



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
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Touro Law Review

Volume 25
Number 2 *TWENTIETH ANNUAL SUPREME
COURT REVIEW*

Article 4

February 2013

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Recommended Citation

Neuborne, Burt (2013) "Voting Rights and Freedom of Speech Decisions from the October 2007 Term,"
Touro Law Review: Vol. 25: No. 2, Article 4.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol25/iss2/4>

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VOTING RIGHTS AND FREEDOM OF SPEECH DECISIONS FROM THE OCTOBER 2007 TERM

Burt Neuborne^{*}

INTRODUCTION

In discussing the next term, the single most important case is going to be who wins the 2008 presidential election. The one thing that you can see coming is the train wreck. The voting rolls are exploding with newly registered voters. The ability to process the information into the systems, assuming the best of intentions by the local officials, is extremely weak, and the new technology that is in place in twenty-one states to try to process this is almost certain to break down in a number of them.

So what we are looking at on Election Day is a real test of the infrastructure; the ability to count the votes in some sort of coherent fashion. In 2004, we came within a shift of 100,000 votes in three states of having exactly the same situation as in 2000: the inability to get a majority in the electoral college, and throwing the case over to the courts.¹ That is a specter that hangs over American presidential politics until we do something about either the infrastructure or the

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¹ See *Bush v. Gore*, 531 U.S. 98 (2000); CNN Election 2004—Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/president/>.

Electoral College that creates a crisis every time we have to choose a new president.²

Let me talk a little bit about the cases that the organizers have asked me to talk about; the voting cases, the electoral cases, and the free speech cases. I will start with the electoral cases. There is an interesting amalgam of free speech cases, but I will begin with the two that I think are the most interesting. By the way, it is cruel and unusual punishment to make me talk about one of these because we lost nine-to-zero in the Supreme Court.

I. VOTING AND ELECTORAL CASES

The interesting issue posed by these cases concerns the nature of a political party in the American constitutional system. The reason this is such a difficult problem is that our law points in different directions; we want political parties to fulfill two very different functions that would create different kinds of regulatory processes.

The conservative way of deciding this by either literalism or originalism is unavailable for political parties. It is unavailable because, as an originalist matter, the Founders did not dream of political parties; indeed they opposed political parties, called them factions, and sought as much as possible to make it very difficult for them to form, and to play a role in American politics.³ So, there is no

² See Richard L. Hasen, *When "Legislature" May Mean More Than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599 (2008).

³ See Michael C. Dorf, *The 2000 Presidential Election: Archetype or Exception?*, 99 MICH. L. REV. 1279, 1295 (2001) ("The United States Constitution was flawed from the outset—not just morally flawed because it condoned slavery, but institutionally incomplete because of the Framers' failure to anticipate the development of political parties."); John V.

originalist idea of what political parties are supposed to do in the American system. Moreover, literalism is a huge embarrassment to conservatives here because freedom of association, which is the obvious First Amendment doctrine that one would apply to political parties, does not appear in the text of the First Amendment.

The First Amendment has six ideas in the text: establishment, free exercise, speech, press, assembly, and petition. But it does not say anything about association. Association is one of the dirty little secrets of Constitutional Law. It is a nontextual right. Justice Harlan dropped it into the First Amendment in the Supreme Court's opinion in *NAACP v. Alabama*⁴ to protect the civil rights movement in the South. Conservatives embrace it, but it is an embarrassment when questioned intellectually because it cannot be defended as an exercise of textualism. Without textualism or originalism, we are thrown back to functionalism, trying to develop some sort of functional idea for how we want to have the Constitution deal with political parties. As I said, we pull in two different directions.

In one direction we want political parties to be the semiofficial vehicle by which we organize the nominating process, and funnel and winnow the candidates for the final general election ballot. It has become an article of faith in the United States. Since the middle of the nineteenth century, we have not just allowed anyone to run who wanted to run. But before the Australian ballot was adopted in the

Orth, *Presidential Impeachment: The Original Misunderstanding*, 17 CONST. COMMENT. 587, 588 (2000) ("It is a commonplace of American constitutional history that the Framers did not foresee the development of a system of durable nationwide political parties.").

⁴ 357 U.S. 449 (1958).

United States,⁵ anyone who wanted to run could run. It did not matter how the nominating process was organized; everything was done on general election day.⁶ Now, the consensus is that we need some mechanism for organizing the ballot so that the voters are presented with a coherent choice.⁷

We want to use political parties. That is the natural way of carrying out the electoral process. In every single state, the state's privileges, the choice of the political party, whomever the political party says its nominee is, whomever they choose, that nominee automatically goes onto the ballot if the political party is one of two major political parties or is a recognized minor party.

Political parties play a quasi-official, almost administrative role as the organizer of the ballot. In that role, they are regulated by the Constitution.⁸ They cannot prevent minorities from voting. They cannot organize their power distribution so it violates "one person, one vote." They have to satisfy the basic tenets of the Constitution that would govern in the general election. This point favors strong constitutional control, and, during the Warren years, there was a very powerful imposition of constitutional restrictions on what political

⁵ James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFF. L. REV. 1413, 1434 (2007).

⁶ *Id.*

⁷ See *Developments in the Law—Elections*, 88 HARV. L. REV. 1151 (1975).

⁸ See *Smith v. Allwright*, 321 U.S. 649, 662-64 (1944) (noting how the Fifteenth Amendment is violated when the state "endorses, adopts and enforces" political party decision to bar blacks from voting in party's state-run primary); *Terry v. Adams*, 345 U.S. 461, 469-70 (1953). The Court held that the state violated the Fifteenth Amendment by allowing a private political club that was "an integral part" of the county electoral process to deny membership to blacks. *Gray v. Sanders*, 372 U.S. 368, 374-75 (1963) (applying the "one person, one vote" principle to primary elections).

parties could do.⁹ The assumption was that they had to satisfy the Constitution as part of the nominating process.¹⁰

Tugging in the other direction is the idea that political parties are the natural way we organize private group association in the United States; that there is something very important going on in the political process that the government wants to keep its nose out of. That is, the ability of individuals to band together in a political institution, choose nominees, and contest the general election free from government control.

The tension between those two ideas has played itself out in constitutional law over the years, resulting in incoherent doctrine. The most recent example is the blanket primary case in California, where California provided a setting where anybody could vote in the primary, and they could skip back and forth from party to party.¹¹ You could vote in the Republican primary for governor, and in the Democratic primary for Attorney General. You could flip back to the Republicans for Secretary of State, and then go down to the Green Party for a different candidate.¹² The Supreme Court declared this practice unconstitutional on the grounds that it allowed outsiders to exercise a disproportionate degree of power over a nominee of a particular party.¹³ The party lost control of who the nominee was going to be because it had no control of who was going to vote in the primary. We are still fighting about open primaries or closed primaries,

⁹ See *Terry*, 345 U.S. at 461; *Gray*, 372 U.S. at 368.

¹⁰ See *Smith*, 321 U.S. at 649; *Terry*, 345 U.S. at 461; *Gray*, 372 U.S. at 368.

¹¹ *Cal. Democratic Party v. Jones*, 530 U.S. 567, 570 (2000).

¹² *Id.* at 570.

¹³ *Id.* at 586.

and the degree to which new people can cross over. Currently, a voter must “affiliate” with a party in order to be able to vote in a primary, although the states dramatically differ in the level and degree of affiliation that is necessary, ranging from a nominal affiliation in open primary states to a formal affiliation in closed primary states.

A. *New York State Board of Elections v. López Torres*

There were two cases on the docket last term where those situations collided; where regulation collided with party autonomy. In the first case that the Brennan Center lost nine-to-zero in the Supreme Court, after having prevailed in district court and the Second Circuit.¹⁴ It is an example of a sea of changes, shifting the nature of Constitutional Law.

*New York State Board of Elections v. López Torres*¹⁵ focused on how judges were chosen in New York State. New York State has a bizarre way of selecting judges, using nominating conventions. The delegates are elected by the party members in an election that everybody agrees is so badly stacked, that the election and the convention are essentially vehicles to provide virtually unchecked power for the party leadership to choose the nominees.¹⁶

Everybody agrees that the party leaders select the nominee, and that there is no real operation of the democratic process.¹⁷ Indi-

¹⁴ *New York State Bd. of Elections v. López Torres*, 128 S. Ct. 791 (2008).

¹⁵ *Id.*

¹⁶ Mark Hansen, *Questioning Conventional Behavior*, 93-APR A.B.A. J. 21 (2007).

¹⁷ See *López Torres v. New York State Bd. of Elections*, 462 F.3d 161, 175 (2d Cir. 2006) (“The process of running a slate of delegates on the primary election ballot is so beset with obstacles that nearly all candidates recognize the attempt as a fool’s errand and do not even try.”), *rev’d*, 128 S. Ct. 791 (2008).

viduals challenged that process, saying the Constitution says if you are an organ of the nominating process, if you are an administrative organ of the nominating process, you must satisfy the Constitution, which requires at a minimum that there be some degree of openness so that an individual can contest the nominating process and have a chance to win. New York is stacked by statute so intensely that nobody can win a challenge to the leadership's choice.¹⁸

The lower courts struck down the process. The district court made factual findings that no challenger could win.¹⁹ The Second Circuit relied on those findings and declared the system unconstitutional.²⁰ But, when it got to the Supreme Court, there was a jiu jitsu move. Ted Olson did the argument and did quite a job. He argued the case should be viewed as a party autonomy case rather than a party regulation case.²¹ When viewed as an autonomy case, if the party wants to use a smoke-filled room to choose its candidates, which is the party's God-given right. That is what the Constitution says they can do. Just because you do not like "smoke-filled rooms" does not mean you can ask the judiciary to overrule the smoke-filled room and impose democracy on the nominating process.²²

They won it nine-to-zero.²³ It is hard to say, I was so deeply involved in it. I am hardly a neutral observer of something like this, but my sense is that the lower courts guessed what the old Supreme

¹⁸ *Id.* at 174-75.

¹⁹ *López Torres v. New York State Bd. of Elections*, 411 F. Supp. 2d 212, 255 (E.D.N.Y. 2006), *aff'd*, 462 F.3d 161 (2d Cir. 2006), *rev'd*, 128 S. Ct. 791 (2008).

²⁰ *López Torres*, 462 F.3d 208.

²¹ See Transcript of Oral Argument, *López Torres*, 2007 WL 2859618, *23 (No. 06-766).

²² *López Torres*, 128 S. Ct. at 799.

²³ *Id.* at 794.

Court would have done.²⁴ The lower courts were correct in saying this process is an administrative organ of the state, and it has to abide by basic democratic principles in its selection of the nominee. In the new Court, the autonomy of the political party takes on far more importance than in the old Court that viewed the political party as an administrative organ.²⁵ The reason is this: the old Court's jurisprudence was driven by the White primary cases. It was driven by the nightmare that the political parties in the South would organize themselves in a way to freeze blacks out of the voting process.²⁶ In order to prevent that, the Supreme Court essentially said everything relating to nominating and voting is under constitutional control.²⁷ As that fear has faded, I think the Court has reverted back to the old-fashioned way of looking at the political party as an autonomous unit, and is providing the party with more autonomy in the process.

B. *Washington State Grange v. Washington State Republican Party*

The second case goes the other way. *Washington State Grange v. Washington State Republican Party*²⁸ is the follow-up to

²⁴ See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 715 (1985) ("Whereas the Old Court had protected property owners who enjoyed ample opportunity to safeguard their own interests through the political process, the New Court would accord special protection to those who had been deprived of their fair share of the political process.").

²⁵ See López Torres, 128 S. Ct. 791.

²⁶ See *Terry*, 345 U.S. at 470 (holding that preventing Negro citizens from participating in the Jaybird Association prevented them from having their vote count in primaries and general elections, which violated the Fifteenth Amendment); see also *Smith*, 321 U.S. at 664 (holding that membership in a political party was not a state concern until membership was an "essential qualification for voting in a primary" which effectively would prevent blacks from participating in the voting process).

²⁷ *Smith*, 321 U.S. at 661-62 ("It may now be taken as a postulate that the right to vote . . . is secured by the Constitution.").

²⁸ 128 S. Ct. 1184 (2008).

the blanket primary declared unconstitutional in *California Democratic Party v. Jones*.²⁹ Once the blanket primary was declared unconstitutional, reformers seized upon a hint in the Supreme Court opinion, and created a de facto blanket primary that will not be declared unconstitutional.³⁰

The de facto blanket primary is run like a general nonpartisan primary, in which the candidates are authorized to self-describe on the ballot which political party they belong to. If they do so, then the top two winners, regardless of political party, go on to the general election.³¹ Now, think about how this works. It works like the blanket primary because it allows outsiders to make judgments about which the general election candidates are going to be, knowing who tells them that they are Republicans, and who tells them that they are Democrats.

The Washington Republican Party challenged it. They said we literally lose control of who our nominee is going to be, because the nominee can self-identify.³² The choice is not the choice of the party, but it is the general electoral choice in which outsiders will control whom the various final nominees are going to be.³³ There was real doubt that the de facto blanket primary would survive.

To the surprise of all of us, the Supreme Court upheld it, at least facially.³⁴ The case is an example of the Court's reluctance to

²⁹ 530 U.S. 567 (2000).

³⁰ *Id.* at 585-86.

³¹ *Wash. State Grange*, 128 S. Ct. at 1192.

³² *Id.*

³³ *Id.* at 1193.

³⁴ *Id.* at 1196.

strike things down facially. The party argued that voters are going to be confused. They are not going to know who the party's real choice is; they are going to think this is the party's choice just because he is a self-described candidate in the primary, and the party's real choice is going to get lost.³⁵

The Supreme Court wanted to take a deeper look at this. If you want to come in with a real factual showing that there is massive confusion, and the party is unable to tell people "don't listen to that person, he is not a real Republican," then we will review it to determine if that is the truth.³⁶ We are not going to strike an entire statute down simply because you hypothesize the possibilities that something like that is going to happen.

The two cases are a draw. The New York case strongly reinforces the autonomy of the political party. The other case recognizes the autonomy as a matter of theory, but I think upholds a mechanism that—I have some sympathy for the Republican Party in this situation—is almost certain to erode the party's ability to choose their own candidate because the nonpartisan primary situation is virtually the blanket primary in disguise.

C. *Crawford v. Marion County Election Board*

The third important voting case affecting elections is *Crawford v. Marion County Election Board*,³⁷ the Indiana photo ID case. Professor Derrick Bell mentioned he could not figure out what the

³⁵ *Id.* at 1194.

³⁶ *Wash. State Grange*, 128 S. Ct. at 1195.

³⁷ 128 S. Ct. 1610 (2008).

lawyers in court were doing; that they tried to translate outrage into essentially a constitutional precedent.³⁸ He is so right; the record is appalling. There was nothing there. The case is just a bunch of outraged reformers jumping in and saying that we all know what photo ID is doing.³⁹ Requiring photo ID eliminates the ability of poor people to get on the ballot at a much higher level than middle class people.⁴⁰ It is particularly outrageous to require photo IDs in Indiana, because there is no evidence of any real pattern of fraud in Indiana that would require this kind of solution.⁴¹

For a case with no record, the challengers did unexpectedly well. The Supreme Court vote was six-to-three.⁴² The Court split on the notion of facial review.⁴³ The majority said look, if you want to “take out” a statute where there is clearly a legitimate governmental interest in deterring fraud and reinforcing faith in the election, you must present us with a record showing the improper effect of the statute.⁴⁴ The state has tried so hard to make sure the problem you are worrying about does not happen—the photo ID cards are free, and someone who does not have a card can cast a provisional ballot—why should we speculate that unfair exclusion is going to take

³⁸ See generally Transcript of Oral Argument, *Crawford*, 2008 WL 83835 (Nos. 07-21, 07-25).

³⁹ *Crawford*, 128 S. Ct. at 1614.

⁴⁰ *Id.* at 1613-14. The “Voter ID Law” stated that a voter without ID could cast a provisional ballot, which would only be counted if she executes an affidavit or brings photo ID to the county clerk within 10 days of the election. These requirements made it difficult for the poor to have their votes counted. *Id.*

⁴¹ *Id.* at 1618-19.

⁴² *Id.* at 1613.

⁴³ *Id.* at 1615.

⁴⁴ *Crawford*, 128 S. Ct. at 1624.

place?⁴⁵

The three person dissent argued that this is a statute that will inevitably affect large numbers of people and prevent some of them from voting.⁴⁶ The showing that the government makes of the need here is so thin, that in the absence of the government showing a greater need, we should strike the statute down.⁴⁷ The case was really about whether the government has to establish “need” or whether the challengers have to establish “effect.”⁴⁸

Under the old rules, the government had to establish need if a statute was likely to impose serious restrictions on voting.⁴⁹ The new Supreme Court says we are not going to do that facially anymore. If you want us to strike a statute down, show us that there is a serious effect. The result is that there may be as applied challenges, but not facial challenges.⁵⁰

Ironically, when the primary in Indiana unfolded, the big news story was about a group of nuns who lived across the street from the polling place. They marched across the street to vote, as they had done from time immemorial, but were denied the right to vote because they did not have their photo IDs.⁵¹ No one knows whether or not photo IDs will have a widespread effect.

⁴⁵ *Id.* at 1623.

⁴⁶ *Id.* at 1627 (Souter, J. dissenting).

⁴⁷ *Id.*

⁴⁸ *See id.* at 1643 (Breyer, J. dissenting).

⁴⁹ *Crawford*, 128 S. Ct. at 1615-16 (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 685 (1966)). *See also* *Norman v. Reed*, 502 U.S. 279 (1992); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

⁵⁰ *Id.* at 1624.

⁵¹ Editorial, *A Supreme Court on the Brink*, N.Y. TIMES, July 3, 2008, at A22.

D. *Riley v. Kennedy*

The last case is the Voting Rights Act case, *Riley v. Kennedy*.⁵² For years, the general rule was to twist, torture, and construe the Voting Rights Act in any way possible for it to apply.⁵³ Some of the rhetorical fights the courts used to find the Voting Rights Act applicable are almost humorous.⁵⁴ This is changing, in large part, because feelings about the Voting Rights Act are changing. The years in which the Voting Rights Act was desperately needed to prevent southern jurisdictions from preventing black people from voting have passed.⁵⁵ It is a new era in which black voters in the South may exercise significant power, so this kind of protection is unnecessary.

Congress re-passed the Act, so the Court had to construe it again.⁵⁶ The question was whether under the Voting Rights Act, to change the voting rules, you need permission from the Justice Department.⁵⁷ A statute allowed a midterm county commissioner to be elected by the people, instead of by the governor. The bottom line was there had to be a baseline to know if there was a change. It was not enough that the baseline was de facto, the baseline had to be legally accepted in the jurisdiction.⁵⁸ An exception existed where the baseline was actually followed in the 1980s, but was eventually de-

⁵² 128 S. Ct. 1970 (2008).

⁵³ *Id.* at 1984.

⁵⁴ See, e.g., *Young v. Fordice*, 520 U.S. 273, 280-81 (1997); *City of Lockhart v. United States*, 460 U.S. 125, 133 n.6 (1983).

⁵⁵ *Riley*, 128 S. Ct. at 1977.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1976.

⁵⁸ *Id.* at 1982.

clared unconstitutional by the state supreme court in 1987.⁵⁹ Even so, today when there is an allegation that they are changing from that baseline, the old Court would unquestionably say that you need the Justice Department's permission before you change from that old baseline.⁶⁰

Now, the Court said no, in order to be a baseline, it not only has to be *de facto*, but it has to be legally in effect as well as factually in effect.⁶¹ I think that is a harbinger as to the way the Voting Rights Act is going to be construed in the future.

II. FREE SPEECH CASES

A. *Davis v. F.E.C.*

The case that I think is most interesting is *Davis v. F.E.C.*⁶² It is the case that struck down the "Millionaires' Amendment."⁶³ This is the campaign finance case. *Davis* is a case where Congress provided that if a self-financed candidate, some very rich self-financed candidate, announced that he or she was going to spend at least \$350,000 of his or her own money on the election, an opponent would be allowed to raise money in larger amounts to offset the millionaire's money.⁶⁴

Under *Buckley v. Valeo*, a very wealthy candidate can spend

⁵⁹ *Id.* at 1985.

⁶⁰ *Riley*, 128 S. Ct. at 1979.

⁶¹ *Id.* at 1986-87.

⁶² 128 S. Ct. 2759 (2008).

⁶³ *Id.* at 2774 (holding that the "Millionaires' Amendment" violates the First Amendment).

⁶⁴ *Id.* at 2766.

as much of the candidate's money as the candidate wants.⁶⁵ There is no regulation. There is no possibility of a cap. The First Amendment forbids regulation of that type of activity.⁶⁶ Congress said that if you were facing one of these candidates with a huge, deep pocket, who can spend without having to raise money, Congress would lift the contribution limits and allow the candidate to collect triple the contribution limits. The contribution limit goes up by three times, and the candidate can receive unlimited amounts of money in a coordinated way from his or her political party.⁶⁷

The contribution limit allows money to pour into an underfunded campaign to match the amount of money spent by the very wealthy candidate.⁶⁸ The Supreme Court struck that down as unconstitutional.⁶⁹ The opinion does not decide the equal protection rights of the rich not to be discriminated against, but states that the statute penalizes the expenditure of money.⁷⁰ When a rich person spends his own money on the campaign, or if the rich candidate spends too much money, a new legal regime comes into play that is adverse to that person. It hurts you to spend your own money. The Court said that kind of penalty violates the First Amendment.⁷¹

Most importantly, what the Court basically said is equalization cannot be used as a government interest to limit or affect the

⁶⁵ *Buckley v. Valeo*, 424 U.S. 1, 23 (1976) (holding that spending limitations restrict "protected freedoms").

⁶⁶ *Id.* at 22-23.

⁶⁷ *Id.* at 33 n.37, 35 n.39 (exemplifying contributions approximately three times more than the thousand dollar limit).

⁶⁸ *Davis*, 128 S. Ct. at 2766 n.5.

⁶⁹ *Id.* at 2775.

⁷⁰ *Id.*

⁷¹ *Id.*

spending of campaign money.⁷² Reformers once argued that there were two very important government interests, stopping corruption and creating a political process that was roughly equal, where individuals could fight on ideas and not on resources.⁷³

This speaks to the equality aspect, which has been on terminal life support since *Buckley*. Every once in a while it would get a puff of air. This takes the equality argument off the table. You cannot limit campaign spending or campaign contributions in the name of equality. The only thing you can act on is in the name of stopping corruption. That is going to keep people constantly arguing about what corruption means. Does it mean individual corruption? Does it mean systemic corruption? It goes back and forth from case to case.

The importance of *Davis*, I think, is that the government says you can never limit speech in the name of equality. You can give the opponent more money, but you cannot stop the first person from speaking. That is a very traditional First Amendment doctrine.

The other important aspect in *Davis* is that Justice Stevens finally weighs in. Stevens did not vote in *Buckley*. He was not on the *Buckley* Court.⁷⁴ Justice Stevens, in writing the dissent in *Davis*, finally says he agrees that Justice White was correct in *Buckley*; that there is a difference between money and speech.⁷⁵ When White dissented in *Buckley*, he said that this is not about speech, this is about

⁷² *Id.* at 2773.

⁷³ *Davis*, 128 S. Ct. (citing *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 428 (2000) (Thomas, J., dissenting) (“[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.”)).

⁷⁴ *Id.* at 2778 (Stevens, J., dissenting).

⁷⁵ *Id.*

spending money. Spending money is different than speaking.⁷⁶ Justice Stevens agrees, which means there are now four votes for jettisoning *Buckley*.⁷⁷

A very important aspect of the 2008 election is going to be its effect on campaign finance reform. *Buckley* has always been, I think, a rotten tree. The only question is which way it would fall. Would it fall towards no regulation or would it fall towards significant regulation? The compromises in *Buckley* do not have the support of the majority of the Court.⁷⁸ But there has never been a case that has pushed on it in either direction.

My sense is that campaign finance is still up in the air. The irony is that the cat is out of the bag. Campaign finance is no longer a major issue because the Internet has outstripped the old problem. The old problem was an inability to reach large numbers of people to make small contributions. That meant disproportionate power was given to those people who could make large contributions. Well, this is no longer the case. In fact, it is less the case every year as candidates learn how to utilize the Internet to stay connected to the younger generation. The ability to raise money on the Internet is going to be so dramatic and widespread it will be regarded as a whole different problem than it is now, and it may well be that the horse is out of the barn.

⁷⁶ *Buckley*, 424 U.S. at 259 (White, J., dissenting).

⁷⁷ *Davis*, 128 S. Ct. at 2778 (Stevens, J., dissenting).

⁷⁸ See *Buckley*, 424 U.S. at 1.

B. *United States v. Williams*

The second free speech case has nothing to do with politics. It is the child pornography case, *United States v. Williams*.⁷⁹ It is, I think, a sleeper of a case. I think it may have more intellectual impact than people give it credit for.

A couple of years ago, the original child pornography statute was struck down as unconstitutional because it was overbroad and vague.⁸⁰ The statute was sent back to Congress, and Congress passed a new statute.⁸¹ The new statute focuses on pandering.⁸² What it focuses on is speech, telling other people that you had child pornography, leading them to believe that it was child pornography, and leading them to believe that you were in a position to make child pornography available to them in ways that would be legal.⁸³ The statute is not phrased any better than the old statute was. It does not tell you what child pornography is, or what you have to say or not say. It is very vague, but it is no longer about child pornography, it is about pandering child pornography, selling, or giving child pornography to other people.

⁷⁹ 128 S. Ct. 1830 (2008).

⁸⁰ *Id.* at 1836 (noting that portions of the Child Pornography Act of 1996 were invalidated as facially overbroad) (citing *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 258 (2002)).

⁸¹ *Id.* at 1836-37 (citing 18 U.S.C.A. 2252A(a)(3)(B) (West 2008)).

⁸² *Id.*

⁸³ *Id.* See also 18 U.S.C.A. 2252A(a)(3)(B), which provides:

Any person who knowingly advertises, promotes, presents, distributes, or solicits through the mails, or in interstate or foreign commerce by any means, including by computer, any material or purported material in a manner that reflects the belief, or that is intended to cause another to believe, that the material or purported material is, or contains (i) an obscene visual depiction of a minor engaging in sexually explicit conduct; or (ii) a visual depiction of an actual minor engaging in sexually explicit conduct, shall be punished as provided in subsection (b).

The lower court predictably struck it down by applying the traditional vagueness or overbreadth doctrine, and recognizing that this statute is not any better than the one they struck down a couple of years ago.⁸⁴ The new Court upheld the statute by expanding an exception of the First Amendment.⁸⁵

The other categorical exception to the First Amendment was the *Pittsburgh Press* exception.⁸⁶ That was the case that upheld the ban on gender-specific want ads in the papers. Ads such as “Man only,” and “Woman wanted” were previously the staple of the want ads.⁸⁷ In 1973, the Supreme Court upheld the ban that Title VII imposes on that type of want ad by recognizing that there is no constitutional right to engage in commercial solicitation to engage in illegal activity.⁸⁸ *Pittsburgh Press* concerned commercial solicitation to engage in gender bias, and no First Amendment protection exists for that type of speech. The categorical exception for speech proposing an unlawful transaction had generally been thought to be a commercial proposition.⁸⁹

On the other hand in *Williams*, the case before the Supreme Court, the man was not offering to sell anything; he was just in a chat room telling people he had child pornography available if they

⁸⁴ *United States v. Williams*, 444 F.3d 1286, 1308-09 (11th Cir. 2006), *rev'd*, 128 S. Ct. 1830, 1847 (2008).

⁸⁵ *Williams*, 128 S. Ct. at 1846-47.

⁸⁶ *Pittsburgh Press Co., v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) (holding that a municipal ordinance “narrowly drawn to prohibit placement in sex-designated columns of advertisements for nonexempt job opportunities, does not infringe the First Amendment rights of *Pittsburgh Press*”).

⁸⁷ *Id.* at 379-80.

⁸⁸ *Id.* at 388-89.

⁸⁹ *Id.* at 384.

wanted it. Thus, it was a noncommercial act.⁹⁰ The lower courts thought this was not within the categorical exception to the First Amendment and applied traditional overbreadth and free speech law.⁹¹ The Supreme Court said wait a minute, we never declared that the categorical exception had to be commercial. The categorical exception exists for any invitation to engage in illegal activities, whether it is commercial or not.⁹² That is a potentially very broad, categorical exception to the First Amendment. We will see how far they will go with it.

Once the Court had the categorical exception in place, the case then became easy. Once the categorical exception was in place, why deploy protective doctrines like overbreadth and vagueness to try to protect speech at the margins on something that is not protected anyway? The Court said we are not going to apply the overbreadth doctrine; we are not going to use the First Amendment vagueness doctrine here.⁹³ We are going to use the due process analysis, and the statute is fine according due process. It gives enough notice for due process purposes. They upheld the statute.⁹⁴ I do not know why a criminal defendant's due process rights were violated because a federal judge, saving the constitutionality of the statute by narrowly construing it, says you fall inside this narrow construction. How has he been misled?

What Justice Scalia did was take a statute that potentially was

⁹⁰ *Williams*, 128 S. Ct. at 1837-38.

⁹¹ *Id.* at 1838.

⁹² *Id.* at 1841-42.

⁹³ *Id.* at 1842, 1845-46.

⁹⁴ *Id.* at 1846-47.

very large, he narrowed it, and said you fall within the narrower reach of the statute. By definition, the man would have fallen within the broader reach of the statute.

C. *Chamber of Commerce of the United States of America v. Brown*

The last free speech case, *Chamber of Commerce of the United States v. Brown*,⁹⁵ is a preemption case with important overtones. If you conduct more than \$10,000 of business within the state, you could not use any funds derived from the state to oppose or advance unionization.⁹⁶ The Court tried to limit the amount that an employer could spend on a campaign against the union. It was almost never for the union. The Chamber of Commerce challenged it and said there is a free speech issue here. Once we have done business with the state and the state gave us the money, it is our money, and we should be able to spend it in any way that we want.⁹⁷

The Court held that the National Labor Relations Act preempts this type of regulation and therefore, California cannot impose it.⁹⁸ The Court did not deal with the First Amendment question in this case.⁹⁹

In looking at the free speech cases, the first problem is that the overbreadth doctrine is developed in connection with state stat-

⁹⁵ 128 S. Ct. 2408 (2008).

⁹⁶ *Id.* at 2410-11.

⁹⁷ Brief of Petitioner-Appellant at 14, 15, *Brown*, 128 S. Ct. 2408 (2008) (No. 06-939), 2008 WL 102370 (arguing that “a state may not leverage public money in a manner that imposes burdens that are inconsistent with [federal law],” and that California’s law “imposes real burdens on noncoercive employer speech.”).

⁹⁸ *Brown*, 128 S. Ct. at 2412.

⁹⁹ *Id.* at 2417.

utes where federal judges lack the power to construe them narrowly. As a result, they were stuck with the construction that the state supreme court applied to the statute and they could not narrow it. When a federal judge gets his or her hands on the federal statute, the natural instinct is to try to save the statute by construing it narrowly, rather than striking it down in an overbroad way. That sets up the notice problem. And that is why Justice Scalia stressed the fact that he was not doing First Amendment notice, which would be overbreadth and vagueness, and all of the protective things that try to protect people at the margins.¹⁰⁰ He said once, “I construe the statute falling within the categorical exception to the First Amendment, the question is what kind of protective things do I deploy? Do I deploy the overbreadth doctrine? Do I deploy the First Amendment vagueness doctrine that protects at the margins? Or, do I say that I do not care about this particular speaker at the margins, as long as this speaker had enough notice to satisfy the Due Process Clause, and what he was doing fell within the statute?”¹⁰¹ Then, the fact that he was making some judgment about whether the statute was unconstitutional or not, he does that at his own risk, if you accept his argument that there is a categorical exception to the First Amendment, or noncommercial solicitations in that regard exhibited.

The reason I say this is so important. Suppose I argue now that all of us, everybody in this room, should rally outside of the Supreme Court because the Supreme Court is as bad as it is, and when they tell us to go home, we should say we will not go home. We are

¹⁰⁰ *Williams*, 128 S. Ct. at 1842, 1845-46.

¹⁰¹ *Id.* at 1845.

lawyers who care about the Supreme Court, and we are going to march down there tomorrow and to hell with the rules about assembling on the plaza outside of the Supreme Court. I have just made a solicitation to you to engage in unlawful activity. And if the categorical exception means what Justice Scalia says it means, then it may be outside of the First Amendment and we may have a substantial limitation on vigorous political speech.

I do not think the Court is going to push it that far. I think it will have to come to grips with what it means. In the old days, you could say it was not commercial; I was not doing this as part of a commercial solicitation, so I am safely inside the First Amendment. After *Williams* this term, I do not think you can do it.

III. CONCLUSION

I think over the years two constitutions have emerged in the Supreme Court; we have a Republican constitution and we have a Democratic constitution with a full line of precedents for both. One of the interesting things is to figure out where they join and where they depart from one another. It is pretty clear to me that you can make a plausible, technically supported, and legally correct argument on both sides of so many constitutional issues. The existence of precedent is what may change it.

Let me just say one last thing; maybe this is the law professor in me speaking and the romantic in me, but I hate to surrender the entire legal process to the proposition that it is totally political, that there is no difference. I begin my federal courts class by asking my class about the three choices in a democracy. There is the choice you

make when you go into a voting booth, where no one can talk to you; it is a secret ballot, if you want to be a bigot, you can be a bigot. You can vote any way you want and you do not have to explain your vote to anybody else. And then there is the vote of a legislator, that has to be publicly defended, and there is at least the possibility of political consequence for it. And then there is a judge.

If I believed that there was no difference between the judge's vote and the vote in the voting booth, and that everything the judge does is simply to paper over the difference and lie about where the real decision making is, then I would believe that this nation is in deep political crisis. I do not believe that. The kinds of cases we talk about here are high visibility Supreme Court cases in which there can be significant differences of opinions about ambiguous decisions, sure, politics play a major role in that. I think it would be a tragedy if people bought into the story that the judges are simply politicians acting in different ways. I think what happens in a court with a good judge is fundamentally different and fundamentally more principled than what goes on in other aspects of democracy.