 pm and 6 pm today.

FINAL EXAM

This is an open-book examination. References to material that was not read or discussed in class will not strengthen your answer. You may not discuss the examination with anyone until the expiration of the exam period. Your answers must be your own work. These rules will be strictly enforced.

This exam is designed to be answered fully in four hours. There are three questions on the exam. I have denoted the points (on a scale of 100 points) allocated to each question below. As discussed, you are permitted to pick up this exam anytime between 8 am and 9 am and return your exam and your exam answers anytime before 6 pm of the same day.

- YOUR ANSWER MUST NOT EXCEED 4000 WORDS, WITH ONE-INCH MARGINS IN TWELVE-POINT TIMES ROMAN FONT – i.e., ABOUT SIXTEEN DOUBLE-SPACED PAGES. Please double space your answers, begin each question on a new page, and paginate your answer.
- RETURN YOUR EXAM AND A HARD COPY OF YOUR EXAM ANSWERS IN THE ENVELOPE PROVIDED TO YOU WITH THIS EXAM. Please write your exam number on each page of your exam and your exam answers.

If you believe an important fact has been omitted, please make a reasonable assumption with respect to that fact, state that assumption explicitly, and answer the question on that basis. Similarly, if you believe the question is ambiguous, identify the ambiguity explicitly, make a reasonable assumption about how to resolve it, and answer the question on that basis. Please also discuss relevant, non-frivolous arguments that you ultimately decide to discard and state your reasons for discarding them.

Thank you for being a great class. Keep in touch. Good luck.

Question 1 (30 points)

You work as an analyst for Citizens for Fair Politics, a nonpartisan think tank based in the southern state of Redgrange. As they have for the last ten years, Republicans hold a majority in the unicameral state assembly and on the legislative committee in charge of redistricting (the “Committee”). George Halas, your boss, is impressed by your stellar election-law training at Emory School of Law. He asks you to study the Committee’s current work on a new districting map for the state assembly.

Of course, Republicans controlling the Committee hope to maintain their party’s majority in the state assembly. Currently, they control sixty of 100 seats in the assembly. Although the two-term incumbent governor is a Democrat, Republican candidates for the state assembly garnered 55 percent of votes statewide. However, the African-American population, which has grown to 10 percent of the total population in the state, tends to vote overwhelmingly for Democratic candidates. The African-American population is concentrated residentially in the geographic center of the state. Voting throughout the state is racially polarized, although the state is proud that it has repudiated its segregationist past.

The Committee has drawn a new districting map that experts expect will increase the Republican majority in the state assembly by three to five seats after the next election. The new map also features a maximum population deviation of 7 percent, which falls within what the Committee believes to be a “safe harbor” for state legislative apportionment. In addition, the new map increases the size of the African-American population in the four districts that were majority-minority districts under the previous districting map. Experts expect these districts to remain as the only majority-minority districts under the new map. All these districts except one are located in the center of the state.

The Committee is proud of its work. The Republican chairman of the Committee boasted to the *Redgrange Journal* that “redistricting is all partisan politics, and I’ve made sure that my party has gotten the best deal possible.”

George asks you to identify and discuss the potential legal deficiencies of the new districting map. Analyze the strengths and weaknesses of each claim.

Question 2 (30 points)

George approaches you with another election-law assignment. This time, George asks you to study the Election Reform Law, an citizen initiative enacted into law in Redgrange by a statewide vote during the last election. Eighty percent of voters voted in favor of the Election Reform Law.

Sammy Centrist, an independent political activist, championed the Election Reform Law in response to two developments in Redgrange. First, the White Power Party and Black Nation Party formed and now offer opposing agendas based exclusively on racial supremacy. Second, political parties of all ideological flavors are running “issue ads” that do not mention a candidate for office but otherwise appear to be campaign advertisements.

The Election Reform Law states the following:

Section 1: A political party may not permit any individual who affirms a belief in racial supremacy to participate in its primary, either as a candidate for office or as a voter. Candidates and voters must sign an attestation disavowing any such belief before participation may be permitted.

Section 2: Within thirty days of any election, money from a corporation or union may not be used to fund broadcast or print advertising that mentions the name of a political party.

George asks you (a) to assess the constitutionality of each Section of the Election Reform Law; and (b) to explain which Sections of the Election Reform Law you would support as legal policy. Please state your normative goals relevant to the Election Reform Law. Discuss why the Election Reform Law serves or does not serve those goals.

Question 3 (40 points total; 10 points for each pairing A-D below)

For each pairing of opinions below, (a) identify an important tension or inconsistency in their approaches; and (b) explain which approach you favor. You should not provide an exhaustive account of every tension or inconsistency between the opinions, but please choose an important and interesting one to discuss. Do not describe the facts or holdings in these cases—you can assume that I know them—but please discuss relevant differences in the theories, assumptions, and principles between the alternative approaches.

- A. *Johnson v. De Grandy* (casebook p. 814) and *Shaw v. Hunt* (course packet, tab 4)
- B. Justice O'Connor's opinion in *Georgia v. Ashcroft* (supplement p. 77) and Justice Souter's opinion in *Georgia v. Ashcroft* (supplement p. 90)
- C. *Austin v. Michigan Chamber of Commerce* (casebook p. 515) and *First National Bank of Boston v. Bellotti* (casebook p. 499)
- D. *Gaffney v. Cummings* (casebook p. 869) and *Davis v. Bandemer* (casebook p. 877)

Please complete your exam by filling out the following statement:

"I certify that my exam answer contains _____ words, as counted using Microsoft Word/WordPerfect/Other (specify) _____."

END OF EXAMINATION

Q1

There are several avenues through which the new Redgrange districting plan may be challenged. Presumably, based on its segregationist past and continuing patterns of racially polarized voting, Redgrange must undergo a VRA §5 pre-clearance process to approve its districting plan. By maintaining four majority-minority seats, the plan does not place minorities in any worse position, at least numerically, than the previous plan; under *Beer*, this plan *may* qualify as non-retrogressive. Statistically, however, minorities are in a worse position, in terms of proportionality of representation, since minorities are a greater proportion of the population, but do not appear to have increased chances of representation in the legislature. This may in fact degrade minorities' "opportunity to participate in the political process," (*Ashcroft*) in comparison with their position when they constituted a smaller portion of the total population.

Under *Ashcroft*, other factors in addition to majority-minority districts, such as coalition and "influence" districts, as well as opportunities for minorities to influence and lead within state legislatures can be sufficient to meet the §5 standard. The continuation of racially polarized voting, the *increase* in Republican seats leading to even greater dominance of the Party in the state assembly counsel against the possibility of these standards being met. However, it is clear that a large minority of the white population, at least 35%, also votes Democratic, which *may* create some limited opportunities. It appears on balance, however, that it is unlikely that the new redistricting plan would create sufficient further opportunities for minority voters to maintain the same proportion of representation that they previously enjoyed when they constituted a smaller percentage of the population.

Further complicating the issue is the fact that, while the redistricting plan (arguably) may have a retrogressive effect, its *purpose* was not to deny or abridge "the right to vote *on account*

of race or color.” (*Bossier*, VRA §5) It appears that the purpose of the districting was purely motivated by partisan politics, not racial animus. Although the VRA imposes an effects-only test on § 2, it may a racial motivation for § 5 claims. Since the use of race as a proxy for political party is lawful under *Cromartie*, racial means for political ends here *probably* would help overcome any § 5 challenge, particularly in the absence of an actual decline in the absolute number of majority-minority districts.

A better case might be made out for § 2 vote dilution, due to the disproportion of minority-held seats in comparison with the size of the African-American population. The African-American population appears to meet the *Gingles* test of geographic compactness, racially-polarized voting, and minority political cohesion. Assuming that the *DeGrandy* rough proportionality guideline is not met (with racially polarized voting, I am assuming that there are only four minority representatives in total), it is likely that several more either majority-minority or coalition districts may be drawn. The claim must be based on *packing* minority districts, rather than the traditional technique of cracking. Whether *Ashcroft*-type coalition districts might be possible here depends on the extent of racial polarization. If white Democrats would either not vote at all if their party’s candidate was white, or would vote for a white Republican candidate over a black Democrat, the remedy must be majority-minority districts, albeit probably not the super-majority that the new plan creates.

As with the § 5 cases, however, the *Shaw* line may undermine a § 2 claim as well. The committee can argue that *Shaw v. Hunt* treated a § 2 claim as an *individual* right. Only minorities in a majority white district would have a claim, and it appears that most minorities are packed into super-majority districts in the center of the state. Under *Gingles* and *De Grandy* §2 claims are still seen as *group* claims. Under *Ashcroft* (admittedly a § 5, not a § 2 case), a

districting plan must be examined over the whole state, rather than on a district-by-district basis, again indicating a group rather than an individual claim. Depending on which line of cases holds sway, there may be a colorable § 2 dilution claim to be made here.

There does not appear to be any justiciable *Shaw* claim here; three of the four majority-minority districts are located in the center of the state. There is no indication that they are weirdly shaped. Even if the fourth majority-minority district is grotesque or bizarre, the *Cromartie* defense that race is a proxy for political party would defeat that claim.

Despite the blatant partisan character of the redistricting, partisan gerrymandering is virtually nonjusticiable under *Bandemer* and *Veith*. Although intent is very clear, it is unlikely that the Democratic Party could demonstrate that the plan “consistently degrades [its] influence over the political process as a whole.” (*Bandemer*) First, this is an *ex post* standard, although the previous districting plan also appeared to favor disproportionately the Republican Party on the legislative level. The fact that the Governor is a Democrat both belies any claim of being locked out of the political process, and demonstrates that party affiliation is quite mutable, since Republican candidates receive a majority of the state legislative votes. Here, therefore, the Court’s presumption that partisan gerrymandering is self-correcting may be accurate. If the redistricting creates a veto-proof margin within the state legislature, a plausible argument for partisan gerrymandering might still be made. In the aftermath of *Veith*, in which partisan gerrymandering claims are still justiciable but without any standard, it is highly unlikely to succeed.

The weakest part of the plan is the 7% population deviation between districts. Under *Larios v. Cox*, the previous 10% safe harbor is no longer a safe harbor, if the deviation is done for partisan purposes and not based on traditional districting criteria (compactness, contiguity,

protecting incumbents from running against one another, and respect for traditional political boundaries). The statement made by the Republican chair of the redistricting Committee is virtually identical to statements made by (and used against) Georgia Democrats in explaining and exulting their redistricting plan. Although the Court did not say what, if any, deviation is still allowable, it is likely that 7% is still too great, as being driven by “arbitrariness or discrimination” (*Larios*). As Justice Stevens pointed out in his concurrence, the one-person-one-vote standard creates a simple, easily justiciable standard by which to strike down a political gerrymander.

Q2

The Election Reform Law (ERL) suffers from numerous deficiencies. Although it was adopted through direct democracy means, courts will not give it any more deference than a statute adopted by any legislature. (*Pacific State*) Whether this is a positive aspect of Direct Democracy often depends on the nature of the issue decided. DD can be a highly effective means of bypassing legislative lock-up and curtailing corporate influence over the legislative process (although many initiative measures are in fact backed by big money, that is probably not the case here). §2 of the ERL appears to meet these goals. The first section, however, appears to represent the darker side of direct democracy—tyranny of the majority. Even if a certain belief is abhorrent to many, it cannot be used as a basis to deny fundamental rights, thereby violating the Constitution.

§1 clearly fails constitutional muster. The restriction on voting in primaries on political belief is frankly outrageous. Once the state grants the fundamental right to vote, any systematic exclusion of people from voting beyond the basic requirements of citizenship, residency, age, and felony status receives strict scrutiny, which is usually fatal in fact. (*Kramer*) Like wealth, political and social beliefs, fundamental First Amendment rights, cannot be used to restrict the right to vote. (*Harper*) Although the section deals with the right to vote in a primary, not a general election, the *White Primary Cases* held that for purposes of discriminatory action, party primaries are sufficient state action to warrant constitutional protections; these protections are particularly relevant when the state is the discriminatory party. While Redgrange may defend the law as promoting civic republicanism, those interests can never trump the double-barrel equal protection argument of a fundamental right (voting) and fundamental first amendment freedoms.

Banning political parties from allowing racist candidates to participate in primaries also is likely to be struck down on the basis of parties' associational rights. Although the restriction appears to be designed to restrict ballot access to only the two major parties, and cut out the minor parties (to which the Court often apply a lesser form of scrutiny, *see Munro*), a ballot access restriction on the basis of political beliefs would likely call into play the same strict scrutiny as did wealth in *Bullock*. In addition, this restriction applies to all parties, not just minor ones. Just like the ban on primary endorsement in *Eu*, this restriction "directly affects speech which 'is at the core of our electoral process and of the First Amendment freedoms.'"

Although the Court has characterized the burden on a voter who is required to attest to his party affiliation prior to voting in a primary as "minor," (*Nader v. Schaffer*) that case dealt with protecting a political party's associational interests and ideological integrity. The opposite is true here; the state's regulation is designed to *restrict* political parties' ability to associate with individuals whose ideas are found distasteful to the polity as a whole, and rejects a particular ideology that political parties may want to espouse (no matter how politically destructive it may be for the party) as well as the rights of these individuals to associate themselves with a party. A party's ability to define its associational interests has been well protected by the Court. (*See Tashjian*) Furthermore, the Court almost invariably protects a party's right to determine who is eligible to participate in its primary. (*Duke v. Massey*).

It is thus highly unlikely that even this aspect of the regulations will pass constitutional muster.

Normatively, there are some arguments that the State can use in promoting these restrictions. Similar to felony disenfranchisement laws upheld in *Richardson v. Ramirez*, the state may have an expressive interest in limiting participation of those espousing racist ideals.

There may be a governance interest in restricting those with racist views from voting or holding office. Both of these theories can cut against the state, as well, however; if it is the process that is important, restricting *any* citizen's access to it is counter to democratic theory; as for good governance, it is preferable that candidates are able to state their beliefs out in the open, rather than force them underground, so that voters are able to make informed choices. Finally, the liberties enshrined in our First Amendment trump all.

The restriction against corporate or union money paying for issue advertising that mentions a political party by name is a closer constitutional call. This restriction goes beyond BCRA's electioneering communications restrictions, which must mention a candidate for federal office by name and which ban corporate or union funding, that were upheld in *McConnell*. Even there, the Court carved out an exception for MCFL corporations; at the very least, such an exception will be read into the regulation here, if it does withstand a first amendment challenge.

Issue advertising clearly implicates First Amendment rights. Both *Buckley* and *McConnell* have stated that a compelling state interest must be implicated in order to justify restrictions on such fundamental rights. The only cognizable interest that the Court has identified has been corruption and the appearance of corruption, with the *McConnell* Court's new twist of the circumvention argument. *Buckley* also made an important distinction between both the rights implicated by and the corruptive potential of contributions vs. expenditures; independent expenditures (if they are coordinated, they are considered as contributions) both are a more "expressive" form of activity than contribution, deserving of higher scrutiny, and pose less of a risk of corruption. The Court thus limited FECA's limitations to "express advocacy," in which an advertisement directly called for the election or defeat of a candidate for federal office. This limitation was later termed in *McConnell* a matter of statutory construction, and not

a constitutional restriction. Although the Court there noted that there was no meaningful distinction between the “magic words” of express advocacy and electioneering speech that *did* contain direct references to candidates, it makes no mention of true issue advertising. It did, however, note that the restrictions were still motivated by Congress’s intent to combat real or apparent corruption.

Thus, the question in analyzing § 2 of the Election Reform Law lies in determining whether there is a potential for corruption in corporate-funded advertising that mentions only political parties. There is no good answer to this in campaign finance precedent, filled as it is with contradictions. On the one hand, the Court in *Bellotti* noted that corporate dollars in non-candidate initiative processes posed no problem of corruption. (As the ERL does not make specific mention whether it refers only to candidate elections or initiative processes, since *Bellotti* has not yet been overruled, it is likely that the word “candidate” would be read into the law). On the other, *Austin* played heavily on the corrosive and distorting effects of immense aggregations of wealth in a candidate election, which is what § 2 of the ERL restricts. In *Shrink Missouri*, even the *perception* of corruption is sufficient to uphold restrictions.

With regard to the role of political parties, the Court has moved significantly on its view recently. *Colorado I* held that a political party’s independent expenditures posed no threat of corruption vis-à-vis a candidate; *a fortiori*, one would assume, an independent expenditure promoting a party would be that much more distant from a candidate to preclude any risk of corruption at all. *Colorado II* likewise rejects the conflation of party and candidate, recognizing their independence, albeit admitting the risk of circumvention of candidate contribution limits in upholding restrictions on coordinated political party expenditures.

We see in *McConnell*, however, a move toward restricting party funding. The Court there upheld soft money bans under the banner of circumvention. National parties may neither receive nor expend soft money from corporations or individuals, as these large contributions are often made to circumvent candidate campaign contribution limits. This restriction is total; it is not limited to expenditures for express advocacy, electioneering communications, or other candidate-related activity. Although it does not explicitly state it, this argument seems to back far away from *Colorado I and II*'s clear distinction between parties and candidates.

It is a very easy step, following the Court's logic, that a) the corporate form poses a unique, inherent danger of corruption and distortion; (*Austin*) b) political parties are being used to circumvent candidate contribution limits; (*McConnell*) and c) electioneering communications provide reasonable restrictions, to extend this logic to ERL § 2. Thus, at least under the current Court, there is a good chance that this restriction will be upheld as a reasonable restriction to limit the potential of corruption by corporate spending in a candidate election.

To do so would be a mistake. Despite Justice Thomas's assertions to the contrary in his dissent in *Colorado II*, there is a difference between political parties and candidates, particularly at the state and local level, which would be affected most strongly by the ERL regulation. Restricting speech for any reason is alien to the First Amendment; the marketplace of ideas is vital to our democratic system. As long as there is disclosure alerting the public to the source of funding, knowing what corporate interests support which political party, and perhaps more importantly, specific planks in the political platform, makes a voter *more* informed. Furthermore, extending the circumvention argument *any* further is a dangerous step down a mighty slippery slope, which the Court should avoid at all costs. The further attenuated the relationship between money and an actual candidate, the weaker the corruption argument

becomes, and the more it starts looking like an equalization argument, which is *not* a compelling purpose to restrict First Amendment rights. Liberty should not be sacrificed on the altar of equality.

Q3

De Grandy treats a § 2 claim as a group claim. The harm that is suffered is a denial of equal political opportunity on the part of a racial or ethnic minority. As a group claim, rough proportionality of representation is sufficient to demonstrate equal political opportunity and thus defeat any claim of dilution.

Inherent in the conception of a § 2 vote dilution claim as a group claim is a recognition that “virtual representation” is sufficient representation to protect the interests of a voter or a minority group. There are both strengths and weaknesses to this approach. On the positive side, it recognizes the value in having minority representation in government. It recognizes that race *is* still an issue in voting and in social interactions in general, and deliberately attempts to protect these interests. On the other hand, it suggests that racial issues are the *only*, or at least the *most* important, issues that minorities want represented in government. It assumes that other issues that are unique to locality are simply not as important to a minority voter. It also suggests that an elected representative of another race cannot adequately represent the interests of a minority. Race here is reified; this approach may exacerbate the problems that the Voting Rights Act was designed to overcome. After all, majority-minority districts are a second-best answer; the best possible outcome would be true equality and color-blindness.

Shaw v. Hunt, on the other hand, looks at a § 2 claim as an *individual* claim. By requiring that any minority district be drawn to include those individuals whose voting rights were being diluted, it expressly rejects the whole “virtual representation” concept that *De Grandy* espoused. This view significantly narrows the number of individuals who may have standing to levy a § 2 claim to minorities who live in a majority-white district, and who are form a sufficiently large and compact group to constitute a majority in a differently-drawn district. It

represents a different conception of “representation” in government—a person is only represented by the official elected in his district. It ignores, however, the reality that there are distinct issues that are unique to minorities that may be better represented by a “virtual” representative rather than someone for whom a person did not vote.

There are strengths and weaknesses to each approach. Group claims are easier to make than individual claims, but virtual representation only gets you so far.

Q3-Ga v. Ashcroft

Justices O'Connor and Souter again display a different conception of "representation" in their opinions in *Ashcroft*. O'Connor views coalition districts, "influence" districts, leadership opportunities in the legislature as effective means to address the mandates of § 5 of the VRA. Souter asserts that § 5 mandates that minorities are able to elect candidates of choice—presumably minority candidates—which are the touchstone of representation.

O'Connor's view of representation includes a number of soft variables that, as Souter rightly points out, would be extremely difficult to manage. The extent to which minority representatives are able to wield power in elected bodies and the ability of voters to influence their elected representatives, for whom they likely did not vote, are salient, but likely inadministrable factors. This view also recognizes that a political *party* can better represent the interests of a minority than a minority *representative* whose party is *not* in power. Although these factors are extremely important in gauging actual political power, any claim on this basis would really be a third generation claim, which is more of a political issue than the courts should be involved in.

Souter's version of representation and political power seems to be straight-forward, being represented by the person for whom you voted. This is a manageable standard, but ignores the realities that the Georgia districting plan had been designed to address—majority-minority districts often are drawn at the expense of the Democratic Party, and legislation favoring minorities would be *less* likely to pass under a Republican dominated legislature. While Souter's method is much easier to manage, it likely will *harm* minority interests in the end.

Austin vs. Bellotti

In banning corporate contributions to candidate elections, the Court in *Austin* focused its attention on the corrupting influence of money, particularly when coming from corporations. It focuses on the speaker, and declared the corruption interest to be the distorting effects of money on elections, which certainly appears to be code for an equalization argument as opposed to a genuine risk of *quid pro quo* corruption. The Court seems afraid here that the public will not be able to differentiate corporate-sponsored speech from more acceptable candidate- or party-sponsored speech, and ignores the possibility that spending could still be disproportionate to public support for a concept. There is an expressive interest in shunning possible corruption, and a governance interest in ensuring that voter's choices are not overly influenced by "bad" ideas.

Bellotti, on the other hand, dismisses the opportunity for corporations to influence initiative processes, focusing instead on the speech itself, and the right of the public to hear ideas. In this conception, the marketplace of ideas is an end in itself, and citizens are discerning enough to evaluate and weigh ideas in advertising. This naively ignores the real impact that advertising has on public opinion, regardless of the merits of an argument. Ultimately, this is the better approach; even given the possibility of corporate influence over voter preference, that risk is no greater than that posed by wealthy individuals; restrictions on First Amendment rights are too high a price to pay for the risk of misinformed voters.

These cases are a wonderful example of the incredible contradictions found in campaign finance laws. *Austin* seems to be saying that money is bad, which *Bellotti* says speech is good. If you add *Buckley*'s determination that money is speech, that pretty clearly captures the Court's take on campaign finance.

Gaffney vs. Bandemer

Gaffney, a case of bipartisan defensive gerrymandering, is seen by the Court as a good thing, politically fair. It sees no injury in the fact that virtually *no* election will be competitive, and only those primaries in which an incumbent is not running will be truly contested. It focuses solely on the rights of the parties, and ignores the problems of bipartisan lock-up and party extremism that can happen when a party is virtually assured of an electoral victory. The rights of voters are virtually ignored. It assumes that voters are adequately represented as long as members of the political party are in office in rough proportion to their strength across the state. Voting here is merely an aggregative function; as long as the numbers work out, it matters not whether the people voted into office are actually representative of the views of their constituents.

Bandemer addressed a party-warfare, offensive gerrymandering case. It explicitly addressed the rights of the *voters* to elect representatives of their choice, and notes that adequate representation includes a voter's ability to influence the candidate from his district, regardless of party affiliation (recognizing governance interests). Although the Court created an unreachable standard here, it nonetheless said that offensive gerrymandering remains justiciable. The opinion speaks repeatedly about voter opportunity to participate in processes; the expressive interest of hostile partisanship is also at stake here.

Aside from the varying theories of "representation" here, and the determination of *whose* rights are at stake, (both of which *Bandemer* beat *Gaffney* by a long shot), the Court's treatment of gerrymandering is deeply ironic. It retained the right to intervene in cases that are more likely to be self-correcting through the electoral process; offensive gerrymanders create "less safe" districts for the ruling party, and *probably* can be addressed by disgruntled or fed-up voters. The advent of mid-term redistricting may change that, however, and thus its justiciability remains

vital. Bipartisan gerrymanders are much more corrosive to the political debate and threatening to the concept of “representative” and competitive democracy. Partisan lock-up virtually guarantees that these gerrymanders will be almost permanent, and yet the Court finds them a good thing.