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Mark Rush

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The United States Supreme Court and the Political Process: The Contemporary Status of Voting Rights Law

Mark Rush

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Mark Rush is Dean of the College of Arts and Sciences at the American University of Sharjah, UAE. He received his Ph.D. from The Johns Hopkins University in 1990 and his B.A.from Harvard College in 1983. His most recent publications include Judging Democracy (Toronto 2008) and several articles on electoral reform and judicial activism in the United States and abroad. He is currently writing an analysis of judicial activism and democracy.

RESUMEN

Este artículo analiza varias tendencias en áreas clave de la actual ley electoral de los Estados Unidos. Se centra en el desarrollo de las decisiones del Tribunal Supremo sobre los derechos de los votantes de grupos minoritarios y la regulación de gastos en campañas electorales. Ambas áreas de la ley electoral de Estados Unidos originan polémica ya que obligan al Tribunal Supremo a equilibrar concurrentes derechos constitucionales, así como los aspectos colectivos e individuales del derecho de voto, la libertad de expresión y la cláusula sobre protección igualitaria[1].

El Tribunal Supremo también ha manifestado una nueva apreciación y cierta sospecha hacia la tendencia de algunos palamentarios de actuar como un "cartel electoral". Ciertos casos de la ley electoral representan un claro conflicto de interés en la medida en que los palamentarios redactan las leyes que controlan el proceso por el cual ellos mismos son reelegidos y la manera en que se regula la actividad electoral. Este poder les permite levantar barreras para participar en el ámbito político o aislarse de la competencia política mientras afirman "reformar" el proceso político. Varios miembros del Tribunal Supremo han expresado su preocupación por la amenaza que este conflicto de intereses representa contra la integridad del proceso electoral. En consecuencia, el Tribunal Supremo se encuentra dividido ahora entre miembros que confían en los motivos de los parlamentarios y aquellos que temen la amenaza que este conflicto de intereses representa para la democracia. Como resultado, vemos ahora cómo el Tribunal Supremo de los EE. UU. es cada vez más "activista" y está más inclinado a cuestionar los poderes electos del gobierno a fin de, irónicamente, proteger la integridad del proceso democrático.

1. INTRODUCTION AND OVERVIEW

For the student of American politics and culture, the evolution of constitutional law concerning elections provides a particularly fascinating and illuminating view into the American political mindset. American election law embodies the best and worst of American constitutional history. On the one hand, it documents the nation's history of racial discrimination and disenfranchisement. On the other, it is a tribute to the remarkable efforts of scholars and practitioners who sought to eradicate that history and pass laws and reforms that would make elections fairer, more open, more egalitarian and more legitimate.

The Supreme Court's case law addresses and embodies two key tensions that inform American politics. The first concerns race, voting rights, equality of political opportunity and the role the government should play in monitoring the political process to ensure that minorities have an opportunity to gain "fair and effective representation" (*Reynolds* v. *Sims*).

The second issue concerns the notion of political corruption and, again, the role the government should play in policing the political process to ensure that the role and influence of wealth are constrained. This aspect of election law is particularly intriguing because, insofar as incumbent political actors draft the legislation that controls political spending and electoral competition, the tendency for them to act in a cartel-like manner is manifest (Katz and Mair 1995, 2009).

Both areas of case law are therefore linked by a common concern with political fairness and the growing suspicion within the Supreme Court about this pattern of cartel like behavior in the legislature. These areas of law therefore presents a fascinating study of both the American concept of political fairness and the role the judiciary should play in resolving conflicts about political rights. For the student of United States politics, an understanding of these issues and how the development of the Supreme Court's case law in these areas is absolutely necessary for understanding the nature and tenor of American political debates.

I will begin the article with a discussion of the Supreme Court's recent decisions concerning minority voting rights. I then turn to discuss the impact of the *Citizens United* decision (which was issued in January 2010) on contemporary scholarly debates about electoral fairness and the role of the court in resolving constitutional disputes about electoral rights.

2. RACIAL DISCRIMINATION AND MINORITY VOTING RIGHTS

The election of Barack Obama as the first African-American president of the United States engendered a host of discussions concerning American electoral law and the need to maintain laws that took special efforts to ensure representational opportunities for minority voters. Scholars debated whether Obama's election signaled that race was no longer a factor in American politics and, therefore, a reason to begin to dismantle the legal regime created by the Voting Rights Act[2] of 1965 ("VRA") and its subsequent amendments. As well, Barack Obama's decision *not* to use public funds for his presidential campaign also sent a shock across the community of legal scholars and practitioners who have debated the merits and methods of campaign spending restrictions for nearly four decades.[3]

Thus, Obama's successful campaign for the presidency illuminated the importance of race in American politics and the important role that the federal government has played in rectifying a history of racial injustices. The Voting Rights Act is, arguably the most prominent piece of legislation dealing with race. Its passage gave the federal government the authority to oversee the state and local administration of elections and gave aggrieved minority voters the legal standing on which to challenge discriminatory electoral practices.

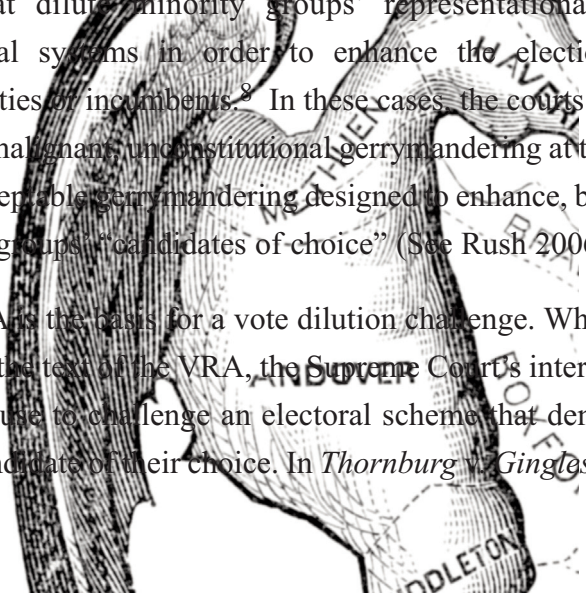
While the VRA's impact has been far reaching, one of its more obvious and more profound impacts has been on the process of redrawing state legislative and congressional district boundaries. Each decade, states are required to redraw district boundaries in order to equalize their population. This process, called "redistricting" has always been politically contentious because, traditionally, the political party controlling the state legislature has controlled the redistricting process. Inevitably, the process has been perverted by partisan—and racial—considerations.

The process of drawing legislative district lines for partisan gain—known as "gerrymandering" is as old as the use of electoral districts. Its history goes back to the rotten boroughs of the British Parliament and, in the United States, to the Founding era. The term "gerrymander" was coined by a newspaper editor in Massachusetts in response to the legislative districts drawn in 1812 and signed into law by then Governor Elbridge Gerry. The Jeffersonian Republicans had taken over the Massachusetts legislature. In an attempt to solidify their control, they redrew one district in northeastern Massachusetts in a manner that

seemed certain to ensure the defeat of the Federalist incumbent in the ensuing election. The district's outline was so bizarre that the newspaper editor compared its shape to that of the mythical salamander and then declared the process of drawing lines for partisan gain "gerrymandering" in honor of the Federalist Governor who had no choice but to approve the legislative districts. [4] Figure 1 depicts the newspaper's rendition of the district.

While gerrymandering for partisan purposes is part of the fabric of American politics,[5] Congress sought to prevents the use of the practice (and other methods of disenfranchisement) against racial minorities when it passed the Voting Rights Act. Besides banning discriminatory practices such as literacy tests, the Voting Rights Act embodied two principal weapons to combat discrimination against minority voters. Section 2 bans any "voting qualification or prerequisite to voting, or standard, practice, or procedure ... [that] den[ies] or abridge[s] the right of any citizen of the United States to vote on account of race or color." Thus, any practice that diminishes the power of minority voters by diluting their capacity to coalesce and elect a representative is subject to a challenge under Section 2 of the VRA. Section 5 empowers the United States Department of Justice to oversee and "preclear" (that is, pre-approve) any changes to voting qualifications, prerequisites to voting, standards, practices, or procedures in jurisdictions covered by the Act.[6]

FIGURE 1: The Massachusetts Gerrymander[7]



In Voting Rights Act cases, the Supreme Court has addressed challenges to electoral rules or arrangements that dilute minority groups' representational opportunities or gerrymander entire electoral systems in order to enhance the election (or re-election) opportunities of political parties or incumbents.[8] In these cases, the courts have had to make a careful distinction between malignant, unconstitutional gerrymandering at the expense of racial minorities and otherwise acceptable gerrymandering designed to enhance, but not guarantee the election chance of minority groups' "candidates of choice" (See Rush 2006: 145).

Section 2 of the VRA is the basis for a vote dilution challenge. While the phrase "vote dilution" does not appear in the text of the VRA, the Supreme Court's interpretation of Section 2 gives a minority group cause to challenge an electoral scheme that denies minority voters the opportunity to elect a candidate of their choice. In *Thornburg v. Gingles*, the Court set forth

the criteria on which a minority group could make a vote dilution claim under Section 2:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district… Second, the minority group must be able to show that it is politically cohesive... Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed…to defeat the minority's preferred candidate… Essentially, vote dilution occurs when a minority group can demonstrate that a particular electoral scheme wastes its voting power either by packing them into district supermajorities or dividing group members among districts so that they are unable to form a majority in any one district. (*Thornburg* v. *Gingles*: 50)

This interpretation of Section 2 precipitated the controversial round of redistricting and remedial gerrymandering that characterized the 1990s. In essence, it required states to draw legislative districts in whatever manner was necessary to ensure that minority voters would have a change to elect candidates. To militate against Section 2 vote dilution challenges, states went to extraordinary lengths to draw "majority-minority" districts (that is, a district in which minority voters comprise a majority of the voting population). In some cases, however, states went to such lengths that the resulting district maps were "so bizarre" that they were deemed by the Supreme Court to be "unexplainable on grounds other than race" and therefore in violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. The court ruled that such a racially-driven redistricting plan would demand "the same close scrutiny that we give other state laws that classify citizens by race" (*Shaw* v. *Reno*: 644).

The decision in *Gingles* essentially constitutionalized a practice that the Supreme Court had declared unconstitutional in 1960 in *Gomillion* v. *Lightfoot*. In that case, the court heard a challenge to changes made to voting districts in the city of Tuskegee, Alabama as well as the city's municipal border. The city had originally been a square-shaped municipality. However, when demographic changes created a voting-age population that was African-American, the city leaders petitioned the state of Alabama to redraw the municipal boundary in a manner that would leave black voters outside of the city and, therefore, unable to vote in municipal elections. The state obliged and redrew the city border as what the Supreme Court described as an "uncouth" 28-sided figure. The Supreme Court declared that this alteration of the city's border unconstitutionally denied black voters the right to vote.

Through a series of decisions culminating in *Easley* v. *Cromartie*, the Supreme Court

modified its minority voting rights case law. Ultimately, the court argued, a redistricting scheme designed to enhance minority representational opportunities would survive constitutional scrutiny so long as the state could demonstrate that race was not the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (*Miller* v. *Johnson*: 916). In *Easley*, North Carolina was able to demonstrate that factors besides race—incumbent protection, balancing partisan representation in the legislature, and so forth—had also played determinative roles in the shaping of district lines. As a result, the court sustained the districting plan. In so doing, it struck a balance between the VRA mandate to enhance minority representation and the 14th Amendment's prohibition against racially discriminatory legislation.

2.1. Section Five and Federal Preclearance[9]

A separate but related question addresses the threshold at which a state may demonstrate that it has met the demands of Section 5's preclearance provisions. Among other things, preclearance requires a state to demonstrate that a proposed change to electoral law does not have a retrogressive impact on a minority group's representational opportunity or political power. That is, a proposed change in voting procedures must not diminish minority representational opportunities.[10]

The interaction of Sections 2 and 5 in the Supreme Court's case law is paradoxical. It is possible for a state to receive preclearance under Section 5 for a change to electoral law—specifically, a change to the shape and composition of electoral districts—that would be violative of the vote dilution provision of Section 2. This can occur because vote dilution under Section 2 is cast in absolute terms of the proportion of minority population at the time of a redistricting. Section 5's retrogression scheme is a relative measure that compares contemporary and previous minority representational power. Thus, it is possible for a redistricting scheme that dilutes (or, at least fails to maximize) minority voting power to be an improvement upon (or, at least not a retrogression of) prior minority representational opportunity. Accordingly, Section 2 can be read in a manner that conflicts with Section 5.

This was demonstrated in *Georgia* v. *Ashcroft*, where the Supreme Court acknowledged that the construction of "minority influence" districts or "coalition" districts (ones that did not meet the "majority-minority" criteria set forth in Gingles but whose political

dynamics enabled the minority to influence or dictate political outcomes) could survive Section 5's nonretrogression standard even though they might seem to run afoul of the vote dilution standard of Section 2.[11]

Critics lamented *Ashcroft* because it lowered the retrogression threshold (Karlan; Benson). Prior to *Ashcroft*, the retrogression standard had focused on the ability of minority voters to elect the candidate of their choice which, for all intents and purposes, was cast in terms of creating majority-minority districts in jurisdictions that met the three part test set forth in *Gingles*. In *Ashcroft*, however, the Court altered the calculus to embrace minority "participation in the political process" as well as ability to elect a representative:

> any assessment of the retrogression of a minority group's effective exercise of the electoral franchise depends on an examination of all the relevant circumstances, such as the ability of minority voters to elect their candidate of choice, the extent of the minority group's opportunity to participate in the political process, and the feasibility of creating a nonretrogressive plan. No single statistic provides courts with a shortcut to determine whether" a voting change retrogresses from the benchmark.
>
> In assessing the totality of the circumstances, a court should not focus solely on the comparative ability of a minority group to elect a candidate of its choice. While this factor is an important one in the § 5 retrogression inquiry, it cannot be dispositive or exclusive. The standard in § 5 is simple—whether the new plan "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."
>
> The ability of minority voters to elect a candidate of their choice is important but often complex in practice to determine. In order to maximize the electoral success of a minority group, a State may choose to create a certain number of "safe" districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice. Alternatively, a State may choose to create a greater number of districts in which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.
>
> Section 5 does not dictate that a State must pick one of these methods of redistricting over another. Either option "will present the minority group with its own array of electoral risks and benefits," and presents "hard choices about what would truly 'maximize' minority electoral success." (*Georgia* v. *Ashcroft,* 461, 479-80)

Ashcroft challenged the Supreme Court to balance a theoretical vision of minority voting rights as set forth by the VRA with the practical demands made by the political actors who were trying to implement the Act. On the one hand, drawing a "bright line" standard that uses a 50% minority voting age population as the base for a vote dilution claim would simplify and clarify the law. On the other hand, such a standard would clearly come at the cost of 1) potentially wasting minority votes by packing them unnecessarily into majority-minority districts and 2)

requiring more bizarre district lines as states seek to construct majority-minority districts.

While some scholars criticized the *Ashcroft* decision, others celebrated the approach it took to minority representation as a "fresh" new paradigm (Hirsch). The controversy surrounding the decision concerned the role and re-election of minority elected officials. While minority incumbents might be able to win re-election in coalition or influence districts, it was not clear that, after they retired, the minority voters would still be able to elect the candidate of their choice in a district in which they did not comprise an electoral majority. Those who lamented the decision[12] feared that the conflation of minority voters' representational opportunity and with the electoral success of minority legislators might jeopardize the former if the latter were to retire.

2.2. Contemporary Minority Voting Rights Law

In two important cases in the 2008-09 term, the Supreme Court sustained the constitutionality of the VRA and deferred to Congress's conclusion that there was an ongoing need for federal protection of minority voting rights. In *Bartlett* v. *Strickland*, the court restated its understanding of vote dilution. In *NAMUDNO* v. *Holder*,[13] the Court upheld the constitutionality of the preclearance requirement of Section 5 of the VRA.

Bartlett embodied a clash between the North Carolina constitution (which prohibits the division of counties when drawing legislative districts) and the state legislature's interpretation of Section 2 of the VRA. The state legislature had divided Pender County in order to draw several "minority influence' districts (such as those discussed in *Georgia* v. *Ashcroft*). Seeking to keep its borders intact in the redistricting process, Pender County argued that Section 2 of the VRA requires that states draw majority-minority districts—but it does not require the creation of minority influence districts. Since minority influence districts were, therefore, optional, Pender County argued that the state had no compelling reason to divide it.

The technical aspect of this case is subtle but important. Pender County did not wish to be divided among legislative districts. To protect itself from this threat, it challenged the interpretation of the VRA on which the state of North Carolina had based its decision to divide the county. Pender County argued that, in the absence of a VRA mandate to draw a minority influence district and in the absence of the possibility of drawing a majority-minority district,

the North Carolina constitution's requirement of preserving county boundaries should take precedence in the redistricting process. For Pender County to succeed in making this claim, the Supreme Court would have to agree that the VRA did not require the creation of anything less than a majority-minority district.

In a carefully crafted 5-4 decision, the Supreme Court agreed with Pender County. The Court reasserted the *Gingles* standard and ruled that the VRA requires states to take special measures to enhance minority representational opportunities **only** when minority voters are numerous and geographically compact enough to comprise a majority of a legislative district's voting population. Under this reading of the VRA, a state is obliged by the VRA to deviate from its own redistricting principles (such as those requiring the preservation of county lines) and take special pains to enhance minority representational opportunities *only* if a minority group is big enough to comprise a majority of a legislative district's population.

The *Bartlett* decision compares to earlier talismanic decisions in *Baker* v. *Carr* and *Reynolds* v. *Sims* where the Supreme Court set forth the one-person, one vote rule and established the constitutional requirement that states equalize the population of their legislative and congressional districts. As John Hart Ely (124-125) noted, in *Baker* and *Reynolds*, the court erred on the side of administrability and simplicity. While it could have been argued that fair and effective representation could be achieved without the one-person, one-vote rule, the rule made the law clearer and correspondingly more predictable. Greater population deviations across voting districts were more likely to result in a constitutional challenge than smaller ones.

Similarly, in *Bartlett*, the court said that the majority-minority rule "relies on an objective, numerical test…[and] provides straightforward guidance to courts and to those officials charged with drawing district lines" (*Bartlett* v. *Strickland* 1237) To have interpreted the VRA as requiring the creation of coalition or influence districts would have invited chaos. Even the dissenters in Bartlett acknowledged that the definition of a coalition district was "flexible." Thus, absent a clear majority-minority standard, courts would be besieged with litigants and petitioners seeking to defend districts that were 39% or 42% or whatever percent minority. Each such case would depend on a multitude of local circumstances that would force judges to weigh and choose among competing (and equally valid) political science

assessments of voting tendencies under discrete circumstances.

Instead, the Supreme Court majority opted to set a clear, simple, straightforward and predictable standard: the VRA calls for the creation of majority-minority districts—period. As the Court said: "We find support for the majority-minority requirement in the need for workable standards and sound judicial legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less-exacting standard that would mandate [influence] districts under §2" (*Bartlett* v. *Strickland* 1244).

Thus, *Bartlett* allows states to continue drawing majority-minority districts, coalition districts or any other type of district that will help to represent interests that are important to state politics. But, according to *Bartlett*, they are *required* to do so by the VRA only when they can construct a majority-minority district.

Bartlett challenged the Supreme Court to clarify the manner in which it interpreted the notion of vote dilution and fair representation. *Northwest Austin Municipal Utility District No. 1 ("NAMUDNO") v. Holder,* however, embodied an ominous threat to the VRA. In this case, the Court was asked to determine whether the continued application of section 5s preclearance requirement is constitutional.

In *NAMUDNO*, Northwest Austin argued that it is no longer reasonable or constitutional to require particular states and their subdivisions to seek federal approval for changes to election laws based on racial practices and problems that occurred some 50 years ago or more. Northwest Austin asserted that enough progress has occurred in the realm of minority voting rights to render the preclearance requirements an unnecessary and now constitutionally unjustified incursion on state and local governments:

> The 2006 enactment of §5 must be subjected to a meaningful evaluation to determine whether its extraordinary prophylactic remedy is a constitutionally valid exercise of Congress's enforcement power under the Reconstruction Amendments. …
>
> Section 5 sweeps far beyond purposeful discrimination, unnecessarily requiring federal vetting of vast numbers of constitutionally benign state and local changes. That unparalleled federal veto was originally enacted to address a specific, acute problem— the gamesmanship by which recalcitrant States and localities formerly attempted to stay one step ahead of federal decrees. The preemptive §5 can only be justified as a response to such a problem; purposeful discrimination that has ripened into a constitutional violation is adequately addressed by direct prohibitions like §2. Absent evidence that case-by-case adjudication remains an unviable method of enforcing constitutional guarantees, §5 cannot be employed simply because a blunt

> instrument is easier to wield than a litigation scalpel.[14]

Whereas the Supreme Court ruled in favor of simplicity in *Bartlett*, Northwest Austin asked the court to rule that a simple preclearance standard was unfair and therefore unconstitutional. As Justice Roberts noted in the opinion of the Court, the Act "differentiates between the States, despite our historic tradition that all States enjoy equal sovereignty" (*NAMUDNO v. Holder* 2009:2511).

Insofar as "the preclearance requirements in one state would be unconstitutional in another," Roberts acknowledged that "the evil that §5 is meant to address may no longer be concentrated in the jurisdictions singled out for preclearance. The statute's coverage formula is based on data that is [sic] now more than 35 years old, and there is considerable evidence that it fails to account for current political conditions" (*NAMUDNO v. Holder* 2009:2511). The court concluded that all jurisdictions covered by section 5 have the right to seek relief from the preclearance provisions if they can demonstrate that they no longer engage in discriminatory electoral practices.

The Supreme Court ruled that covered jurisdictions such as Northwest Austin should be allowed to prove that they no longer should or need to be overseen by the Department of Justice. Nonetheless, the Supreme Court sustained the constitutionality of Section 5 despite the fact that it is burdensome for the covered areas.

Scholars and critics debated the necessity of the VRA extension of 2006. On the one hand, Barack Obama's ascendance to the top of the Democratic Party's ticket has evoked suggestions that the VRA's time has passed (Thernstrom; cf. Toobin). Did Obama's candidacy not demonstrate that the VRA had achieved its goals and that, as a result it was no longer necessary to maintain the level of federal oversight of state and local electoral practices mandated by the Act? On the other, there is no question that the VRA is the principal reason why minority candidates have been elected to state and federal offices (Davidson Grofman 1994; Lublin, Brunell, Grofman and Handley 2009). As Chief Justice Roberts affirmed in *NAMUDNO*, "the historic accomplishments of the Voting Rights Act are undeniable" (*NAMUDNO v. Holder* 2009:2511).

NAMUDNO forced the Supreme Court to consider whether it should defer to

Congress's determination that, despite the progress that has occurred in voting rights over the last half century, it is still necessary to take extraordinary measures to ensure that the political system does not operate in a way that marginalizes minority voters and erases the gains they have made. The court deferred to Congress's judgment, but indicated that it regarded the VRA as a blunt instrument. In this respect, Roberts's opinion can be regarded as a warning to Congress to refine the analytical basis on which it continues to authorize the Department of Justice to oversee electoral changes in jurisdictions covered by section five.

2.3. Perspective

Bartlett and *NAMDUNO* can be regarded as carefully crafted decisions in which the Supreme Court asserted its role in hearing disputes about controversial voting rights laws while deferring to the judgment that Congress used in adopting the Voting Rights Act. *Bartlett* clarifies the law concerning vote dilution. The standard the court reasserted in that decision may not be perfect for the purposes of maximizing minority representational opportunities. Nonetheless, so long as the United States uses single member electoral districts, the majority-minority standard that the court affirmed in *Bartlett* will ensure that litigation is grounded on clear rules for drawing districts.

In this respect, we see the Supreme Court fulfilling its duty to nurture the development of the law and clarify the standards for making constitutional challenge. Insofar as the law's legitimacy depends on its predictability,[15] the court's clarification and simplification of the vote dilution standard in *Bartlett* can be regarded as an attempt to preserve the law's predictability and the court's legitimacy. Similarly, while the court deferred to ongoing congressional concerns about the need to police the political process in order to protect minority voting rights in *NAMUDNO,* it maintained that it might be necessary for Congress to refine the measures of voter participation that for that inform Section 5's preclearance standard.

This same concern about legal clarity and predictability animates the Supreme Court's case law concerning campaign spending restrictions. However, in this area of law, the court has taken a much less deferential posture with regard to congressional justifications for regulating campaign spending and speech. This is due to the fact that campaign spending restrictions embody a conflict of interest insofar as they also regulate the level and nature of

competition in congressional elections. In this respect, campaign spending restrictions allow incumbent members of Congress to control the process by which they are returned to office. Insofar as this embodies a clear conflict of interest for Congress, the Supreme Court has been more exacting in its assessment of the constitutionality of campaign spending laws.

3. CAMPAIGN SPENDING AND FREE SPEECH

Voting rights case law embodies the court's struggle to set forth clear principles by which congressional efforts to protect minority voters can confirm to the Constitution. In the cases we reviewed, the Supreme Court has assumed a deferential attitudes towards the Congress and has supported its efforts to oversee state and local election administration despite, as the court noted in *NAMUDNO*, the fact that laws such as the Voting Rights Act do alter the balance of power between the states and the federal government. Throughout the voting rights case law, the court has supported congressional efforts to break up or stop political practices that discriminated against minority voters, kept them out of power, and kept anglos in political power.

In its campaign spending decisions, the court has not been able to maintain this deferential posture because campaign spending legislation embodies an unresolvable conflict of interest for the legislature. On the one hand, the Supreme Court has acknowledged that the government has a compelling interest in overseeing and regulating the political process to ensure that private wealth is not used to corrupt either elections or the legislative process and to ensure that existing regulations prevent the appearance of corruption. On the other hand, the court has also acknowledged that freedom to speak about political issues is fundamental to the health and integrity of a democracy. Insofar as it is necessary to spend money to broadcast one's speech and to engage in the political process, the court has equated spending money for political purposes with political speech. Accordingly, the court has always subjected regulations of campaign spending to the same high degree of scrutiny that it applies to other regulations of political speech. Thus, the Supreme Court's case law is characterized by the tension between protecting freedom of political speech and ensuring that wealth political actors do not corrupt or appear to corrupt the political process. The court's case law embodies a struggle to define the scope of political speech, the notion of "corruption" that underpins campaign spending regulations and the rights of corporations to engage in political activity.

In January, 2010, a bitterly divided Supreme Court released its decision in *Citizens United* v. *Federal Election Commission*. The court declared two provisions of BCRA unconstitutional. The first, section 203 prevented corporations and labor unions from using their general treasury funds for political advertisements. Instead, corporations and unions had been required by BCRA's predecessor (The Federal Election Campaign Act of 1971) to create political action committees ("PACS") for political purposes. The purpose of this ban was to protect shareholders and investors by ensuring that the corporate or union treasury was used to support a firm's business interests (or union's labor interests) and to ensure that executives could not use the treasury to advance their personal political agendas (at the expense, perhaps or despite the disapproval of the shareholders or union members). If they wished to engage in political activity, corporate executives, employees, shareholders or union members could pool financial resources in the PAC. The second section, 441(b) of BCRA banned the use of electioneering communications in the last 30 days of a primary election or the last 60 days of a general election.

The decision was met with praise and criticism from across the political spectrum. A poll conducted by the *Washington Post* indicated that 80% of Americans opposed the decision (Eggen 2010). Critics called the decision "devastating" and "appalling" because it enabled corporations to spend money at will to influence elections. Others hailed the decision as a victory for free speech. Still others took a more moderate view (Dworkin; Tribe).

I suggest that the moderate view is most accurate and most instructive. In *Citizens United*, the Court declared that sections 203 and 441 of the Bipartisan Campaign Reform Act of 2002 ("BCRA")[16] were vague and therefore unjustifiable constraints on political speech. Speaking for the majority, Justice Kennedy maintained that the vagueness of these sections essentially gave the federal government censorial powers. This was unconstitutional.

3.1 Background Issues: Defining Corporate Speech Rights and Political Corruption

The Supreme Court has sought to balance both the individual and collective aspects of political speech. It has acknowledged that political spending by individuals, groups or corporations is tantamount to political speech and is therefore protected by the First Amendment. However, it has also acknowledged that unregulated political spending could corrupt the political process or, at least, generate the appearance of corruption. As well, a

completely unregulated free market could easily produce either a cacophony of political speech or a political marketplace dominated by a relatively few large, influential interests. In either case, the electorate would suffer because the quality of political speech to which it had access would be diminished as a result of the uncontrolled volume of some actors' speech.

At first, the Supreme Court deferred to congressional concerns about the corrupting influence of wealth on the political process and the need to strike a balance between the volume of individual speech and its collective quality. However, as congressional attempts to regulate political spending became more aggressive, the court became correspondingly more skeptical of the motivation behind Congress's efforts to expand its power over the political process. Throughout the court's case law, individual justices expressed concerns about the extent to which campaign spending regulations also seemed to buffer incumbent legislators from political competition. In short, the Supreme Court became increasingly suspicious that Congress was behaving as a political cartel.[17]

A key aspect of the campaign spending case law is the definition of political corruption. On the one hand, the court supported Congress's desire to prevent "quid pro quo corruption" by limiting the amount that anyone could contribute to a candidate's campaign. But, when Congress sought to expand the definition of corruption to include, for lack of a better term of art, "inequality of political influence," the court was much less deferential and, finally, in *Citizens United*, it rejected this definition.

Ostensibly, Congress's expansion of the definition of corruption was grounded in a desire to control the impact of vast accumulations of individual and corporate wealth on the political process. This, however, forced Congress and the courts to determine what rights corporations had. In a series of cases dating back to 1819, the Supreme Court has acknowledged that corporations are "persons" and therefore have legal rights.[18] Included in the roster of corporate rights is the right to political speech.[19]

To appreciate the impact of and controversy surrounding the *Citizens United* decision, it is necessary to review several precedents that form the case's background. These cases demonstrate the complexity of the law and tensions that characterize American political thought In *Buckley* v. *Valeo* (1976). The Supreme Court upheld the restrictions on contributions to individual candidates and political parties set forth in the Federal Election

Campaign Act of 1971.[20] But, it declared that restrictions on independent campaign expenditures were unconstitutional abridgments of political speech.[21]

The Supreme Court ruled that restrictions on contributions to candidates and campaigns were constitutional because their infringement on political expression was minimal. As long as contributions of some scope were permitted, contributors could express their support for a particular candidate by offering financial support.

> 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. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. (*Buckley* v. *Valeo* 21)

Congress's desire to prevent corruption, or at least remove the appearance thereof, outweighed the minimal impairment caused by contribution limits on political expression because these limits still allowed anyone to express support for a candidate.

The Court regarded restrictions on independent spending (that is, spending in support of a candidate that does not take the form of a direct contribution) differently. The court equated independent spending by individuals during an election campaign with the freedom to discuss candidates and issues. Whereas contributions to a particular candidate may create the appearance of a "quid pro quo" exchange of influence between the candidate and the contributor, the court said that the expression of political opinions (and the expenditure of money to do so effectively) did not embody the same quid pro quo relationship because there was no direct connection between the speaker and the candidate.

> [T]he independent expenditure ceiling … fails to serve any substantial governmental interest in stemming the reality or appearance of corruption in the electoral process, it heavily burdens core First Amendment expression. For the First Amendment right to speak one's mind … includes the right to engage in vigorous advocacy no less than "abstract discussion." Advocacy of the election or defeat of candidates for federal office is no less entitled to protection under the First Amendment than the discussion of political policy generally or advocacy of the passage or defeat of legislation. (*Buckley v. Valeo* 47-48)

Insofar as Congress had stated only the desire to control corruption (defined essentially as quid pro quo exchange of influence) as a basis for controlling spending, the court saw no clear connection between using one's financial resources to state or broadcast an opinion and corruption of the political process, so defined. It therefore struck down the spending restrictions. In a compelling passage, the court concluded:

> It is argued, however, that the ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections serves to justify the limitation on express advocacy of the election or defeat of candidates… But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed to secure the widest possible dissemination of information from diverse and antagonistic sources, and to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion. (*Buckley v. Valeo* 48-49)

Thus, the Supreme Court argued that the equalization of political speech and influence by the government was not a valid constitutional end in itself. Preventing corruption justified placing particular restrictions on speech.

The *Buckley* decision was based on a narrow "quid pro quo" definition of corruption. While it was clear that unregulated—and therefore unequal—contributions to a particular party or candidate would have the appearance of corruption, it was unclear that independent expenditures on political issues or campaigns would have the same quid pro quo corrupting effect. The problem with the premise underlying *Buckley* was obvious: independent expenditures could still influence the outcome of elections, and thereby create attenuated but nonetheless clear quid pro quo relationships.

The strange logic of *Buckley* was manifest in *Austin* v. *Michigan State Chamber of Commerce*. There, the Supreme Court upheld a Michigan law that prohibited corporations from using treasury money to make independent expenditures to support or oppose candidates in elections. The key passage in the decision is the following:

> The Chamber argues that this concern about corporate domination of the political process is insufficient to justify restriction on independent expenditures. Although this Court has distinguished these expenditures from direct contributions in the context of federal laws regulating individual donors, it has also recognized that legislature might demonstrate a danger of real or apparent corruption posed by such expenditures when made by corporations to

> influence candidate elections. Regardless of whether this danger of "financial quid pro quo" corruption, may be sufficient to justify restriction on independent expenditures, Michigan's regulation *aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas*. The Act does not attempt "to equalize the relative influence of speakers on elections," rather, it ensures that expenditures reflect actual public support for the political ideas espoused by corporations. We emphasize that the mere fact that corporations may accumulate large amounts of wealth is not the justification for [the statute]; rather, the unique state-conferred corporate structure that facilitates the amassing of large treasuries warrants the limit on independent expenditures. Corporate wealth can unfairly influence elections when it is deployed in the form of independent expenditures, just as it can when it assumes the guise of political contributions. We therefore hold that the State has articulated a sufficiently compelling rationale to support its restriction on independent expenditures by corporations. (*Austin* v. *Michigan State Chamber of Commerce* 659-660)

The Court was irreconcilably divided on the rationale for sustaining the Michigan campaign spending law. Was this truly an attempt to regulate "the corrosive and distorting effects" of wealth or was it an attempt to equalize political influence? The court had noted in *Buckley* that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." (*Buckley v. Valeo* 48-49) So, *Austin* raised the question: What are the speech rights of corporations?

The court's case law and American jurisprudence were divided on this question. The court ruled in *First National Bank of Boston* v. *Bellotti* that corporations had the right to spend money to influence the political process. In *Austin*, the court acknowledged that corporations were to be feared because they could amass vast amounts of wealth and use it to exercise disproportionate influence in the political process.

Accordingly, at the end of the 20th century, American case law concerning campaign spending was internally contradictory. Political speech was of paramount importance. It could be restricted only if there was a compelling interest for doing so, such as preventing corruption. The court's case law was unclear, however, with regard to Congress's role in and justification for equalizing political influence.

The first signs of a change in the court's thinking came in 2003 where the court heard a challenge to the federal Bipartisan Campaign Reform Act of 2002 (BCRA) which updated and expanded the restrictions set forth in the FECA and upheld in *Buckley*. In a bitterly decided

decision (*McConnell* v. *Federal Election Commission*), the Supreme Court upheld the key provisions of BCRA including:

Restrictions on the "electioneering communications" that prohibited the use of corporate and union treasury funds to pay for or broadcast advertisements that referred to a federal candidate within 30 days of a primary or 60 days of a general election

Restrictions on "soft money" that prohibited federal parties, candidates, and officeholders from raising or spending funds not in compliance with contribution restrictions.[22]

The majority again voiced its support for congressional efforts to remove the appearance of corruption from the political process.

> Because the electoral process is the very "means through which a free society democratically translates political speech into concrete governmental action," contribution limits, like other measures aimed at protecting the integrity of the process, tangibly benefit public participation in political debate. For that reason, when reviewing Congress' decision to enact contribution limits, "there is no place for a strong presumption against constitutionality." (*McConnell* v. *Federal Election Commission* 137)

The court acknowledged that congressional regulation was vital to the preservation of the integrity of the political process: "Take away Congress' authority to regulate the appearance of undue influence and the cynical assumption that large donors call the tune could jeopardize the willingness of voters to take part in democratic governance" (*McConnell* v. *Federal Election Commission* 144). Accordingly, the court also expressed its support for Congress's desire to remove the corrupting influences associated with gross disparities of economic power:

> Many years ago we observed that "[t]o say that Congress is without power to pass appropriate legislation to safeguard ... an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection." We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system (*McConnell* v. *Federal Election Commission* 223-224).

The American court had clearly evolved markedly from the narrow approach it took regarding political corruption in *Buckley*. A court that had once rejected Congress's desire to equalize political influence now stated:

> [The plaintiffs in this case] conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing "undue influence on an officeholder's judgment, or the appearance of such influence." Many of the "deeply disturbing examples" of corruption cited by this Court in Buckley to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. (*McConnell* v. *Federal Election Commission* 150)

However, in two ominous dissents, Justices Antonin Scalia and Anthony Kennedy offered a rival and more skeptical vision of the manner in which Congress was regulating the political process. Justice Kennedy argued that the restrictions on campaign spending were vague and based on an expanded and unjustified definition of corruption that now embodied the notion of "inequality of political influence" as well as "quid pro quo" corruption.

> In *Buckley*, the Court held that one, and only one, interest justified the significant burden on the right of association involved there: eliminating, or preventing, actual corruption or the appearance of corruption stemming from contributions to candidates.
>
> Placing Buckley's anticorruption rationale in the context of the federal legislative power yields the following rule: Congress' interest in preventing corruption provides a basis for regulating federal candidates' and officeholders' receipt of quids, whether or not the candidate or officeholder corruptly received them. Conversely, the rule requires the Court to strike down campaign finance regulations when they do not add regulation to "actual or apparent quid pro quo arrangements."(*McConnell* v. *Federal Election Commission* 294)

Kennedy chastised the court for deviating from the narrow vision of corruption that had informed the decision in *Buckley* v. *Valeo*. He maintained that there is a difference between undue influence that comes with quid pro quo corruption and inequality of influence that may arise because some speakers, interest groups, or lobbyists are simply more adept or effective than others:

> The very aim of Buckley's standard, however, was to define undue influence by reference to the presence of quid pro quo involving the officeholder. The Court, in contrast, concludes that access, without more, proves influence is undue. Access, in the Court's view, has the same legal ramifications as actual or apparent corruption of officeholders. This new definition of corruption sweeps away all protections for speech that lie in its path. (*McConnell* v. *Federal Election Commission* 294)

3.2 Incumbent Entrenchment

Kennedy and Scalia also argued that it was necessary for the court to review campaign spending regulations carefully because, under the pretense of political reform, such regulations could be used to suppress political competition and dissent. They noted that the spending restrictions forced participants in the political process to channel their speech through preferred routes—routes that were subject to government control:

> The First Amendment guarantees our citizens the right to judge for themselves the most effective means for the expression of political views and to decide for themselves which entities to trust as reliable speakers. Significant portions of Titles I and II of the Bipartisan Campaign Reform Act of 2002 constrain that freedom. These new laws force speakers to abandon their own preference for speaking through parties and organizations. And they provide safe harbor to the mainstream press, suggesting that the corporate media alone suffice to alleviate the burdens the Act places on the rights and freedoms of ordinary citizens. (*McConnell* v. *Federal Election Commission* 287)

Justice Scalia offered a more critical assessment. Besides funnelling political speech through preferred channels, BCRA also quelled dissent and criticism of the government. The restrictions on advertisements criticizing candidates in the waning weeks of campaigns were clearly designed to protect incumbents from criticism:

> We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and the not-for-profit sort. It forbids pre-election criticism of incumbents by corporations, even not-for-profit corporations, by use of their general funds; and forbids national-party use of "soft" money to fund "issue ads" that incumbents find so offensive. (*McConnell* v. *Federal Election Commission* 248)

Scalia also demonstrated the hypocrisy underlying BCRA. Legislation that treats political actors equally does not render the political system more fair. Instead, it diminishes the polity's collective ability to challenge incumbent political powers.

> To be sure, [BCRA] is evenhanded: It similarly prohibits criticism of the candidates who oppose Members of Congress in their reelection bids. But as everyone knows, this is an area in which evenhandedness is not fairness. If all electioneering were evenhandedly prohibited, incumbents would have an enormous advantage. Likewise, if incumbents and challengers are limited to the same quantity of electioneering, incumbents are favored. In other words, any restriction upon a type of campaign speech that is equally available to challengers and incumbents tends to favor incumbents. (*McConnell* v. *Federal Election Commission* 249)

Thus, while BCRA leveled the political playing field for actors outside of the government, it

also amplified the relative power of governmental officials vis-à-vis the society at large.

3.3 The Current Setting: Citizens United v. *Federal Election Commission*

The divisions in *McConnell* informed the decision in *Citizens United*. The *McConnell* decision exposed the tensions within the system of campaign spending regulation. The definition of corruption was unclear. The restrictions on political advertizing prior to an election buffered political competition and diminished the accountability of incumbent legislators. With the replacement of Chief Justice William Rehnquist and Associate Justice David Souter with Chief Justice John Roberts and Associate Justice Samuel Alito, respectively, the Supreme Court took on a more conservative character that was more suspicious of government regulation of (or, more pejoratively, interference with) the political process.

Citizens United embodied a challenge to sections 203 and 441b of BCRA. Citizens United is a nonprofit corporation that produced a film, *Hillary: The Movie* which was critical of Hillary Clinton. It wished to make the movie available via video on demand within 30 days of the 2008 primary elections. It was concerned, however that it would be subject to civil and criminal penalties under BCRA.

Speaking for the majority, Justice Kennedy argued that the BCRA provisions were vague and therefore gave the Federal Election Commission the power to censor speech.

> the FEC has created a regime that allows it to select what political speech is safe for public consumption by applying ambiguous tests. If parties want to avoid litigation and the possibility of civil and criminal penalties, they must either refrain from speaking or ask the FEC to issue an advisory opinion approving of the political speech in question. Government officials pore over each word of a text to see if, in their judgment, it accords with the 11-factor test they have promulgated. This is an unprecedented governmental intervention into the realm of speech. (*Citizens United* v *Federal Election Commission* 896)

As well, Kennedy noted sections 203 and 441b could not be used to suppress the publication of a book during an election campaign that was critical of a candidate: “Were the Court to uphold these restrictions, the Government could repress speech by silencing certain voices at any of the various points in the speech process” (*Citizens United* v *Federal Election*

Commission 898).

Kennedy then proceeded to overrule the *Austin* v. *Michigan Chamber of Commerce*, saying that its justification for restricting corporate political speech because of the "corrosive" and distorting" effect of corporate wealth was unclear.

> If the antidistortion rationale were to be accepted, however, it would permit Government to ban political speech simply because the speaker is an association that has taken on the corporate form. The Government contends that *Austin* permits it to ban corporate expenditures for almost all forms of communication stemming from a corporation. If *Austin* were correct, the Government could prohibit a corporation from expressing political views in media beyond those presented here, such as by printing books. The Government responds "that the FEC has never applied this statute to a book," and if it did, "there would be quite [a] good as-applied challenge." This troubling assertion of brooding governmental power cannot be reconciled with the confidence and stability in civic discourse that the First Amendment must secure. (*Citizens United* v *Federal Election Commission* 904)

Kennedy concluded by echoing the concerns about cartel-like behavior by Congress stated by Justice Scalia in *McConnell*. He explained that the anti-distortion rationale interferes with the "open marketplace" of ideas protected by the First Amendment: "By suppressing the speech of manifold corporations, both for-profit and nonprofit, the Government prevents their voices and viewpoints from reaching the public and advising voters on which persons or entities are hostile to their interests" (*Citizens United* v *Federal Election Commission* 907)

Thus, Kennedy argued that BCRA's restriction on corporate speech and election communication in general were too broad. As written, BCRA authorized the government to police any and all media during an election campaign.

> Modern day movies, television comedies, or skits on Youtube.com might portray public officials or public policies in unflattering ways. Yet if a covered transmission during the blackout period creates the background for candidate endorsement or opposition, a felony occurs solely because a corporation, other than an exempt media corporation, has made the "purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value" in order to engage in political speech. Speech would be suppressed in the realm where its necessity is most evident: in the public dialogue preceding a real election. Governments are often hostile to speech, but under our law and our tradition it seems stranger than fiction for our Government to make this political speech a crime. Yet this is the statute's purpose and design. (*Citizens United* v *Federal Election Commission* 917)

3.4 Judicial Fear of Political Cartels

The court is hopelessly divided in the wake of the *Citizens United* decision. The dissent, led by Justice Stevens' 90 page opinion reiterated the concerns about the impact of vast corporate wealth manifested in the court's prior decisions. The majority, however, was more concerned with the government's use of its power to insulate itself from political competition and accountability by controlling competition and the dissemination of political speech: "When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful" (*Citizens United* v *Federal Election Commission* 908).

While critics condemned *Citizens United* for unleashing the power of corporate wealth, it is important to note that throughout the Supreme Court's campaign spending case law, members of the court have expressed an uneasiness with the capacity of Congress to behave as a political cartel and the conflict of interest that is manifest in Congress's writing the laws that regulate the process by which its members are returned to office.

For example, in *Buckley* v. *Valeo*, Justice Rehnquist and then Chief Justice Burger expressed grave concerns because the campaign spending restrictions discriminated against minor political parties and grassroots organizations. The Democratic and Republican parties received campaign subventions from the government (i.e., themselves) in advance of election cycles. Minor parties only had the opportunity to be reimbursed—and only if they could demonstrate a particular threshold of support. As Chief Justice Burger stated in *Buckley*:

> [T]he scheme approved by the Court today invidiously discriminates against minor parties… [T]he present system could preclude or severely hamper access to funds before a given election by a group or an individual who might, at the time of the election, reflect the views of a major segment or even a majority of the electorate... I see grave risks in legislation, enacted by incumbents of the major political parties, which distinctly disadvantages minor parties or independent candidates...
>
> I would also find unconstitutional the system of matching grants which makes a candidate's ability to amass private funds the sole criterion for eligibility for public funds. Such an arrangement can put at serious disadvantage a candidate with a potentially large, widely diffused — but poor — constituency. The ability of a candidate's supporters to help pay for his campaign cannot be equated with their willingness to cast a ballot for him. (*Buckley* v. *Valeo* 252)

The court's opinion in *Citizens United* manifests a similar concern with regard to Congressional control not only of the use of wealth for political purposes, but also the capacity to organize for political purposes.

On the one hand it can be argued that constraining the use of corporate wealth for political purposes is necessary to level the political playing field in civil society. By restricting the political activity of wealthy actors, the government can ensure that smaller political actors have a chance to voice their opinions and influence the electorate. In this respect, the regulation of the volume of individual speech rights of powerful actors is necessary to ensure that voters are exposed to a diversity of political information. But, constraining the most powerful (or potentially powerful) political actors' capacity to speak also hampers their ability to challenge the government (that is, the incumbent legislators). Accordingly, the Supreme Court's case law in the field of campaign spending embodies the tensions that arise from trying to balance individual and collective speech rights and from seeking to ensure that government officials do not insulate themselves from or diminish political competition.

The Supreme Court's concern with political cartels in its campaign spending decisions echoes the concerns manifest in its voting rights case law. In its Voting Rights Act decisions, the court supported efforts by Congress to break up the creation of political cartels at the state and local level of the nation that were created at the expense of the rights of minority voters. In these cases, the court could defer to congressional justifications for regulating the political process because the VRA embodied no conflict of interest. It was designed to aid political minorities.

In its campaign spending decisions, the court has been less deferential towards the Congress because of the conflict of interest that is embodied in legislation that restricts campaign spending and political speech. Despite the court's less deferential approach to campaign spending legislation, the *Citizens United* decision can, in fact, be regarded as an exercise in judicial self restraint.

3.5 Clarifying the Law and Ensuring its Predictability

In declaring sections 203 and 441b of the BCRA unconstitutional, it appeared that the majority of the court had rejected its prior deference in favor of a more "activist" approach to

constitutional interpretation. As Justice Stevens noted in his dissent, "there were principled, narrower paths that a court that was serious about judicial restraint could have taken" (*Citizens United* 919). In fact, the decision can be regarded as the manifestation not only of judicial restraint, but also of an acknowledgment of the limits of judicial power. In essence, the Supreme Court asked Congress to rewrite and clarify sections 203 and 441b. The court did not revoke its prior assertion of support for Congress' desire to police the political process. However, in *Citizens United*, the court declared that it was unable to administer the challenged provisions because of their vagueness. In fact, as of this writing, Senator Charles E. Schumer and Congressman Chris Van Hollen have already introduced new campaign spending regulations in response to the decision.[23]

4. CONCLUSION

Supreme Court decisions concerning voting rights, speech and the democratic process are always controversial because they embody multiple visions of rights and conflicting visions of political fairness. They require the courts to strike a balance between deference to congressional wisdom while remaining vigilant with regard to the blatant and subtle aspects of corruption that can undermine the legitimacy of the political process.

Insofar as electoral fairness, minority rights and political speech are fundamental principles of democratic politics, the debates among the Supreme Court justices and political and legal commentators offer students of the courts and American politics in general a comprehensive view of the beliefs, concerns and tensions that characterize American political beliefs. The contemporary case law is emblematic of the tensions that inhere in the American political psyche: The Supreme Court trusts Congress to protect the rights of racial minorities, but it does not trust it to regulate political speech.

The relationship between the Supreme Court and the other branches of government is, of course, a dynamic one. With regard to voting rights and the regulation of the political process, this relationship will most certainly change again as we enter a new decade and undergo the constitutionally required processes of reapportionment and redrawing of legislative districts after the census of 2010. Accordingly, the Supreme Court is about to write the next chapter in this history of constitutional law and voting rights.

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NOTES

[1] Ndt: Traducción de "equal protection of law" de la Enmienda 14 de la Constitución de Estados Unidos.

[2] 42 U.S.C §1973-1973aa-6.

[3] For the purposes of this paper, I regard the passage of the Federal Election Campaign Act and the Supreme Court's decision to declare parts of it unconstitutional in *Buckley* v. *Valeo* 424 U.S. 1 as the principal events in the new era of campaign spending jurisprudence and legal scholarship.

[4] It is an historical fact (one that is seldom discussed) that this gerrymander backfired. The Federalists actually maintained control of the district. See Rush 1993.

[5] In fact, the Supreme Court has stated that partisan gerrymandering *could* be unconstitutional. However, the standard of proof is so high that making a successful partisan challenge to a redistricting plan is highly unlikely. See, e.g., *Davis* v. *Bandemer* (478 U.S. 109. 1986) and *Vieth* v. *Jubelirer* (541 U.S. 267. 2004. Print)

[6] For a thorough overview and history of the Voting Rights Act, see, Valelly, Richard M. (ed.) 2006. *The Voting Rights Act: Securing the Ballot*. Washington, DC. Congressional Quarterly Press. Print.

[7] Figure 1 is available at: "The Gerry Mander". *Wikipedia.* Web. 24 February 2010.

[8] See, e.g., *Thornburg* v. *Gingles*, *Davis* v. *Bandemer*, *Shaw* v. *Reno, Easley* v. *Cromartie*, *Georgia* v. *Ashcroft* and *Vieth* v. *Jubelirer*.

[9] The following discussion is drawn from my article, "Legal Portrait of the United States Presidential Election of 2008." 3 *Journal of Parliamentary and Political Law* 1 (2009): 81-98. Print. (Government of Canada: House of Commons).

[10] See generally, John C. Jeffries, Jr. & Daryl J. Levinson 1998: 1213.

> Preclearance thus depends on whether minority political power would decrease if the proposal went into effect. Existing minority political power constitutes the baseline, and non-retrogression describes the permissible direction of change. Section 5 does not require any absolute level of minority success or influence, nor does it condemn all disadvantageous electoral structures. Even the most burdensome of arrangements can remain in place if they predate the Act or a particular jurisdiction's inclusion in the coverage of the Act. Section 5 forbids only changes that would make minority success less likely.

[11] Scholars debate the relative merits of "coalition districts" (where a particular minority can dictate the outcome of an election with the help of dependable nonminority allies) and "minority influence districts" (in which a minority group may not be able to dictate the outcome of an election but, because of its nontrivial size, other voting groups and electoral officials will be obliged to court it). In *Georgia* v. *Ashcroft*, however, the Supreme Court essentially equated the two insofar as neither constitutes a majority-minority district. See Karlan.

[12] See, e.g., Justice Souter's dissent in *Ashcroft*.

[13] "NAMUDNO" is the acronym for "Northwest Austin Municipal Utility District No. One.

[14] *Northwest Austin Municipal Utility District Number One* v. *Holder*. Brief for Appellants. 12-13.

[15] In this respect, I am referring to the importance of legal predictability as stated by Oliver Wendell Holmes: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." (Holmes 1897).

[16] Pub. L. 107-155, 116 Stat.81, enacted March 27, 2002. BCRA is more popularly known as the "McCain–Feingold Act."

[17] See note 2, supra.

[18] In *Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), the Supreme Court ruled that Dartmouth College was granted corporate rights under its original charter with England and that the state of New Hampshire assumed the rights and responsibilities under that contract as a result of the United States' secession from England. Accordingly, New Hampshire was also bound by the contract to respect the college's corporate rights to hold property, etc.

[19] In *First National Bank of Boston v. Bellotti*, 435 U.S. 765, the Supreme Court ruled that corporations had the right to spend money and participate in election campaigns.

[20] 2 U.S.C.§ 431

[21] The following discussion draws from Manfredi and Rush 2008.

[22] See generally, Bauer.

[23] See, e.g., "A Welcome, if Partial Fix." *The New York Times*. 17 February 2010. See also "Two Democrats' remedy for the high court's campaign finance ruling." *The Washington Post.* 15 February 2010.

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