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Campaign Finance and Political Gerrymandering Decisions in the October 2005 Term

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Campaign Finance and Political Gerrymandering Decisions in the October 2005 Term

Cover Page Footnote

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CAMPAIGN FINANCE AND POLITICAL GERRYMANDERING DECISIONS IN THE OCTOBER 2005 TERM

*Burt Neuborne**

I have been asked to take a look at the campaign finance case¹ and the Texas gerrymandering case.² They are both part of what I call the “law of democracy.” Part of the disarray we see today regarding the rules governing democracy is exemplified by the fact that these two cases are thought to be so different that they are on different panels. While the campaign finance case is considered a First Amendment³ case, the Texas gerrymandering case is considered a Voting Rights Act⁴ or Fourteenth Amendment⁵ case. They are

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¹ *Randall v. Sorrell*, 126 S. Ct. 2479 (2006).

² *League of United Latin American Citizens (LULAC) v. Perry*, 126 S. Ct. 2594 (2006).

³ U.S. CONST. amend. I, states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

⁴ Voting Rights Act, 42 U.S.C. § 1973 (2000).

⁵ U.S. CONST. amend. XIV, § 2 states:

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

looked at through different lenses in different ways.

I. BACKGROUND: MODERN AMERICAN DEMOCRACY

A plea that I have for people like you, who think about constitutional law and who are going to shape constitutional law in the future, is that it is a tragic mistake to have our democracy be the accidental intersection of a series of rules where people make the decisions myopically, looking at only a small piece of the pie. If we accept that American democracy is the sum total of a series of unrelated decisions under the First Amendment, the Fourteenth Amendment, the Voting Rights Act, and any other items of law viewed in splendid isolation, it is difficult to expect to achieve a coherent set of rules governing democracy.

What I do urge is for you to resist the notion that democracy is divisible into these artificial components. We should be thinking holistically about the law of democracy. What is it that helps democracy work in the most effective and efficient way to help us govern? American democracy should not be the accidental result of what the First Amendment, the Fourteenth Amendment, and the Voting Rights Act let us do. Of course, those areas of law are important components in any serious law of democracy, but they should be integrated into a holistic idea of building an institution, instead of looked at in isolation.

There are four major problems confronting American democracy today. The first major problem is low voter turnout. When I first started doing this kind of litigation, just after the Spanish American War, there were tremendous formal obstacles to voting.

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They are gone now. They have been largely swept away—although there are still issues concerning voting for ex-felons, the homeless, immigrants, and persons with mental problems. For the bulk of Americans though, formal restrictions on voting have been swept away.

Yet, we still have a system in which the highest voter turnout in the 20th Century for a Presidential election was 61 percent, in the 1960 Kennedy-Nixon race. If we hit a 55 percent voter turnout for a Presidential election, we congratulate ourselves on having a terrific election. This means that 45 percent of the population just did not vote. Voter turnout is even lower when you get into state and local elections. For state or local elections, if there is a 30 percent turnout, we consider that an excellent election. That is a disaster. It is a moral disaster because the people at the bottom, economically and educationally, and racial minorities, are the people with disproportionately low voter turnout.

Thus, the American voting electorate continues to be skewed on the basis of race, education, and wealth. What comes out of that machine is not a morally acceptable democratic solution. One of the things that we should be talking about on panels like this is how we can change this. For example, are we one of the only democracies that votes on a workday? Why do we vote on a workday? Why don't we vote on a weekend or a holiday? Puerto Rico makes Election Day a holiday and it has one of the highest turnouts of any

circumscription in the United States.⁶

A second major problem for democracy today is running for office. Why is it that today we have so many elections in which there is a sense that the two parties reflect a kind of duopoly about fundamental things? Thus, there is no real choice on the ballot. That was not so in the 19th century. The degree of choice available to people in the 19th century in voting was much wider than it is today. We should be thinking about ways of changing that.

Third, how can we work out a representative model that provides the capacity for fair governance? In 1988, I was a member of the first government delegation that went to the Soviet Union to discuss the evolution of the rule of law. It was during the early part of perestroika. The first Bush Administration sent the delegation, and at the last minute they realized there were no private lawyers in the delegation. The Administration thought it would be a good idea to inform the Soviets that rights did not necessarily come from the government, but were, instead, something that individuals fought for, and private people had a lot to say about what their rights were. The Bush Administration asked me, as ACLU Legal Director, if I would go and I said sure, as long as I received a return trip ticket. The Administration did promise that I could come back. I'm not sure whether I could get the same promise today.

I went to Moscow and debated the Soviet Deputy Minister of Justice who, in his opening remarks, said that in the Soviet Union, we

⁶ Steven Hill & Rob Richie, Editorial, *Calls for Electoral Standards Mount*, AUGUSTA CHRON. (Georgia), Dec. 22, 2004, at A05 (criticizing the practice of voting on a "busy workday instead of a national holiday or weekend").

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have an institution called the Politburo. The Politburo is our principal governing body, and there is a twenty-five percent turnover in membership every year. The Soviet Deputy Minister of Justice continued by saying that the United States has something called the House of Representatives, which is supposed to be the United State's principal democratic governing body. In the House of Representatives, there is a ninety-eight percent reelection rate, or less than a two percent turnover. He posed the following question: who has a more democratic institution—the institution where the governing body turns over 25 percent each year or the institution where the voting rules are so rigged that it is impossible to vote an incumbent out of office?

My answer was that if the United States created vacancies in the House of Representatives the way the Soviets created vacancies in the Politburo, by imprisoning dissidents, we would have a good turnover too. But he had a point. The way the rules are set up in American democracy, incumbents have a massive advantage principally because they get to gerrymander the district lines. In other words, the incumbents decide what the circumscriptions are going to be.

The software is so good now that you can plug in the voting information from recent elections and run lines through apartment buildings, taking various apartments in and out of districts based upon the voting patterns of the people who have lived in those apartments in recent years. It is to the point where, since my wife and I occasionally disagree about politics, I suspect that one of these

days the district lines are going to come down our bed because you can get that accurate in developing this software. This has translated into an industry where incumbents in every state draw lines to make themselves impregnable. The major party in this country is neither the Republicans nor the Democrats. It is the Incumbent party that runs the country.

The incumbent party draws the district lines so that you simply cannot defeat an Incumbent. Article 1, Section 2⁷ of the Constitution says that the House of Representatives shall be elected by the people. This is simply no longer the case in my opinion. Instead, the House of Representatives is elected by the state legislatures, who draw the lines in ways that determine who will win and who will lose in election after election.

In the 2006 campaign, out of the 435 available House seats, thirty-five are contestable seats.⁸ Four hundred of the seats have been so rigged and so gerrymandered that they are uncontestable. By using the criteria of the American Political Science Association,⁹ you

⁷ U.S. CONST. art. I, § 2, cl. 1 states in pertinent part: “[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States”

⁸ Norman Ornstein, *The Similarities to '94 Are Real, But They're Far From Exact*, ROLL CALL, Sept. 12, 2005 (comparing the parallels between the then upcoming election of 2006 and that of 1994).

⁹ The American Political Science Association is an organization that provides political science education. It includes numerous subsections including a section on Elections, Public Opinion, and Voting Behavior of the American Political Science Association, which “promote[s] interest in teaching and research on elections, electoral behavior, public opinion, voting turnout, and political participation, both within the United States and in comparative perspective.” See American Political Science Association: Election, Public Opinion, and Voting Behavior, <http://www.apsanet.org/~elections/> (last visited Oct. 21, 2006); see also Charles Backstrom, Samuel Krislov & Leonard Robins, *Desperately Seeking Standards: The Court's Frustrating Attempts to Limit Political Gerrymandering*, 39 PS: POLITICAL SCIENCE & POLITICS 409 (2006), available at http://www.apsanet.org/imgtest/PSJul06Backstrom_etal.pdf (discussing the historical and presently applicable methods for and ramifications of

know who is going to win before you cast your ballot. The election is a formality. The reality took place when the lines were drawn in the state legislature.

When the Constitution was adopted, the Senate was elected by the state legislatures; the House was elected by the people.¹⁰ A constitutional amendment was adopted to make sure that the Senate was elected by the people.¹¹ Yet, somewhere along the way, the House of Representatives is now elected by the state legislatures. I consider that to be one of the fundamental structural problems of American law. How do we wrest the power away from incumbent politicians, who are using it in their own self-interest and self-advantage? How do we wrest that power away so that elections can be meaningful in ways that will allow the people to do more than ratify judgments that have been made for them by politicians in the state legislature who cut deals to control the outcome?

I do not think the question is whether the deals are fair or unfair. The real question is, have politicians drawn lines that essentially deprive the electorate of a real choice? I would not care if the ultimate legislature really did reflect the population. Do the voters have a choice in who their representatives are going to be? Do the politicians feel that they have to actually respond to the electorate? Or do they simply shrug them off because they realize

partisan gerrymandering).

¹⁰ U.S. CONST. art. I, § 3, cl. 1 (amended 1913) states in pertinent part: "The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof"; U.S. CONST. art. I, § 2, cl. 1 states in pertinent part: "The House of Representatives shall be composed of Members chosen every second Year by the People"

¹¹ U.S. CONST. amend. XVII states in pertinent part: "The Senate of the United States shall

that they are going to get reelected year after year since they can continually jiggle the lines to make sure that they are safe? Athens chose its leaders by lot. If you choose leaders by lot, and you do it from a large enough sample, you will get a representative assembly. But there is one small thing missing—an election. Similarly, the small thing that is missing from American democracy is an election, a contested election.

II. THE CONSTITUTIONALITY OF GERRYMANDERING: LEAGUE OF UNITED LATIN AMERICAN CITIZENS V. PERRY

Ironically, in the states now, the Senate and the Presidency are vigorously contested. Why? Mainly because politicians have not figured out a way to move the state lines from West Virginia to Virginia so they can change the outcome. The politicians are stuck with the fixed lines. Therefore, you can have real contests. The House, which is the crucial governing institution in American democracy, is literally controlled by the deals.

What does the Supreme Court say about this? The case out of Texas, *League of United Latin American Citizens v. Perry* (“*LULAC*”),¹² is the most important Supreme Court election decision of the term. *LULAC* continues the Court’s unwillingness to grapple with this problem.¹³ *LULAC* involves four issues. The case arose out of the reapportionment of the state of Texas, caused by the fact that since Texas’ population is continually increasing, it is entitled to

be composed of two Senators from each State, elected by the people thereof”

¹² *LULAC*, 126 S. Ct. 2594.

¹³ *Id.* at 2612 (holding that a state legislature’s decision to redraw districting lines imposed by a court prior to a new census was not suspicious enough to impose a “standard for

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more representatives. Therefore, in each of the last several decades, there has been significant line redrawing to create new districts. The Democrats, for years, used that power to maximize their advantage in Texas and to minimize the emergence of a large Republican vote in Texas. The Congressional delegation in Texas was overwhelmingly Democratic, even though the Republicans had strengthened in the state and moved to almost a fifty/fifty split.

When the Republicans finally gained the majority, they tried to change this with a mid-decade reapportionment in 2004, shifting four Congressional seats from the Democrats to the Republicans. This was challenged in the Supreme Court by the Democrats. The Democrats concentrated on challenging mid-decennial gerrymandering. This was one of the first examples of what I call, “Our Lady of Perpetual Gerrymandering.” It used to be that we gerrymandered only every ten years when the decennial census came out. Now, politicians are gerrymandering all the time. In Texas, the 2000 decennial reapportionment was done by the courts because the Texas legislature could not agree on what it should be. In 2004, with the Republicans firmly in control of both houses and the governor’s mansion, the judicial plan was scrapped in favor of a ruthless gerrymander that maximized Republican power. The question presented to the Supreme Court was do you leave the 2000 judicial lines in effect or do you allow the 2004 political gerrymander to take effect?

The argument was that the 2004 plan, in the middle of a

identifying unconstitutional political gerrymanders”).

decennial cycle, was so obviously partisan, so clearly designed to get every possible seat for the Republicans and minimize the Democratic presence in every possible district, that it was unconstitutional under the First Amendment. Therefore, it should be viewed as an unconstitutional partisan gerrymander and the judicially drawn lines should be reinstated.

That raises a serious question. Is a challenge to political gerrymandering justiciable? The Court was divided in its answer. Five Justices of the Court said that it may be justiciable.¹⁴ Four of the Justices said that it clearly is justiciable: Justices Stevens, Souter, Ginsburg, and Breyer agreed that a challenge to partisan gerrymandering can be adjudicated.¹⁵ Justice Kennedy said that he thinks it might be justiciable, but he was not prepared to commit himself.¹⁶ If Kennedy is given a manageable standard, he says he

¹⁴ *Id.* at 2607. Justice Kennedy, joined by Justices Stevens, Souter, Ginsburg, and Breyer stated that:

In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court held that an equal protection challenge to a political gerrymander presents a justiciable case or controversy . . . but there was disagreement over what substantive standard to apply. . . . We do not revisit the justiciability holding but do proceed to examine whether appellants' claims offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.

Id.

¹⁵ Justice Stevens, joined by Justice Breyer explained that "it is perfectly clear that judicially manageable standards enable us to decide the merits of a statewide challenge to a political gerrymander." *Id.* at 2626 (Stevens & Breyer, JJ., concurring in part and dissenting in part). Justice Souter, joined by Justice Ginsburg explained that they disagreed with "Justice Kennedy's seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting, nor do [they] rule out the utility of a criterion of symmetry as a test." *Id.* at 2647 (Souter & Ginsburg, JJ., concurring in part and dissenting in part) (citation omitted).

¹⁶ *Id.* at 2611 (plurality). Justice Kennedy stated that:

Even assuming a court could choose reliably among different models of shifting voter preferences, we are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur

will use it. He has invited people to work harder in order to come up with a standard.¹⁷ So far, no one has come up with a standard to decide when politics play too great a role in line-drawing.

In the context of Texas, where each party has done whatever it could to minimize the other and maximize itself for decades, when do you say enough is enough? When can you freeze the existing unfair status quo and say the other party cannot undo it. Justices Thomas and Scalia said stop it; just stop, stop burdening the courts with these political gerrymandering issues because we will never be able to develop a judicially manageable standard of what is fair.¹⁸

Justices Alito and Roberts said that the abstract justiciability issue did not have to be decided, since the parties had not provided the Court with a manageable standard in this case.¹⁹ Alito and Roberts did not think that a standard had yet been devised that

in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose.

Id.

¹⁷ *LULAC*, 126 S. Ct. at 2611 (stating that while a challenge may be presumably litigated, the absence of a workable test prevents litigation, but encourages legislators to work harder towards a manageable solution).

¹⁸ *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part) (stating that claims of unconstitutional political gerrymandering are not justiciable because no court, including the Supreme Court of the United States, can put forth an effective standard on which to evaluate such claims).

¹⁹ *Id.* at 2652. Justice Alito joined in Chief Justice Roberts' concurrence, which stated that:

I agree with the determination that appellants have not provided a "reliable standard for identifying unconstitutional political gerrymanders." The question whether any such standard exists--that is, whether a challenge to a political gerrymander presents a justiciable case or controversy--has not been argued in these cases. I therefore take no position on that question, which has divided this court, and I join the Court's disposition in Part II without specifying whether appellants have failed to state a claim on which relief can be granted, or have failed to present a justiciable controversy.

Id. (Roberts, C.J. & Alito, J., concurring in part and dissenting in part) (citation omitted).

worked.²⁰ They declined to decide what might happen in the future. Thus, the final split of the Court on justiciability was five-to-two, with two undecided but leaning against.²¹

The next issue that the Court was asked to decide upon was whether a manageable standard had been proposed in *LULAC*. The standard that was proposed in *LULAC* was a ban on mid-decennial gerrymandering in the absence of a compelling need to act. Plaintiffs argued that the only motive for such a mid-decennial line drawing is partisan; and that is unconstitutional. The Court split three-two-two-two on this issue.²²

Kennedy, Ginsburg, and Souter said that is an interesting standard, but they did not like it.²³ According to these three Justices, it is too subjective, and figuring out what the motive behind it is just too hard.²⁴ Therefore, Kennedy, Ginsburg, and Souter voted against the standard.²⁵ Scalia and Thomas said that they did not care what

²⁰ *Id.*

²¹ Five Justices agreed that political gerrymandering at least might be justiciable. *See LULAC*, 126 S. Ct. at 2607 (plurality) (Kennedy, Souter, Ginsburg, Breyer, & Stevens, JJ.). Two justices concluded that political gerrymandering was nonjusticiable. *Id.* at 2663 (Thomas & Scalia, JJ., concurring in part and dissenting in part). Two Justices stated that the issue of justiciability did not have to be decided. *Id.* at 2652 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part).

²² Specifically, Justices Kennedy, Souter, and Ginsburg rejected the standard. *LULAC*, 126 S. Ct. at 2612 (plurality). Justices Scalia and Thomas rejected the standard and considered the issue nonjusticiable. *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part). Chief Justice Roberts and Justice Alito explained that the proposed standard was not an acceptable standard—though they would necessarily strike down the whole statute. *Id.* at 2652 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part). However, Justices Stevens and Breyer are the only Justices who believed the standard proposed was a good standard. *Id.* at 2632 (Stevens & Breyer, JJ., concurring in part and dissenting in part).

²³ *Id.* at 2612 (plurality).

²⁴ *Id.*

²⁵ *Id.*

standard plaintiffs came up with. The issue is nonjusticiable.²⁶ By putting these two groups together, there were five votes to reject the challenge to the Texas gerrymandering. Then there were two votes, Stevens and Breyer saying that this is a great standard; it works beautifully.²⁷ The standard allowed the Court to figure out when the motive was purely partisan.²⁸ Alito and Roberts said that while they were not sure as to whether or not they would strike the whole statute down with a good standard, they agreed that the ban on partisan mid-decennial reapportionments was not a particularly good standard.²⁹ Thus, by a seven-to-two vote, the Court rejected the challenge to the statewide reapportionment.³⁰

The Court then moved to the other issues in the case which were two voting rights challenges. This is important because the Voting Rights Act has now been re-enacted and will be with us for many years. The first challenge was a Section 5³¹ challenge. A

²⁶ *Id.* at 2663 (Scalia & Thomas, JJ., concurring in part and dissenting in part).

²⁷ *LULAC*, 126 S. Ct. at 2632 (Stevens & Breyer, JJ., concurring in part and dissenting in part) (stating that the standard illuminates the legislature's motive in enacting mid-cycle redistricting).

²⁸ *Id.* at 2632-33.

²⁹ *Id.* at 2652 (Roberts, C.J. & Alito, J., concurring in part and dissenting in part). Both Chief Justice Roberts and Justice Alito agreed that the appellants have not provided "a reliable standard for identifying unconstitutional political gerrymanders." *Id.* at 2612 (quotation omitted).

³⁰ *See supra* note 22.

³¹ Voting Rights Act, 42 U.S.C. § 1973b(a)(5) states in pertinent part:

The court, upon such reopening, shall vacate the declaratory judgment issued under this section, if after the issuance of such declaratory judgment, a final judgment against the State or subdivision with respect to which such declaratory judgment was issued, or against any governmental unit within the State or subdivision, determines that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or . . . a consent decree, settlement or agreement has been entered into resulting in any abandonment of a voting practice

Section 5 challenge is an anti-retrogression challenge.³² The states that were the focus of the Voting Rights Act had large racially homogeneous populations that did not have high voter turnout in 1964.³³

The Voting Rights Act coverage includes Texas.³⁴ One of the provisions of the Voting Rights Act is the non-retrogression principle, which provides that the lines cannot be redrawn and election rules cannot change if the change might weaken the voting power of racial minorities. The required approval from the Department of Justice must make clear that the redrawing does not detrimentally affect a minority group.³⁵ If the Department of Justice refuses to approve the redrawing of the lines, or if they do approve of it, there is then a review of the issue in the District Court for the District of Columbia.³⁶

The Section 5 argument was raised in connection with the gerrymandering of a Latino district in which Congressman Bonilla received only eight percent of the Latino vote in the last election. It looked like he was very vulnerable in the upcoming 2006 election, so the district was broken in half. The redrawing brought large numbers of Anglo votes into the Latino district in order to solidify a Bonilla

challenged on such grounds.

³² *LULAC*, 126 S. Ct. at 2613.

³³ *Id.* at 2612-13, 2618 (“ ‘The purpose of the Voting Rights Act is to prevent discrimination in the exercise of the electoral franchise and to foster our transformation to a society that is no longer fixated on race.’ ” (quoting *Georgia v. Ashcroft*, 593 U.S. 461, 490 (2003))).

³⁴ *Id.* at 2612-14.

³⁵ Voting Rights Act, 42 U.S.C. § 1973c(a) (2000); *LULAC*, 126 S. Ct. at 2614 (quoting *Johnson v. DeGrandy*, 512 U.S. 997, 1006-07 (1994)).

³⁶ Voting Rights Act, 42 U.S.C. § 1973c(a).

majority and make it much easier for him to be reelected. In return, the Latinos were given another safe district; a neighboring district in which there was a strong Latino majority. However, it was a long, thin district in which the Latinos were concentrated in the north and south, with a strong Anglo presence in the middle. If the north and south portions voted together, it would be a safe district, but the social and economic statuses of the north and south Latino voters were very different.

Texas argued that there was no retrogression. What we took away with the left hand in this Latino district, Texas argued, we gave back with the right hand in the new Latino district. The Court split five-to-four on this issue and struck down this new district.³⁷ This is the only part of the Texas reapportionment that the Court struck down. Essentially, the Court struck down the notion that somehow all Latinos are fungible, meaning that if you retrograde some Latino voters in one district, you can make up for it by helping Latino voters in another district.³⁸ The Court said that Texas had not helped the Latinos much since there is a lack of geographical cohesion of the Latino voters in the new district.³⁹ But, more importantly the Court said that you measure retrogression at the level of the voters who are being hurt, and do not allow this group of voters to be moved around the chess board in some fungible way.⁴⁰

The last issue was whether the reapportionment of Martin

³⁷ Justices Kennedy, Stevens, Ginsburg, Souter, and Breyer joined in the decision. *LULAC*, 126 S. Ct. at 2623.

³⁸ *Id.* at 2619.

³⁹ *Id.* at 2615-16.

⁴⁰ *Id.* at 2620-21.

Frost's Dallas Congressional district to assure his defeat could be sustained. The Dallas Congressional district was a black swing district. There was an Anglo majority, with two blocks of about twenty-five percent black and twenty-one percent Latino voters. The black and Latino voters rarely voted together. But the blacks argued that they essentially controlled the district because, by throwing their votes to Frost, they could assure that Frost would win. Therefore, they argued that black voters had an influence which made them very powerful in that district.

The 2004 reapportionment cracked the district. It cracked the district so that the black voters no longer had the influence to control who the winner in the election would be. The black voters argued that this was a Section 2⁴¹ violation of the Voting Rights Act because their votes had been diluted. The Supreme Court rejected this argument by a five-to-four vote.⁴² The Court's majority rejected the vote dilution argument by saying that it did not think that black voters had demonstrated that they had a significantly powerful influence in the district—at least not enough to argue that their influence had been

⁴¹ Voting Rights Act, 42 U.S.C. § 1973 provides:

No voting qualification or prerequisite to voting or standard, practice or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . . . A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected. . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

⁴² *LULAC*, 126 S. Ct. at 2624.

unconstitutionally diluted.⁴³

In what was a serious mistake, the challengers in the Dallas area did not set up a Section 5 challenge. Instead, they only brought a Section 2 vote-dilution challenge. I think a Section 5 challenge, an anti-retrogression challenge, might have won because the black voters were clearly less well-off than they were prior to the reapportionment. The only question presented to the Court was whether they were so poorly off that their votes were illegally diluted under Section 2. But the Republican Justice Department had approved the Texas reapportionment prior to its enforcement in Dallas; meaning that if the challengers were to bring a Section 5 challenge, they had to bring a separate action in the District of Columbia Circuit.⁴⁴ They did not do it. The Court noted it had no Section 5 challenge before them.⁴⁵ Had there been a Section 5 issue, I predict that the Dallas district would have gone down as well.

When all of the smoke clears, I have a simple bar exam question. This would be to give all of the graduating students the *LULAC* opinion and have them say who voted how on what issue. It is 136 pages with wide swings in voting in terms of who voted how and who voted what. But, the central issue to emerge from it, and the issue I hope you will remember, is that the central issue in American politics is what we do with political gerrymandering.

New York, for example, is a state in which the Republicans always control the State Senate and the Democrats always control the

⁴³ *Id.*

⁴⁴ Voting Rights Act, 42 U.S.C. § 1973c(a).

⁴⁵ *LULAC*, 126 S. Ct. at 2625, 2626.

State Assembly, with the same voters voting for both. The lines are so carefully drawn that the Republicans can predict that they will always win the State Senate; and the Democrats will always win the Assembly. The electorate lives with what it has been given.

The question is this: is there a justiciable standard that can be used in gerrymandering cases? That is the challenge that Justice Kennedy sets out in his opinion in the *LULAC* case.⁴⁶ Essentially, what Justice Kennedy is saying is that the Court does not like political gerrymandering any more than you do, so give us a standard.⁴⁷ The trail we have gone down so far is to try to figure out a standard of political fairness.

I do not think that is the standard because it asks judges to make decisions about political fairness that may be outside of their competence. The standard that I urge people to think about is whether the reapportionment in question does away with competitive elections. If there are ten Congressional districts in a state and you set up the lines so that there is a fifteen to twenty percent registration edge in every district, then you know what the outcome is going to be without the messy necessity of an election. I would strike such an incumbent gerrymander down, not because it is politically unfair, but because it deprives voters of the right to cast a meaningful ballot.

The American Political Science Association says that a fifty-five to forty-five district is a landslide district. It is a district in which you simply cannot change the outcome in any predictable way. If

⁴⁶ *Id.* at 2609-11.

⁴⁷ *Id.* at 2611.

that is what state legislatures give us, then I think they have taken away the right to vote. The right to vote is not just casting a ballot; it is casting a meaningful ballot in a contestable election. That doesn't mean that each district must be contestable. Sometimes the numbers make that impossible. But it does mean that the politicians cannot draw lines that systematically minimize the chance for competitive elections.

III. CAMPAIGN FINANCE DECISIONS

A. Traditional Campaign Finance Regulation: *Buckley v. Valeo*

The United States has a system of regulating campaign finance that no sane person would ever have created. The United States backed into this system through a series of traditions and judicial determinations—not as a result of a democratic judgment. We're stuck with it because the Supreme Court in 1976, in a case called *Buckley v. Valeo*,⁴⁸ set out standards that we are still trying to live with—standards that are extraordinarily counterproductive to coherent campaign regulation.⁴⁹

The *Buckley* Court held that limitations on campaign expenditures are unconstitutional because they are a direct and frontal assault on the First Amendment.⁵⁰ In effect, the Court ruled, campaign spending is speech. On the other hand, the Court found campaign contributions differ from expenditures because they are a

⁴⁸ 424 U.S. 1 (1976).

⁴⁹ *Id.* at 46-47 (distinguishing independent expenditure limits from contributions).

⁵⁰ *Id.* at 39 ("It is clear that a primary effect of these expenditure limitations is to restrict

means of allowing a candidate to speak by giving the candidate money—the donor does not speak, it is the donee who speaks.⁵¹ Therefore, according to the *Buckley* Court, there is only an indirect relationship between the money and the speech. The *Buckley* Court also explained that campaign contributions are more dangerous than expenditures in terms of corruption because of the risk of a quid pro quo.⁵²

Essentially, the Supreme Court ruled in *Buckley* that you cannot limit expenditures; but you can limit contributions.⁵³ The Court held that campaign contributions could be regulated by keeping them so small that the risk of corruption is minimized.⁵⁴ But the *Buckley* Court failed to define what they meant by “corruption.” Does “corruption” mean quid pro quo corruption, which is already illegal as a form of bribery or extortion? Or, is it corrupting of the democratic process to give some people access based on contributions, but not other people access? Whose telephone call does a Congressman take, the person who gave him a lot of money or

the quantity of campaign speech . . . [and] political expression . . .”).

⁵¹ *Id.* at 20-21. The Court explained that:

A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. . . . While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. at 21.

⁵² *Id.* at 45 (“[A]ssuming, arguendo, that large independent expenditures pose the same dangers of actual or apparent quid pro quo arrangements as do large contributions, § 608(e)(1) does not provide an answer that sufficiently relates to the elimination of those dangers”).

⁵³ *Buckley*, 424 U.S. at 20-21.

⁵⁴ *Id.* at 29-30 (“Congress was justified in concluding that the interest in safeguarding against the appearance of impropriety requires that the opportunity for abuse inherent in the

the person who did not? Is that a corruption of the process? We have been debating that for years.

If you stop for a moment, that is a crazy system. Every economist who looks at the system would say it cannot work. They would say you have just replicated the way American society deals with its drug problem. The way American society deals with its drug problem is to have essentially an uncontrolled demand because we do not know how to control the demand, and instead we try to control supply. We try to cut the supply off at the borders. We try to arrest the dealers. We do everything we can to cut the supply off, but because there is a huge demand for it, the demand sucks the stuff in, and creates financial incentives to deal. Our drug policy is, by and large, a failure because we don't know how to control of the demand for drugs. Depending solely on supply side control simply fails.

The United States has replicated that in the campaign finance area. *Buckley* said there is no control on expenditures, which means there is no control on demand. There is an uncontrollable demand for campaign cash. Why? Because candidates are caught on an ascending demand spiral. Even when one candidate wants to stop, the candidate is afraid his or her opposition will keep going and gain an advantage. So both sides keep spending more, even when both would like to stop.

It is like the United State and Soviet Union during the arms race of the Cold War. For obvious economic reasons, each side wanted to stop building nuclear bombs, but each was afraid if they

process of raising large monetary contributions be eliminated.”).

stopped the other side would gain a potentially lethal advantage. Finally, the Soviet Union collapsed because of the economic strain of the process. Incalculable damage was done to our economy, as well. We have replicated that same process in the context of campaign finance. Candidates continually spend more and more and more, not necessarily because they want to, but because they are afraid they will lose the competitive advantage if they stop. That means there is an unlimited demand for campaign money; but we at the same time attempt to control the campaign process by putting restrictions on the contributions.

It is as though we attempt to regulate in a vacuum, where we control the money coming into the system, without controlling the demand for the money coming out of the system. Understandably, it fails. It creates an industry of lawyers who work out loopholes. It creates gray market money. It creates a tremendous pressure on the system to pour more money into the system because the demand is there and the supply follows demand. You just cannot overestimate the total failure of the system.

The McCain-Feingold Bill⁵⁵ plugged up two of the most egregious loopholes that had evolved that were making a mockery of the system. In *McConnell v. FEC*,⁵⁶ the Supreme Court upheld the loophole-plugging, upholding bans on corporate contributions and phony issue ads.⁵⁷ Those are gone. But within moments, new

⁵⁵ Bipartisan Campaign Reform Act (McCain-Feingold Bill), 2 U.S.C. § 441b(b)(2) (2000).

⁵⁶ *McConnell v. FEC*, 540 U.S. 93 (2003).

⁵⁷ See generally *id.* at 132-89 (upholding a ban on corporate contributions and fake issue-ads).

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loopholes opened up through the use of so-called “527s,” which are political organizations purporting to operate outside of the restrictions on campaign spending. By the end of the year we will have built an entirely new web of loopholes that will be placing the system under assault.

B. Campaign Contribution and Expenditure Decisions

1. *Randall v. Sorrell*

Now, if the laboratory of democracy means anything, it would be interesting to see how such an experiment in democracy might operate under those circumstances. Our existing democracy is a function of the accident of our First Amendment and equality jurisprudence. The First Amendment steps in and says wait a minute; you can’t control campaign expenditures, which are a form of speech, in the absence of a showing of an overwhelming necessity.⁵⁸ Campaign expenditures are speech; speech is sacrosanct under the First Amendment, especially political speech.⁵⁹ The Supreme Court held this exact principle existed in *Randall v. Sorrell*.⁶⁰

The loophole plugging in McCain-Feingold and *McConnell*, set the stage for the radical steps Vermont tried to take in *Randall*.

⁵⁸ *Buckley*, 424 U.S. at 15, 24-25 (stating that an interference with protected rights is subject to the “closest scrutiny” that may only be allowed if the State “demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms” (citations omitted)).

⁵⁹ *See id.* at 39 (stating that limits on campaign expenditures are limits on political expression, the most vital aspect of the electoral process, in contravention of the First Amendment); *see also* *Randall v. Sorrell*, 126 S. Ct. 2479, 2499-500 (2006).

⁶⁰ *Randall*, 126 S. Ct. at 2499-500 (holding that the Vermont statute “violate[s] the First

Vermont tried to address the system's deficiencies by passing an integrated regulatory mechanism that restricts expenditures, thus narrowing the demand for the money, along with the imposition of very low restrictions on the size of contributions, with the combination of the two designed to squeeze big money out of politics. Vermont envisioned that elections would go on in a much more modest scale, without vast amounts being spent by either candidate. The Court struck down the Vermont statute attempting to regulate campaign expenditures.⁶¹ The Court also struck down, for the first time, the contribution limits, as well.⁶²

My sense is that once the expenditure limits went, the contribution limits were ridiculous because they were too low. They were limits that would be okay in a world in which there were a control on the expenditures. But in a world in which there was no control on the expenditures, it was almost an exotic exercise to squeeze the contributions that low. The contribution limits were a thousand dollars in *Buckley*; and in Vermont they were considerably lower depending upon the nature of the office. And they were very rigorous; volunteers' expenses were counted. It was a very, very rigorous system.

The Supreme Court struck down the contribution limits as too low, indicating that there is a minimum, below which they will not

Amendment as interpreted in *Buckley v. Valeo*").

⁶¹ *Id.* (stating that the Vermont statute goes too far by burdening First Amendment interests, seeking to limit the voice of political parties, hindering participation in campaigns, and consequently violating the First Amendment).

⁶² *Id.* at 2485. The Court defined contribution limits as "the amounts that individuals, organizations, and political parties may contribute to those campaigns." *Id.*

allow contribution restrictions to go.⁶³ It is a sensible minimum. The Court said if the contribution is set so low as to starve the process of the money it needs to function, especially for a challenger to raise enough money to defeat an incumbent, then it is unconstitutional.⁶⁴ It is a shot across the bow of legislatures that are going to go down too low.

The interesting thing about the case was not the contribution cases, but rather, the effort to limit expenditures. Let me give you a quick lineup. Justices Breyer, Roberts, and Alito pledged allegiance to *Buckley*, arguing that the Court should try to make *Buckley* work.⁶⁵ Under *Buckley*, you cannot limit expenditures; and you can't set contribution limits so low that the system is starved for the needed money. Justice Breyer wrote a long opinion asserting that *Buckley* is what we have.⁶⁶ It may be right or wrong; but *Buckley* is what we have and we are going to try to make it work.⁶⁷ Justice Kennedy, writing for himself, said that he had so little faith in this whole enterprise that he could not concur with the plurality, but only with the outcome.⁶⁸ As I read Justice Kennedy, he would be willing to reverse *Buckley* in the other direction and say no regulation at all, even of the size of contributions. Justices Thomas and Scalia, who

⁶³ *Id.* at 2492.

⁶⁴ *Id.* at 2492, 2496.

⁶⁵ *Randall*, 126 S. Ct. at 2489, 2490-91.

⁶⁶ *Id.* at 2487-91.

⁶⁷ *Id.* at 2490. The Court explained that: "*Buckley* has promoted considerable reliance. . . . Overruling *Buckley* now would dramatically undermine this reliance on our settled precedent. . . . [W]e find this [is] a case that fits the *stare decisis* norm. And we do not perceive the strong justification that would be necessary to warrant overruling so well established a precedent." *Id.*

⁶⁸ *Id.* at 2501 (Kennedy, J., concurring).

have been crusading against *Buckley* for years, argued that *Buckley* was wrong; but not wrong because of why the liberals say it is wrong. It is wrong, they argue, because it allows too much regulation.⁶⁹ Justice Stevens says *Buckley* was wrong, but it was wrong because it equated speech and money.⁷⁰ According to Justice Stevens, under *Buckley*, you should be able to regulate both expenditures and contributions.⁷¹ Justices Souter and Ginsburg do not go quite that far, but they say that they are prepared to take a good, hard look at whether, under *Buckley*, expenditure limits can be imposed because this creates an arms control spiral, or some other serious interference in the democratic process caused by not having an expenditure cap.⁷²

You wind up with a six-to-three lineup. Justices Breyer, Roberts, Alito, Kennedy, Thomas, and Scalia all voted to invalidate the Vermont rules, while Stevens, Souter, and Ginsburg tended to approve them.⁷³ So, the future is interesting. As it stands, six of the Justices on the Court think *Buckley* is wrong—in its result and reasoning. Some Justices think it's wrong because it does not allow enough regulation; some think it is wrong because it allows too much regulation.

⁶⁹ *Id.* at 2506 (Thomas & Scalia, JJ., concurring).

⁷⁰ *Randall*, 126 S. Ct. at 2508 (Stevens, J., dissenting) (citing *Buckley*, 424 U.S. at 263 (White, J., concurring in part and dissenting in part)) (noting that the expenditure limits should be upheld as long as they serve a legitimate and “sufficiently substantial” political purpose).

⁷¹ *Id.* at 2507-08.

⁷² *See id.* at 2512, 2514 (Souter & Ginsburg, JJ., dissenting).

⁷³ The Vermont rules were invalidated by the majority of the Court, which included Justice Breyer, Chief Justice Roberts, and Justice Alito in the majority opinion. *See id.* at 2485 (majority). The concurring Justices included Justices Kennedy, Thomas, and Scalia. *Id.* at 2501 (Kennedy, J., concurring). *Id.* at 2501-02, 2506 (Thomas & Scalia, JJ., concurring). The minority of the Court leaned towards approving the Vermont rules. *See id.* at 2515, 2516 (Souter, Ginsburg, & Stevens, JJ. dissenting). Notably, Justice Stevens only

Only three Justices are hanging on to *Buckley*. Justices Breyer, Roberts, and Alito are hanging on trying to make the case work, which means we have unstable law in the area. Trying to read what is going to happen in the future is almost impossible. *Buckley* is a rotten tree but nobody knows which way it is going to fall. Is the tree going to get pushed over to regulate expenditures; or is it going to get pushed over to say no regulations at all, even contributions? When I say no regulation of contributions, I mean no regulation of the size of contributions. Everybody agrees that they have to be disclosed; disclosure laws are okay, just can you regulate the size?

2. *Wisconsin Right to Life, Inc. v. Federal Election Commission*

The last thing I want to mention is that there was another case, and I think it is important, not just for campaign finance but generally, and that was a case called *Wisconsin Right to Life, Inc. v. FEC* (“*WRTL*”).⁷⁴ *WRTL* deals with the longstanding ban on corporations being able to use funds in the national political process.⁷⁵ Corporations cannot spend treasury funds on federal elections and they cannot make contributions.⁷⁶

There is a longstanding exception to that; something called

joined in Parts II and III of Justice Souter’s dissent.

⁷⁴ *Wis. Right to Life, Inc. (WRTL) v. FEC*, 546 U.S. 410 (2006) (per curiam).

⁷⁵ *Id.* at 410 (citing Bipartisan Campaign Reform Act of 2002 (BCRA), 2 U.S.C. § 441b(b)(2)). The BCRA prohibits corporations from influencing candidates by using general treasury funds to pay for broadcast, cable, or satellite communications that refer candidates for federal office within a specific time frame before federal primary elections. 2 U.S.C. § 441b(b)(2).

⁷⁶ *WRTL*, 546 U.S. at 410 (detailing the progressive limitations of corporation campaign contributions).

the *MCFL* exception, which is an exception that dates to the '80s, created in *FEC v. Massachusetts Citizens for Life, Inc* ("*MCFL*").⁷⁷ *MCFL* dealt with non-profit grassroots organizations that just happen to be in corporate form. But they are really small, independent groups of people who are corporations in the formal sense, but not in the sense that we are worried about them in the campaign process. The Supreme Court said there is a First Amendment exception for those grassroots corporations.⁷⁸ Wisconsin Right to Life, a non-profit grassroots corporation, argued that it was entitled to one of those grassroots exceptions; that even though *McConnell* had upheld the ban facially. Wisconsin Right to Life argued that it was entitled to bring an as-applied challenge to the ban on corporate campaign spending based upon the fact that it was a grassroots organization to which the statute could not be constitutionally applied.

In *WRTL*, the lower courts misread *McConnell*. They read it as saying once the statute was facially upheld, that is the end of it; that everybody had to live with it and there were not going to be as-applied challenges.⁷⁹ The Supreme Court reversed unanimously, and I think correctly, reminding everyone that *McConnell* upheld the act facially.⁸⁰ The Court upheld the facial constitutionality of that act, but it did not say that there would not be applications of the act

⁷⁷ *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 263 (1986).

⁷⁸ *Id.* at 259-260, 263 (explaining that *MCFL* is a corporation designed to disseminate political ideas, rather than amass capital and should not be treated "differently than other organizations that only occasionally engage in independent spending on behalf of candidates").

⁷⁹ *WRTL*, 546 U.S. at 410.

⁸⁰ *Id.*

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that were unconstitutional.⁸¹ It still leaves it open to raise unconstitutional as-applied challenges rather than facial challenges. I think that is a key to the current Court's constitutional jurisprudence.

The other revealing case this Term was the abortion case, where the Court chastised the First Circuit for operating facially, and said you have to do these things as applied.⁸² Facial review is still okay in certain situations, but the Court continues to believe that as-applied review is the fundamental way we should be dealing with most of our constitutional jurisprudence.⁸³

⁸¹ *Id.*

⁸² *Ayotte v. Planned Parenthood of N. New England*, 126 S. Ct. 961, 968 (2006) (“[T]he ‘normal rule’ is that ‘partial, rather than facial invalidation is the required course’ such that a ‘statute may . . . be declared invalid to the extent that it reaches too far, but otherwise left intact.’ ” (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985))).

⁸³ *Id.* at 968.

