



Election Law
Professor Michael Kang
Fall 2005

Return this exam and your answers before 6 p.m. today.

FINAL EXAM

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

This exam is designed to be answered fully in roughly three and a half 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 any day during the examination period and must return your exam, and your exam answers, anytime before 6 pm of the same day.

- YOUR ANSWER MUST NOT EXCEED 3500 WORDS, WITH ONE-INCH MARGINS IN TWELVE-POINT TIMES ROMAN FONT – i.e., ABOUT FOURTEEN 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 your hard work this year. Good luck. Have a happy holiday.

Question 1 (40 points)

The State of Nagurski is a traditional southern state, with a large African-American population of approximately 20 percent. Although voters in the state are divided almost evenly between Democrats and Republicans, the round of redistricting following the 2000 census tilted the state toward the Democrats as a result of successful Democratic gerrymandering. Until the 2005 elections, the Democrats held a 60-40 advantage in the unicameral 100-seat Nagurski Legislative Assembly.

However, during the 2005 elections, political insiders of Nagurski were stunned by the success of the Panther Party, a third party that campaigned on a theme of “promoting the interests of African Americans in Nagurski.” The Panther Party formed after a schism among African-American legislators in the Democratic Party of Nagurski. Several prominent African-American Democrats decided that the Democratic Party took African-American votes for granted—voting is racially polarized in Nagurski—and formed the Panther Party in an attempt to build up a viable alternative. Most African-American politicians and voters have remained loyal to the Democratic Party (there are still 10 majority-African American districts represented by African-American Democrats), but in the 2005 elections, the Panther Party won ten seats in the Assembly, all from districts in the geographic center of the state where most of Nagurski’s African-American residents live.

Following the 2005 elections, Democratic and Republican politicians began planning a response to the Panther Party threat. Democrats feared the loss of the African-American vote. The majority leader of the Legislative Assembly, an African-American Democrat, declared that widespread defection of African-American voters to a third party would be “disastrous for African-American interests.” Among other things, he felt that Panther Party success would diminish his leadership influence among Democrats and eventually “marginalize African-American interests within the major parties.” Although virtually all Panther Party voters are African Americans who used to vote Democrat, Republicans are also concerned. Republicans believe that the Panther Party is dangerously extremist and must be stopped.

The Democrats and Republicans agree to a new redistricting of the Legislative Assembly. The new redistricting redraws the ten districts held by the Panther Party, all of which were majority-African American. Five of these districts are redrawn as majority-African American districts that experts expect African-American Democrats to win back. However, the other five districts are combined into a single gigantic multi-member district that stretches from the state’s geographic center to its western border. Conservative white voters from Nagurski’s farm belt, who vote Republican, will constitute a voting majority in the multi-member district. This multi-member district, the only one in Nagurski, will contain a total of eight times more residents than any other district. As a result, the maximum population deviation of the Assembly will now be about 12 percent, up from 5 percent before the redistricting.

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The net result of the new redistricting, after the next election, should restore Democratic control of the Assembly by a 55-45 margin over the Republicans, with each party picking up five seats currently held by the Panther Party.

Identify and analyze potential legal challenges to the new redistricting following the 2005 election. Analyze the strengths and weaknesses of each legal claim.

Question 2 (35 points)

Yesterday, the U.S. Congress passed another round of major campaign-finance reform, the Campaign Finance Act of 2005 (CFA). After the 2004 elections, many reformers cited a “527 loophole” and argued that all 527 organizations should comply with federal campaign finance law. Others have argued that the Bipartisan Campaign Reform Act (BCRA), by ending party soft money, has inappropriately reduced the influence of political parties. The CFA was designed to address these perceived problems.

Section One of CFA redefines “expenditure” under federal campaign-finance law as any disbursement made to fund any “electioneering communication,” as the latter term is defined by BCRA. One effect of this amendment, reformers hope, is to classify as a “political committee” under federal campaign finance law all 527 organizations that engage in electioneering communications.

Section Two of CFA (i) reduces to \$500 the limit on contributions given by individuals directly to a candidate for federal office; and (ii) increases to \$100,000 the limit on contributions by individuals directly to a political party.

Please (a) assess the constitutionality of each Section of the Campaign Finance Act of 2005; and (b) explain which Sections of the Campaign Finance Act of 2005 you would support as policy.

Please state your normative goals relevant to the Campaign Finance Act of 2005. Discuss why the Campaign Finance Act of 2005 serves or does not serve those goals.

Question 3 (25 points total; 12½ points for each pairing)

For the pairings of opinions below, (a) identify an important tension or inconsistency between the approaches taken by the opinions in each pairing; and (b) explain which approach you favor between the two opinions in each pairing.

You should not provide an exhaustive account of every tension or inconsistency between the opinions. Instead, please choose a single 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. *California Democratic Party v. Jones* (casebook p. 391) and *Timmons v. Twin Cities Area New Party* (casebook p. 427)

- B. *First National Bank of Boston v. Bellotti* (casebook p. 499) and *Arkansas Educational Television Commission v. Forbes* (casebook p. 436)

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

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Q1: There are several challenges (§ 5, § 2, part.gerry., shaw, 1p/1v, const. dil.) and each will be handled separately while realizing the discussion of others may coincide.

§ 5 pre-clearance would be a good place to start considering Nagurski is a traditional southern state and would likely be subject to VRA. § 5's standard of retrogression established by previous cases (*Beer*; *Bossier*) require only that the plan not place minorities in a worse position. Since the old plan contained 20 districts that had a majority pop. of African-Amer. (AA) voters, the new plan which contains what appears to only be 15 maj-min. districts would likely succeed under *Beer/Bossier* b/c statistically the AA population is worse off. However, *Ashcroft* will make this more of an uphill battle.

While a majority of the court under *Ashcroft* considered taking some other factors (aside from strictly a maj/min statistical analysis) such as coalition districts and its possible incentive to decrease racial polarization into account, there are still unanswered questions about how this will apply (eg: influence districts, party leadership power,etc). O'Connor's opinion for the Ct. will give the state many arguments here that this plan should not be considered retrogressive. Because of comments from the Dem. AA leadership that the current plan would be disastrous for AA interests and his worry of losing power in the legislature (both mentioned in *Ashcroft*) the state may have a good point that this is not retrogressive for minority AA's and is instead the party looking out for it's power in Congress. However, this situation is markedly different from *Ashcroft* since here you have a large portion of the AA's who don't agree with party leadership and who have forged together a relatively successful (10% of seats) 3rd party. Ultimately, given the Ct's hostility to 3rd parties, pride in 2 party stability, and their deference to party

leadership decisions, there is a good chance that b/c of *Ashcroft* this gives the state enough ammunition to say they were giving up minority seats to stay in power (not allow the AA interest to become marginal in the major party through loss to Panthers) and keep party in it for the long run with minority leadership remaining in a powerful position for Dems.

Staying with VRA, § 2 provides a chance for a dilution claim b/c of the new MMD that has been drawn. Under *Gingles* racial polarization is stipulated here and they could show that they are compact and of sufficient size by pointing to the central location of AA's inside the MMD and the previous districting plan that allowed AA majorities to elect the candidate of their choice in this area (Panthers got 10 seats from this area). The problem is going to be in the argument for a politically cohesive majority since all AA's don't necessarily agree on a candidate. While AA's voted as a bloc and did agree in the area of the state where the MMD was drawn, they don't agree state wide which is an interesting twist. However, because they have shown that they can elect the candidate of their choice and that choice is in opposition to another racial class (white republicans in this MMD), I believe this case stands a decent chance albeit unique. Here, there is an argument that *Degrandy* does nothing to help the state's argument b/c not only will they not have rough proportionality, if you now look at the net result of the MMD it is that AA's (whether they change their mind and decide to go back to democrats or stay with Panthers) will not have an "equal opportunity to elect the candidate of their choice" assuming continued racial polarization. The AA's vote will be diluted by being packed into a majority white republican MMD.

Ashcroft obviously makes this a tougher argument considering the fuzziness of the Court's approach and O'Connor's (although she is gone she will likely be replaced by someone more conservative) willingness to take into account so many other factors. The state may argue that Democrat AA's are protecting AA's as a whole and that this is just party politics in action. Also under *Ashcroft* they may argue that this MMD and the overall approach of considering other factors will allow for more influence and coalitions to be forged inside the MMD, thus decreasing racial polarization in the first place. I don't buy that approach and neither should a Ct. It's tough to compare this with *Ashcroft's* facts since in that case at least race coincided with party and here it looks more like greedy party leadership willing to sacrifice the strength of AA votes in a trade off for 5 safe seats.

There is also a small chance to try and revert back to the constitutional dilution claim. While it is harder to meet b/c you must show purpose, there is less case law in this area and more of an argument that the Ct. should take an approach akin to Steven's ideas here in this arena and say that while AA's are part of Democrats making decision, this dilutes the vote of a politically salient group here (AA panthers). Under either a classic constitutional dilution claim or Steven's approach, the claim would likely fail with our Ct today.

A *Shaw* type claim might be in order, possibly because no one really knows what it is exactly and it may give room for new argument. While we are unsure of the exact injury under this type of claim, here one could point to the ultimate consideration of race here as a predominant factor in submerging the AA panthers into a MMD. This would be unique since *Cromartie's* reasoning of party coinciding with race assumes a two party

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system with no viable alternative for AA's. Here, possibly even under *Cromartie* one could satisfy Brennan by saying that the legislature did have a choice here and they used race as a predominant factor in drawing these lines, they could have made a more compact district (eg: see previous districting plans), they drew a weird shaped district and made it MMD, and the AA's in this area can show that under previous alternatives there was greater racial balance (eg: 20 maj/min districts; as compared to 15 maj/min and no chance of choosing candidate of choice in MMD).

A partisan gerrymandering claim is an option here as well. At first glance, this is not the type of partisan gerrymander that the Ct usually deals with (See *Gaffney*) b/c we have parties that are working together to achieve more political balance. The argument would be that Dems/Reps are roughly equal population and this results in more equal representation statewide (eg: 60/40 before 55/45 after). However, peeling away this outward air of cooperation between Dems and Reps, one finds a second type of partisan gerrymandering going on here against a third party. This partisan gerrymandering of the 2 major parties against a 3rd party is all the more blatant b/c it not only diminishes their role, but eliminates it completely by submerging it in a MMD that will be locked in by Repubs.

The argument for this type of gerrymandering (mixture of offensive and defensive) would say that the intent is easy to see here (to eliminate third party). The state would counter and try to point out that this is the *Gaffney* type of situation and the Ct shouldn't be concerned when parties seek equalize the playing field. The response is that they should be concerned b/c of lock up and accountability and that this doesn't equalize the playing field, it eliminates basically a 10% voice of the playing field in a

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partisan sense. While these appear to make a partisan gerrymandering claim strong, there is the problem that this is just one redistricting and generally the court's want to see something along the lines of consistent degradation. The counter in favor of a partisan gerrymandering claim is that this should be seen as consistent degradation b/c it assures that the Panthers are eliminated and what more can they show.

Ultimately, the best claim may be in a 1p/1v approach. Pointing to *Larios* and the standard of deviation of 12% should easily result in this plan being thrown out. While there used to be some who thought states had more leeway and a safe harbor of 10% overall deviation, *Larios* pointed out that partisan gerrymandering was not a legitimate state interest for deviating from 1p/1v. While this is not the theoretically best option, it is an easily manageable judicial standard to strike down a political gerrymander as Justice Stevens has pointed out. Better yet it is something the majority of the Ct. would presumably accept.

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Q2: § 1's change of the definition of expenditure to the definition of electioneering communication is heavily burdensome and requires should require strict scrutiny (see *Buckley*). The goal of classifying all 527's that make electioneering communications as political committees and thus placing them under FECA limitations while motivated by good thoughts, should not be allowed under the constitution. Political committee's as they stand now under FECA are defined in terms of any group that makes \$1000 of contributions or expenditures, which are basically defined in terms of express advocacy, thus allowing those not explicitly referring to a candidate by name (magic words, etc) to not be subject to the limitations of FECA. The statute's new approach is basically going to prevent individuals (corps already prevented) from giving money in excess of \$500 (b/c of § 2's limitations), to any group that uses more than \$1000 for electioneering communication (refers to candidate for federal office 60 days before general election or 30 days before primary election that is targeted at the electorate, etc). This will severely restrict the free exchange of ideas and marketplace rationale that was the framework for the court's ideas in *Buckley*.

However, it would be tough to overcome the Ct's previous reasoning and actually defeat this section b/c there are some arguments for extending the rationale of the court in *McConnell* to allow some restrictions. The Ct's refusal to settle on a rationale for it's analysis in campaign finance makes it all the more confusing since they have gone the full spectrum from quid pro quo corruption (*Buckley*) to corruption as distortion of viewpoints (*Austin*) and even to the appearance of corruption (*Shrink*). The last analysis in *McConnell* is truly frightening, not so much because it's normative goals (which truly do border on a kind of equality ideal) are bad, but because the underlying rationale might

truly allow for the kind of regulation that § 1 and § 2 propose if you continue to extend the logic. The reason that § 1 may withstand the current scrutiny of the Ct. under *McConnell* is found in the argument that *Buckley* was only a limiting construction of FECA expenditure definition and that defining it in this manner was not announcing a constitutionally protected area. While the Ct. is going to be more wary of any limitation on what they considered “direct speech” under *Buckley*, they may still be willing to sacrifice liberty here if they continue on the current path.

The Ct. should take into account that this extremely limits the amount of direct speech that can take place if they are to subject all money that is used for electioneering communications to FECA restrictions. Call me crazy but this seems to be very similar to the expenditure limits definition that was struck down in *Buckley* for being too broad. The time period leading up to these election periods is exactly when individuals should be able to unite in groups by giving money to an organized fund that would like to inform the electorate of candidate’s stands on issues. By allowing the proposed § 1 to stand, the court is basically diminishes a group of individual’s ability to focus the issue. I know that there will still be room for an individual to use their own money for direct expenditures, but not everyone is able to make an impact in this way. By trying to prevent corruption, the Ct will ultimately end up allowing political parties and party insiders to control all of the issues and candidate information when voters need it most.

It is true that it would include the 527’s and limit what the Ct. has come to perceive as a corrupting influence of money (though shrouded in equalization theory) but it also will make it tougher for actually equality and competition outside incumbents and the two party system by reinforcing parties as power holders and allowing the more wealthy

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to control the system. This may not seem evident, but when looking at § 2 of the proposed CFA and the limitations on individual contributions to \$500 and the increase to \$100,000 on contributions by individual's directly to the party, the system promotes even more of a quid pro quo or appearance of corruption as viewed under *McConnell*. The current act does absolutely nothing to prevent this "appearance of corruption" b/c it still allows wealthy individuals to funnel massive amounts (up to \$100,000) to the party and have a greater voice come the real election time (since § 1 makes other organizations that engage in electioneering communications relatively weaker by limiting individual contributions and forcing them all under FECA). I don't know how this is supposed to quell the appearance of corruption, it's ridiculous. It's true that under FECA, source disclosures will have to be made, but it still does nothing to dispel the notion of corruption or even to satisfy the court's other hidden rationale of distortion of the message unless one believes that political parties are not subject to these same risks. The Ct itself has even extended the corruption rationale to parties under *McConnell*, assuming that the system is corrupt, while they are actually the ones who, if they allow these proposed amendments would be further corrupting the system by denying others their liberty rights to speech.

An even greater fear under the proposed § 1 and 2 amendments concerns the affect this will have on ability of challengers of incumbents, those inside parties who don't hold the same views as party leadership, and individuals who wish to promote a certain viewpoint but lack sufficient funds to do so without pooling resources. Because proposed § 2 favors funneling money through the parties, it completely reinforces the 2 party system b/c of voice/exit issues and the Ct's hostility to 3rd parties in other arenas

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(eg: *Burdick* to *Forbes*), something that the Ct has rarely considered explicitly in conjunction with campaign finance. It is true that they could form a 3rd party and fall into the \$100,000 category, but why not allow more liberty. The Ct has even recognized under *Austin* that there should be an exception for corporations (*MCFL* exception) that aren't controlled by other interests to allow them to contribute directly, so why should 527's that don't explicitly use words of express advocacy be restricted from making statements during the time leading up to elections. Any one who actually buys into the current court's rationale in this area and thinks anything they've said makes sense is a better person than me. Whether the rationale be equalization, corruption, or one of the court's secret formulas of both, the proposed regulations provide both overbroad regulations that serve to damage individuals expressive ability and incentives that are under inclusive to achieve any attempt at quelling corruption or serving a role at equalization.

Q3A: These cases show an example of the Court's confusion and tension in defining parties as ideological associations with expressive value and a high level of autonomy (*Jones*) versus a state interest in how a party conducts its functions and is used as a winnowing device for elections, thus allowing a state interest in stability and greater regulation (*Timmons*). Interestingly enough, Scalia's argument in *Jones* supports a party's right to regulate its internal affairs and control its primary choices, a central value of association and expression in the face of a challenge by a state. "In no area is the political association's right to exclude more important than in the process of selecting its nominee" (p.392). According to *Jones*, the moment of choosing the party's candidate to serve as general ambassador to the electorate on the ballot is the most critical juncture defining the party. An invasion into the party's process of choosing its candidate is not a slight burden and requires strict scrutiny, a strong state interest and a narrowly tailored solution.

The view in *Timmons* is exactly the opposite when Rhenquist argues that it is not a party's right to have their candidate of choice appear on the ballot. Under this view, the party's voters are still free to support who ever they choose and it's not really a big burden if he can't be their candidate on the ballot, they can still vote for him after all in the general election. Rhenquist believes this is only a minor burden and can be supported by just about any rational state interest. This is the perfect example of the Ct. endorsing a two party system and ignoring associational and expressive rights when it comes to third parties, while endorsing them when it comes to one of the majority parties.

This disparaging treatment is all the more discouraging considering the incentives for a two party system in the first place and as a result, *Timmons* prevents the 3rd parties

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from having the same meaningful potential for exit in the voice/exit paradigm, instead forcing them to be a nobody and choose a different candidate or vote for the guy they wanted in the general election, with no real reason for him to pay attention to them anyway, since they have no distinct identity. As we studied, this is made all the more apparent when combined with other cases dealing with 3rd party rights.

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Q3B: *Bellotti* and *Forbes* show that the Ct basically has no solid framework when evaluating claims that implicate similar rights, here centered on money in one case and speech in the other. Even more interesting, if money equals speech and it has expressive value under *Bellotti*, then how can one explain how real speech doesn't have the same expressive value when words are actually spoken?

Bellotti operates under the assumption that people aren't stupid and know how to distinguish b/w different arguments and speech (since they equate money w/speech), favoring a robust speaking environment, b/c under it's view 1st amendment rights are just as much about the right to hear as the right to speak. Therefore, since money equals speech, the state shouldn't be able to regulate how much money goes into expression b/c people have a right to this robust debate and a choice for themselves. After all, it's not up to the state to decide.

Contrast this view dealing with money, to the Court's view under *Forbes* dealing with actual speech and access to a forum. Under *Forbes*, the Court decides that the state does have an interest in regulating speech and deciding who's allowed to speak because otherwise things would get too chaotic and people wouldn't actually be hearing from the "real candidates". This case, supporting the state chosen candidates (basically by default the two parties) ignores the expressive value of speech, in favor of order and stresses stability, while at the same time ignoring a robust speaking environment and the off hand chance that just maybe a candidate actually speaking words might change the focus of issues and raise things that would otherwise never be heard publicly.

Bellotti says there's no danger of confusion when corporations can pour large infusions of money behind a specific proposition or issue that is up for popular vote

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because according to the Ct it's important to hear ideas. *Forbes* says there is a danger of confusion when voters have to listen actual real people talk about why they should be allowed to represent the voters and says it's okay for the state to decide for them.

Even as ridiculous as one might think an equation of money and speech is or whether they disagree with the balance of equality and liberty in these arenas, they will be hard pressed to come up with a logical explanation for the legal reasoning used in these two cases. While recognizing that there must be limits on the amount of speech in a limited forum such as a public debate, one would think that the Court would at least be wary of the State choosing who can actually speak and limiting ideas and choices for voters when they are so concerned about a corporation's right to support ideas with money and the public's right to hear money talking.