

Where do judges get the raw material for the decisions they're making?

*U.S. Constitution*: is the ethos in itself a blueprint for democracy? Or do we need all the parts?

Neuborne has argued to judges that the Const. itself is a pact with democracy, designed to make democracy operate. Don't just need to construe the text – see the forest for the trees.

- **Preamble**: “we the people,” not ‘we the aristocracy’
- **Art. I, Section 2**: selecting the House
- **Art. II, Section 4**: holding elections
- **Art. I, Section 5**: “each House shall be the judge of its own elections”
- **Art. I, Section 6**
- **Art. II, Section 1**
- **Art. IV, Section 2**: privileges and immunities – why is voting not a privilege and immunity?? Never tried to use this as a Const. hook.
- **Art. IV, Section 4**: guaranteeing a republican form of govt – isn't that a guarantee of democracy? Never tried to use this as a Const. hook.
  - o Why are we willing to develop and read into other parts of the Const. but not these?
- **1st Am.**: sometimes argued that right to vote is protected as free speech or a modern version of a petition for redress of grievances (but instead of petitions, there are political movements) – is there room for protection of democracy in the First Am.? Haven't seen anything from SCOTUS about that since 1968, but it's a latent idea waiting to be reasserted.
- **9th & 10th Ams.**: talk about residual rights of the people – if a right isn't taken away, the people retain it...so maybe voting is supported there?
- **12th Am.**: about banana republic election...previously, winner got to be prez and runner-up got to be VP...election of 1800, actual slates ran, got incredibly messed up, this amendment passed to change that
- **14th Am.**: defines who is a citizen; forbids deprivation (by states – Fifth Am. applies to U.S.) of privileges and immunities to citizens of the U.S.; guarantees equal protection; affirms due process
  - o Subsection 2 meant to induce extending vote to black pop. – says you can't get representation in Congress (that you used to have under 3/5 Compromise) unless you let ppl vote...became a dead letter when 15<sup>th</sup> Am. was passed saying no racial discrimination in vote allocation
  - o Levels of scrutiny:
    - **Strict scrutiny**: Triggered if law categorizes on the basis of race or national origin or infringes a fundamental right. Unconstitutional unless

*narrowly tailored* to serve *compelling state interest* that can't be served by a less restrictive means.

- **Intermediate scrutiny:** Triggered if law characterizes on basis of sex. Unconstitutional unless *substantially related* to *important govt interest*.
- **Rational-basis scrutiny:** Triggered if law categorizes on some other basis. Constitutional as long as it's *reasonably related* to a *legitimate govt interest*.
- **15th Am.:** no racial discrimination in vote allocation
  - **Section 1.** The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
  - **Section 2.** The Congress shall have power to enforce this article by appropriate legislation.
- **17th Am.:** direct election of Senate; dramatically changes Senate
- **19th Am.:** can't deprive right to vote on basis of sex (not gender!) – no one has yet tried to differentiate
- **20th Am.:** changes lame duck deadlines
- **23rd Am.:** DC can vote for president – gives them electors
- **24th Am.:** Abolishes poll tax in federal (not state!) elections
- **25th Am.:** if prez becomes disabled, can pass power to VP
- **26th Am.:** voting age = 18
- **27th Am.:** compensation for Congress

## THE RIGHT TO VOTE

Standard in a right to vote case through the EPC analysis is a **compelling or highly important state interest, by least drastic means** (fundamental rights prong of the EPC)

Looks a bit like 1<sup>st</sup> Am. protection, except 1<sup>st</sup> Am. is much more stable – EPC always in flux

WHAT DOES THE RIGHT TO VOTE LOOK LIKE WITHOUT COURTS?

- NEUBORNE FEARS, B/C OF **MINOR** AND **GILES**, THAT WHEN COURTS WITHDRAW THERE IS LITTLE DEMOCRATIC RESPONSE TO DISENFRANCHISEMENT
- REAL ENFRANCHISEMENT FOR WOMEN AND BLACKS: TOO LITTLE, TOO LATE

***Minor v. Happersett (GENDER, 1875)***

- Facts: woman argues she has the right to vote under 14<sup>th</sup> Am. P&I clause
- Holding: Voting is not a privilege and immunity; no equality argument; no equal protection argument – only way to do it is to change the Const. (which it was)
  - Subsection 2 of 14<sup>th</sup> Am. talks about male enfranchisement
  - At time amendment was adopted, no state except NJ allowed women to vote
  - Confederacy was allowed back in without allowing women to vote

HYPOTHESIS: WHAT IF 19<sup>TH</sup> AM. WAS NEVER PASSED, AND THE CASE CAME BEFORE THE COURT TODAY?

- COURT THEN WAS MUCH MORE ORIGINALIST THAN COURT NOW
- HOW WOULD WE WRITE THE OPINION IN *MINOR* TODAY?

***Giles v. Harris (RACE, 1903)***

- Facts: Pl (black) denied voter registration in Alabama; alleges Alabama's registration scheme is meant to disenfranchise blacks (literacy tests, registration rules, etc.) Alleges violation of 15<sup>th</sup> Am.
- Holding: (Holmes) Court can't do anything about widespread racial discrimination.
  - o Kicks off judicial withdrawal from issue of racial discrimination in voting
  - o Courts didn't come back until 1940s

**SCOTUS map**

**SCOTUS failure to protect voting rights:**

- ***Happsett***: first case on voting rights. Courts give word "male" in Subsection 2 of 14<sup>th</sup> Am. a very close textualist reading, base denial of rights on it.
- ***Giles***: court refuses to enforce 15<sup>th</sup> Am., even though everyone knew about widespread disenfranchisement. Maybe about federalism.
- ***Richardson***: felon disenfranchisement
- ***Lassiter***: literacy tests
- ***Crawford***: photo IDs upheld facially

**SCOTUS on 2nd-tier disenfr. (formal right to vote, but vote is somehow nullified):**

- ***Gomillion***: black voters gerrymandered out of district, so can't vote about anything that matters. (Another way to nullify vote is multi-member districts – dilute vote, instead of leaving them in district where they would dominate)
- ***Whitcomb***
- ***White***
- ***City of New Orleans***
- People excluded from nomination stage, even though can vote in election
- Only cases in which SCOTUS granted relief are ***Gomillion*** and ***White***. But was it effective relief?

**SCOTUS turns it around, starts protecting rights:**

- ***Carrington (1965)***: TX refusing servicemen on active duty in TX to vote in TX
- ***Harper (1966)***: Poll tax struck down
- ***Kramer (1969)***: Real turning point. struck down provision in NY that said can't vote in school board elections unless you're a taxpayer or a parent of a kid in the school; Pl was someone living in his parents' home who wanted to vote; question was whether he had a sufficient interest; Court begins to develop potentially powerful right-to-vote notion.
- ***Blum v. Dunstein (1972)***: Struck down durational residency requirements. Can vote in a state the day you move there (or within 30 days, to get on the rolls).

***Richardson v. Ramirez (FELONS, 1974)***

- Facts: Pl disenfranchised b/c of felony conviction. Claims Equal Protection violation.
- Holding: Felon disenfranchisement laws do NOT violate EPC.

- Like *Minor v. Happersett*, textualist reading of Section 2 of 14<sup>th</sup> Am. (Now eviscerated by 15<sup>th</sup> Am.)
- View of voting as a privilege, rather than a right

Note: AL felon disenfranchisement law struck down later in *Hunter v. Underwood (1985)*.

- SCOTUS convinced that AL Const. was adopted with intent of disenfranchising blacks, not felons
  - AL Const. Convention delegates believed the crimes they included in criteria for disenfranchisement were committed more frequently by blacks
- **Today, intent to discriminate against blacks + disparate impact triggers strict scrutiny & the court finds a violation of the EPC.**
- *Hunter* argument (showing evidence of racially discriminatory intent) has worked in a few states, though not in FL

HYPOTHESIS: WHAT WOULD IT TAKE TO WIN *RICHARDSON* TODAY?

- COULDN'T WIN UNDER *HUNTER* (WHY?)
- HAVE TO ARGUE THAT *RICHARDSON* SHOULD BE OVERTURNED
  - COULD ARGUE DISCRIMINATORY EFFECTS
  - COULD ARGUE SPIRIT OF THE CONSTITUTION, MOVE COURT AWAY FROM ORIGINALISM

*Lassiter v. Northampton Cty. Board of Elections (LITERACY TESTS OK, 1959)*

- Literacy tests upheld (Douglas)
  - Rational basis for states to want voters to be literate
  - Statute was facially nondiscriminatory
  - Issue of race not reached
- **Nullified by 1965 Voting Rights Act** (saying literacy can't be a criterion)
  - Same problem as felon laws – was being abused to disenfranchise blacks
  - Banned in VRA b/c of racially discriminatory misuse

*Harper v. Virginia Board of Elections (NO POLL TAXES, 1966)*

- Poll taxes struck down
- Property requirements violate EPC
- Court moving toward viewing voting as a fundamental right
- **See below**

Right-to-vote Constitutional standard 'knit' together in four cases:

- *Carrington v. Rash (RESIDENCY, 1965)*
  - Facts: Military servicepersons transferred to TX couldn't acquire TX residence ("voting domicile"). Rationale was that 26,000 servicepersons influenced by commanders could take over local politics.
  - Holding: Law facially invalid under EPC b/c fails rational basis
    - Ct. says no rational basis for denying vote to the individual Pl, who swore he was going to stay in TX as a resident and did not pose a threat

- Minimum holding: when you say one person can vote and another can't, there has to be a rational story, and it CANNOT be, 'he falls into a category of problematic people, even though he himself doesn't pose any problems'
  - Didn't reach the question of heightened scrutiny, b/c didn't survive rational basis
  - Why a different result in *Minor v. Happersett*?
    - Textual problem there (word 'male' in Const. text)
    - Rational basis existed, even if it stank (reserving vote for men)
- ***Harper v. Board of Elections (NO POLL TAXES, 1966)***
  - BN: Is this a rational basis test or something higher?
  - Read today by lower-court judges as an absolute ban on property qualifications
  - *Phoenix v. Kolodziejki (S. Ct., 1970)*: Violates EPC to restrict vote on municipal bonds to real property taxpayers
- ***Kramer v. Union Free School District (STRICT SCRUTINY, 1969)***
  - **Announces strict scrutiny equal protection as the standard for voting cases**
  - **Facts**: NY statute: can vote in school board elections if (a) a real property taxpayer in the district or (b) a parent of a student in the district – way of establishing voters have a stake in the school system.
  - Law clearly has a rational basis, so this case ratchets up the Const. standard
  - **Holding**:
    - Voting is a *fundamental right*, so higher Equal Protection standard is required: ***compelling state interest***
    - BN: de facto creation of fundamental right to vote, based on 14<sup>th</sup> Am. EPC (a standard the Ct. tiptoed up to in *Carrington* and *Harper*)
- ***Dunn v. Blumstein (NO DURATIONAL RESIDENCY REQS, 1982)***
  - Residency requirement upheld, but TN's additional requirement of substantial period of residency (1 yr) failed strict scrutiny
  - Rejected claims that durational requirement was necessary to prevent fraud (failed means/ends test) and to ensure educated, committed voters (over- and under-inclusive)

All this leads up to *Crawford*, which enunciates **the modern test**. Query whether the modern test looks anything like the *Kramer* test.

***Crawford v. Marion County Election Board (PHOTO ID REQ. FACIALLY OK, 2007)***

- **LEADING PRECEDENT**
- **EITHER STRICT SCRUTINY OR STRICT SCRUTINY A LITTLE WATERED DOWN**
- **Facts**: Indiana law requires voters to present state or federal photo ID. About 45k people don't already have it but no fee to get it. If you don't have one you can still cast absentee ballot if you qualify, and if you don't qualify you can cast provisional ballot which will be counted if you prove your identity by going to state headquarters within 10 days of election. Harshest in nation on 2 levels: other laws allow range of photo IDs, and

provisional ballots not automatically counted. Other states simply had signature verification.

- **Rule: The more severe the restriction on voting, the higher the scrutiny.**
  - Balancing test
    - So a ban on voting requires an equally severe government interest
    - Subjective, like all balancing tests
  - Must consider how the statute affects all voters, not just a sub-section
- **Holding: FACIALLY UPHELD** (no as-applied challenge brought – possibility left open)
  - Kennedy/Roberts/Stevens plurality: burden on most voters is low, and trumped by gov't interest.
    - Gov't interests:
      - Preventing voter fraud
      - Promoting public confidence in electoral outcomes
    - Burden on voters:
      - Gathering docs and going to DMV for ID
      - Casting provisional ballot if can't get ID
- **Souter/Ginsburg/Breyer dissents:** statute burdens specific class of people, and those people won't have the resources to bring as-applied challenges. Should strike down whole statute.
  - Roots in 1<sup>st</sup> Am. overbreadth cases (if a class burdened, then whole statute overturned as a prophylactic)
- **Scalia/Thomas/Alito concurrence:** law should be upheld b/c of minimal burden and weightier state interests
  - Evaluate under deferential ***Burdick v. Takushi*** std., which only requires an “important regulatory interest” to justify non-severe, non-discriminatory restrictions on voting
- **Additional points:**
  - Some say ***Harper*** and ***Crawford*** are backwards: lighter burden to pay \$1.50 then to satisfy Indiana ID requirement
  - ***Lassiter*** is still likely good law, but literacy test will outright prohibit some from voting. Photo ID requirement does not stop any Indianan from voting.
  - This case could be viewed not as a right to vote but as an administration of voting case
  - BN supports voter IDs because the issue of fraud has become such a red herring

## “INSTITUTIONAL DESIGN” CASES: SUBTLE LIMITATIONS ON RIGHT TO VOTE

### GERRYMANDERING

#### *Gomillion v. Lightfoot (NO RACIALLY EXCLUSIONARY LINE-DRAWING, 1960)*

- Facts: City of Tuskagee, AL redraws city district; goes from a 4-sided figure to a 28-sided figure; virtually all black voters now excluded. Suit alleges violations of 14<sup>th</sup> Am. EPC, 14<sup>th</sup> Am. DPC, and 15<sup>th</sup> Am.
- Procedure: Case comes to S. Ct. on 12(b)(6) motion to dismiss, so Ct. must assume facts as pleaded (e.g. purposeful drawing of lines based on race).
- Holding: Racial gerrymandering to exclude voters violates 15<sup>th</sup> Am.
  - o Not decided on 14<sup>th</sup> Am. grounds.
  - o BN says Frankfurter was trying to limit holding to cases of **racial gerrymandering** by grounding decision in 15<sup>th</sup> Am. If had found a 14<sup>th</sup> Am. violation, would affect a ton of subsequent gerrymandering cases (e.g. political gerrymandering).
- Concurrence: 15<sup>th</sup> Am. not the right basis, b/c technically right to vote hasn't been denied.

#### HYPOS:

- DRAWING LINES TO BRING BLACK VOTERS *INTO* A DISTRICT, TO *STRENGTHEN* THEIR VOTES...
  - o 15<sup>TH</sup> AM. VIOLATION? PROBABLY NOT.
  - o 14<sup>TH</sup> AM. VIOLATION? YES.
- AMOEBA-LIKE DISTRICT LINES DRAWN A LONG TIME AGO; NOW POOR PEOPLE LIVE OUTSIDE THE AMOEBA; CITY COUNCIL HAS BEEN PETITIONED TO EXPAND AMOEBA TO A SQUARE. PROBLEMATIC TO SIMPLY *DECLINE* TO REDRAW LINES TO BRING PEOPLE IN (VS. ACTIVELY REDRAWING LINES TO EXCLUDE THEM)?
  - o INACTION SEEMS TO BE LESS PROBLEMATIC UNDER **GOMILLION**
  - o **HOLT CIVIC CLUB V. CITY OF TUSCALOOSA (1978)**: CT. HOLDS THAT NO RIGHT TO VOTE IS CREATED SIMPLY B/C PEOPLE OUTSIDE BOUNDARIES OF TUSCALOOSA, AL VOTING DISTRICT PAY CITY TAXES AND ARE COVERED BY TUSCALOOSA POLICE (E.G. NJ RESIDENTS WHO COMMUTE TO NY CAN'T VOTE IN NY)
  - o BUT **GOMILLION** ARGUMENT MIGHT WIN IF CAN PROVE IT'S **RACIALLY MOTIVATED**

#### *Whitcomb v. Chavez (14<sup>TH</sup> AM. REQUIRES PURPOSE, 1971)*

- Facts: IN multi-member districts = pie slices w/ some urban minority in each slice, always outvoted by suburban white voters.
- Holding: no 14<sup>th</sup> Am. violation (White)
  - o Plaintiffs concede no discriminatory purpose in the line-drawing – hence no basis in 15<sup>th</sup> Am.
  - o Announces rule requiring **proof of discriminatory purpose**

- Dissent in part, concurrence in part: Effects test is sufficient when assessing multi-member districts; showing of purpose is unnecessary. Gerrymandering is in tension with one-person-one-vote. (Douglas/Brennan/Marshall)

***White v. Regester (PURPOSE SHOWN, 1973)***

- Only Sup. Ct. case striking down a multi-member district
- Also a White opinion – so what’s the difference? “Texas, not Indiana.”
- Easier to establish purpose in a district with a long history of discriminating purposefully
- BN suggests that the history of a jx is what allows a Pl to show purpose

***City of Mobile v. Bolden (VRA REQUIRES PURPOSE, 1980 – overruled by ’82 VRA)***

- Facts: 3-member city council serving legislative *and* executive functions elected at large; council members represent different sections of city and must reside in those sections, but everyone votes for everyone, and it takes 50% to win. Looks like localism, but in reality, minorities easily trumped.
- Holding: No Const. violation b/c no adequate showing of purpose.
  - o BN thinks critical difference in this case is that councilors served executive as well as legislative functions. Democratic theory of representation doesn’t extend to executive.
- Rule: Have to show **purposeful discriminatory intent** to succeed with Voting Rights Act § 2 claim. VRA no broader than 15<sup>th</sup> Am, which requires showing of purpose.
- Implication: Effectively shuts door to vote dilution claims b/c purpose very hard to prove.
- **VRA amended in 1982: new standard is discriminatory purpose or effect.**

HYPOTHESIS: LOUISIANA ELECTS ITS SUPREME COURT. NEVER A BLACK JUSTICE ELECTED UNTIL VERY RECENTLY. 5 JUSTICES ELECTED FROM SINGLE-MEMBER DISTRICTS. CITY OF NEW ORLEANS ENTITLED TO 2 JUSTICES BASED ON POPULATION; SEGREGATED HOUSING WOULD HAVE ALMOST CERTAINLY RESULTED IN CONTROL BY BLACK VOTERS. BUT 2 JUSTICES FROM NEW ORLEANS ELECTED AT LARGE; BOTH WHITE. [REAL CASE BN ARGUED.]

- STANDARD FROM CASE LAW: MUST SHOW MULTI-MEMBER SYSTEM WAS PURPOSEFULLY SET UP TO DISCRIMINATE AGAINST BLACK PEOPLE.
- STATE CLAIMS SETUP IS MEANT TO ENSURE THE URBAN JUSTICES ARE ‘URBAN VOTERS.’ STATE CROSSED ABOUT HOW SETUP INCREASES JUSTICES’ ‘URBANNESS’; LOTS OF HEMMING AND HAWING.
- HOLDING: PLS FAILED TO MEET THEIR BURDEN. BN SAYS THIS IS A PLAUSIBLE DECISION UNDER A REALLY IMPOSSIBLE LEGAL STANDARD.

## **PRIMARY ELECTIONS**

When a single party dominates, the primary election can be the de facto election

Who gets to be on the general election ballot? Decisions made by:

- Smoke-filled room (party leaders)



- Party convention
- Closed party convention, where reps are elected by party members
- Primary
  - o Closed – only open to party members
  - o Semi-closed – open to party members and independents
  - o Open – open to anyone
  - o Blanket – all party primaries open to everyone; can split votes between primaries

## WHITE PRIMARY CASES

Series of TX cases

Tackled question of state action: to what extent are parties appendages of the state that must be restrained, and to what extent are they private orgs entitled to autonomy vis-à-vis the state?

- ***Nixon v. Herndon (1927)***
  - o Facts: TX statute regulating primary elections said no “Negro” eligible to participate in a Dem party primary election. Pl sued seeking \$5k in damages.
  - o Holding: EPC violation. (State action + const. right) Easy b/c damages sought instead of injunction; could award damages once and party would get idea that it couldn’t go on like this w/o paying out hefty sums.
- ***Nixon v. Condon (1932)***
  - o Facts: TX passes new statute saying parties can determine qualifications for own candidates. TX Dem party then adopts resolution saying only white candidates.
  - o Holding: Statute struck down. Defense argued party was private actor and 14<sup>th</sup> Am. didn’t apply. Ct. sidestepped and struck down on a technicality: b/c decisions made by party executive committee, rather than party membership, power flows from state and therefore resolution is a state action.
- ***Grovey v. Townsend (1935)***: ok for party to exclude black voter from primary process and thus from the party, b/c while primaries were required by state law, the process of determining membership was a private party matter.
- ***U.S. v. Classic (1941)***: participation in primary process is protected by right to vote
- ***Smith v. Allwright (1944)***: party becomes state agent when it determines the participants in a primary election, so the same tests applied in general election to determine the character of discrimination or abridgement should be applied to the primary (N.B. didn’t really truly look much like state action, but Dem party basically was TX gov’t at the time)
- ***Terry v. Adams (1953)***:
  - o Facts: Jaybird Party (private assn., not state-regulated) excludes blacks from its primaries. Jaybirds are dominant in county, nearly always win w/o opposition in Dem. primary and general election.
  - o Holding: 15<sup>th</sup> Am. violated
    - Doesn’t turn on finding Jaybirds are state actors – they’re not
    - “It violates the 15<sup>th</sup> A for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election”; “the Jaybird primarily has become an integral part, indeed the only effective part, of the elective process”

- Despite line of White Primary cases, took the VRA to enfranchise black voters
- We come to the present with the notion that the autonomy of parties is minimized b/c they were committed to the exclusion of blacks from the ballot – not an autonomy worthy of the court’s respect (Terry v. Adams and subsequent cases)

Types of primaries adopted across country in 20<sup>th</sup> c.:

- **LOCKED PRIMARY** – requires durational membership in party
  - o 11 mos. upheld (BN thinks this is the outside – miss 1 election, but not 2)
  - o 23 mos. struck down
- **CLOSED PRIMARY** – must be party member
  - o Unquestionably legal (*Rosario v. Rockefeller*)
  - o Independents’ efforts to infiltrate closed primaries always lose
- **SEMI-CLOSED PRIMARY**
  - o Version 1: only open to party members + independents
    - **CONSTITUTIONAL**
    - *Tashjian v. Republican Party of Conn. (1986)*: Statute mandating closed primaries struck down. State interests (integrity of 2-party system, preventing voter confusion, etc.) not enough to justify intrusion on associational right. Parties entitled to have semi-closed primaries.
  - o Version 2: open to party members, other party members, + independents
    - **UNCONSTITUTIONAL** if statute requires closed primaries
    - *Clingman v. Beaver (2004)*: Libertarian party of OK claims statute requiring closed primary violates 1<sup>st</sup> Am. expressive and associational rights by preventing Libertarians from inviting other party members to vote in primary. Majority (Thomas) holds statute is constitutional – justified by state interests and minimally burdensome on associational rights.
- **OPEN PRIMARY** – whole electorate can vote
  - o Several district courts: **CONSTITUTIONAL**
    - Based on assumption that voter, by voting in primary, becomes “impliedly affiliated” with the party
    - Sup. Ct. seems to agree that open primaries saved by the implied affiliation (see *Jones*, below, where Ct. indicated this view of open primaries in a footnote)
  - o 26 or 28 states have open primaries
- **BLANKET PRIMARY** – can vote in different party primaries for different elected positions
  - o **FACIALLY UNCONSTITUTIONAL**
  - o *California Democratic Party v. Jones (2000)*:
    - Facts: On a primary ballot including all nominees, anyone can vote for any candidate regardless of the candidate’s political affiliation. The candidate of each party who wins the greatest number of votes is the nominee of the party for the general election.
    - Holding: Blanket primary forces parties to associate with (have nominees, and hence positions, determined by) those who have refused to associate

with the party or have affiliated with a rival. Interference with this right is very important at the primary stage b/c the nominee is supposed to represent the principles of the party and its members. B/c of the heavy burden imposed upon free association by the regulation, the law must meet **strict scrutiny**. None of the state interests proffered is compelling: producing more representative officials; expanding candidates beyond partisan concerns; increasing voter participation; promoting fairness, voter choice, protecting privacy. Even if they were, the narrow tailoring required is lacking.

- **NON-PARTISAN PRIMARY** – all candidates run, regardless of party, and top candidates qualify for general election
  - o **FACIALLY CONSTITUTIONAL**
  - o ***Washington State Grange v. Washington State Rep. Party (2007)***
    - Facts: Wash. State allows candidates to self-identify in primary, signaling what party they support. Really like a blanket primary in different guise. Argument for challenging law is that choosing candidates is a 1<sup>st</sup> and 14<sup>th</sup> Am. associational right of political parties.
    - Holding (Thomas): Candidates just say which party they'd like to be linked with – law does not imply party endorsement. Leaves open possibility for challenges of individual candidates who are unacceptable to party members – e.g. a KKK member who runs as a Dem.

***New York v. Lopes Torres (2008)***: Party autonomy allows party leaders to choose delegates for judicial conventions (the way judges are selected in NYS).

- 9-0 S. Ct. opinion
- BN: this case leads to next question: can party leaders elect to choose candidates from a smoke-filled room?

## **STATUTORY REMEDIES: THE VOTING RIGHTS ACT OF 1982**

### **VRA SECTION 5 (PRECLEARANCE)**

In areas with history of racial discrimination in voting, new voting regulations must be reviewed by DOJ to see if they would perpetuate discrimination

*Constitutionality:*

- ***South Carolina v. Katzenbach (SECTION 5 = CONSTITUTIONAL, 1966)***
  - o Facts: S. Carolina, covered jurisdiction, sought a declaration that Sec. 5 of VRA violated Constitution. S. Carolina's main defense is that can't do this except by adjudication – i.e. can't assume congressional power to override sovereign power of states w/o case by case finding of unlawfulness (i.e. only cts can strike down state statutes/procedures).

- Holding (Warren): Congress had power to pass Act under Sec. 2 of 15th Am.; case by case litigation is no longer sufficient and/or necessary; Congress isn't bound in a way it would be; must judge constitutional propriety w/history in mind
  - Notion that once Congress has ID'd problem of significant importance, Congress can act to fix it
  - Significant blow to federalism
- ***Northwest Austin Municipal v. Holder***, last term, thought to be test case on constitutionality of Section 5 b/c district never discriminated. But court sidestepped constitutionality issue. Thomas wrote separate opinion saying Section 5 exceeds Congress's power under 15<sup>th</sup> Am.

#### *Who is covered?*

- Section 4: covered if <50% of pop voted in '64 election and some sort of "test or device" (e.g. literacy test, even if not per se unconstitutional) was used
- Includes all of old confederacy, TX, 3 counties in NY, 9 in CA, a few in AZ, one in AL, and every so often a new county pops up when voting goes below 50%
- Text of VRA suggests limited to entities that register voters, but S. Ct. has overridden text to extend coverage
  - ***U.S. v. Sheffield Board of Commissioners (1978)***: city is a covered jx even though it doesn't do voter registration. What matters is that it's an entity with power over some aspect of the electoral process within a state that's covered by Section 5.
  - ***Dougherty County Board of Ed. v. White (1978)***: board of ed also is a covered jx, and therefore must seek preclearance for personnel rule that might affect candidates for public office
- Can get out of Section 5 obligations by petitioning D.C. District Court for termination of coverage
  - ***Northwest Austin Municipal v. Holder (2009)***: even though VRA text says bailout available for 'political subdivisions,' S. Ct. holds that really means that utility district (and all political subunits) can seek bailout too. Reasoned that only 17 of 12,000 jxs have bailed out so far, and Congress could not have intended to make it that hard.

#### *What is a covered change for which preclearance must be sought?*

- ***Allen v. State Board of Electors (1969)***:
  - Shift to multi-member district → trigger
  - Shift from elected to appointed sec. of education → trigger
  - Access to ballot by independents → trigger
  - Protocol for assisting illiterate voters → trigger
  - Court concerned w/ mechanisms that might impede *effective* political participation
  - Hard to see what would *not* trigger Section 5 after this case
- ***Presley v. Etowah County Commissioner (1992)***: changes to how county board can spend common funds does not implicate Section 5, b/c not connected to voting

procedures, candidate requirements, election procedure, or voting power (e.g. the number of officials for whom the public may vote).

- Hard to reconcile *Presley* with *Dougherty* – neither have much to do with voting. Might former be overruling of latter?

*Standard for granting preclearance?*

- Non-retrogression – NOT maximization (*Beer v. U.S.*)
  - Statutory test says person seeking preclearance has burden of persuasion to show no discriminatory purpose or effect
  - *Beer* (1976) imposes retrogression principle. **Preclearance cannot be denied if demonstrated that there is no retrogression**, even if groups might be much better off under other systems
- *Georgia v. Ashcroft* (2003)
  - **GA v. Ashcroft was overturned by Amend., but totality of circs test survives**
  - Facts: 2001 GA reapportionment b/c of shifts in pop – basically a Dem party gerrymander. Before: 11 black majority districts; only 10 when you look at voter registration instead of pop. After: 13 black majority districts + 13 new districts that are 30-50% black + 4 new districts that are 15-30% black (“significant influence” districts). Done by taking voters out of the old black majority districts (moving districts from 60% black to 50% black, and sprinkle those into surrounding districts).
    - Increasing substantive representation, b/c can still carry the black majority districts, and can form coalitions with non-black democrats in other districts – might not elect black democrats in those districts, but they’ll elect democrats
    - But DOJ preclearance check says reducing majority from 60% to 50% in some districts looks like retrogression, b/c will be harder for blacks to elect their reps in those districts
      - Should it matter that Dems designed this?
      - NAACP LDF presses Justice Dept. to make a retrogression finding – thinks it’s too dangerous a move
  - Procedure: District court 3-judge panel upholds DOJ refusal to grant preclearance. Says it’s hard in GA to elect black reps and reduction from 60% to 50% majorities might affect ability to do that. Meanwhile, not yet clear that they’ll get better rep in the new districts.
    - American Poli Sci Assn: with 44% black voters, pretty likely that you can pull another 6% and get your candidate elected
  - Holding (O’Connor, 5-4): remands for **totality of circs inquiry to ID retrogression**, but says GA probably met its burden
    - **Factors**: past margins of victory, history of coalitions, any evidence that there will be coalitions in new districts (i.e. that they won’t just racially polarize), primary setup
    - O’Connor looks at statewide picture: Of course it’s retrogression if we just look at districts where majority diminished. But need to look statewide at

allocation of power and see if black minority is worse off than it was before – therefore need to look at TOC to see if loss is compensated by increases in power elsewhere.

- Rebuke to O'Connor: not ok to think in terms of black essentialism! Who says that blacks in one district have the same interests as blacks in other districts?? (e.g. rural vs. urban). This was LDF's concern. Assumes black voters are fungible.
- Dissent (Souter): This kills the effects test. Gone from asking whether power has *formally* changed to asking whether power has *functionally* changed – how can Justice Dept. or S. Ct. make that kind of determination?
- Implication (Neuborne): Makes it really easy to pass Section 5 now – all you have to do is demonstrate some benefit for minorities somewhere else. Question becomes whether minorities are better off in the state than they were before.

**Richmond**: Showing of purpose sufficient to establish violation of Section 5; don't need to show retrogression

**Reno**: **overrules Richmond**. Need to show retrogression under Section 5.

## VRA SECTION 2

- Applies to everyone, not just jxs swept up in Section 5
- Court, in **Mobile**, construed it as re-codification of 15<sup>th</sup> Am.
- 1982 VRA extension responded to **Mobile** by **codifying an effects test** as well as the original intent text.

**Inherent conflict: Can't permit dilution, but can't mandate proportional rep. either**

- Says you can't have the effect of diluting ability of racial minorities to elect reps of their choice, BUT it doesn't mean you can require proportional representation
- Scalia says the two ideas pull in two such different directions that they can't work together – i.e. there's no baseline, b/c only possible baseline is proportional representation, and that's not desired (fragmentation of country) or allowed in VRA

*How to determine whether racial minorities are deprived of 'equal opportunity to elect candidates of their choice?' **Thornburgh factors**.*

**Thornburgh v. Gingles (1986)**: Brennan op. for 4 justices, plus White concurrence

1. Group is sufficiently large and sufficiently contiguous that, acting together, they could elect candidates of their choice
  - In practice: group needs to constitute more than 50% in a geographically contiguous unit
  - Need either submersion in a multi-member district, or fragmenting pop into many different districts
  - Rationale: if you never had the power to control outcome of an election, then nothing has been taken from you
  - Neuborne assumes Brennan was thinking about **Gomillion**

- Assumes that minority voters will vote together – Thomas bridges at this
- 2. Group is a cohesive voting block
  - They tend to vote together, they have historically, and it's safe to think that they will continue to do so
- 3. Racial block voting exists, and it's racially motivated
  - White majority votes sufficiently as a block (i.e. does not vote for black candidates) and vice versa. Means that minority's preferred candidates will be defeated.
  - Cannot just be that black voters are usually Democrats and white voters are usually Republicans – must be racial motivation in block voting (White concurrence)

***Voinovich v. Quilter (1993)***: Section 2 challenge in Ohio

- First northern Section 2 case
- First time VRA applied to a single-member district
- Shows that Section 2 applies to voter submerging, packing, and fragmentation
- Failed b/c 3<sup>rd</sup> ***Thornburgh*** factor not satisfied – no history of racial block voting in OH

***Johnson v. DeGrandy (1994)***

- Facts: FL redistricting results in Latinos getting seats in rough proportion to their population.
  - Pls claim they could have gotten a few more seats if district lines hadn't scattered and diluted some of pop. **Maximization claim**: argue that if ***Thornburgh*** factors exist, have to apportion votes in way that maximizes minority voting power.
  - Gov't claims that **proportionality is a safe harbor for Section 2** – so even when ***Thornburgh*** triggered and locality could do better, no Section 2 problem if apportionment is proportionate.
- Holding: proportionality is a factor, but not dispositive
  - **Totality of circumstances**
    - ***Thornburgh*** factors → even when they exist, no duty to maximize
    - Proportionality → will probably suffice, unless other factors exist to suggest it's not enough
  - Souter seeks to avoid rule that treats minority voters as fungible – i.e. ending inquiry as long as % of group can elect candidates of their choice. Souter rejects both maximization *and* proportionality.
  - Section 2 equivalent of ***Beer***, which rejected maximization under Section 5

If maximization is not an acceptable std, and neither is proportionality, then what is?

Law sits with ***Thornburgh*** and ***Johnson*** for a while.

Imagine being a district judge and getting a vote dilution case in this era.

***Holder v. Hall (1994)***

- Facts: GA county has always had a single commissioner. Pop. of voters in county is about 20% black. If had more commissioners – e.g. 5 – black pop. could elect one.

- Holding (3-justice opinion): The mere size of the unit (i.e. whether it's single-member, 5-member, etc.) does not implicate Section 2.
  - o Problematic that there is no baseline standard for the size
  - o 3 justices think that if Section 2 applied, it would be violated here
- Scalia/Thomas concurrence: Section 2 would not be violated b/c it is just about voting.
- Dissent: No reason to exclude shape/size of unit from Section 2 when dilution effect is the same. Can get baseline from school board cases: 5 members.
- **Rule**: When bringing a challenge under Section 2, must ID a **baseline standard**.

***LULAC v. Perry (2006) (also see p. 29)***

- Facts: In TX reapportionment, black & Latino voting blocks that were somewhat influential (roughly 20%, so could enter into coalitions) scattered down to about 5% - no influence.
- Holding: **Cannot bring an effects challenge under Section 2 if pop. is below 50% threshold**
  - o Ct. had essentially pulled factors out of air in *Thornburgh*, and here they are treated as sacrosanct
  - o Can still bring a purpose challenge, but not an effects challenge

***Bartlett v. Strickland (2009)***

- Facts: NC constitution says must make max efforts to keep counties coherent, unless for the purpose of 1-person, 1-vote. State officials feel that state constitutional provision is trumped by VRA Section 2, b/c of county where former black majority (50%) has dwindled to 30% b/c of demographic changes. Propose to create a district with 40% black voters, anticipating coalition (gaining another 10% from white voters).
- Holding: 1<sup>st</sup> *Thornburgh* factor not met (<50% of pop.); therefore no Section 2 obligation.

*Side point: identity representation vs. substantive representation*

- Identity rep: person looks like you
- Substantive rep: person shares your politics and concerns
- In old days, in south, there was really no tension between those two
- But increasing tension nowadays
- By packing minorities into districts and maximizing their voting power in that one district (creating 'safe' minority districts), there is a cost – and that is influence in other districts
- Sacrificing substantive rep for identity rep

Also hard questions about Section 2's constitutionality: if there aren't problems with voting, where does Congress get the power to impose effects tests?

- Congress can't ratchet up Const. protections
- Only S. Ct. can do that – Congress only gets to enforce

## **THE RIGHT TO RUN FOR OFFICE**



*How does it compare with right to vote?*

- In practice: exclusionary techniques and state/party regulations much more accepted
- Court language sometimes treats voting cases (high protection) and run-for-office cases as indistinguishable, but if that was the case, running-for-office cases should have come out differently.
- But we should feel free to insist that right to run for office SHOULD BE just as protected as right to vote.
- Neuborne hypothesis: we'll see a watered down heightened scrutiny std for right-to-run cases

***Burdick v. Takushi (VOTING IS NOT AN ACT OF EXPRESSION, 1992):***

- Facts: Pl in Hawaii wanted to write-in candidate as protest; Hawaii prohibited write-ins.
- Holding: Prohibition of write-in candidates is not a 1<sup>st</sup> or 14<sup>th</sup> Am. violation.
  - o Not a severe restriction – could set up own party or run in non-party primaries – so no strict scrutiny.
  - o Treated as an election regulation case subject to rational review (when only imposes reasonable burdens, is presumptive valid)
  - o Balancing of asserted injury vs. precise state interests → slight burden so doesn't have to be compelling interest
  - o *S. Ct. formally rejects that voting is a act of expression protected by 1<sup>st</sup> Am. Ct. says voting is a formal act by which we choose who will win and lose. Expression happens before the vote; the vote itself is a mechanical tallying.*

**BUT** then S. Ct. strikes down anti-Communist oath for candidates as infringing on a right to speak about issues to electorate. **Holds up voting as expressive act. Inconsistent with *Burdick*, which says it's not expressive.**

***Bullock v. Carter (1972)***

- Facts: TX primaries are expensive. Parties given option: taxpayer funding (which makes taxpayers mad), or internal funding. So parties opt for internal funding, calculate costs, break out funding and assign amounts to candidates. Say it also screens out candidates that don't have much support b/c they don't raise the \$. Fact that white candidates will be able to raise the money easier than black candidates is just too bad.
- Holding: **No property qualifications for candidates.** Basically overrides party's decision about how to fund primary – either have to shift cost to taxpayers OR pay for it internally w/o excluding anyone from running.
  - o Reach is limited, though, b/c **petitioning requirements** have been upheld and those are also expensive.
    - Though, Neuborne litigated case challenging NYS petitioning requirements in 2000 on behalf of McCain – 2<sup>nd</sup> Cir. struck them down as overly exclusionary

- Some jxs have low filing fees for candidates – under \$700 – query whether that’s a test of a candidate’s interest or an exclusionary property qualification. Courts all over the place on this question.

***Lubin v. Panish (1974)***: Read today to mean that if \$ is the only way to get on the ballot, that’s unconst as applied to the person w/o \$ (not facially). If there’s another way of getting on the ballot, then poor person must use that way (even petitioning, which is not cheap). As-applied case with a trapdoor.

## **MINOR PARTY ACCESS TO BALLOTS**

No strict scrutiny in these cases – perhaps rational basis

Every good district judge deciding one of these cases starts with ***Storer*** and moves to ***Munro***

Discussions in these cases are all about the two major parties and who should be allowed to compete with them

No discussion about role of minor parties in our democracy

Therefore no theory about how hard it should be for them to compete

### ***Williams v. Rhodes (DISCRIM FILING DEADLINE STRUCK DOWN, 1968)***

- **Facts**: Two major parties had made it impossible for new candidates to get on ballot. Needed signatures from 15% of voters who voted for the office in question in the last general election, and **sigs had to be filed by Feb. for a Nov. election** – so one had to get sigs during ‘slumber’ period, when ppl aren’t paying attention to electoral issues. Wallace (segregationist) tried to get on ballot, gets plenty of sigs, but only gets them filed in March, and is denied access to ballot in Ohio.
- **Holding**: Statute struck down – violates EP to discriminate against minor parties and in favor of major parties.
  - Clearly also implicates a 1<sup>st</sup> Am. associational right – ct. makes passing reference
  - Decision rooted in EP equality-based voting jurisprudence developed in 1960s

***Jennes v. Fortson***: **UPHELD** requiring sigs from 5% of voters by a more lenient filing deadline

Other than ***Williams*** and ***Jennes***, not much guidance on what requirements are too burdensome and which are permissible

### ***Storer v. Brown (UNDUE BURDEN STANDARD, 1974)***

- **Facts**: Candidates given 24 days to file 5-6% sigs, must be filed 60 days before election, and there’s a sore-loser rule – i.e. if you ran in primary and lost, OR you voted in a primary, you can’t be an indep candidate.
  - Argument for sore-loser rule: w/o it, losing faction in party primary will always go independent. Most states have sore-loser provisions.
- **Holding**: Remanded for evidentiary proceedings to determine **whether statute creates an undue burden on access to the ballot**

- Very high standard – same as abortion standard that comes out of *Casey*
- Also a notoriously subjective, factual inquiry:
  - Number of signatures needed?
  - Time given?
  - True pool of people from whom signatures can be collected? (Including or excluding people who voted in primary? Sore loser rule excludes them, which is ok, but might be problematic combined with other restrictions.)

***American Party of TX v. White (UPHOLDS SORE LOSER RULES, 1974)***

- Decided on same day as *Storer*
- Sore loser rules resoundingly upheld
  - Protecting two-party system is a legitimate state goal
  - Ok if it makes it harder for independents and minor party candidates to get on ballot

***Anderson v. Celebrese (RANDOM 1<sup>ST</sup> AM. CASE)***

- “Lost case” – like it’s been wiped off the map
- Challenged early filing rule only – had to file sufficiently low % of sigs, but still had to do it by Feb.
- Holding (Stevens): Early filing rules struck down, but on 1<sup>st</sup> Am. grounds alone
  - Says associational right implicated, and no compelling state interest for the rule
- This case is never cited anymore. *Storer* and *American Party of TX* and *Williams* are all cited, but not *Anderson*.

***Munro v. Socialist Workers Party (1986)***

- Facts: Blanket primary with easy access; anyone with 1% in blanket primary gets on general election ballot; socialist candidate barely misses that threshold, challenges rule
  - This is before blanket primaries struck down in *Jones*.
- Procedure: Lower court strikes down statute on *Anderson* 1<sup>st</sup> Am. grounds – says no evidentiary showing (necessary in a 1<sup>st</sup> Am. case) to show compelling state interest in having smaller ballot. No history in state of ballot that’s too large or confusing.
- Holding: Reversed. No need to prove problem exists – **ok for state to enact prophylactic measures, as long as it’s reasonable to think problem might develop**. Don’t need to show actual compelling interest.
  - Does not cite *Anderson* at all – this is why *Anderson* is a ghost case.

***Timmons v. Twin Cities Area New Party (OK TO BAN FUSION VOTING, 1997)***

- Final nail in minor parties’ coffin
- Facts: Voters can vote for major-party candidate on the minor-party line (“fusion voting”). Way for a minor party to demonstrate support for its platform, and can then bargain with major party for influence in the next campaign. Major party leaders HATE this – 41 states **banned fusion voting** after 1900 (even if major parties were happy to do it, couldn’t do it).

- Holding: Ban on fusion voting upheld. New Party has right to select its own candidate, but New Party does not have absolute entitlement to have specific nominee appear on ballot as its candidate. **Does not severely burden party's associational rights.**
  - o Killed New Party, which relied on cross-endorsements
  - o 9 states still allow fusion voting, including NY
  - o In Oct. 2009, though, fusion party head (Liberal party) indicted for bribing bigger parties with votes – this is the uglier side of fusion voting

### ***U.S. Term Limits v. Thornton (1995)***

- States can't set Congressional term limits – doesn't fall within state power to regulate 'time, place and manner' of elections under Art. I, Sec. 4.
- Instead, violates Qualifications Clause of Art. I
- Need to follow Const. amendment process in Art. V

### ***Cook v. Gralike (2001)***

- State const. amendment requiring Congressional reps to advocate for federal term limits amendment (and threatening them with language at polls IDing them as disregarding voter wishes on term limits if they don't) – UNCONST.
- Violates Elections Clause to try to dictate outcome of election

## **ACCESS TO BALLOT BY MAJOR PARTY INTERNAL CHALLENGERS**

### **White Primary Cases:**

- No autonomy for parties
- Maybe race is just different, either b/c of history or b/c of 15<sup>th</sup> Am.

***Rosario*** (closed primaries are constitutional); ***American Party of TX*** (sore loser rules are constitutional)

- Concern is Democrats running as Republicans for raiding purposes, and vice versa
- Ct. consistently upholds statutes requiring candidates to wait one election cycle after leaving Party A before running as a Party B candidate
  - o N.B.: in South Africa, you can't change parties during your term once you've been elected by a party – i.e. can't pull an Arlen Specter
  - o Ct. was sort of worried about this in ***Washington Grange*** – all about ppl moving between parties w/o a breathing period

### ***Eu v. San Francisco County Democratic Central Committee (1989)***

- Facts: CA statute requires parties to structure their leadership in a specific, rigid way and forbids them from endorsing candidates during their primary campaigns.
- Holding: Statute struck down.
  - o **Parties free to express views – free speech grounds**
    - Perfect example of argument for party autonomy: why shouldn't party be able to say which candidate they think is strongest, most electable?
  - o **Parties free to structure leadership as they choose – party autonomy grounds**

- Risk is, of course, democratic centralism – *Eu* invites parties to structure themselves so they're impervious to insurgency from the rank and file
- CA statute was designed to prevent this, but at the expense of party autonomy
- BN thinks *Eu* was rightly decided, if parties are at all independent and not just agents of the state.

### *New York v. Lopes Torres (2008)*

- Applies party autonomy rule from *Eu* to judicial nominee selections in NY.
- Facts: Judicial conventions choose nominees for judgeships, and each delegate to convention is elected in a primary. To contest a party's selection of judges, you have to run to become a delegate to the convention.
  - This means a person has to run a slate of delegates to influence the selection – no one has ever successfully done this – hugely expensive, no name recognition for delegates.
- S. Ct. upholds system 9-0, rely on *Eu* rule that parties can organize themselves however they want.
  - Neuborne argued that this actually detracted from party autonomy b/c it was a statutory system
  - Court retorted that only person with standing to challenge is party leader (who, of course, set up whole system in the first place)

## **RIGHT TO FAIR REPRESENTATION**

### Discussion of alternative voting schemes:

Rich debate in poli sci literature – less so in the law – about different voting schemes

- Allowing space for protest votes/candidates
  - Cambridge: allows you to vote preferences, instead of for one person only. You cast protest votes at the top, knowing they'll get knocked out and a mainstream candidate will win.
- Placement of transaction costs:
  - In U.S., all costs are on voter
  - Means rich and leisurely are more likely to register
- Degrees of compulsion
  - Compulsory voting: Belgium, Argentina, Australia
  - Compulsory registration in other places

Arguments for an opt-out system, rather than an opt-in system

- S. Ct.'s treatment of class actions: running an opt-in system results in too few ppl opting in, even though opting in makes sense for jx purposes
- We have compulsory jury duty – for reasons of proper representation
- We're already discarding direct democracy – old-style, everyone-at-the-town-hall democracy. Even though we could now do it logistically, via the internet

- CA is one example – direct democracy as response to what is perceived as a broken legislature

Neuborne: legislatures around country are considering shifting to opt-out systems. It's a time for legislation, not litigation.

Law on the meaning of a fair representative system: 'impoverished'

[Crucial case is *Reynolds*]

***Colgrove v. Green (1946): dismissed***

- Facts: Huge (roughly 9-to-1) disparity btwn largest and smallest Congressional districts in Ill. No apportionment changes in 60 years. Neither state legislature, nor Congress, nor state courts will change it, b/c they benefit from overrepresentation. Federal suit filed.
- Holding (Frankfurter): dismissed. Courts cannot say what democratic representation should be, when there are dozens of competing viable systems of representation in an ideal democracy.
- Class discussion of possible bases for a different ruling:
  - No 14<sup>th</sup> Am. – EP applies to states, not to Congressional districting
  - **Guarantee Clause** – tough, b/c about guaranteeing republican form of gov't for state legislatures
  - Maybe **Art. I, Sec. 4: 'time, place, and manner'** of elections should be regulated by Congress
  - Also maybe **5<sup>th</sup> Am.** – language re equality in 14<sup>th</sup> Am. retroactively said to be present in 5<sup>th</sup> Am. as well, even though at time of 5<sup>th</sup> Am.'s drafting, drafters were ashamed/unable to put in equality language b/c of slavery
- Dissent (Black): don't need dem. theory to know what equality is, and 9-to-1 ratio of representation ain't it

***Baker v. Carr (1962): cause of action acknowledged (EPC)***

- Facts: Disparities in TN are 40-to-1 between some districts, and there's been no reapportionment since 1901.
- Holding (Brennan): reverses lower court's dismissal of case, remands for fact-finding. Recognizes cause of action in EP; case not barred by political question doctrine.
  - Tells lower courts nothing about how to decide whether there's been a violation of law
  - Did not explicitly endorse 1-person-1-vote – couldn't get 5 votes for that. May be implied, but if it were explicit, Stewart and Clark (concurring) would be off the train.
- Concurrence (Clark): comes **closest to articulating theory of democracy**
  - 37% of electorate can elect 20 of 33 senators, and 40% of voters elect 2/3 of house – this can't be a democracy b/c a minority of voters are electing a majority of legislature – if democracy means anything, it means you can't have a minority governing by electing a majority of reps
  - If his opinion had won out, our inquiry would ask whether representation in congress would be roughly proportionate to wishes of electorate

- Neuborne: ‘that’s a theory of democracy you could love’: just saying that a minority shouldn’t be electing a substantial majority
- Skew is also racialized – rural white districts are majority, and urban black districts are stuck with less representation
- Concurrence (Douglas/Black): issue is equality, not politics (essentially Black’s dissent from *Colgrove*)
- Dissent (Frankfurter): Court is making a mess by not having any standard. Can’t go forward that way.

***Gray v. Sanders (1963): malapport. stds apply to both houses of state legislatures***

- Every county in GA is like an entity with reps in upper house of state legislature, with same representative model as U.S. Senate
- Holding: malapportionment not ok in state houses.
  - U.S. Senate is malapportioned b/c of compromise in U.S. Const.: needed to bring in states, which were independent sovereigns at the time.
  - No county in GA ever had indep sovereignty, though.

***Reynolds v. Sims (1 PERSON, 1 VOTE, 1964)***

- Facts: AL legislature hasn’t reapportioned state legislature since 1900 federal census, despite state constitutional mandate to do so.
- Holding (Warren): dilution of the vote violates the EPC, both houses of state legislature have to be apportioned on a population basis – one person, one vote
  - Formalist approach: can one person’s vote be worth more than another? Neuborne suggests Warren knew Frankfurter would insist on avoiding functionalist approach b/c believed court ill-equipped to deal with it.
- **Crucial impact of case: every state body at local level MUST be apportioned so that everyone’s vote is relatively equal to everyone else’s vote**

*Three cases establish U.S. Senate and Electoral College as the only exceptions to an equipopulous distribution of the vote – and those exceptions are because of history.*

- **Reynolds**: 1P, 1V as only way of establishing democratic representation
- **Westbury v. Sanders**: 1P, 1V for congressional districts
- **Gray v. Sanders**: formally rejects idea that upper house of a state legislature can mirror the U.S. Senate

***Lucas v. Forty-Fourth General Assembly of Colorado (1964)***

- Facts: CO referendum proposed redistricting plan that confers 1P, 1V for lower house but not the upper house of state legislature. Rural areas drastically overrepresented, w/33% of pop electing majority of state senate. Plan approved by majority in each district. (Race not an issue in this case – very white state.)
- Holding (Warren): Plan violates EPC, 1P/1V. **Majority approval in referendum does not make violation of 1P, 1V permissible.**
  - “A citizen’s constitutional rights can hardly be infringed simply because a majority of the people choose that it be.”

- Formalist approach applied to tougher facts, b/c all counties approved and b/c a more equipopulous option was on ballot.
- But 1P, 1V means majorities in counties may not trump individual rights of those who voted against it.

### ***Karcher v. Daggett (1983)***

- Facts: post census, # of reps. for NJ goes down 1, so must redistrict. New district w/mild population deviation from the ideal (.6984%); clear was Democratic gerrymander, legislature had before it other plans with smaller population deviations (e.g. .4514%). But deviation adopted is still within census margin of error.
- Holding (Brennan): redistricting plan violates Art. I, Sec. 2
  - Formalism: deviation, even if de minimis (<1%), not permissible b/c could have done better
  - Irrelevant that difference in #s is small enough to be within census margin of error, and too small to establish harm in fact for standing
- *Reflects strengths and weaknesses of **Baker** formalist approach*
- *Last effort to use formalism to combat political gerrymandering. Struck down on formal grounds, but just told politicians to make sure it is absolutely equipopulous, which is what they have done.*

### **Who counts in the population base?**

- People serving felony sentences? Under existing census rules in NY they are counted in the district where they are serving felony sentences, even though they cannot vote while they are serving their sentences.
- Children?
- Undocumented immigrants? Could argue create significant needs in a jx and should be counted.
- Unregistered voters? Hawaii enacted constitutional amendment saying only registered voters count. *Carrington* law said you cannot register to vote at all, but here law is simply that unless you register to vote, you will not be counted for apportionment. (Not clear why, b/c missing out on more rep in Congress.) **Sustained.**

### **Is it appropriate to apply 1P/1V to govts on the local level, where branches of govt are often combined?**

- Maybe should allow for more flexibility at local level
- Question is always whether deviation is high enough to break up the existing boundaries
- Fairly standard state deviation: 10-15%
  - Neuborne's experience is that 10-15% deviation is upheld if boundaries are local
  - If higher up, then usually forced to redraw
  - Congressional level: "brutish" mathematical equality (**Karcher**)
- **Early school board cases**: post-*Brown*, school boards failing to integrate. Subject to 1P/1V because they have legislative power. Neuborne thinks based on racial grounds. (See return to this question on following page.)
- ***Board of Estimate v. Morris (1989)***



- Facts: City structure used to have Board of Estimates: elected mayor (2), elected comptroller (2), city council with a president elected from the whole city (2), boro presidents (1 each). Voted on budget and major contracts. Rep distorted b/c residents in less populous boros (Staten Island) have same vote on B of E than residents of other boros.
- Question: should **Baker v. Carr** apply to this local level? It's representative govt, but doesn't look like a legislature.
- Holding: **Baker and 1P/1V applies to local level**; violation of EPC b/c boroughs have widely disparate populations, and B of E handles big budget issues.
- *Neuborne*: Now mayor has all power. This case turned an imperfect representative structure into a unitary executive structure. That's not what **Baker** was about. Maybe that's what happens, though, when you drop **Baker** onto the local govt structure.
- **Jackson v. Metropolitan Utility Dist.**: 1P1V does NOT apply to local utility board – which, while elected, is a single-purpose district (operating electric co.). Not performing legislative tasks.
- **Salyer v. Tulare Basin (1973)**
  - Facts: Water dist. in CA builds dams and controls flow of water to ppl in valley (77 ppl, but really big commercial farms). Statute sets up board w/ vote confined to landowners, and votes apportioned by acreage. So big landowners get to control how water is used; won't want to direct water to municipal pools, residents' shacks, etc.
  - Holding: While a local govt unit, district does not have general-purpose power that **Baker** is meant to address. Therefore not subject to 1P, 1V. (Fact that only 77 people covered makes it easy case, b/c hard to see a distortion.)
- **Ball v. James (1981)**
  - Facts: AZ water district covers ½ of AZ pop., incl. all of Phoenix. Allocates water to Phoenix and large agricultural landowners, and yet voting power is controlled by large landowners in late 70s and early 80s.
  - Question: is this a political inst. exercising the kind of power that should be subject to **Baker v. Carr**?
    - In other words, does this dist. look more like the B of E in **Morris** (lots of power, affects lots of ppl, subject to 1P/1V) or the water district in **Tulare** (single-purpose entities not subject to 1P/1V)?
  - Holding: **single-function districts exempted from 1P, 1V.**
    - District doesn't exercise general govt functions
    - Primary purpose is relative narrow (just stores, conserves, delivers water)
    - District's power does not legality of property-based voting scheme (power is incidental)
  - *Neuborne*: does not have a sense of which approach is right. Not right to apply **Baker** to everything in a 1-size-fits-all way, esp. b/c **Baker** is somewhat flawed itself. On the other hand, it's hard to overpower entrenched groups via democratic process. (N.B.: AZ did eventually manage to overhaul constitution of water board as cities grew.)

- **Given precedent we have today, would school board cases come out differently?**
  - o Look like single-purpose districts
  - o Early 1P/1V cases were race cases, even when race was not explicitly discussed
    - Court often had race in mind
    - ***Vlast v. Colm***: standing to challenge establishment clause; most ppl think this case is about religion, but it was really about fear that white religious schools would drain white students from integrated schools, and make ***Brown*** impossible to enforce.
  - o But when race is pulled out of equation, we get decisions like ***Tulare*** and ***Ball***
  - o The narrower the entity's governance responsibility, the more it looks like ***Ball***
- **Should 1P/1V apply to the election of state judges? "One person, one judge?"**
  - o State judges do have general governance power
  - o But judges so far are exempt from 1P/1V
    - Judges not supposed to represent constituents' interests.
    - Compelled to rule based on what law requires, w/o regard for what constituents want (ideally)
  - o Possible argument in favor of applying ***Baker*** to judges:
    - Distorting allocation of scarce resources (wait times for trials in different locations, e.g.) Neuborne has argued this twice and lost.
    - Representation argument:
      - A crim defendant has equal chance of appearing before judges from different districts, some more punitive than others
      - Judges will say they have loyalty to the law, not constituents
      - Retort: in close cases, judges differ, and voters in one district will be better able to effectuate their wishes than voters in another district

## **GERRYMANDERING**

***Gomillion v. Lightfoot*** (see p. 7): 15<sup>th</sup> Am. violation to gerrymander minorities out of district

***Gaffney v. Cummings*** (1973): gerrymander to protect incumbents of both parties does NOT violate 1P, 1V just because it minimized people's voting power

- "packing": putting unnecessarily large majorities together
- "cracking": splitting people who could control district across multiple districts
- This puts pressure on the antecedent primary, where the competition will now actually occur. But ***Lopez-Torres*** is most recent law on primary and shows that primaries may not allow for fair competition.
- Argument in favor of this system: virtual representation
  - o Even if your vote is swallowed up and you lose because of partisan gerrymandering, your neighboring district follows your views and the legislature adequately represents the leanings of all citizens
  - o Pretty close to proportional representation (allocation of seats based on gross vote), which liberals like, so why is this problematic?

- Neuborne: Athenian democracy is option he likes

**Karcher v. Daggett (see p. 24):** partisan Dem gerrymander (*Gaffney* was cooperative). Court uses formalistic 1P/1V rule to toss out clear political gerrymander.

- Stevens concurrence: Court should supplement population equity std with additional criteria, like *Thornburgh* factors (p. 14). Should look at shapes of districts: clean lines, or lines that follow cities or rivers? Or ridiculous lines without any good reason?

**Davis v. Bandemer (1986):** theoretical cause of action for political gerrymandering, but level of exclusion that need be shown is incredibly high (not much short of Nazi Germany)

- Effort must be so systematic and sustained that minority group is fundamentally excluded
- Politics is more fluid than race
- Only one case has ever satisfied this test: election of judges in NC (at-large election with about 70/30 split between Dems and Repubs – if this was racial split clearly would not be legal [in 220 elections only 1 Republican elected]); case wins in 4<sup>th</sup> Circuit
  - Problem is that NC turns Republican so quickly that in next election a significant number of Republican judges are elected. This is why White wants to stay out of political gerrymandering, because political views are so fluid.

**Vieth v. Jubilizer (2004):**

- Facts: Redrawing of district so that Dems elect 5 and Repubs 15 (in a state that is about evenly split). 14 of 15 Rep seats are impregnable. Blatant gerrymander.
- Scalia Plurality: Claim is nonjusticiable. Issue is a political one. *Davis* std doesn't work; no baseline.
- Liberal wing can't agree on a single standard, and thus prove Scalia right:
  - Souter's concurrence has five variable test, each not quantifiable, and not ranked in importance
  - Stevens says to go to *Thornburgh* analysis
  - Breyer and Ginsburg say don't go to level of individual districts, but look to political power in state itself to see if it has been unfairly distorted
- Neuborne: latter two tests make sense; wishes liberals had agreed on one of them. How could Kennedy agree when liberals couldn't?

**Districting to protect partisan power/incumbents = permissible, nonjusticiable**

**Districting to protect racial minorities = impermissible, justiciable**

Neuborne:

- Would have *predicted* that a system would allow districting to protect minorities but not to protect incumbents
- Would have *understood* a system that allowed both or neither;
- Impossible to defend current system – this is exactly what Frankfurter warned about (if you let judges build a system, they will build one that is indefensible; judges do it ad hoc, case-by-case, and are not democratic theorists)

There are no more *Shaw* cases because there aren't dumb lawyers. Described as politically partisan districts when really race is in mind. Something massively dishonest now in system because the rules are wrong.

## **RACIAL REPRESENTATION**

### ***UJO of Williamsburg v. Carey (1977)***

- **Facts:** Reapportionment of state legislature arguably creates Section 5 violation by diluting minority power of Williamsburg. DOJ tells NY to create a better plan. New plan creates 2 black-controlled districts instead of 1, but in doing so breaks up Hasidic district into two halves (cracked). United Jewish Org (UJO) claims 14<sup>th</sup>/15<sup>th</sup> Am. vote dilution.
- **Holding:** 14<sup>th</sup> Am. not implicated, and therefore no strict scrutiny, when racial majority hurts itself to bolster power of racial minority.
  - o Strict scrutiny triggered when majority hurts minority
  - o Permissible for NY to draw lines on racial grounds b/c it was done in trying to comply with Section 5, and avoiding VRA violation is a compelling state interest.
- Problems:
  - o Assumes white pops (Hasidic, non-Hasidic) are homogenous, fungible
  - o Sets up impossible std: cannot be that reliance on a statute allows a state to violate the Const.
- **Substantially eroded by *Shaw v. Reno*, below**

### ***Shaw v. Reno I (1993)***

- **Facts:** triggered by same DOJ maximization policy as in *UJO* – NC created 1 minority district but could have made 2; DOJ rejects – so NC creates “I-95” district that snakes through state. Challenge brought by whites in new district.
- Court avoids question of what the cognizable harm to whites is. Sticks to formalism.

### ***Shaw II (IMPERMISSIBLE TO BASE DISTRICTING ON RACE, EVEN WHEN BENEVOLENT)***

- Rejects much of *UJO v. Williamsburg* – O'Connor says race is so volatile that should cause discomfort whenever it is used, even when aim is to help minority
- No Section 5 justification for snake district, b/c original plan that did not include it was not retrogressive
- No Section 2 justification, either, b/c *Thornburg* requires geographically compact minority and there is none here (squiggly shape of district)
  - o *Neuborne*: why only look at districts? Why not look at state as a whole?

### **Strict scrutiny only triggered when it's established that reason for redistricting was predominantly racial.**

- Easily proved in *Shaw* b/c of district's shape and DOJ's demand that another black district be created. Clearly unconstitutional.
- But *Easley* makes it much harder to mount a *Shaw* challenge (see below)

- Normal-looking districts that were nevertheless drawn with racial intentions: unconstitutional (*Miller v. Johnson, 1995*, admitted drew lines with racial purpose).
- Lesson of *Miller*: redistricting now done with absolutely nothing in the record about race, even when race is probably the motivation.

**Once strict scrutiny triggered, only compelling state interests are compliance with Section 2 and 5 (no retrogression).**

***Bush v. Vera (1996)***

- 3 funny-looking districts can't be explained by anything other than race, which **demands strict scrutiny**
- **No compelling state interest**, because:
  - o No possible VRA violation to avoid
  - o Decency (aim of remedying past discrimination) not compelling interest. **Only a compelling interest if specifically remedying identifiable discrimination in identifiable compact district.** (Same focus on small districts as *Shaw* – why can't focus be on a statewide problem to be fixed?)

Note: When federal judge strikes down state statute, need convene three judge court, including another district judge and a Circuit judge, with an automatic appeal to SCOTUS – designed to inhibit ability of single judge to overturn state law, but became mechanism for SCOTUS to get at civil rights cases; only residue of this jurisprudence is challenges to statewide apportionment statutes – three judges and obligatory appeal right to SCOTUS that SCOTUS must hear

***Easley v. Cromartie (2001)***

- Facts: Officials say trying to create a Democratic district, and the greatest predictor of voting is race, b/c blacks overwhelmingly vote Dem. **Mixed-motive case.**
- Holding: Was erroneous for lower court to find that race was the dominant motive (really about evidence and proof of fact.)
- Implication: **As long as govt maintains that motive was political, rather than racial, districting will not be found to violate *Shaw*.**

**LINES OF AUTHORITY CONVERGE**

Three lines of authority:

- Section 2 vote dilution claims
  - o ***Thornburgh v. Gingles*** criteria: compact group w/candidate of their choice, history of vote dilution, history of inability to elect candidates of their choice
  - o Constitutionality stable for now
- Section 5 retrogression claims
  - o Covers only jxs with <50% vote turnout and some sort of voting test when statute was enacted
  - o Assuming subdivisions are covered entities
  - o Non-retrogression principle comes into tension with DOJ maximization principles

- Racial reapportionment claims
  - o *Shaw*
  - o Unconstitutional (EP violation) for race to dominate reapportionment process, even when trying to help minority
  - o So far, can mount adequate defense by saying that you're just complying with Section 2 or 5. Query how long that will last.

These three lines converge in *LULAC v. Perry* and *Georgia v. Ashcroft*

*Georgia v. Ashcroft* (see pp. 13-14):

- Now really easy to pass Section 5 – only have to demonstrate some benefit for minorities somewhere else. Question becomes whether minorities are better off in the state than they were before.

*LULAC v. Perry* (2006)

- Facts: Republican reapportionment in TX. Only majority-Latino district split to scatter Latino voters and save Repub incumbent (Bonilla). Another district split to scatter black voters and expose Dem incumbent (Frost, who was consistently supported by black voters). Elsewhere, another long, thin district created to pick up Latino voters.
- How to challenge?
  - o Not under Section 5
    - Under *GA v. Ashcroft*, new Latino district compensates for cracked one – so no retrogression (essentialist thinking)
    - Republications at DOJ opt to not interpose Section 5 objection to Frost district, even though DOJ staff recommended it.
      - Think about how this Section 5 challenge would have come out
  - o Section 2 challenge brought by Pls
    - Latinos who used to live in Bonilla district can no longer elect candidates of their choice b/c they've been cracked into 2 districts (+ racially polarized voting in TX, + history of being unable to elect candidates of their choice)
      - *Govt defense*: should apply *GA v. Ashcroft* to Section 2. If trade-off is good enough for Section 5, it's good enough for Section 2.
    - Blacks in Frost district had significant power (25% of pop) that has now been diluted
      - *Govt defense*: no cohesive group large enough to elect cand of their choice, under *Thornburgh* – not enough to show that group is 25% of pop and can align with others to elect a candidate
- Holding (Kennedy):
  - o Frost reapportionment upheld. **Cannot bring an effects challenge under Section 2 if pop. is below 50% threshold.**
  - o Bonilla reapportionment struck down as violation of Section 2. **Reject govt argument that trade-off under *Ashcroft* avoids Section 2 violation.**

- In *GA v. Ashcroft*, Court said there were 2 standards: Section 5 and Section 2! Section 2 was supposed to be about electing candidates of your choice. Can't dilute votes of ppl in one part of state just b/c voters in another part of state get more power.
- Court not ready to adopt functionalist approach to Section 2 – would require Court to answer impossible questions about coalitions
- Even if trade-offs were ok under Section 2, this trade doesn't work – don't know how this new dist will work (it's massive, pop is diffuse, and there's no history of racial block voting in it).
  - Is Ct. saying NO trade-offs under Section 2? Or just not this one?
- Souter dissent: Should heed *Ashcroft* and look at Frost reapportionment *functionally*. Real effect is that voting power was diluted.
- Souter/Ginsburg part-dissent, part-concurrence: Would allow Section 2 challenges for influence districts and coalition districts (should not need 50% threshold of pop.)
- Stevens dissent: None of the gerrymandering was racial – it was all political, to benefit Republicans.
- Scalia/Thomas part-dissent, part-concurrence: Bonilla district destruction was political rather than racial. Creation of long, thin Latino district may violate *Shaw*, or may be saved by fact that it was created to comply with Section 5 when Bonilla district was destroyed. **Leaves open question of whether *Shaw* conflicts with Sections 2 & 5.**

## **MONEY & POLITICS: CAMPAIGN FINANCE**

Can we even distinguish between campaign speech and issue speech?

- **Campaign speech** includes some mention of imminence – i.e. “we are going to do X” – it's targeted and designed to achieve an imminent result
- **Issue speech** might allude to something that's going to happen at some point in future, but it's abstract advocacy; it's more diffuse

Problem with any definitions: tension between **overbreadth** and **vagueness** doctrines

- **Vagueness doctrine** requires specificity, esp. in 1<sup>st</sup> Am. context
- **Overbreadth doctrine** forbids laws that regulate permissible speech along with impermissible speech

**McCain-Feingold Bill** (Bipartisan Campaign Reform Act) tries to find balance with objective criteria: 60 days before an election + candidate's name/face + cost \$10k or more + tv or radio + likely to reach at least 50,000 people

- If meets those criteria, then it's campaign speech, so no treasury funds (PAC funds ok)
- Even that is imperfect – could sweep up some issue speech
- Upheld in *McConnell*, but eroded badly in *Wisconsin Right to Life II* - may have returned to something close to *magic words*

**Questions to ask about any money entering or being spent in campaign system:**

- SOURCE?
- SIZE?
- DISCLOSURE?
- TIMING?

***Buckley v. Valeo (1976, per curiam)***

- Omnibus facial challenge to campaign finance statute (containing clause re speedy judicial review) – no actual case or controversy
- Neuborne: court writes “comprehensive law review article” – shoddy decision-making
- Holding:
  - o **“Magic words test”**: it’s campaign speech if you say ‘vote for/against’; it’s issue speech if you don’t.
    - Bright line, but obviously flawed
    - Eventually overridden by McCain-Feingold
  - o **Disclosure rules upheld**, with exception for small donations to controversial parties or organizations
  - o **Cannot regulate expenditures** – either by campaign or by supporters – b/c expenditures are speech and must be protected as such
  - o **Can regulate contributions**, b/c contributor not actually doing any of the speaking, so it’s an indirect 1<sup>st</sup> Am. exercise.
    - **Corruption prevention**: permissible rationale
    - **Equality**: impermissible rationale
    - \$1,000 cap on contributions to federal campaigns upheld, with \$25,000 cap on contributions in any given year
- Brennan: **Money and speech virtually interchangeable**.
  - o Metaphor of gas in a gas tank: money is the gas that you put in the gas tank of speech. Money enables the speech, the sine qua none of the speech.
  - o BN: the danger of brilliant metaphor. Holmes wrote brilliant metaphors but got a lot of things wrong. BN says this is a wrong metaphor – the right metaphor is that of a car race, where one person has all the gas and the other person has none.
- No other western democracy accepts that the regulation of \$ is the regulation of speech
- BN: when one group has an edge over everyone else, we don’t generally “level down” – i.e. deprive that group of the thing giving them the advantage. Is \$ different?
- Current court’s view:
  - o Conservative wing: can’t regulate either contributions or expenditures
  - o Stevens, Ginsburg, Souter, maybe Breyer: must regulate both
  - o Alito, Roberts, and maybe Breyer appear to be only ones trying to make ***Buckley*** work.
  - o Conceivable that it could be reversed soon, but more likely that portions of McCain-Feingold that regulate corporate spending will be struck down.



**Buckley** requires radical, fictitious distinction between...

- **CONTRIBUTIONS**
  - o Soft money (i.e. issue speech money or independent expenditures) – not regulated under **Buckley** but covered in part by **McCain-Feingold** (campaign speech masquerading as issue speech + corporate treasury funds paying for indep. expenditures)
  - o Corruption rationale
- **EXPENDITURES**
  - o No corruption rationale for regulating if candidate already has the funds.
  - o But Neuborne thinks could extend corruption rationale b/c unlimited expenditure rule creates *unlimited demand for contributions*, which could lead to corruption.

## **LIMITS ON CONTRIBUTIONS**

### **Source Limits**

- **Aliens**
- **Corporate treasury funds**
- **Labor union funds**
- **PACs (associated with another org)**
  - o Contributions to PACs – *restricted (Cal Med)*
  - o PACs' contributions to campaigns – *restricted (NCPAC, Shrink)*
  - o Indep. expenditures by PACs – *Unrestricted*
- **527s (not affiliated like PACs)**
  - o Unanswered question: limits on contributions to 527s? (Any corruption rationale?)
    - Is money given to 527 a contribution, or merely a pooling to get over collective action problem for independent expenditures?
    - A single individual could certainly make independent expenditures
    - Courts split and S. Ct. has not yet decided
  - o No disclosure rules (e.g. Swift Boat Veterans)

### **Size Limits**

\$1,000 cap on state campaign contributions from PACs or persons **UPHELD**

- First upheld in **FEC v. NCPAC (1985)** on grounds that PAC with money is just like a contributor and will have undue influence over candidate if they can contribute too much
- Upheld again in **Nixon v. Shrink Missouri (2000)**
- (**Buckley** upheld same limit on contributions to federal campaigns)

\$5,000 limit on contributions to PACs **UPHELD**

- **Cal. Med. Assn. v. FEC (1981)**
- PACs' independent expenditures remain unregulated

\$250 limit on contributions to anti-referendum campaign **STRUCK DOWN**

- *Citizens Against Rent Control v. Berkeley (1981)*
- b/c no candidate, and therefore no corruption rationale

\$400 limit on contributions to state campaigns in VT **STRUCK DOWN**

- *Randall v. Sorrell (2006)*
- **Contributions limit can't be so low that, practically, candidate would be unable to raise funds to run a competitive campaign against a well-financed opponent**
  - o Functional inquiry that differs by location
  - o Court must look into how much it costs to run a campaign

Limits around \$1,000 to \$2,000 will be **UPHELD**

Law letting opponents of self-financed cand raise 3x the original contr cap **STRUCK DOWN**

- *Davis v. FEC*
- Discriminatory vs. rich candidates

### **Disclosure Requirements**

*Brown v. Socialist Workers (1982)*: state cannot require minor party to disclose contributors and recipients of campaign funds when evidence of private and govt hostility suggests reasonable probability that party's members will be threatened or harassed

- Consistent with safety valve in *Buckley* (small donations to controversial parties or orgs are exempt from disclosure rules)

**527s**: no disclosure rules

### **LIMITS ON EXPENDITURES**

By candidate: *NO control (Buckley)*

By rich folks:

- *NO control, as long as not coordinated with campaigns (Buckley)*
- *Control if coordinated, b/c then treated as contribution*

By political parties:

- *NO control over a party's indep expenditures (Colorado Republican I)*
  - o Very unusual scenario. Happened here b/c party couldn't agree on candidate.
- *Control over a party's coordinated expenditures (Colorado Republican II)*
  - o Otherwise opens too big a loophole
  - o Same scrutiny as for contributions
  - o No 1<sup>st</sup> Am. violation b/c no evidence that parties' ability to support candidates is frustration by limits

By PACs

By 527s

By corps and labor unions

By grassroots orgs

**Under current 1<sup>st</sup> Am. law (*Buckley and Randall*), could law be passed limiting campaign spending?**

- Neuborne thinks there's a good corruption argument
- Like in an arms race, competition motivates candidates to keep raising money
- Aim would be to stifle demand for contributions
- Argument for limiting indep expenditures:
  - o Same corruption argument
  - o If elected, candidate will feel beholden to actor who got him/her there – regardless of whether person is donating directly to campaign or funding indep activities outside the campaign
  - o Stevens always argues this, but so far only Ginsburg and Souter won over
- Cap could be set really high – only matters that it exists b/c it renders all \$ fungible
  - o If dirty donor offers a ton of \$, more incentive to try to get clean \$ elsewhere
  - o Neuborne: this argument should have been made in *Randall* and wasn't

**1<sup>st</sup> Am. and campaigns:**

- No one suggests that speech in a legislative chamber has Constitutional protection under the First Amendment – you can set time limitations, subject limitations, all sorts of controls in order to achieve purpose for which institution is existing
  - o Same goes for faculty meetings, etc.
  - o Maybe speech within a campaign can be thought of similarly – question of whether electoral campaign is a sufficiently bounded institution (as the Australian ballot is a bounded thing that allows for regulation)
- Neuborne would like someone to argue that...
  - o An electoral campaign is a very powerful speech-driven phenomenon designed to achieve a certain result; and
  - o It is bounded; and
  - o Speech within the boundaries can be limited in ways that speech outside of the boundaries could never be limited
- Question of whether there are any tests that could be applied to separate speech that is inside from speech that is outside bounds – Neuborne notes this is dangerous proposition
- *Citizens United* law has these boundaries – 60 days, candidate's face, etc.

## Corporations

Commercial speech cases say hearer has 1<sup>st</sup> Am. right to hear, *not that* corp. has right to speak

***First National Bank v. Bellotti (1977):***

- Bank wants to spend treasury funds on referendum question.

- **Ban on corporate spending in relation to any elections violates 1<sup>st</sup> Am. rights of people to hear what bank has to say.** Court says not deciding whether corps have 1<sup>st</sup> Am. rights.
- White's argument in *Bellotti* about why corps shouldn't be able to spend on political speech:
  - o b/c people buying Coors never intended to give Coors \$ to spend on politics. Ditto for labor unions.
  - o People who are worried that *Citizens United* will overturn ban on corporate \$ think that there will soon be a liberal car and a conservative car, for that reason.

***Austin v. Mich. Chamber of Commerce (1990):***

- **UPHELD ban on corporate treasury funds in contested elections** (not necessarily referenda)
- Rule is narrowly tailored b/c there's an exemption for segregated funds.
- Introduced new idea of corruption, the distorting effects of aggregate wealth
- Not clear whether meant to address a corruption or an equality issue.
  - o Neuborne thought it was an equality issue when he worked on it, but it couldn't now be sustained on those grounds.
  - o That's why it's shaky precedent now that Court is considering *Citizens United*.

***McConnell v. FEC (2003):***

- **Facts:** McCain-Feingold tries to codify *Austin* by saying corps don't have any 1<sup>st</sup> Am rights, so they can't make contributions from the corp treasuries to national political parties, contribute to candidates, or make indep expenditures w/in the electoral field.
  - o Amended 1971 Fed. Election Campaign Act, which defined campaign speech as having the "purpose and effect" of influencing an election's outcome
  - o McCain-Feingold meant to narrow that with objective criteria:
    - <60 days before election
    - On tv or radio
    - Contains candidates name or face
    - Costs \$10,000 or more
    - Likely to reach at least 50,000 people
  - o Corps. claim definition is unconst. vague and overbroad in violation of 1<sup>st</sup> Am.
- **Holding: Statute upheld facially but may be challenged on as-applied basis** (and is, in *Wisconsin Right to Life II*).
  - o Ct. invokes constitutional avoidance doctrine – construes definition narrowly to essentially be limited to 'vote for/against' or functional equivalent
  - o Hints at *Buckley*'s **magic words**
  - o Ct. was reluctant to find statute overbroad b/c remedy is so drastic – would have to topple statute and there'd be no regulation at all – and corps well-equipped to bring as-applied challenges (unlike, e.g., civil rights plaintiffs in South)
  - o Ct. also sustains limits on corporate and rich ppl soft \$ contributions to parties – b/c it's a close enough conduit to candidates. This part of McCain Feingold is not being challenged.

- What will happen in *Citizens United* decision?
  - o Court may overturn *Austin* – if that happens, there’s no limit on corporate funding and McCain-Feingold is clearly overbroad
  - o Court may also leave *Austin* and McCain-Feingold intact but rule that there’s a de minimis exception for grassroots orgs that get 1% of funding from corporations

### **Grassroots organizations**

- ***FEC v. MCFL (Mass. Citizens for Life): EXEMPTION FOR GRASSROOTS CORPS. W/NO CORPORATE FUNDING***
  - o Group organized in corporate form, but free of corporate funding, distributed abortion voter guide.
  - o Ct. found speech was functional equivalent of ‘vote for/against’ but exempted group from statute b/c received no corporate money.
- Answers rich folks question – no corporate money, so can pour money into campaign
- Issue in *Citizens United*: does de minimis corporate funding (1%) close off grassroots exception?

### ***Wisconsin Right to Life II (2007)***

- **The as-applied challenge that McConnell invited**
- **Facts:** WRTL is grassroots corp. but it gets corporate funding. Produces ad that meets objective McCain-Feingold criteria for campaign speech (during Feingold Senate campaign, used name, etc.). Ad says, “contact Senators Feingold and Kohl and tell them to oppose the filibuster” of judicial nominee vote.
- **Holding:** WRTL’s ad is not the functional equivalent of campaign speech.
  - o Test for as-applied challenges to McCain-Feingold campaign speech restrictions: **could any reasonable person looking at this ad think it was anything other than a campaign ad?**
    - Here, yes – could be about judicial nominees
  - o Only look at 4 corners of ad – not at context
  - o Too vague to look at subjective intent of speaker, or reasonable understanding of listener – can’t administer that kind of test
- *Neuborne and others think that this revives Buckley’s magic words test*
- Court also warns that the statute may cover so much const protected speech as to be unconstitutional

### ***Citizens United v. FEC (2010?)***

- CU = corporate structure with 1% corporate funding. Makes “Hillary: The Movie” (smear) during Democratic primary.
- CU sort of concedes that it’s campaign speech b/c creating test case for 1% funding question. But not clear whether it meets objective factors (timing, cost, name/face, etc.).
  - o It’s a movie not on tv – only available for download
  - o Not ‘thrust on viewer’s consciousness’ like a tv or radio ad is
  - o Not clear would be seen by 50,000 Democrats
- Issue for court: does 1% corporate funding matter?

- Really should fall within MCFL exception for grassroots orgs
- Big question is whether 5 justices going to throw out the whole system (i.e. go to facial unconstitutionality – covers so much protected speech that it can't be maintained)
  - Could revisit *Belotti* and *Austin* and say that corporations are persons and the govt has no right to keep them out of the electoral tent
  - Or could do what Neuborne suggests in his brief: do what Court did in *Austin* and avoid constitutional problem by reading statute really narrowly. Would be easy to do that here.

## THE RIGHT TO A FAIRLY ADMINISTERED ELECTION

No graduate degrees available in administering elections

All other democracies give the responsibility to civil servants – it's a career path

Elections are expensive, and we have a tendency as a culture to think we can run it off the books

We do that by getting private ppl to do it for free – volunteers organized by political parties

We get what we pay for

- Monumentally inefficient
- 5% of votes in every election are not counted, b/c they're lost or the machine breaks or some other glitch
  - Usually doesn't affect outcome
  - The votes that aren't counted are random, so they cancel each other out – and the closer the election, the more likely they are to cancel each other out
  - Others argue that poorer districts that are more likely to vote Dem are less likely to be counted, b/c they have lower capacity to deal with problem – but BN says the empirical data doesn't show this.

FEC is dysfunctional – meant to mirror how local election boards are set up

- 2 Dems and 2 Reps
- Almost always deadlock when considering whether to go after major parties
- End up expending their energy chasing Citizens United and the small parties who have no organized support on Commission
- BN brought a few suits 25 years ago saying something about this 2-2 structure is unconstitutional – it's like an oligopoly
  - But he couldn't answer the question of what he'd put in its place

Local political machines aren't interested in registering all unregistered voters, b/c they're nervous about how they would impact local balance of power

What BN would change, if he could:

- Voting on a weekend instead of a Tuesday. 15% spike in turnout in Mich. when they did this.
- Same-day voter registration.
- Professionalized election administration that would increase efficiency.

None of these are Const. issues – just policy choices

Voting machines that work:

- Technology problem
  - o Must be a back-up paper ballot generated
  - o Without it, chance of breakdown is high and chance of cheating is high
- Cheating problem

Debates:

- What if networks had to sponsor 3 presidential debates during campaigns, as a requirement for keeping their licenses?
- That would basically be a public subsidy to the candidates – free tv time
- Who decides who gets to be in that debate?
  - o Too many, and you don't have a serious debate
  - o Too few, and it's the status quo
- Arkansas Television case: should look at it like it's a tv journalist putting together a story. Producers from network should say who participates. (In this case, it was NPR.)
  - o That's generally what we do now. We offload the decision to a private actor, whether it's the League of Women Voters or a tv network.
  - o We should ask ourselves whether that's analytically and pragmatically the right thing to do.

### ***Bush v. Gore***

- Electoral college: disaster waiting to happen in so many elections
- FL's job is to select electors who will go to Washington and vote for prez in Dec.
- Two problems with FL's election:
  - o Undervote problem
    - Know how many votes are cast on machine, but machine doesn't read the vote – either b/c left blank or was inadequately manifested on ballot, so scanner doesn't read it
  - o Overvote problem
    - Voters voting for two ppl (realize they made a mistake, cross it out, correct it – problem for machine counting)
- Machine count in FL results in incredibly close count – margin of a few hundred – so ppl start saying that machine count may not be accurate count of popular vote, b/c of under- and over-vote problems
- No real provision in law for machines screwing up and hand recounts – there ARE provisions for machine recounts, which they do – Bush lead shrinks even further – but then statute says, at the end of 7 days after the 2<sup>nd</sup> machine recount, the FL secretary of state certifies the election and says who the winner is
- Dems go into FL state courts in several jxs requesting manual recounts of under-votes
  - o Repubs argue there's no provision for manual recount and 7 days are over
  - o FL S. Ct.: probably looked at circs and said, geez, there's a hole in our statutes. We have an equitable obligation to protect the ballot, and there's a FL Const. right

- to vote. So they order manual recount of the under-votes in 4 counties. Rest the opinion on shaky amalgam of FL statutes (which were far from precise), FL Const., and their inherent equitable power as a court sitting in a democracy.
- Manual count begins, clear that it's favoring Gore, begins closing gap
  - **Bush I**: Bush campaign goes to S. Ct., argues that Art. 2, Clause 1, Section 2 – setting up electoral college – says electors shall be chosen in a manner decided by state legislature
    - o And indeed, for many years, state legislatures actually just chose electors in a number of states
    - o So campaign is saying that FL S. Ct. was trumping the unequivocal power of the FL state legislature under Art. 2
      - BN thinks this is a joke b/c the FL legislature is created by the FL constitution
      - FL legislature obvi can't act beyond its const limits, as defined by FL constitution
        - Would be like a single if there was no baseball
        - No meaning if operating in a vacuum – b/c its only meaning is within the system that created it
      - And in fact, this argument only gets 3 votes (Scalia, Thomas, Rehnquist)
    - o Majority says to FL Sup. Ct., we don't know what you were doing, so we vacate your opinion, and tell us (again) what you were doing
    - o So FL S. Ct. reissues opinion in total statutory construction terms – as a matter of construction of FL law, there has to be a manual recount if there's a plausible showing that machine recounts have failed, and we think there's a plausible showing of that. So there has to be a recount of the under-votes and maybe the over-votes. So look at ballots and see if you can ascertain the intention of the voter (hanging chads). Gave 12 days, and it will all come back to FL S. Ct. for a final ruling on all the ballots.
      - Elector deadline (6 days before electoral college vote – from Safe Harbor Act after Hayes/Tilden election) approaching. Possible that FL votes wouldn't be counted, and then no candidate would have a majority, and then vote would go into House of Rep., which was evenly split...and then Strom Thurmond would be prez (!).
  - Goes back up to S. Ct. a second time – **Bush II** – campaign asks Ct. to stay the count – court votes 5-4 to grant the stay, making it impossible for FL to meet the Safe Harbor deadline
    - o Scalia defends decision almost exclusively on Art. 2, Clause 1 grounds – says it would be worse to let unqualified ppl vote (counting decision of state legislature) than to not count some votes → this only gets 3 votes
    - o 7 members of Ct. agree that FL did something wrong (only Gins and Stevens disagree)
      - Other members say it's a problem that there will inevitably be different standards used by different ppl doing recount in different counties
      - Not enough to have S. Ct. overseeing



- Will inevitably create unequal voting power – violates one-person, one-vote
  - List off all cases starting with *Reynolds v. Sims*
  - Violation of one-person, one-vote for different counties to count votes differently
  - BN does think that there's an equality problem – he just thinks the remedy was all wrong! Dissents agree (4 votes) – say should remand to FL court to create a single standard for how to count votes, which would be fine if they can do it by deadline
  - But 5 votes say they'll never make it, it can't be done – so if can't fix Equal Protection problem before deadline, they have no choice but to freeze recount
- Terrible story of democratic failure, and of S. Ct. overreaching, b/c arguably this really was a matter for the FL courts
- But case is actually very hard when you consider whether there was an equality problem, and whether the problem could have been fixed by the Dec. 18 deadline
- Neuborne thinks Obama was soured on courts b/c of this case, and that's why he's not aggressively working on judicial nominees, reinvigorating Justice Dept.
- Also, big question is whether case will sour young people on courts – too soon to know