

QUESTION I

A. VRA CONSIDERATIONS

1. Preclearance Requirement

Florida is not a ‘covered’ jurisdiction under VRA, but 5 counties are ‘covered’. The Supreme Court held in Lopez v. Monterey County that state laws impacting covered counties within non-covered states must be precleared.

a. Preclearance required for all Provisions

§1 requires preclearance, as it is a ‘voting qualification’. §3 will require preclearance considering that a reapportionment plan submitted to a District Court by a legislative body required preclearance in McDaniel v. Sanchez. §2 while not a ‘practice or procedure’, will require preclearance because it pertains to voting (i.e. election administration/redistricting). Allen v. State Board of Elections.

b. Provisions will receive preclearance

Provisions will not receive preclearance if they have a retrogressive purpose OR effect; the plan cannot place or intend to place minorities in a worse position than they occupy currently. Reno v. Bossier Parish.

Intent: As the exam question explains, no such intent exists.

Effect: While §1 might have a disparate impact on minority voters, as examined in Part B, since the plan extends the right to vote to more people, including more minorities, the plan does not have a retrogressive effect. §2 is not retrogressive because it creates an elected

commission. §3 is not retrogressive because it is likely that districts in which African Americans lived had more undervotes, resulting from poor voting tabulation machines, and will now have greater voting strength.

2. Section 2 of the VRA – Vote Dilution

§1 and §3: present no substantial problems under §2 of the VRA.

§2: African Americans who, as the question states, represent 10% of Florida's population might claim vote dilution -- that they cannot elect a single commissioner who represents 'their interests'. A plan involving single member districts, some being majority minority, would be preferable. Plaintiffs must pass the three Gingles prongs¹ and satisfy a general totality of circumstances test as outlined in Zimmer. Plaintiffs will not have show that this provision was implemented with any discriminatory intent. Even a positive intent does not seem to defeat the claim. Based on the history of the last election and, if a more general pattern of racial block voting and discrimination in the past, this claim might succeed in invalidating the at-large statewide plan and instituting another.

B. CONSTITUTIONAL CONSIDERATIONS

1. §1 – “No Taxation Without Representation”

“Once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the 14th Amendment.” Harper v. Virginia Board of Elections. Once granted, voting thus becomes a fundamental right and Courts adjudicate

¹ Three prongs are: (1) there is a minority group that is sufficiently large and geographically compact to constitute a majority in a single member district, (2) this minority group is politically cohesive and (3) racial block voting exists that will otherwise prevent minorities from having their views represented.

limitations according to strict scrutiny (narrowly tailored/compelling state interest). Harper; Kramer v. Union Free School District. Since §1 extends the right to vote beyond the current electorate, the question becomes whether the income tax filing requirement is an impermissible line under Harper.

The provision might be attacked if distinction unnecessarily discriminates against minorities and/or impoverished: In Harper, the Court held that “wealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.” Individuals who are impoverished and who do not work and/or do not earn enough income will not file a tax return. Why should they be denied the benefits of this extension? If it can be shown that racial minorities are less likely than whites to file tax returns, this distinction may disparately impact another protected group: racial minorities.²

Governmental interests do exist in limiting the extension of the franchise: §1 extends the franchise and this limitation furthers legitimate government interests beyond automatically granting every person the right to vote. It ensures the integrity of voter rolls regarding citizenship, competency of the voter to some extent (if you can fill out a tax return, you can understand a ballot), that voters have a stake in outcome (if you pay taxes you care about government), etc. Further, minorities and poor individuals will still be able to vote through proper registration methods.

This regulation may not be narrowly tailored: many people who file tax returns do not fill them out themselves (i.e. accountant does this instead) and thus competency is not demonstrated. Thus, finding some other type of restriction that extends the franchise while simultaneously limiting it may be necessary.

² It is unlikely that any fifteenth amendment claim will apply discriminatory purpose would need to be shown and none is evident here.

2. §2 – “Katherine Harris Be Gone”

Successful challenge to §2 will likely be brought under VRA as opposed to the Constitution because of stringent intent requirements necessary for a partisan gerrymandering claim (Davis v. Bandemer) or Constitutional racial vote dilution claim (Mobile v. Bolden).

3. §3 – Compensatory Justice Act

This provision may violate one person, one vote requirement and Equal Protection Clause of the 14th Amendment: Congressional districts, more so than state/local districts, must be apportioned as equally as practicable. Wesberry; Karcher v. Daggett. Deviations from the one person, one vote requirement are only acceptable if the state proves that deviations are necessary to achieve a legitimate state objective. Karcher v. Daggett. “Whether deviations are justified requires case-by-case attention...” *Id.*³

Justifications will likely not withstand scrutiny: A state will traditionally claim that deviations occurred in an effort to make districts compact, respect municipal boundaries, and preserve cores of prior districts, among others. The justification in this case does not seem like one that will survive review if a districting plan in which less deviation is possible. This proposed plan is equally ridiculous as the one summarily dismissed in Reynolds v. Simms -- “a state could constitutionally...enact a law providing that certain...voters could vote two, five or ten times...while voters living elsewhere could vote only once.”

³ Two Preliminary Issues: first, the fact that this new districting scheme will be approved by the electorate is without consequence for constitutional analysis. If the scheme adopted fails to satisfy the basic requirements of Equal Protection, it will be struck down. Lucas v. the Forty Fourth General Assembly of the State of Colorado. Second, the fact that deviations in the district will be no more than 1% (the highest rate of undervoting) will not create a safe harbor of any sort for the plan under Karcher v. Daggett.

QUESTION 2

All three provisions present Constitutional problems and may be invalidated if challenged.

A. §1 – Party Protection Provision

This provision does not involve a change regarding who can participate in a primary. it involves the weight/effectiveness of the votes cast. Regardless, the question is the same: is the primary a product of state action? If so, federal constitutional guarantees apply. Such federal guarantees may attach here and this provision may be vulnerable to a claim it denies individuals their 14th amendment fundamental right to cast a meaningful vote.

1. Primary as State Action

Regarding racial discrimination, the Supreme Court has held that federal constitutional guarantees relating to voting apply to primaries that are “an integral part of the procedure for popular choice of” a representative. US v. Classic. “The right of qualified voters to vote at the Congressional primary...and to *have their ballots counted* is thus the right to participate in that choice. Id. (emphasis added). Federal regulation of primaries is permissible when the primary is “an integral part of the election machinery.” Smith v. Allwright. The fact that the primary would take on its form under a statute enacted by Florida’s Legislature gives greater force to the position that this primary is integral.

Voters may claim that preference primary deprives them of the right to vote in that their votes are not counted: Plaintiffs would claim that they are denied their right to cast a meaningful vote. See Stevens’s Dissent in Timmons. As the constitution recognizes vote

dilution claims when voters' ballots do not receive the same weight as others, the voter in this primary runs the risk of not only having their vote diluted, but discounted. Morse v. Republican Party of Virginia provides further support in holding that rules regarding participation in a party nomination convention implicate voting in the VRA sense -- voting involves "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, ... casting a ballot and having such ballot counted properly with respect to candidates for public or party office." 42 USC §1973l(c)(1).

Associational Rights of Political Parties: Sending delegates to the national convention, where parties' associational rights are greatest, is a concern here. Yet, this primary regulation does not involve an internal function of the convention (i.e. deciding whether a group can have a booth at the primary), but involves actual election of a Presidential Candidate at the convention - as such, it involves an integral part of the election process. Therefore, first amendment rights associational of the party are limited. Republican Party of Texas v. Dietz.

2. VRA Concern

Florida laws involving a covered change that apply to the still covered counties must be precleared. If found to involve requisite amount of state action and integral function in the political process, state party rules might require preclearance under the VRA. Morse v. Republican Party of Virginia; LaRouche. This regulation may be subject to §2 challenges if a discriminatory racial diluting impact is found.

B. §2 – Ballot Reform

1. Standard of Scrutiny

Challenge to this provision will be judged according to balancing test from Anderson v. Celebrezze. If character and/or magnitude of the injury alleged is severe, strict scrutiny applies. If measure represents a reasonable/non-discriminatory restriction, rational relationship test applies.⁴

2. Provision will likely be invalidated

Types of Potential Constitutional Challenges: the statute may be subject to equal protection challenge under 14th amendment by challengers excluded from ballot who claim that the law therefore infringes on an individual's fundamental right to vote for the candidate of their choice. Williams v. Rhodes. The statute may also be vulnerable to 1st amendment challenges brought by voters who claim that they are being denied their right to express support for a candidate and/or associate with that candidate, or brought by a candidate or political party who claims that the regulation infringes upon their first amendment rights.

Restriction is severe because it is an outright ban on access: The Supreme Court has struck down less absolute bans in the past. Williams v. Rhodes (struck down ballot access law which allowed non-established party to gain access by obtaining signatures from 15% of voters from previously gubernatorial election). Laws courts have upheld have not represented such severe bans.

Statute impermissibly promotes specific parties: The Supreme Court has held that ballot access laws may be enacted to maintain a two party system, but not to promote two specific parties (i.e. republicans and democrats). Williams v. Rhodes. This provision promotes those

⁴ Prior to establishment of the Celebrezze standard, the Supreme Court made clear that there is "no litmus paper test for separating those [i.e. ballot access laws] which are valid from those which are invidious...decision in

parties that are currently represented in the legislature and highlights a concern raised by Justice Stevens in Timmons; this is a fox guarding the henhouse problem. The democrats in the Florida legislature are trying to ensure minor party candidates such as Nader, whose party is not currently represented, will not challenge their power in upcoming presidential elections.

Given the severity of the burden, asserted state interests are not sufficient: There are less restrictive ways to avoid voter confusion and ensure that the winner of presidential electors has the support of a majority of state voters. Relatively stringent signature collection requirements coupled with other types of restrictions will likely achieve these goals. Minor party candidates play an important role in elections. They infuse new ideas into the process and give voters who do not agree with the two major parties a meaningful way to express their vote.

C. §3 – Campaign Finance Reform

Buckley v. Valeo is authority for state limits on contributions to state political candidates, but such regulations need not be pegged to Buckley dollars. Nixon v. Shrink. State regulations are subject to the rigid and quasi-strict scrutiny announced in Buckley.

1. **The Statute will likely be struck down**

This law may face challenges under 1st (expression/association) and 14th amendments.

Regulation is not narrowly tailored to promote asserted government interests: The law generally seeks to level the playing field between challengers and incumbents. Regardless of whether this is a valid interest, the law is not narrowly tailored to achieve this goal by limiting only individual contributions. Other sources (i.e. corporations, PAC's, etc.) likely provide

this context is very much a matter of degree.” Storer v. Brown. It seems that this principal remains despite the

politicians with the majority of funding and incumbents will continue to enjoy a significant advantage in that arena. Limiting individual expression via contributions this way may therefore not be justified despite differences between expenditures and contributions.

The Buckley Court recognized that contributions are not subject to the same level of protection as expenditures because “a contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.” Since Buckley, Thomas and other Justices have disagreed with this distinction, stating that “the decision of individuals to speak through contributions rather than through independent expenditure is entirely reasonable.” Nixon v. Shrink Dissent. A contribution is still arguably political speech and setting the restriction so low when doing so will not achieve the asserted government interest will likely not be permitted by Courts.

The statute does not attempt to limit corruption or appearance of corruption: This government interest is the one that the Supreme Court has routinely accepted as justifying infringement on expressive/associational rights involved in campaign contributions and expenditures. Without such an interest behind the regulation, it may not survive scrutiny.

This law may be struck down because the \$20 limit is too low: The Supreme Court made clear in Nixon v. Shrink that “in Buckley, we specifically rejected the contention that \$1,000 of any other amount, was a constitutional minimum below which legislatures could not regulate.” Instead the question is whether the limits are so low as to impede the ability of candidates to amass the resources necessary for effective advocacy. Even given the power of incumbent candidates, the \$20 restriction seems low and, if individual donations compose a significant portion of incumbents’ donations, runs the risk of driving “the sound of a candidate’s voice below the level of notice, and render contributions pointless.” *Id.*

establishment of the balancing test noted above.

QUESTION 3

(1) Preclearance Should be Granted

To receive preclearance, Texas has burden of proving that the changes do not have the retrogressive purpose of denying or abridging the right to vote on account of race and that the provisions will not have retrogressive effect. *See* Reno v. Bossier Parish. The baseline in a retrogression analysis is the status quo.

Intent: The lines are being drawn not with retrogressive intent, but to “ensure Republican dominant of the Commission through the next ten years.”

Effect: No majority minority districts existed under the previous plan. Under the proposed plan one majority minority district exists. Despite greater breadth of current administrative guidelines, Supreme Court precedent makes clear that §5 only prevents backsliding and the new plan which creates one new majority minority district should be precleared. Reno v. Bossier Parish.

(2) Potential Claims

a. Partisan Gerrymandering

Lopez must show intentional discrimination against an identified political group and actual discriminatory effect. Davis v. Bandemer. Supreme Court has only ever found one case of partisan gerrymandering.

Intent to discriminate against democrats may be shown here while effect may not. The fact that the plan has an adverse affect on Lopez is not enough -- to be actionable it must unconstitutionally deny democrats, as a group, “its chance to effectively influence the political

process.” *Id.* With one majority democrat district and significant numbers in the other districts, this claim will likely fail.

b. Constitutional Vote Dilution & Vote Dilution under VRA §2

Both can be brought, but success under §2 is more likely because intent is not required – intent likely cannot be shown in this case to satisfy Constitutional claim. Can bring a claim that District 1 packs Hispanic voters therefore diluting their impact on political process in general. VRA applies because 14(c)(3) includes language minority groups, including Hispanics, in coverage of VRA. To succeed, must satisfy Gingles Prongs and totality of circumstances review. Lopez will likely not succeed on this claim.

Proposing alternative plan will be difficult because percentages make it nearly impossible to draw another majority minority district. Advocating for creation of an influence district may not succeed because influence districts do not satisfy Gingles Prong 1. Influence districts seem only to be relevant in a totality of circumstances approach where the question is “whether the voluntary creation of influence districts...should be counted as a factor weighing against finding a § violation.” McWherter.

Satisfying Gingles Prong 3, as recently interpreted by circuit courts, may be difficult because any correlation between Hispanics and Democrats makes it hard to show that § 2 should be implicated because Hispanics are losing because they are Hispanics and not because they are Democrats.

c. Racial Gerrymandering

Can bring Shaw v. Reno claim seeking invalidation of plan because race was predominant factor in districting and court will review under strict scrutiny under Hunt v. Cromartie (1999).

Would likely have to join another plaintiff because only individuals living in District 1 will have **standing** to sue under US v. Hays and Lopez is not one of them.

If standing problem is fixed, creative line-drawing and assumingly bizarre districts will help claim, but will not make it automatically successful. Use of sophisticated computer tools similar to the REDAPPL program used in Bush v. Vera will also likely support invalidation. Consideration of subordination of traditional districting principles (compactness, contiguity, respect for political subdivisions, communities of interest, etc.) will also help invalidation.

Intent required under Shaw claim, but is really only the intent to use racial criteria as predominant factor in drawing. Demonstrating this may be difficult in light of recent decision in Hunt v. Cromartie (2001) under which the Republicans in this problem can claim that politics and not race played the predominant role in creation of district and that it should therefore be upheld.

Success of a Shaw claim is unclear, but it is perhaps Lopez's best chance at invalidating the scheme.