**The Law of Democracy Outline**

**(Neuborne, Fall 2009)**

Is there a Constitutional right to vote?

75% of the amendments have to do with voting. Many of the important strides in voting rights have not been judicial.

How we exclude people

* First tier
* Second tier: People can vote, but their votes are diluted
* Third tier

Judicial Precedent

1. Direct failure to protect voting
   1. *Minor* (women), *Giles* (Blacks/literacy tests), *Richardson* (felons), *Lassiter* (literacy tests), *Crawford* (photo ID)
   2. Also second tier disenfranchisement techniques (can technically vote, but their votes are diluted or made worthless)
      1. Gerrymandering people IN and OUT
      2. Nomination process
2. Cases where court affirmatively protects the right to vote
   1. *Carrington* (1965, first time court develops right to vote), *Harper* (strikes down poll tax/property qualification), *Kramer* (school board elections not only for taxpayers and parents), *Dunn* (strikes residence req- durational)
   2. Arguments against disenfranchisement
      1. Textual has never really been done
      2. Often about purpose- if you can prove purpose, usually in your favor
      3. Can argue the effects test, or intent of the Const.
3. ***Minor v. Happerset***: (1874) Tier 1
   1. Woman suing, says she has a right to vote under EP and P&I
   2. Judge says nope, 14th Amend is about male enfranchisement. Not a P&I. Look to originalist intent- didn’t intend women to vote.
4. ***Giles v. Harris*** (1903) [Holmes] Tier 1
   1. AL Const imposed strict requirements for voting, but grandfathered in those who registered before 15th Amend- eviscerates 15th Amend and prevents blacks from voting.
   2. Not saying he doesn’t have a right, but more like the Court saying, what can we do?
      1. Won’t intervene. Don’t recognize a right to vote yet.
   3. If you look at Giles and Minor w/o courts, see that there isn’t a democratic route to enfranchisement- can’t vote
      1. After 15th Amend, §2 of 14th Amend dies- *have* to let blacks vote- can’t just accept less representation.
5. ***Richardson v. Ramire***z (1974) Tier 1
   1. Ex-cons say they have a right to vote under EP. Court says § 2 of 14th Amendment doesn’t require that non-males or rebels/criminals be allowed to vote.
   2. Just like *Minor*. But here, can say 15th Amend struck §2- Court doesn’t accept this argument.
6. ***Lassiter v. Northampton Bd. Of Elections*** Tier 1
   1. Says literacy tests are Const. Courts never struck these down- VRA later does. Not facially Unconstit- didn’t mention race.
7. ***Carrington***  Protects
   1. First case where SC says right to vote is attached to something other than race or gender
   2. TX said military couldn’t vote in TX, too transient.
   3. SC- Voting is VERY important, must have a good reason for giving it to A and not B. Otherwise, violate EP
   4. Not a super strong holding- rational reason requirement. As π was planning to stay in TX, no good reason. Law also not narrowly tailored.
      1. SC invalidates facially
8. ***Harper*** Protects
   1. VA has a poll tax.
      1. Textual arg in favor, says Const forbids fed poll tax, by being explicit, must mean state poll tax is ok
   2. SC- Wealth has no relationship to capacity to vote
      1. Read today as an absolute ban on anything that smacks of $$ or property.
   3. Following case- AZ limits bond vote to taxpayers- only those who would have to pay for it.
      1. SC- NO. May have a future stake.
9. ***Kramer*** (1969) pg 44 [Warren} Protects
   1. Key case- can’t be viewed narrowly
   2. Limited purpose election- School board elections limited to property taxpayers and parents.
      1. May be rational, but still Unconstit.
      2. Voting is a fundamental right, thereby protected by strict scrutiny and EP.
         1. De facto creation of the substantive right to vote
   3. Probably Kramer’s strict scrutiny that pushed society to try and disenfranchise people via second tier methods.
10. ***Dunn v. Blumstein*** Protects
    1. TN law that you have to live in state for so long before voting.
       1. SC says no, fails strict scrutiny.
       2. Not about race or pretext, but still, substantive right to vote involved.
11. How much survives ***Crawford v. Marion County***? Tier 1
    1. DMV photo ID to vote – SC upholds it.
    2. 4 opinions, dominant case governing right to vote
       1. Stevens/Roberts/Kennedy- law is Const facially, but could be problematic in the future as applied
          1. Say Harper/Carrington got heightened scrutiny because they were absolute prohibitions on voting, not because the voting criteria had nothing to do with voting.
          2. Adopt Burdick’s **balancing** **test**- balance severity of the interference with the right to vote/run for office, against the asserted governmental interest.
             1. Very subjective, how much does each thing ‘weigh’
          3. Not a real burden on most people, won’t knock out facially
       2. Scalia/Thomas/Alito- Const all around
          1. Don’t look at individs- look to general voter’s interests. Small burden. No room for as applied. Looks at EP, purpose- no bad purpose. Big change!
       3. Souter/Ginsburg- Unconstit
       4. Breyer- Unconstit
    3. SRK, SGB agree on what the right to vote means, disagree on balancing
    4. BN: should we use overbreadth analysis/reasoning in voting rights? Reasons were that it was probable the state was being used against people, and they lacked the resources to protect themselves- court acts prohpylactically.
       1. What SGB were doing.
12. ***Gomillion v. Lightfoot*** (1960) pg 85 Tier 1
    1. Gerrymandered blacks out of the city- could still vote, but not in a meaningful area
    2. Decide on 15th Amend, not 14th- don’t want to go down road of having to decide every group that should be protected from gerrymandering.
       1. Result- you can still gerrymander for political reasons
       2. What would be the limiting principle?
    3. Held you can’t use race to redraw lines (Purpose + Race)
13. ***Whitcomb v Chavez*** (1971) pg 529 [White] 2nd Tier
    1. Multi member districts, putting blacks in with tons of whites to dilute their votes.
       1. Several structures. Formally fine, but reality is awful.
    2. Declared Const
       1. Uses 14th Amend- no proof of racial/discriminatory purpose, arguing effects. (π said no purpose, gave it up)
       2. White uses purpose test, failed to show it.
          1. Might be willing to use knowledge standard.
14. ***White v. Register***
    1. Just like Whitcomb, but in TX. Using history of discrim to show purpose
    2. Strikes down the multi-member district🡪 only time.
15. ***City of Mobile v. Boulder***
    1. 3 person commission governs city w/exec, leg, and admin powers, elected at large. 3 posts in the city- have to live in your post, but everyone votes.
       1. Blacks could make up 36% of population in a post, but be overwhelmed by the white voters elsewhere.
    2. SC reiterates purpose.
       1. 14th and 15th both require it
       2. § 2 of VRA just codifies 15th, also need purpose.
          1. 1982 renewal in response to Mobile, codifies an effects test

**Statutory Remedies**

**Voting Rights Act of 1965**

1. **Section 5**
   1. Anti-retrogression. Argument that this was the only way it could be done, otherwise, just keep finding ways around the courts
   2. If a covered jurisdiction (test or device, sub 50% turnout) changes its rules at all, needs Justice Dept pre-clearance. Certify doesn’t adversely affect ability of minorities to vote.
      1. Changes in voting qualifications, prerequisites and “standards, practices and procedures with respect to voting”
   3. If pre-clearance denied, can appeal. If granted, not subject to judicial rev.
2. **Section 2**
   1. Prohibition against discrimination in elections
   2. Applies to all.
   3. 1982 renewal created an effects test, as well as a purpose test
      1. No longer just a restatement of 14th/15th
      2. Have to determine when there’s been an illegal effect.
   4. Gingles test
   5. Totality of the circumstances look
3. **Constitutionality of Section 5**
   1. Katzenbach 🡪 Sheffield, Dougherty 🡪 Morse 🡪 Gaston
   2. **S. Carolina v. Katzenbach** (1966) pg 461
      1. Upholds Const of Section 5
   3. **Sheffield** (pg 471) a city is covered
   4. **Dougherty** (pg 471) a board of education was required to seek preclearance
   5. **Morse**
      1. VA changed primary to a convention, had to pay $20. Struck down on other grounds, would have been a big deal to say Section 5 applied to party primaries
   6. **Gaston**
      1. Tried to bailout, court said no. You used to segregate in education, minorities still lower in education
         1. Limits the bailout if there is a showing that the group is vulnerable, and the entity trying to bailout is in some way responsible.
   7. **Connor v. Johnson** (2002)
      1. Orders of a fed judge imposing a change don’t have to be pre-cleared
      2. If the fed judge is simply accepting a proposal by the state (upholds a state reapportionment plan for example), it has to be pre-cleared.
      3. *Everything* that a state judge does requires preclearance
      4. Question of what the generative force was.
   8. **North Austin** (2008)
      1. Saying Section 5 shouldn’t apply anymore, don’t discriminate, let us out.
      2. SC- gives this one the opp to get out.
         1. Don’t address Const – will we ever? Why would π challenge Const rather than just try to get themselves out?
4. What’s covered?
   1. ***Allen v. Board of Elections*** (1969) pg 487
      1. Single member to multi member district covered
      2. Moving a position from elected to appointed
      3. Access to the ballot by independents
      4. Assistance to illiterate voters.
         1. After these 4, what wouldn’t be covered?
   2. *Presley v. Etowah Count Commission* (1992) pg 497
      1. Change system so now 6 people, 4 from the previous system, 2 new black districts- but they also changed the responsibilities of the positions, so the blacks don’t actually have power
         1. Blacks are getting elected, but don’t have power.
      2. SC first limitation on Section 5
         1. This doesn’t affect voting, is about governance
         2. Re-insertion of formalism into the process
            1. Earlier cases about functionality- asked if it was functionally about political power.
            2. Functional test, could argue *everything* affected voting
      3. (implicitly overrule Dougherty)
5. **Beer v. U.S**. (1976) pg 506
   1. **Imposes retrogression principle on Section 5** – even if you could have done a better job, as long as you don’t retrogress, you don’t trigger Sect. 5.
      1. Rejection of maximization principle
   2. If brought under Section 2, would have been an effects test.
6. **Georgia v. Ashcroft** (2003) pg 511
   1. Takes black districts down from 53% to 47%, put the other 6% in contested areas- argue not retrogression, actually increased the power in other districts and will still win in the old one.
   2. SC- no retrogression.
      1. Functionality approach (in tension with Presley, where formally it was fine but functionally draining power, upheld it)
      2. “totality of the circumstances” argument- don’t just look at the district, look to power statewide
   3. Change in Act later, thought to reverse Georgia v. Ashcroft
      1. Put in an effects test to Section 5.
7. Beer and Georgia together**- an effects test, but only if there was retrogression**
   1. *Richmond*- couldn’t really show if there was a retrogressive effect, but purpose was clear, SC said no preclearance.
   2. *Reno v. Bossier*- essentially overruled Richmond
      1. **Can’t show purpose unless there is retrogression**! Imposes on Section 5 purpose test a retrogression requirement.
8. What is a Section 2 Effects test after 1982 renewal?
   1. Thornburgh 🡪 Johnson 🡪 Holden 🡪 LUAC 🡪 Bartlett
   2. *Thornburgh v. Gingles* (1986) pg 597
      1. For there to be an effect under the effects test, previously there had to be: (**Gingles Test**)
         1. (1) More than 50% of the group in a geographical unit
         2. (2) The minority is a cohesive voting block that tends to vote together and probably will in the future
         3. (3) Has to be racial bloc voting (whites won’t vote for you)
      2. Can also apply the effects test to dilution and submerging
      3. Me- doesn’t this test require that you already have had some power before you can have more removed? More like §5 retrogression and less about discrimination
   3. *Johnson* (1994) pg 627
      1. Dilution claim from FL reapportionment, could’ve done a better job, arguing that if the Gingles factors exist, have to maximize.
      2. SC says no, they’re necessary but not sufficient.
         1. “Totality of the circumstances”- if the judge likes it!
         2. This wasn’t a violation, just proportionality
      3. BN- prob makes proportionality test a presumptive defense.
   4. *Holder*
      1. Section 2 doesn’t apply to questions about the size of the unit or saying if something is single member district or not.
         1. County had the option to go to a 5 member district and chose not to, allegedly diluting the black vote.
         2. Scalia concurrence- not about voting! Section 2 doesn’t cover vote dilution claims
      2. Also requires you to look at a baseline, an alternative practice, to measure the existing voting practice.
         1. Dissenters- VRA meant to go beyond formal voting. When the state authorizes 2 alternatives and you choose the one that minimizes power, it should be a violation.
   5. *Voinovich*
      1. Section 2 can require the creation of “majority-minority” district, in which a minority group composes a numerical, working majority of the voting age population
   6. *LUAC*
      1. TX split up an influential minority block, but it didn’t meet the Gingles requirements
         1. Not a section 2 violation.
      2. Section 2 doesn’t require the creation of an “influence” district
   7. *Bartlett v. Strickland* (2009)
      1. **Held: Crossover (whites vote for blacks too) districts don’t meet the Gingles requirement that the minority is sufficiently large and geographically compact to trigger Section 2**
         1. No right to protect political coalitions
         2. Too political for courts to try to figure out where coalitions exist
      2. NC Const said you can’t split counties in redistricting, but the legislature did, worried about violating Section 2 otherwise.
      3. This case lies between Voinovich’s majority districts and LUAC’s influence districts- crossover district.

**Modern Voting Issues**

1. **White Primary Cases**
   1. Frankfurter- don’t get involved in politics! Judges shouldn’t decide what a Republican form of gov’t looks like- has tons of subjective components.
      1. Can’t do this piecemeal- can’t think that fixing the pieces individually, that you can put it back together and have a democracy machine that will work well.
      2. Have to look at the effect on the larger conception of democracy.
      3. These cases should have been decided by asking what role the primary plays in the democratic process- need an overarching conception of what you’re doing.
2. **Ballots**
   1. Viva voce- no official ballot, write down who you want. Not as secret
   2. Australian ballot- to stop ballot stuffing. But who decides who’s on it?
      1. Gov’t gets monopoly of deciding who’s on
      2. Also has to be a list of voters- makes sense for gov’t to officiate both sides
      3. Turnout dropped
3. How to get on the ballot?
   1. (1) Smoke filled room- leaders get together and choose
      1. If this is what the party wanted, could the state stop them?
   2. (2) Open convention- open to all party members, vote there
      1. Can be a farce if no one comes, chaos if all come
   3. (3) Closed convention – elected members convene and vote
      1. People in power already controlling
   4. (4) Primary
      1. Closed- only party members can vote
         1. Const b/c if you’re not part of the party, you’re asking to influence the outcome of how another group chooses
      2. Semi-closed- party allows independents to vote too
      3. Open- anybody can vote
      4. Blanket- all primaries are open to everyone, you can switch back and forth from position to position if you want
         1. Privilege centrist candidates- broader appeal to broad electorate, more people show up.
   5. View the party as an element of the state, or as an autonomous group?
4. **Nixon v. Herndon** (1927) pg 209
   1. TX says blacks can’t participate in Dem primaries. ∆ Says it’s political, out of Court’s jurisdiction
   2. Uses 14th to say Unconstit
5. **Nixon v. Condon** (1932)
   1. After Herndon, TX statute says party can prescribe qualifications of members/voters. Dem party *exec committee* said only whites. ∆ says 14th doesn’t apply, private actor (state party) rather than state.
   2. Court decides on technicality – exec committee is organ of the state
6. **Grovey v. Townsend** (1935)
   1. After Condon, Dem *convention* saying only whites can vote. Choice now coming from membership, not state.
   2. Court says not subject to 14th- exclusion is the product of private, possibly Const protected, activity.
7. **United States v. Classic** (1941)
   1. Election officials caught stuffing ballots in a primary.
      1. This is a corruption case, not a race case
   2. Gov’t argued that ∆’s had interfered with the right to vote.
      1. SC says primary is an integral part of the general election
         1. How to get around Grovey- say it’s so integral, that any regulation of the primary is state action.
8. **Smith v. Allwright** (1944) pg 212
   1. Overrules Grovey
   2. State compelled primary – that’s enough state action
      1. But what about conventions? Not state compelled. Still don’t know the answer.
         1. (I would argue become even more integral, can be publicly funded, finances are regulated)
9. **Terry v. Adams** (1953) pg 214
   1. Like Smith, but later. Jaybird party excludes blacks. Group of autonomous folks, but presumptively a member if a Dem. Have own primaries, Dem primary always elects the Jaybird election
10. End of White Primaries
11. **Tashian**
    1. CT has closed primaries, GOP wants to have Inds vote.
    2. SC strikes down statute- can have semi-closed if you want.
12. **Clingan v. Brewster**
    1. Small OK party wants to let anyone in, State says no.
    2. SC upholds ban on semi-open parties
       1. Small party attacking autonomy of other parties
       2. BN- not persuasive.
13. **Jones**- argue that blanket primaries are Unconstit (HOLDING?) (unconst, I think)
    1. Can have an organized raid- choose the weaker candidate of other party
    2. Your nominee may be someone who doesn’t have the majority of party support
       1. Associational value lost- not really representative of the party beliefs
14. **Washington Grange**
    1. All run in one big primary, candidates self-identify, top two go to general, regardless of party. Like a blanket?
    2. Self ID isn’t trustworthy- Dems can’t challenge if someone says they’re a Dem.
    3. SC doesn’t see a facial problem, may allow an as applied
15. **Lopez Torres**
    1. Nominees for judge chosen in a judicial convention (really a smoke filled room). Convention delegates essentially hand chosen by county leader. Challenging that they can’t get on the ballot.
       1. Formally, the system looks great. Functionally, it’s a disaster.
          1. SC refuses to go beyond formalism- a competence thing- how do they know what really goes on?
    2. Real question is standing.
       1. SC says only party leaders can raise issue.
          1. But they wouldn’t- system keeps them in power.
       2. Party itself has autonomy, but the members don’t- only party leadership has standing.
          1. This kills the autonomy issue- only person able raise the issue has no interest in raising it.
    3. *Eu* (1989) led to this (struck down rule that party leaders couldn’t endorse a candidate- a free speech ruling)
       1. Also had to do with party autonomy. Led to Court saying here, party autonomy to choose how they want.
          1. But there’s a statute mandating this method!

**The Right to Run For Office**

1. Standard of review?
   1. 1st Amend? Stable standard
   2. Equal Protection- unstable
      1. End up using this, get a de facto judicially protected right to vote. Is difficult to apply.
2. Constitutional “right to run for office”?
   1. BN happier with the 1st Amend argument: fundamental to the structure of gov’t, a way to associate with fellow citizens.
   2. But gets decided on EP grounds.
      1. Get a watered down version of strict scrutiny in running for office cases.

**Access to the Ballot**

1. Questions to ask
   1. Right to fun for office as an independent candidate
      1. Burdick-no right to be a write in. Formally reject voting as a 1st Amend exercise.
   2. What rules should govern minor party candidates’ access to the ballot?
   3. How do challengers within the major parties get on the primary ballot?
2. *Bullock v. Carter*
   1. How to fund primaries in TX- taxpayers, or parties pay themselves?
      1. Two major parties opt for the latter, have a filing fee for the primary. $1500. A lot.
   2. SC- if you *make* them have a primary (party?), then it’s a burden you *have* to shift off to the taxpayers. If you want to be internally funded, it can’t have an adverse impact on candidates who can’t afford it
      1. BN- don’t read too much. Not saying property requirements to run for office are unconst.
3. *Lubin v. Parnish*
   1. $700 fee. How likely is it that someone who can’t raise $700 will win? At what point is the fee so low that it’s just a test of intensity, and at what point is it exclusionary?
   2. Held- $700 is ok.
4. *Forbes*
   1. You have to have a primary, even if kind of pointless. Have to be able to petition onto the ballot in a way that isn’t radically exclusionary.
5. *Williams v. Rhodes* (1968)
   1. About the Const right to run for office
   2. To get onto ballot, needed 15% of the voters for that office in the last general election to sign a petition by February
      1. Wallace got them in June, wouldn’t let him on the ballot.
   3. Held: the law violated the EP clause because it gave the 2 established parties a decided advantage over new parties.
      1. If you do this under EP, where is the line? How hard is too hard?
6. *Jenness v. Fortson* (1971) pg 295
   1. Like Williams, but only needed 5% and the timeline was better.
   2. Held: Says it’s ok, but not why.
7. *Storer v. Brown* (1974) pg 295
   1. Needed 5-6%, done in 24 days, at least 60 days before election (and more)
   2. Held: This is an **undue burden**
      1. Same language as Casey.
      2. Still the test. Intensely factual (# of signatures, time you have to get them, how soon before election, true pool of sig’s you can draw from)
8. *American Party of Texas* (1974)
   1. Sore loser provision upheld- legit end to protect the 2 party system
9. *Anderson v. Celebresi*
   1. Stevens strike down early filing rules (February) using exclusively the 1st Amned. No compelling state interest for an early filing.
   2. This case is never cited- fallen off the face of the earth.
   3. Glimpse of the road not taken- would it have been better to ask the state their reason for the rule, rather than looking at the undue burden?
10. *Munro v. The Socialist Party* (1986) pg 298
    1. Blanket primary requires you to get 1% to be on general election ballot. π challenges, says has a 1st Amend right.
       1. WA has no history of overcrowding/confusion on the ballot
    2. Held: Don’t have to wait til there’s a problem, can take prophylactic action
       1. How would this reasoning have held up in 1st Amend framework?
11. The real standard is, is it *too* hard to get on the ballot. It’s ok if it’s just hard.
12. ***Timmons*** *v. Twin Cities Area New Party* (1997) pg 302 [Rehnquist]
    1. Can a minority party cross-endorse a major party candidate (fusion)?
    2. Held: **Bans on fusion are Const**
       1. State can have a protected interest in banning fusion so that the 2 major parties aren’t chipped away.
    3. This is the final nail in the coffin of third parties.
       1. End of being able to make the argument about the functional role of minority parties.
    4. Should’ve made a stronger freedom of association argument- right to talk to who you want, vote for who you want 🡪 voting as an expressive matter
       1. Rehnquist- votes are really just bean counting.

**The Right to Fair Representation**

**What does it mean to be fairly represented?**

1. Direct democracy?
   1. Changes too much, don’t have time to dedicate to the issues. Staccato government, unstable.
2. Representative Democracy
   1. Are the reps autonomous?
   2. Or supposed to take a nightly poll of what the constituents want
3. Compulsory voting?
4. Fewer transaction costs in being able to vote?
5. Choose representatives by lot like the Athenians?

**Judicial Precedent/The Reapportionment Revolution**

(emergence of the one-person, one-vote rule)

* Colegrove (Ill 1946) 🡪 Baker (Tenn 1962) 🡪 Grey v. Sanders (GA 1963) 🡪 Reynolds v. Sims (Ala. 1964)

(race played a huge role)

1. *Colegrove v. Green* (1946) pg 113 [Frankfurter]
   1. Huge disparity of 9 to 1 between largest and smallest Congressional districts.
      1. Couldn’t change it through state legislature because the over-represented people don’t want to, the Ill courts won’t do it, and beyond Cong’s jurisdiction.
   2. Go to Fed Court, try to use the Const. But where?
      1. Frankfurter- **not sure what the judicially manageable standard is**. If we don’t know what the ideal is, how would judges be different than a political group as deciders
         1. Can’t say this is bad democracy if you don’t know the antecedent decision of what good democracy is.
      2. Black’s dissent- functional answer of equality. Any theory of democracy would say that X has 9 votes to Y’s 1.
   3. Held: Let the current districting/apportionment stand.
2. *Baker v. Carr* (1962) pg 118 [Brennan]
   1. Said to be the iconic one person one vote, but didn’t actually have a maj
   2. Like Colegrove, but in TN and some districts were 40 to 1!
      1. Held unacceptable (Unconst?)
   3. Brennan- Says this isn’t barred by political question doctrine, makes out a judicially cognizable cause of action, says it’s a violation, but gives us no guidance on how to measure if there’s been a violation.
   4. Douglas- one person one vote.
   5. Clark/Stewart- don’t say one person one vote, but talk about democratic theory. Can’t be right to have 37% of the electorate elect a majority of the senators. Has to be rational.
   6. Frankfurter dissent- We’ll have to evaluate all reapportionment plans now to see if they deviate from a norm, and we can’t even say/agree what that is. We shouldn’t go forward without a judicially manageable standard.
3. *Gray v. Sanders* (1963)
   1. County unit voting system for state elections (like a smaller electoral college)
      1. Though, BN says that it says the state senate can mirror the U.S. Senate
   2. Not ok- Court working it’s way toward one person one vote
4. *Reynolds v. Sims* (1964) pg 134 [Warren]
   1. **One person, one vote**
      1. Where we get the standard.
5. *Westbury v. Sanders*
   1. Congress is one person, one vote.
6. After Reynolds, Gray, and Westbury- state and federal level have to be one person one vote, the only exceptions being the US Senate and the electoral college.
   1. Is it justified to have one person one vote on local structures?
   2. 3% deviation seems to be permissible, 15% almost always struck down
   3. **Judges are exempt from one person one vote**
      1. Don’t represent people but uphold the law (should we really be electing judges then? Constituents vote based on the judges’ decisions)
7. *Lucas v. General Assembly of Colorado* (1964) pg 147 [Warren]
   1. Majority of the voters in every county voted for this apportionment structure. Not racially motivated. Not an entrenched mechanism. Trying to balance rural/urban mis-representation- not one person one vote, by choice.
   2. Struck down for violating equi-populous rules.
      1. This case is tough in that it’s the Court overruling the will of the people.
         1. Counter-intuitive to protect democracy by striking it down.
8. *Karcher v. Daggett* (1983) pg 161 [Brennan]
   1. Does their apportionment satisfy one person one vote?
   2. Smallest is 500k, largest 503k.
      1. Court says 3k deviation is too large- we have computers now, you could do better.
   3. What’s the harm? Is your vote really debased with a 3k deviation?
      1. Also within the margin of error of the count.
   4. Baker maturing- equipopulous was great for a decade, blew up some systems. Now, following it so closely requires us to reapportion all the time.
9. *Board of Estimate v. Morris* (1989) pg 172 [White]
   1. High point of the one person one vote application
   2. Board of Estimate- Mayor, Comptroller, Council Pres (all 2 votes) and 5 Borough Presidents (1 vote)
      1. Brklyn voter has 1/million say, Staten Island voter 1/100,000
         1. Argue under Baker disproportionate political power
         2. But this isn’t an ordinary legislature
   3. SC looks to school board cases that say equipopulous applies locally (good precedent to look at?), struck down the Estimate.
      1. (what was a functional consensus governing structure is now a formal equipopulous structure all about the mayor)
10. *Salyer Land Co. v. Tulare Lake Basin Water* (1973) pg 178
    1. Water district, function to build dams, control the flow of water to users. 77 people live in the area, very agricultural.
    2. Voting confined to landowners, vote by acreage.
    3. SC said one person one vote didn’t apply
       1. Nature of the body diff than legislature. Also, only 77 people in the basin- where’s the distortion.
11. *Ball v. James* (1981) pg 177
    1. Water district covering half of Arizona
    2. Reynolds doesn’t apply- it’s a limited purpose entity, also mostly a private biz

**Gerrymandering**

1. Political gerrymandering (gmg) versus racial gmg
   1. Current law is it’s Unconst to do racial, but political is ok.
      1. Prob that political can often be a proxy for race
         1. But SC says, if you can’t show racial intent, no problem
         2. Now massive intellectual dishonesty as to motive
   2. Gomillion- can’t use race to gmg. But Shaw is the obverse, trying to empower minorities
      1. Couldn’t use Gomillion as a 15th Amend precedent to strike down district in Shaw, because there isn’t a deprivation.
      2. O’Connor follows the 14th Amend concurrence, but this draws SS.
2. ***Gaffney v. Cummings***
   1. First time political gmg has reached SC.
      1. Fallout from Baker- if you have to reapportion, then the reapportionment will be politicized.
      2. Took the population of CT, drew lines to ensure that the legislature had the same ratio of reps (compromise, GOPs advantage in one chamber, Dems in other)
   2. π argues packing and cracking is Unconstit- need to be able to vote in an election where you aren’t guaranteed to lose
      1. Packing- putting unnecessarily large majorities in one district to take members of one party out of the surrounding districts.
      2. Cracking- take what would be a majority in one district and crack it into two where their vote is submerged by other party.
   3. Held: Upholds districting, no baseline by which to judge.
      1. Ultimate representational balance is the same.
3. *Karcher v. Daggett*
   1. Dem gmg.
   2. SC goes after it (struck down for violating one person one vote)
      1. But don’t want to do functional (GOPs denied representation)
      2. Brennan- wants to blow it up
      3. Stevens- more complicated than equipopulous. Should use the Gingles vote dilution test for race, here for politics.
         1. But Gingles wasn’t a Const case- was a statutory VRA case
4. *Davis v. Bandemer* (1986) pg 830
   1. GOP gmg
   2. First time say that a political/partisan gmg is justiciable
      1. A π would have to show intentional discrimination against an identifiable political group and an actual discrim effect on that group
      2. The π’s here hadn’t met the standard.
5. *Vieth v. Jubelier* (2004) pg 843 [Scalia]
   1. Really blatant GOP gmg, Dems can only maybe get 5 of 20 seats, though about 50% of state. 14 GOP seats are absolute locks
   2. Scalia says Davis v. Bandemer didn’t work, no baseline for what’s fair, Courts have no business doing this. (Not majority – majority only in result to allow)
   3. Kennedy concurrence- could be a judicially manageable standard, but don’t see it here
   4. Liberals- shoot themselves in the foot. Can’t agree on a standard, kind of proving Scalia right. Souter has a vague 5 part test, Stevens says do Gingles already, Breyer/Ginsburg say don’t look at individ districts but see if political power in the state has been malapportioned.
6. ***UJO Williamsburg v. Carey*** (1977) pg 718 [White]
   1. Reapportionment splits Haccidic district in half in maximizing black voter power to create a second district.
      1. They challenge- excessive focus on race to the exclusion of other groups is Unconstit.
   2. SC upholds, barely
      1. 14th Amend not about a racial majority hurting itself to give a racial minority more power
         1. (But this assumes the racial majority is a homogenous group)
         2. No strict scrutiny when helping a minority
      2. **Even is strict scrutiny, it’s ok- compelling state interest to avoid violating the VRA**
         1. Caught between EP and Section 5- rely on a statute to violate the Const. This can’t work forever.
7. ***Shaw v. Reno*** (1993) pg 724 [O’Connor]
   1. 3 major factors to have in mind
      1. Vote dilution/VRA
      2. Baker apportionment (one person one vote)
      3. Political gmg
   2. NC reapportions, rejected for not maximizing, does it again- new black district that snakes along the highway. Challenged by whites in it.
      1. What’s the harm? Court doesn’t want to say functional value is diminished, an expressive harm? Beyond formal dilution.
         1. Say it’s a symbolic harm.
   3. Much of UJO rejected- **whenever race is used, EP strict scrutiny comes in**.
   4. Compelling state interest?
      1. SC- no § 5 issue, no retrogression, max. rule struck down before
      2. SC- no § 2 issue- no compact geo. black population.
         1. Why not look at the whole state?
   5. Struck down as Unconst racial gmg.
8. *Miller*
   1. After Shaw, have to find something rotten in purpose
      1. Easy in Shaw- crazy lines, only explanation was race
      2. Harder here, square district. But had admitted to using race.
         1. No one admits to using race anymore
   2. Struck down.
9. *Bush v. Veira*
   1. Strike down 3 funny looking districts- no plausible compelling interest of a fear of violating Section 5 or Section 2 here.
      1. Also strike down decency defense - remedying past discrim
         1. Would have to be small district with proof of discrim
         2. But in GA v. Ashcroft, we look to the “totality of the circumstances” – whole state
10. ***Easley v. Cromartie*** (2001) pg 751 [Breyer]
    1. Funny looking district, went from 50% black to 47%
       1. Whites challenge.
       2. ∆ say building a safe Dem district.
    2. Lower court says racially motivated.
       1. SC says clearly erroneous, mixed motive, can’t say race was dominant.
          1. **How would you ever prove race? So strongly correlated to politics, will it always be mixed**?
       2. Backdoor way of pulling Shaw’s teeth- maj here are Shaw dissenters. Say it’s not race so you can let it stand.
          1. But if were dominated by race, would violate EP, even though you’re trying to help
11. Tension between Shaw and Sections 2 and 5
    1. Sections force you to be preoccupied with race, Shaw says don’t be too preoccupied
       1. How long can this last?
12. Think about the 3 lines of authority, come together in GA and Lulac
    1. (1) Section 2 vote dilution cases under Gingles
    2. (2) Section 5 retrogression claims
    3. (3) Shaw line of cases about racial reapportionment
13. ***GA v. Ashcroft*** (again, pg 5, talking about Section 5)
    1. SC reverses a refusal to grant pre-clearance.
       1. Though districts aren’t as strong, there are more districts.
          1. **Look at the totality of the circumstances**
          2. Not just the retrogressive numbers in the district
    2. Souter dissent- this eliminates Section 5 as a serious standard
       1. **Gone from formal to functional**! Analyzing if they functionally still have power.
          1. Racial essentialism 🡪 they’re all fungible
       2. How can you reverse the local court which said this doesn’t work?
    3. **Now, can you always show a gain somewhere to make up for the loss**?
       1. Kills the effects test? Have to show intent?
          1. Majority says the sections have different standards
          2. Dissent- should be the same standard- the effects test
       2. (But does later Act change this?)
14. ***Lulac v. Perry*** (2006) pg 790
    1. Like GA v. Ashcroft, but Section 2
    2. Three districts- AG approved, didn’t raise Section 5! π'’s bring Section 2
       1. (1) GOP losing latino base, crack district, move latinos out
          1. Retrogression, but replaced with new latino district
          2. Liberals switch stance from GA v. Ascroft, now say § 5 and § 2 standards are different
       2. (2) Liberal gets support of 25% black in district. Crack blacks out
          1. Would’ve won under Section 5 retrogression, but don’t meet Gingles test as a group
          2. SC doesn’t want to go down functionality road with influence groups- too hard to determine
       3. (3) New snaking Latino district
    3. Defense argues that if totality of the circumstances (tradeoff of packing one district in exchange for cracking another) is good enough for § 5, it is for § 2.
       1. But § 5 looks at aggregate voting power, § 2 at ability to elect candidates of your choice.
    4. SC says the cracking of (1) was ok, but split on why (some say it’s not about race but politics, some say there isn’t a violation because of the new district)
       1. Scalia/Thomas- the new district was clearly racial, may violate Shaw
          1. Let it go today, prob tried to avoid Section 5, but one day this tension will have to be decided.
    5. Souter dissents, says vote dilutions is a violation of Section 2, that Section 2 functional violations should count too.

**Campaign Finance Reform**

1. Can we distinguish between issue speech and campaign speech?
   1. Issue- trying to translate your speech into ideas, advocacy speech. Less imminent, more abstract.
   2. Campaign- has a purpose, more imminent.
2. Is money speech?
3. The Courts have created this whole world
4. Motives
   1. Corruption
   2. Risk of corruption
   3. Honesty
   4. Equality?
5. Contributions
   1. Ask about
      1. Source
      2. Size
      3. Disclosure
      4. Time
6. **Types**
   1. Individ 🡪 Candidate
      1. Limit usually in range of $1k-2k, broad disclosure rule
   2. PAC 🡪 Candidate
      1. Limit
   3. Individ 🡪 PAC
      1. Limit, but prob shouldn’t be able to
   4. Individ 🡪 Ballot
      1. Unlimited
   5. PAC 🡪 Ind Expends
      1. Unlimited, but can’t coordinate
   6. 527 🡪 spend own money
      1. 527 – individs forming org to affect the outcome of election. Not sure if we can limit them. Don’t contribute to candidates. Not a conduit. Coors has 527s – no idea what they spend – no disclosure.
7. **Buckley v. Valeo**
   1. Poorly written opinion, more like a law review article advising the 76 election
   2. Solves the vagueness/overbreadth problem by using magic words
      1. If an ad doesn’t say vote for or against, it’s not campaign speech
   3. (Source) Can’t use corporate treasury funds, but corporate PACs are ok
   4. (Disclosure) is good, as long as they’re larger amounts and not controversial groups (Socialist Worker’s party doesn’t have to disclose membership)
   5. Expenditures vs. Contributions
      1. Expenditures are closer to speech, 1st amend.
         1. Supporters can also spend money, but can’t coordinate 🡪 independent expenditures.
            1. (tough question of fact)
         2. Can’t cap the amount of money a campaign can spend
      2. Contributions are indirect exercises of the 1st Amend, not actually the contributor speaking, therefore can be regulated. Giving money to someone else to speak.
         1. “Speech minus”, “derivative speech”
         2. BN- indefensible. Why is it less of a political act or a lesser 1st Amend decision to enable someone else to make your point
   6. Preventing corruption is a compelling governmental interest, equality is not.
   7. Leads to our current system of trying to constrain the supply for an uncontrollable demand.
   8. Now, Court prob ready to get rid of Buckley
      1. Scalia/Thomas/Kennedy- treat contributions and expenditures the same, don’t regulate either
      2. Stevens/Ginsburg/Souter/Breyer(?)- distinction is indefensible, regulate both.
      3. Alito/Roberts/Breyer(?) – trying to make Buckley work
         1. If they joined the conservatives, would knock this and McConnell out.
8. Soft money- what can be raised outside of the regulatory system under Buckley
   1. Issue speech and ind expenditures
   2. Versus hard money- within the campaign
9. **Contribution vs. Expenditure dynamic**
   1. Speech minus theory of contributions, expenditures as actual speech
   2. Maybe about the risks involved
      1. Worried about a cover/overt promise in return for the contribution money – gov’t has so much power these days, maybe the new official will give you a K in return or a major appointment
         1. **Corruption prob the most valid argument to limit contributions, as you couldn’t use it to limit expenditures. If you already have the money, where would the corruption come from**?
      2. But in giving money, isn’t there a promise they’ll carry out your ideas?
      3. This is probably the most valid distinction between them
         1. Can’t use corruption argument to limit expenditures – they already have the money, where would the corruption come from?
   3. Argue that if you don’t cap the expenditures, money will flow like a river, creating more demand, making you more vulnerable to corruption.
   4. Loss of faith in they system
   5. If equality could e a rationale, we could probably regulate both
10. **Size limits**
    1. BN’s non-chronological order: Shrink 🡪 Cal Med 🡪 Citizens Against Rent Control 🡪 FEC v. NCPAC 🡪 Randall 🡪 Davis v. FEC
    2. *Cal Med* (1981)
       1. $5k contribution limit to a PAC- but a PAC is limited in its donations to a candidate, so they will spend independently, should have a right to donate.
       2. Uphold it. 4 give a lame corruption explanation (equality disguised), Blackmun says because a PAC can give $ to a candidate, the candidate might therefore be really grateful to a major donor to the PAC.
    3. *Citizens Against Rent Control* (1981)
       1. Limit on referendum contributions. But no candidate to corrupt! All that’s left is an equality rationale. Struck down.
       2. **Rule: ballot initiatives/referendums operate under uncontrolled giving**.
    4. *FEC v. NCPAC* (1986)
       1. Limits a PAC contribution to a candidate to $1,000, pretty easy and consistent with Buckley.
    5. *Shrink Missouri* (2000)
       1. SC upholds MI law limiting contributions to statewide campaign to $1k (from PAC or ind), 8th Cir had struck it down, saying no empirical showing of corruption🡪 Need a causal link, just like you would to strike down other speech.
          1. But under Buckley, this is fine.
          2. (This is a back door equality effort not allowed under Buckley)
          3. (Souter thinks equality should be ok, Buckley was wrong)
    6. Randall v. Sorrell (2006)
       1. **Only case to knock out a contribution limit on size** ($400 too small)
          1. Question to ask- is the limit so low, that as a practical matter, the candidate would be unable to raise funds to run a competitive election against a well finance opponent?
             1. State specific, possibly even election specific
       2. Also knocked out expenditure limits
    7. Davis v. FEC
       1. Millionaire amend in MF- if opponent spends more than $3mm own money, your contribution (to you) limits are raised
       2. Struck down- can’t have 2 separate rules for 2 candidates🡪 discrim.
          1. Irony, trying to create fair playing field, no unfair one
11. **Speech**
    1. Bellotti 🡪 Austin 🡪 McConnell 🡪 Citizens United
    2. **Issue speech**
       1. Right to anonymity. No restrictions on disclosure, contributions, or source
    3. **Electoral speech**
       1. Under MF: 60 days before an election, uses face or name of a candidate, appears on radio or tv, costs more than $10k (and reaches more than 60,000 people)
          1. Not vague, but still can capture issue speech
             1. This overbreadth could bring it all down!

Barely upheld in McConnell, could be struck in Citizens United

BN- carve out exceptions, don’t blow it up!

* 1. Speaker cases
     1. autonomous/anonymous rights of the speaker
     2. Doesn’t ask to purpose. Asks relation to act of speaking and human dignity.
     3. Political speech is speaker speech
  2. Hearer cases
     1. Led to commercial speech protections- right to have info for informed decisions
  3. *Belotti* (1977)
     1. Referendum on tax issues, bank wants to put money in it, state law forbids corps from expending funds on politics
     2. SC overturns ban
     3. **Read as corps have 1st Amend rights as speakers, but SC expressly said that’s what they weren’t saying**!
        1. Really focused on the right of the hearer (to info on the tax stuff)- does the statute abridge the kind of speech the 1st Amend was meant to protect?
  4. *Austin*
     1. Ban on corps spending treasury funds to affect the outcome in candidate elections.
        1. Chamber of Commerce wanted to drop a lot of ads a week before the election.
     2. SC upholds ban
        1. Hearers aren’t necessarily helped by having all this $$/speech dropped before the election
        2. Corporations can’t make IE’s.
     3. Not sure if this is a corruption case or an equality case- this is what makes it on the tip of being overruled.
  5. McCain/Feingold
     1. Says to corps- no 1st Amend rights, can’t contribute to national parties, candidates, IEs in electoral field.
        1. Grassroots 1st Amend exemption
  6. *McConnell* (READ)
     1. Upholds MF, very narrowly. Open to as applied challenges
  7. *Wisconsin Right to Life I & II*
     1. Ad targeting Feingold for his abortion stance. They get money from corps, but not using it in ad (?). Argue it’s issue speech. But big picture, it’s a campaign ad.
        1. Were going to take depositions on intent, when Court says this is crazy, we have cases about what’s Const electoral/issue speech, adminstrative nightmare
     2. SC strikes down- conduit for corporate money.
        1. Souter dissent- if you can have well funded groups like this insede the tent, how can the system work? Go right up to the line of what you can/can’t do.
  8. *MCFL* (Mass. Comm. For Life)
     1. Put out directory of how candidates voted on abortion. FEC says violates MF (insane enforcement)
        1. Non-profit organized in corp form, not money from corps.
     2. SC- 1st Amend exemption, don’t count
        1. Key that you aren’t a corporate conduit
  9. *Citizens Unite*d (READ BRIEFS?)
     1. One hour video on Hillary, non profit that get’s 1% of money from corps (no MCFL exemption), FEC on them. Say everything you do is issue speech. Ridiculous. Would take all the work out of McConnell.

1. **Expenditures** by
   1. Candidate
      1. Can’t cap (but could argue speech isn’t money, system of regulation is too permeable otherwise)
   2. Political Party
      1. If they were unlimited, would be a huge circumvention. Can give $20k to a political party
      2. Colorado I (ind exps) Colorado II (coordinated exps)
   3. Rich folks
      1. Can do all the IEs they want. Can’t coordinate
   4. PACs
   5. 527s
   6. Grassroots groups

Judicial Elections

1. We elect judges, but they aren’t supposed to behave as political actors
   1. Part of the fictive system that judges respond to the commands of the Const/Legislature/Justice and aren’t really making decisions based on their thoughts
2. Minnesota v. White
3. Judicial Statements
   1. Freedom of speech issues. But you can’t commit yourself in advance to a decision.
   2. How would you draft a code of speech for a judicial election? What would be off limits and why?
4. Caperton v. Massey
   1. Judge’s campaign got $3mm of support by Pres of coal company, got elected.
   2. 5th Amend claim that judge needs to be neutral, and that the perception needs to be neutral, but how could you be neutral with such a contribution.
   3. 5-4, it’s not ok.
      1. Narrowly read now, only for judicial elections and only really big contributions.

**Public Funding**

1. Every poll shows huge support for public funding. So why don’t we have it?
   1. Would allow us to control the huge costs of campaigns (would it? Still a desire to win- would this solve IE problems?)
   2. But gov’t can’t impose public funding- have to elect.
      1. Trying to control expenditures by bribing the candidates to take money from you
      2. Has to be truly voluntary- can’t have a system with such strong restrictions that it would be untenable to refuse.
2. What rules are ok?
   1. BN- thinks any rule that would have been in effect without public funding
      1. Any effort to make the rules tougher on a non public funded candidate would bring the whole system down.
         1. Would be punishment
3. How much money to give?
   1. Maine has a qualifying phase. Have to raise a certain amount in small chunks
      1. Show broad support.
   2. If your opponent isn’t in the system, you will get more and more money as he raises more, to a limit
      1. But does this penalize the other candidate?
         1. But if you can’t, who would ever take the public money?
4. Arkansas- all people get a $50 tax credit on income taxes for campaign donations
   1. Similar bill introduced to Cong every yer
      1. Afraid it will work, unseat incumbents
      2. Or, afraid it will look like a subsidy to the rich.
5. Black box option- don’t disclose at all!
   1. Candidate will never know for *sure* if someone really donated.
6. Democracy dollars? Everyone gets monopoly money to donate.
7. Media subsidies
   1. Half of campaign spending is on media.