

L6474 ADVANCED CONSTITUTIONAL LAW: THE POLITICAL PROCESS

Candidate for Graduation in May 2001 (2,792 words)

Q.1

Application of Voting Rights Act

5 Florida counties are covered by the VR Act. These counties cannot deny the right to vote on the basis of a change to a 'voting qualification etc' ('voting practices') unless these changes have been precleared under §5.

Changes to voting practices still require preclearance even if contained in State, rather than county, law (*Lopez v Monterey County (1999)*). The fact that changes are the result of a referendum doesn't automatically immunise them from the VR Act. Section 5 of the VR Act can override the Florida Constitution (via supremacy clause), and the VR Act was designed to protect minority voting rights (cf *Lucas (1964)*). But it does make working out the 'purpose' of these changes harder.

Proposal states these provisions will come into force immediately once passed. Potential *Bush v Gore* equal protection problem if these changes haven't been precleared – the law would apply in some parts of Florida, but not in covered counties.

§1 – No Taxation without Representation

VR Act

Proposed §1 expands the franchise – needs preclearance under §5 of the VR Act. (Even *beneficial* measures require preclearance if they change 'voting practice': *Allen (1969)*)
DoJ will preclear b/c doesn't have effect of reducing minority representation (*Beer v US (1976)*).

Constitution

States have broad power to determine who has right to vote in State and federal elections (see eg Art II, §2) – the US Constitution only prevents the vote being selectively *denied* on certain bases. So while it is *permissible* to exclude felons from franchise (*Richardson v Ramirez (1974)*), there is no constitutional problem with including them. Claim for including felons even stronger if show that felon disenfranchisement laws had racially invidious purpose and effect (*Hunter v Underwood (1985)*).

§2 – Katherine Harris Be Gone

VR Act

§5: Change to 10-member commission requires §5 preclearance. While *Presley (1992)* held that a change to the internal operations of an elected body doesn't require preclearance, Kennedy J stated the law there '[did] not *increase or diminish* the number of officials for whom the electorate may vote' (see also *Bunton v Patterson (1969)*). Here, proposed §2 *increases* the number of elected officials with power over election administration (from one to 10), and *decreases* the number of officials with power over re-districting (from number in State legislature to 10).

DoJ will preclear proposed §2 in its application to election administration, b/c no retrogressive effect – minorities equally worse off. (Previously, Secretary of State elected in state-wide vote, now 10-member board elected at-large.)

In its application to redistricting, proposed §2 will probably have a retrogressive *effect*. Probably are some majority-minority districts in Florida State legislature, whereas all 10 members of commission are elected at-large. But proposed §2 probably does not have a retrogressive *purpose* (although difficult to determine purpose of a referendum proposal).

Certainly FER didn't have retrogressive purpose. Need both discriminatory purpose and effect to deny preclearance (*Reno v Bossier Parish (1999)*). (Note also that breach of §2 of VR Act is not reason to deny preclearance under §5: *Bossier Parish (1999)*.)

§2: But possible vote dilution claim under §2 of VR Act, b/c African-Americans constitute about 10% of Florida's population, but have no ability to elect any of the 10 commission members. True that couldn't make a claim under §2 when elections were administered by Secretary of State (*Holder v Hall (1994)*), but this doesn't mean can't challenge if that power given to multi-member body. (Cf *Kramer (1969)*: can still challenge selective denial of franchise under 14th A, even when the official could have been appointed.) Note also that §2 of the VR Act only requires proving effect, not purpose, so immaterial that FER had purpose of *maximising* the political power of African-Americans.

In order to have a claim under §2 of the VR Act, would need to show as a threshold matter that:

- (1) African-Americans are sufficiently large and geographically compact to form a majority in a single-member district;
- (2) African-Americans are politically cohesive; and
- (3) There was racial bloc voting.

(*Gingles (1986)*)

FER believes (3) which, if true, means (2) is likely. No information on (1).

If the *Gingles* prongs are satisfied, then need to show vote dilution in the totality of circumstances (*Johnson v DeGrandy (1994)*). The fact that the proposed §2 uses at-large

districts (which enhance the opportunity for racial discrimination) is relevant, as is any evidence of official discrimination (eg that officials tried to deny African-Americans access to the polls).

Constitution

Also possible vote dilution claim under the 14th and 15th A (relevant for Florida counties that aren't covered by the VR Act). However, a constitutional vote dilution claim requires proving discriminatory purpose, as well as disparate effect (*Mobile v Bolden (1980)*). Once again, the fact that FER intended the proposed §2 to maximise the political power of African-Americans means unlikely that could prove discriminatory intent, even if this provision had the effect of diluting the African-American vote.

§3 – Compensatory Justice Act

VR Act

Redistricting requires preclearance under §5 of the VR Act (*Allen (1969)*; cf Thomas J in *Holder v Hall (1994)*). The proposed §3 changes the population base, which could have an effect on the redistricting process for the state legislature. (Though it need not – the undercount was not more than 1% in any district, and state legislature districts can deviate from the equal population standard by about 10%: *Mahan v Powell (1973)*.) In any event, proposed §3 does not have a retrogressive effect, so does not present a ground of challenge under §5 of the VR Act.

Constitution

Equal protection: Proposed §3 only deals with undervotes, and not overvotes. So voter who casts 'overvote' does not have her vote taken into account when determining the size of districts, but voter who casts 'undervote' does. Possible equal protection problem

under *Bush v Gore (2000)*. No rational reason for treating these two votes differently (see Souter J in *Bush v Gore (2000)*, and Clark J in *Baker v Carr (1964)*). Like *Bush v Gore*, the equal protection claim raised by proposed §3 concerns the mechanics of voting (determining whether legal consequences should be given to a particular piece of paper). The reach of *Bush v Gore* is uncertain – per curiam opinion tried to limit its reasons to the facts of the case, but didn't give any principled reason for doing so.

Here, not clear whether undervoting has a particularly significant impact on any particular group (only know that voting machines in African-American districts are *inaccurate*). So not clear who would have standing. But per curiam in *Bush v Gore* vague about who needs to be harmed by supposed equal protection violation (no evidence that Bush or his supporters harmed by the Florida Supreme Court's orders).

Also, no suggestion that proposed §3 is motivated by an invidious purpose. But per curiam *Bush v Gore* didn't seem to require any proof of a discriminatory purpose.

Shaw v Reno: Possible argument that proposed §3 means that race will be the 'controlling and dominant rationale' for redistricting (*Miller v Johnson (1995)*). At the very least, this argument would require evidence that undervoting was a particular problem in majority African-American districts. However, even if this was established, probably the most that could be said is that race was the 'controlling and dominant rationale' of *proposed §3*. Given the large number of other factors relevant to redistricting, it is extremely unlikely proposed §3 would mean that race was the predominant rationale of the *redistricting*.

Q.2

Partisan gerrymandering

Democrats hope that these provisions will give them an ‘electoral advantage’. Partisan gerrymandering claims are justiciable, but the plaintiff has to show that the law has the purpose and effect of consistently degrading a group’s (here, the Republican’s) influence on the political process as a whole: *Davis v Bandemer (1986)*. This is difficult to establish (eg in *Badham v Eu (1988)*, the fact that a recent Governor of California had been a Republican was sufficient to defeat a claim that the Republicans were shut out of Californian politics).

§1 – Party Protection Provision

VR Act

Change to effect of primary clearly requires preclearance under §5 of the VR Act (see the reference to primary elections in definition of ‘voting’ in §14(c)(3)). DoJ will preclear b/c no retrogressive effect. (Fact that 2-year delay before law comes into effect means shouldn’t get potential *Bush v Gore* problem raised under Q(1).)

Constitution

Proposed §1 probably ineffective. The Democratic Party’s 1st A right of association requires that it, and not the State, determine who attends the National Convention (*LaFollette (1981)*). So National Democratic Party could ignore Florida law that said primary only ‘advisory’, and could treat the primary as binding if it wanted to. Florida can’t attempt to save the party from itself (*Tashijan (1986)*). (This is particularly the case, given that the proposed §1 would limit, rather than encourage, voter participation: *Jones (2000)* per Stevens J (diss).) In this area, it is difficult to identify who ‘the party’

is. On one view, the dispute here would be between the National Democrats and the Florida Democrats (*LaFollette (1981)* per Powell J (diss)), so the Florida legislature is entitled to let the elected Democratic members speak for the party (cf *Duke v Massey (1996)*, where party officials could validly exclude people from the ballot). On the other hand, as the Democrats are a minority in the Florida legislature, the Florida law could be seen as an attempt by a Republican legislature to impose procedures on the Democratic Party (cf *Tashijan*, where a Democratic Governor refused to pass a law that the Republican legislature wanted).

§2 – Ballot Reform

VR Act

Changing the rules about who may go on the ballot requires preclearance under §5 of the VR Act (*Whitley v Williams (1969)*). DoJ will preclear b/c no retrogressive effect.

Constitution

‘Two-track’ approach to laws limiting access to the ballot (*Anderson v Calabrezze (1983)*): if the character and magnitude of the injury to 1st and 14th A interests is severe, the Court applies strict scrutiny, but applies rational relationship test if the injury is reasonable and non-discriminatory. (Note choice of test largely determines outcome.)

Here, preventing voter confusion is a legitimate state interest (*Munro (1986)*), as is ensuring that the winner enjoys support from a majority of voters (*Williams v Rhodes (1968)*). But proposed §2 imposes a heavy burden on 1st A interests (as applied via the 14th A), because it limits presidential candidates to those nominated by a party with representatives in the state legislature.

It is permissible to protect a two-party system, but state legislatures cannot protect two particular parties (*Williams v Rhodes (1968)*). Proposed §2 presents similar problems, and unduly restricts the opportunities for new parties (the law would exclude Ralph Nader, for example). *Bardick v Takushi (1992)* shows it is permissible to *limit* the ways in which independent parties get on the ballot (eg by prohibiting ‘write in’ candidates), but even that law made provision for candidates to be put on the ballot who did not receive a nomination from a party. The problem with laws like this (and the reason the courts need to intervene) is that they prevent voters from using democratic means to express their dissatisfaction with incumbents (see esp Clark J in *Baker v Carr (1964)*).

§3 – Campaign Finance Reform

VR Act

Not clear that campaign finance is a voting practice etc for the purposes of §5 of the VR Act, but even if is, proposed §3 would be precleared b/c no retrogressive effect.

Constitution

There is more scope to regulate campaign contributions than campaign expenditures, because contribution limitations are seen as mostly implicating rights of association, and having only a small affect on speech rights (*Buckley v Valeo (1976)*). The contribution/expenditure distinction has been criticised (see eg Stevens J, Kennedy J and Thomas J in *Shrink Missouri (2000)*), but maintained.

Equal protection: Proposed §3 severely limits contributions to incumbents, but imposes no limits at all on contributions to challengers. It might be possible to subject contributions to incumbents to more severe restrictions than contributions to challengers. In *Buckley*, the Court acknowledged that incumbents are better placed to raise

contributions (in rejecting an argument that contribution limits discriminated against challengers). But the huge difference contained in proposed §3 between the permissible contributions for incumbents, and those permitted for challengers, is invalid. The ‘corruption’ rationale for regulating contributions applies to challengers as well as incumbents (*Buckley*). Even assuming that increasing competition between incumbents and challengers is a legitimate state interest (which the Court didn’t determine in *Buckley*), proposed §3 is so heavy-handed that it is not a rational means of achieving this purpose.

Limit too low? Apart from the disparity, there is a question whether the \$20 limit, in itself, is invalid. The Court has not put a dollar figure on what contribution limitations are permissible, stating instead that the test is whether the limit prevents candidates from amassing the resources necessary for effective advocacy (*Shrink Missouri (2000)*). This is a factual question. In *Shrink Missouri*, the Court upheld contributions on the basis of a pretty flimsy factual record, stating that the level of evidence required will vary according to the novelty and plausibility of claim, and whether those challenging the law bring evidence to contradict the factual assumptions underlying the contribution limit. An unresolved Q is whether the indirect benefit that incumbents might obtain from party ‘soft money’ is relevant to the question of whether limits on direct contributions prevent them from advocating their cause effectively.

Q.3

(1) DoJ should preclear. (Texas is covered jurisdiction.) It can only refuse preclearance under §5 of the Voting Rights Act if the purpose or effect of the plan is ‘retrogressive’ purpose or effect, ie reduces the representation of minorities (*Beer (1976)*; *Bossier Parish (1999)*). A breach of §2 of the VR Act is NOT a reason for refusing preclearance (*Bossier Parish (1999)*).

Here, the first plan had no majority-minority districts, and the second plan has one. So hard to argue that it is ‘retrogressive’.

(2) 3 possible bases for challenge:

§2 vote dilution: Under the *Gingles* prongs, need to show:

- (a) Hispanics in Bush County sufficiently large and compact to form majority in a single member district (this established);
- (b) Hispanics are politically cohesive (no information);
- (c) Bush County has racial bloc voting (no information).

If satisfy *Gingles* prongs, is a reasonable argument that, in the totality of the circumstances, the second plan dilutes the Hispanic vote. The plan ‘packs’ nearly all the Hispanic voters into one district, giving them v little influence over the other districts. It is true that the plan allows Hispanics to elect one representative, and is therefore closer to ‘proportionality’ than the first plan. But proportionality is not an absolute defence (*DeGrandy (1994)*), and ‘influence districts’ (ie districts where minority is between 25-55%) are also relevant to the totality of the circumstances (*McWhorter (1997)*). (Note that under Plan 1, have 2 Hispanic Democrats, even though Hispanics not a majority in

any district.) Hispanics have gone from having 3 ‘influence districts’ but no majority-minority district (Plan 1) to having 1 majority-minority district and no influence districts (Plan 2). Arguably, they have *less* influence overall under the second plan (*McWherter*).

Shaw v Reno: Would also have claim if could prove that race was the ‘controlling and dominant rationale’ behind the re-districting (*Miller v Johnson (1995)*). The County Commission would argue that partisanship, rather than race, was the predominating factor. To refute this, Lopez would need to show that the Commission could have pursued its legitimate interest through alternative means that achieved significantly greater racial balance (*Easley v Cromartie (2001)*). (Note that Commission entitled to use voter behaviour, rather than voter registration, in calculating partisanship.)

Partisan gerrymander: Lopez would have a partisan gerrymandering claim, if could prove that the redistricting has the purpose and effect of consistently degrading a group’s (here, the Democrat’s) influence on the political process as a whole: *Davis v Bandemer (1986)*.

Here, Republicans intend to ‘dominate’ for ‘next ten years’ – which might meet the *intent* prong (lack of success in particular election not sufficient to make out this claim). But query whether the redistricting will actually have this *effect* – are 2 districts where Democrat/Republican split is 45%/55%. In either of these, it would only take a 6% swing to make these Democrat seats (cf O’Connor J concurrence in *Bandemer (1986)*, arguing that partisan gerrymander is self-limiting). So effects prong may not be made out.

Plus need to show party shut out of political process ‘as a whole’. If courts will look to party of a state Governor in determining whether party shut out of state legislature

(Badham v Eu (1988)), might have to look beyond Bush County to see whether Democrats are shut out.