

L6474
Advanced Constitutional Law: The Political Process

Professor Persily

Final Examination

May 3, 2001

This Examination consists of a total of 7 pages including this cover sheet. Check now that your exam has all 7 pages.

IF YOU ARE A CANDIDATE FOR GRADUATION IN MAY, 2001, WRITE AT THE TOP OF THE FIRST PAGE OF YOUR EXAM "CANDIDATE FOR GRADUATION IN MAY, 2001."

Instructions

1. This is an 8 hour take home exam. It is open book. In answering the questions, you may consult any materials you wish, but you may not consult any person.
2. All exams are to be typed and double-spaced.
3. There is a strict word limit for this exam. **Your answers to all three questions combined may not exceed 2800 words.** (This is roughly 11 double-spaced, typed pages using a 12-point type and one-inch margins.) You must indicate on your examination how many words you have used. If you go over the word limit you will be penalized.
4. Questions 1 and 2 each count for 40% of your score. Question 3 counts for 20%. You might want to budget your time, effort and words accordingly. Please be clear which question you are answering.
5. Be very organized and concise in your answers. I encourage you to use headings and subheadings.
6. Thanks for being such a terrific class. Good luck, have a great summer, and please keep in touch.

Question I – 40 points

Outraged by the events surrounding the 2000 Presidential election in their state, African American Floridians (who constitute about 10% of Florida's population) formed an organization called the Floridians for Electoral Reform (FER). Of particular concern to FER (led by Assemblyman Alan Leader) were the unconfirmed reports that less accurate voting machines were used in areas with large African American populations, that African Americans were disproportionately purged from voter registration rolls, that road blocks were set up obstructing access to the polls particularly in African American neighborhoods, that Florida's lifetime voting ban for convicted felons disqualified one out of four African American men from voting in the 2000 elections, and that voting was polarized along racial lines.

Because of the partisan rancor accompanying and following the 2000 election, Leader has been unable to push through the legislature any kind of electoral reform proposals to remedy what FER considered a racially biased electoral regime. FER therefore decided to propose a popular initiative to be submitted to Florida voters next month, which would immediately go into effect once the voters pass it. FER's principal motivation behind the initiative was to restore and maximize the political power of African American Floridians.

FER's initiative proposal in the form of a state constitutional amendment included several pithily stated components:

§1 – “No Taxation Without Representation”

In addition to all those eligible to vote under current state statutes (citizens without felony convictions over the age of 18), any Florida resident over the age of 18 who has filed a federal income tax form over the previous year will have the constitutional right to vote in all state and federal elections.

§2 – “Katherine Harris Be Gone”

Power over election administration and redistricting will be transferred to a non-partisan, ten-member commission whose members will be elected through an at-large statewide vote and elected to 4 year terms.¹

¹ Currently, elections are administered by the Secretary of State, who is elected in a statewide vote, and the laws establishing legislative district lines are passed just like other bills, with a majority vote of each house of the legislature plus the governor's signature.

§3 – Compensatory Justice Act

The number of undervotes (i.e., where the ballot machine did not register a vote) cast in the 2000 presidential election will be a factor in redrawing state assembly districts. (No precinct had a rate of undervoting that exceeded 1%.) Depending on the percent of undervotes cast in the previous election, each precinct will be awarded “extra population” in the redistricting process. For example, if a precinct actually has 1000 people but had an undervote rate of 1% in the 2000 presidential election, the precinct will be considered as having 1010 people for purposes of redistricting for the 2002 election.²

According to Florida law, every initiative must undergo a legal analysis by the Florida Attorney General. The analysis is published in the pamphlet that all voters receive in which advocates and opponents of initiatives make their arguments for or against the initiative, but the Attorney General’s legal analysis is intended to be a neutral, non-partisan description of the possible legal and constitutional problems with the initiative.

You are Florida’s new Attorney General. Write the legal analysis of the initiative explaining any reasons why the initiative in whole or in part might violate the Constitution or the Voting Rights Act.

² Assume for the purposes of this question that each precinct contains exactly one and only one census block.

Question 2 – 40 points

Democratic members of the Florida state legislature are also enraged by the election debacle. They believe that Al Gore would be President if it were not for the fact that Bill Bradley weakened him in a divisive primary, that Ralph Nader took votes away from him, that Pat Buchanan's presence on the Palm Beach butterfly ballot caused hundreds of erroneous votes to be cast for Buchanan, and that the Republicans and their interest groups had a fundraising advantage. Democratic members, who constitute a minority of the Florida state legislature, would like to enact a comprehensive program of campaign and election reform that they hope will give Democratic candidates at all levels of government an electoral advantage.

The Democrats propose the following three-part bill, called the Fair Elections Act, to address their concerns. The effective date of the bill, should it be enacted into law, will be two years after the date of its enactment:

§ 1 – Party Protection Provision.

The Florida Democratic presidential primary will be converted to a non-binding presidential preference primary. (The current rules for the Florida Democratic presidential primary provide that the candidate who receives the greatest number of votes at the primary election will be awarded all of Florida's delegates to the Democratic National Convention.) Under a preference primary, Democratic voters will still vote for their preferred candidate in the primary election, but their vote will be advisory. The ultimate decision as to which candidate's delegates will represent Florida at the Democratic National Convention is determined by a majority vote of the Democratic members of the Florida state legislature.

§ 2 – Ballot Reform.

Because the state has strong interests in avoiding voter confusion and in ensuring that the winner of its presidential electors has support of a majority of the state's voters, candidate access to the presidential ballot will be limited to nominees from parties that have at least one of their members currently elected to the state legislature.

§ 3 – Campaign Finance Reform.

Because incumbent legislators have an incredible fund-raising and name-recognition advantage over challengers, an individual's contribution to the campaign organization of any incumbent member of the state assembly will be limited to \$20 per calendar year. There shall be no limits on the amount of money that can be contributed to the campaigns of challengers or candidates running in open seats in the state assembly (i.e., where an incumbent is not running for reelection). (Terms of office for the state assembly are identical to those of the U.S. House of Representatives—i.e., elections are held for all state assembly seats every two years.)

After its submission in the state assembly, the bill is referred to the Subcommittee on Government Organization. You are Counsel to the Subcommittee and it is your job to advise the Subcommittee on possible legal and constitutional problems with bills such as the Fair Elections Act. Write a memo to the Subcommittee warning them of possible challenges to the bill under the Constitution and Voting Rights Act if the legislature passes the bill and the governor signs it.

Question 3 – 20 points

In the past ten years, the Republican Party in Bush County, Texas, has made great strides in taking over the County Commission. At the beginning of the decade not a single member of the five-member Commission was Republican. Following the 2000 election, three of five members on the Commission are now Republican, the remaining two seats are filled by Hispanic Democrats (Ramon Garcia from District 1 and Miguel Lopez from District 3). Having suffered under Democratic control of the redistricting process for most of the County’s history, the Republicans think it’s now time for a little payback. Now that they can control the redistricting of the County Commission, they want to draw lines that will ensure Republican dominance of the Commission throughout the next ten years.

Only Hispanics and Non-Hispanic Whites live in Bush County. Bush County is approximately 26% Hispanic and 74% Non-Hispanic White. Every person who lives in Bush County is a qualified voter under the applicable statutory criteria, is registered to vote, and is a member of either the Democratic or Republican parties.

At the time of the 2000 election, the population of the districts had the following racial and partisan composition. (Racial data come from the 2000 Census figures released last month and partisanship data come from party registration information on voter registration cards.)

Plan in Effect for 2000 Election

District Number	1	2	3	4	5
Hispanic	30%	30%	40%	20%	10%
Non-Hispanic White	70%	70%	60%	80%	90%
Democrat	55%	45%	60%	50%	40%
Republican	45%	55%	40%	50%	60%

With creative line-drawing and sophisticated computer tools, the Republicans were able to create the following districts for the 2002 election.

Proposed Plan for 2002 Election

District Number	1	2	3	4	5
Hispanic	90%	10%	10%	5%	15%
Non-Hispanic White	10%	90%	90%	95%	85%
Democrat	90%	40%	45%	30%	45%
Republican	10%	60%	55%	70%	55%

The Bush County Commission passed the new set of lines on a party-line vote with all three Republicans voting for the plan and both Democrats voting against it. The plan has now been submitted to the Department of Justice for preclearance.

Commissioner Lopez is enraged at the proposed set of lines because he has now been gerrymandered into a district much less likely to elect him. He feels that the Republicans have targeted him because of his outspoken opposition to Republican immigration reform proposals. He asks the law firm of Jones & Smith to figure out any way to get a court to strike down this new plan if it takes effect.

1. Should the Department of Justice preclear the plan? Briefly explain why or why not. (3 points)
2. You are an associate at Jones & Smith writing a memo to Lopez about his case. What possible claims under the Voting Rights Act or the Constitution could be brought to force the redrawing of the Commission districts and will they be successful? (17 points)