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VIII. ELECTION LAW

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PARTISAN REDISTRICTING

**“High Court Upholds Texas Redistricting
In rejecting Democrats’ charge of ‘partisan gerrymandering,’ the justices give lawmakers
wider power to redraw lines for their parties.”**

The Los Angeles Times
June 29, 2006
David G. Savage

The Supreme Court gave politicians legal license Wednesday to aggressively redraw election districts to benefit the party in power, as it upheld the mid-decade redistricting plan engineered by former House Majority Leader Tom DeLay and other Texas Republicans.

By clever line-drawing, DeLay and the Texas Legislature—with both houses newly under GOP control in 2003—remade its delegation in Congress, turning a 17-15 Democratic majority into a 21-11 Republican majority in 2004.

The bold move signaled an escalation in partisan warfare.

Before, the redrawing of electoral districts had been a once-a-decade battle that followed the release of new census numbers. Under the Constitution, states are required to adjust district lines to account for population changes. Wednesday's ruling means they may redraw the lines whenever they choose, as long as they do not violate voting rights laws.

Legal experts and political strategists said the ruling would encourage Republicans in other GOP-dominated states to redraw their districts to gain more seats.

It is not clear whether Democrats will be able to do the same. In the ruling, the court

emphasized that the Voting Rights Act generally forbade splitting up blocs of minority voters. That makes it harder to create more Democratic districts.

Mary G. Wilson, president of the League of Women Voters, called the decision "extremely disappointing," saying it would encourage politicians to become serial mapmakers. "We now can expect an even more vicious battle between the political parties as they redraw district lines every two years for partisan gain," she said.

The partisan nature of redistricting has inspired efforts to take the process out of the hands of lawmakers. Last year, California Gov. Arnold Schwarzenegger proposed to give a panel of retired judges the task of redrawing electoral districts, but voters rejected the idea.

Gerrymandering is hardly a new phenomenon. The word came from an 1812 cartoon that portrayed a district drawn by Massachusetts Gov. Elbridge Gerry as resembling a salamander. In recent decades, computers have given politicians an ever more powerful tool to shape the outcome of elections by shifting voters among districts.

In the past, the Supreme Court has struck down "racial gerrymandering" and said the Constitution generally bars officials from making decisions based on race.

Politics is another matter, and although many Supreme Court justices have voiced unease over brazenly partisan gerrymandering, they have never struck down a redistricting plan as too partisan.

On Wednesday, a five-member majority said DeLay's plan, even if it were drawn for a purely partisan purpose, did not violate the Constitution and its guarantee of equal protection under the law. But the court did find one district to be illegally drawn because it diluted Latino voting power. The overall ruling applies to other electoral districts as well, including those for state legislatures.

Electoral districts are usually drawn by politicians in state capitals, the justices noted, and it is hard to say when such a politically drawn plan becomes too partisan.

Justice Anthony M. Kennedy, speaking for the court, cited two other reasons for upholding the Texas plan.

First, he said, the task of redistricting belongs to elected legislators. In 2001, a panel of federal judges redrew the Texas districts because the state Legislature—then divided between a Republican Senate and a Democratic House—could not agree on a plan. So the plan pressed by DeLay in 2003 was the first to win the approval of the state's elected legislators.

"There is nothing inherently suspect about a legislature's decision to replace mid-decade a court-ordered plan with one of its own," Kennedy said.

Second, he said, it is not clear that DeLay's plan was less fair than the Democratic-friendly plan it replaced.

Before 2003, Democratic leaders had used

their power in Austin to preserve a Democratic majority in the state's congressional delegation, even as most Texans voted for Republicans. Four years ago, 59% of Texans voted Republican and 41% Democratic in statewide tallies, yet more Democrats than Republicans won election to the House of Representatives.

By this measure, DeLay's plan "can be seen as fairer" than the one it replaced, Kennedy said.

The court's four conservatives—Chief Justice John G. Roberts Jr. and Justices Antonin Scalia, Clarence Thomas and Samuel A. Alito Jr.—joined Kennedy in rejecting the charge of "partisan gerrymandering" against the Texas Republicans.

At the same time, Kennedy joined with the four liberal justices—John Paul Stevens, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer—to rule that one southwest Texas district was drawn illegally in a way that hurt Latino voters.

The Voting Rights Act of 1982 forbids officials from "diluting" the power of minority voting blocs, and Kennedy said Texas lawmakers violated that provision when they shifted 100,000 Latino voters to shore up the reelection prospects of Rep. Henry Bonilla, a Republican who has been unpopular with Latino voters.

The Texas Legislature split Webb County, which is 94% Latino, between Bonilla's 23rd District and a neighboring district.

This ruling requires the Texas Legislature—or perhaps a panel of judges—to redraw that district, which will force others to be changed. The court's decision to uphold the mid-decade redistricting plan, despite its

objections to how one district was drawn, was the second defeat for liberal reformers this week.

On Monday, the court rejected a move by a group of reformers to lessen the impact of money in politics. They had strongly defended a novel Vermont law that set low spending caps for state candidates, but the Supreme Court, in a 6-3 ruling, struck it down as a violation of the 1st Amendment.

Good-government activists also joined the Texas case, hoping it could lead to competitive election contests that would be decided by the voters, not by the politicians who drew the districts.

Typically, politicians draw districts that have a comfortable majority of Republicans or Democrats, so the outcomes are

essentially foregone conclusions.

Ken Mehlman, chairman of the Republican National Committee, called the ruling "a victory for Texas voters and the Republican Party." He added that it "confirmed that the current Texas map is fair under any standard."

J. Gerald Hebert, a lawyer for the Texas Democrats pressing the case, said he was dismayed the court had turned a blind eye to an "extreme example . . . of raw partisan politics."

The decision "opens the floodgate for partisan redistricting," he said. "The court has essentially ceded the field . . . and state legislatures have largely been given a free hand to do what they will with congressional districts."

“Justices Express Concern Over Aspects of Some Texas Redistricting”

The New York Times

March 2, 2006

Linda Greenhouse

Texas Democrats had their day in the Supreme Court on Wednesday to challenge the unusual middecade redistricting of the state's Congressional delegation that led to the loss of five Democratic seats and helped solidify Republican control of Congress.

While the Democrats may not come away completely empty-handed, it appeared unlikely by the end of the intense two-hour argument that a majority of the court would overturn the 2003 redistricting plan, or any other plan, for that matter, as an unconstitutional partisan gerrymander.

The new districts were drawn under a plan that was engineered by Representative Tom DeLay of Texas, then the House majority leader, after Republicans gained control of both houses of the Texas Legislature. And they are not necessarily invulnerable. Several justices, including, most significantly, Justice Anthony M. Kennedy, who may be in a position to cast the deciding vote, expressed concern with aspects of how particular districts were dismantled and reconfigured.

As a result, it appeared possible that the court would find a violation of the Voting Rights Act or the Constitution's equal protection guarantee in the way the new lines were drawn in South Texas. The legislators removed 100,000 Mexican-American residents of Laredo from a district in which the Republican incumbent, Representative Henry Bonilla, had become more vulnerable with each passing election, while creating a new Latino-majority district in a narrow strip running 300 miles from

Austin to the Mexican border.

Justice Kennedy, addressing R. Ted Cruz, the Texas solicitor general, called the new district "a serious *Shaw* violation," a reference to the court's landmark 1993 case, *Shaw v. Reno*, that opened such oddly shaped districts to challenge as racial gerrymanders. The removal of the Mexican-Americans from the Laredo district, leaving the Latino population a bare statistical majority there but not numerous enough to control electoral outcomes, was an "affront and an insult," Justice Kennedy said.

Texas is holding its primary election Tuesday, and the Supreme Court's disapproval of even one of the 32 Congressional districts, in a decision that is not likely to come until early summer, would set off a new political scramble. But the prospect that the justices would declare the entire 2003 enterprise to be invalid appeared slight.

After Paul M. Smith, arguing for the Democrats, declared that the "whole map" was unconstitutional as "wholly lacking in any legitimate public purpose," Justice David H. Souter seemed to be having second thoughts about whether a political gerrymander could go too far.

"The difficulty I have," Justice Souter said to Mr. Smith, "is that it is impossible, and let's even assume it's undesirable, to take partisanship out of the political process." Mr. Smith's position, Justice Souter said, might "imply the illegitimacy of any redistricting."

Mr. Cruz, the Texas state lawyer, appeared to make some headway in defending the 2003 redistricting as an appropriate effort to counter "one of the most profoundly anti-majoritarian maps in the country," as he described the district lines drawn by the state's Democratic-controlled Legislature after the 1990 census.

Texas picked up two Congressional seats in the 2000 census. Republicans had gained control of the State Senate by then. The divided Legislature deadlocked over redistricting and left the job to a federal court, which based the 2001 plan largely on the one from a decade earlier. By drawing a new plan in 2003, after winning the State House, the Republicans were simply taking back a legislative prerogative from the court, Mr. Cruz said.

"The framers chose political checks for the problem of partisan gerrymandering," he said.

A special three-judge federal district court in Austin upheld the redistricting last year. Of seven appeals generated by that ruling, the Supreme Court agreed to hear four, consolidating them for two hours of argument; the lead case is *League of United Latin American Voters v. Perry*, No. 05-204. Nina Perales of the Mexican American Legal Defense and Educational Fund, arguing on behalf of Latino and black voters, made the South Texas redistricting the focus of her argument.

Texas violated the Constitution by "the excessive use of race," Ms. Perales said, particularly "to craft a razor-thin 50.9 percent Latino majority" in Mr. Bonilla's 23rd Congressional District. She said the Legislature chose to retain the narrow majority, down from 63 percent, to protect Mr. Bonilla and "give the false impression of

Latino support."

Her argument brought the court into the heart of one of the most complex issues of voting rights law, the relationship between race and partisanship in political environments where race often serves as a rough proxy for party affiliation.

While the state argued, and the district court agreed, that the 100,000 Mexican-Americans were shifted out of the district because they were Democrats, Ms. Perales told the justices: "We contend that the state removed the Latino voters because they were Latino." Leaving just enough Mexican-Americans to create the "impression" of a Latino-majority district was "cynical," she said.

"What constitutional relevance does that have?" Chief Justice John G. Roberts Jr. asked Ms. Perales, adding: "What's the difference between 'being one' and 'looking like one?'"

The chief justice continued: "You're asking us to draw a very fine line. What's the magic number? What's the number that changes it from political nuance to a Hispanic-opportunity district? Would it have been better in your view if they had excluded more Hispanics so it didn't 'look like' a majority?"

Ms. Perales replied that each district must be evaluated for its own circumstances but that it was impermissible to "zigzag through neighborhoods and streets" in an "egregious use of race for its own sake." To uphold this district, she said, would "give states free rein to use race to manipulate outcomes."

Justice Antonin Scalia replied, "Of course you want to use race to manipulate outcomes, just sometimes."

Justice Scalia made his views clear throughout the argument. To Mr. Smith, he said at one point: "Legislatures redraw maps all the time for political reasons. To say it's something horrible is ridiculous."

Further, Justice Scalia said, even if there was a problem with middecade redistricting as a general rule, any such rule should not apply when a first redistricting after a new census had been done by a court rather than a legislature. "Surely that's a good reason" for the legislature to redistrict when it chose to, he said.

The plaintiffs are also challenging the Legislature's dismantling of a Dallas-Fort Worth district that had been represented for 13 terms by a Democrat, Martin Frost. While the district had been only about one-quarter black, black voters, through their high participation in the Democratic primary and their consistent support of Mr. Frost, had been able to keep him in office while most of the district's whites voted Republican. The district court held that, lacking a majority in the district, black voters could not bring a challenge to the district's dismantling under the Voting Rights Act.

This was erroneous, Mr. Smith argued, because the test under Section 2 of the Voting Rights Act was whether a minority group could effectively elect a candidate of its choice.

This argument gained little traction. "I don't see the limits of your principle," Justice Kennedy said. And Justice Stephen G. Breyer objected that because there were "many, many districts where African-American voters have influence on the Democratic Party," such an interpretation would greatly expand the reach of the Voting Rights Act.

Mr. Smith tried to be reassuring, saying his test would apply only when minority voters actually could control, rather than simply influence, electoral outcomes. "We're not just asking for the Voting Rights Act to become the Pro-Democrat Act," he said.

The Bush administration entered the case to defend the lower court's interpretation of the Voting Rights Act. Gregory G. Garre, a deputy solicitor general, argued that black voters did not, in fact, control the outcome in the old district.

**“Justices Set For Redistricting Cases
Court considers Texas’ revision of map after ’02 GOP victories.”**

USA Today

February 28, 2006

Joan Biskupic and Jim Drinkard

The story of how Texas' congressional map was redrawn in 2003 to favor Republicans is wrapped in partisan politics, personal vendettas and claims of racial bias. It's also a saga that led U.S. Rep. Tom DeLay to step down as House majority leader.

And now, the legal battle over Texas redistricting has landed at the U.S. Supreme Court, which on Wednesday will hear a set of cases that could help determine how far legislatures across the nation can go in reshaping voting districts to favor the party in power. The justices will hear arguments on whether Texas' Republican-led Legislature violated the U.S. Constitution and federal voting rights law by unfairly splitting up traditionally Democratic voting districts.

At issue is a map that the Texas Legislature drew up a year after Republicans achieved a majority in the statehouse in 2002. Normally, redistricting is done once a decade, after the U.S. Census. A Texas map was drawn by a federal court in 2001, but Texas Republicans, capitalizing on their just-won majority, passed a revised map in 2003 to help the GOP win more congressional seats.

The plan worked. Before the new map was used in the 2004 elections, Democrats held a majority of Texas' 32 congressional seats, 17-15. Afterward, Republicans held 21 seats.

The Supreme Court traditionally has given legislators wide latitude to draw maps to a

party's advantage, believing such political business is the proper domain of elected officials. But the Democratic challengers argue that a mid-decade map drawn solely for partisan gain violates principles of constitutional equality and rights of political association.

Advocates for minority voters, including the Latino veterans' group GI Forum, argue separately that Texas lawmakers impermissibly broke up concentrations of Latino and black voters for partisan goals.

Supreme Court justices have been narrowly divided on voting rights cases through the years, whether the disputes involved allegations of racism or unfair partisanship. In a 2004 ruling, the court signaled that it soon might stop reviewing partisan gerrymanders altogether.

"The court is at a crossroads ... where it's being asked to intervene pretty aggressively in the political process," says Richard L. Hasen, a professor at Loyola Law School, Los Angeles. "It has to make some fundamental decisions on how much to intervene in state races."

The Two Basic Issues

The four consolidated cases before the justices raise several issues, but they boil down to whether the Constitution bars mid-decade redistricting for political gain, and how judges should assess whether a state has wrongly diluted the influence of minorities in that effort.

"The state of Texas enacted a new congressional districting plan in 2003 for one and only one reason: to engineer the replacement of Democratic members of Congress with Republicans," says Paul Smith, a Washington lawyer who will argue Wednesday on behalf of a group of Texas Democrats. He says there was no lawful need to change the 2001 boundaries.

"The use of governmental power solely to help or hurt a particular political party's or group's voters, based on . . . their speech or beliefs, cannot be squared with the First Amendment and the guarantee of equal protection," he says.

Texas officials counter that state Democrats are simply clinging to the remnants of their old dominance in the state. "Texas' current congressional map is the natural result of four decades of Texas political history, during which the voting preferences of Texas voters have shifted decidedly," says state Solicitor General Ted Cruz.

Texas, like much of the South, had been realigning toward the Republicans for years before the controversial map was drawn. But Democrats, in part because of a map drawn by their party in 1991, held most of the state's U.S. House seats through the 1990s.

After the 2000 Census, Texas gained two congressional seats, for a total of 32, and a new round of redistricting began. The Legislature, then with a Democrat-controlled House and a Republican-controlled Senate, was unable to agree on a map. A three-judge federal court adopted a redistricting plan that largely followed the 1991 map.

That frustrated DeLay, one of Texas' most visible politicians and then the majority leader of the U.S. House. He was irked that

Republicans were capturing a majority of the state's popular vote in congressional races but still had fewer House seats than Democrats.

Victory Came At a Cost

DeLay set about to help Republicans take control of the Legislature and the redistricting process.

He established a political action committee, Texans for a Republican Majority PAC, to raise money for Republican legislative candidates. The effort was successful, as the Republicans captured the full Texas Legislature in 2002. Then DeLay and his allies pushed through the new district map.

"It was an extremely clever but very partisan gerrymander" that diluted Democratic districts while creating greater opportunities for Republicans, says Richard Murray, a political scientist at the University of Houston.

Among the six Democrats who were forced out during the 2004 elections were veteran congressman Martin Frost of Dallas—a longtime DeLay nemesis—and Rep. Nick Lampson of Beaumont, who now is trying to stage a comeback by running against DeLay.

The state GOP victory came at a cost to DeLay, who was indicted in 2005 on a campaign-finance-related charge, forcing him to leave his post as the No. 2 Republican in the House. The indictment alleges he directed illegal corporate contributions to legislative candidates by moving the money through the national Republican Party. DeLay denies the charge.

The GOP plan also is being challenged by minority groups, including the League of

United Latin American Citizens. They claim the Legislature boosted GOP candidates at the expense of Latino and African-American political strength, which the groups say violated federal law designed to help those who historically have faced bias.

The groups say the state squeezed what could have been seven heavily Latino districts into six districts, and also dismantled a district in which Latinos had strong influence.

“First Thoughts On Voting Rights, Gerrymandering, and Texas”

SCOTUSblog

June 28, 2006

Rick Pildes

Rick Pildes of NYU Law School has these thoughts on today's decision:

Today's complex opinion in the Texas case is noteworthy for a number of reasons, some more obvious, some more subtle. As a practical matter, Democrats lost the war but won a battle that might have important partisan implications nonetheless. As a legal matter, apart from its significance for current law in the areas of race, politics, and the Constitution, the decision will also have direct implications for current debates in Congress over whether to renew the Voting Rights Act and if so, in what form, both to address possible constitutional challenges to the Act and to deal with the diversity within new minority communities, such as the Latino community, that the Court wrestles with in this case.

Partisan Gerrymandering

This aspect of the case will get the most attention, since it is both the easiest to understand and has the dramatic personality of Tom DeLay at the center. The Court held that the hardball tactics Texas Republicans used to redraw districts to increase Republican power in the US House may have been tough politics, but not in such a way that the Constitution was violated. As between the aggressive Democratic gerrymander of Texas in the 1990s and the Tom DeLay inspired gerrymander of today, the Court majority essentially washed its hands of the matter and concluded there was no constitutional basis for choosing sides in this ugly partisan warfare. The question now will be whether this ruling triggers a similar

spiral of other mid-decade redistrictings after this fall's House elections, the answer to which might depend on how close the balance of power turns out to be in the House—and whether Democrats in states like La, New Mexico and some other states are willing to use the same hardball tactics as DeLay prompted in Texas.

Looking forward on this issue, might partisan gerrymandering violate the Constitution in other contexts? Technically, the answer remains yes, as it has for many years now. Practically, though, the opinion makes it less likely the Court will find an actual violation. Chief Justice Roberts and Justice Alito once again signaled their unwillingness to confront precedents they did not have to address; showing a cautious moderation, both refused to take positions on the large question of whether partisan gerrymandering is ever unconstitutional. But Justice Kennedy rejected yet another effort to craft such a standard. Because Justice Kennedy has been more open to the possibility of such a standard, his rejection of every actual standard offered to him, including the one today, makes it harder for plaintiffs to win on partisan gerrymandering claims.

Race, Ethnicity, and the Voting Rights Act

Nonetheless, Justice Kennedy, and a majority in this case, clearly remained disturbed about the extent to which current officeholders manipulate the design of election districts for their own self-interest.

And partisan politics is deeply entangled these days with race and ethnicity. Even though the Court rejected the direct partisan gerrymandering attack on Texas' plans, it indirectly accepted part of that claim through the route of focusing on the manipulation of Latino voters in the Texas plan. Republicans sought, for partisan reasons, to dismantle one Hispanic district and compensate (as they thought the Voting Rights Act required), by creating a different Hispanic district elsewhere. But the Court majority rejected this attempt. As Justice Kennedy concluded for the Court, dismantling the first district would have violated the Act, unless Texas had created a new, legal Hispanic district to replace the one dismantled. But Texas had not done so because the new Hispanic district itself violated the Act. Why did it do so? Because the groups of Latinos put into the new district—some in the Austin area, others near the Mexican border—were located far apart and, more importantly, had "disparate needs and interests," according to the Court, mostly because their economic status differed considerably. This constitutes a major, major innovation from the Court, one that reflects the increasing skepticism to grouping voters together based on racial or ethnic identity. Justice Kennedy concludes, in essence, that the Voting Rights Act does not permit Latinos to be grouped as Latinos,

merely because they share Latino identity and vote for Latino candidates, when they otherwise differ in class status and location in this way. Moreover, Chief Justice Roberts and Justice Alito have laid down a major marker on these issues, for in the Chief's separate opinion, he writes: "It is a sordid business, this divvying us up by race." The result in this case, and passages like this in the various opinions, have direct implications for the renewal of the Voting Rights Act, which I will address in a separate matter.

Immediate Practical Consequences

Given that the Texas plan is illegal and elections are this fall, there are two options. The Governor could call the legislature into special session to draw a new plan for the fall elections. Ironically, it was through just such special sessions that the legislature created the plan held illegal today. Texas's legislators will thus end up devoting much of the decade to drawing and re-drawing and re-re-drawing a congressional districting plan. When a new plan is drawn to comply with the Court's decision, it is not clear at this stage how if at all the partisan makeup of the delegation might change. Alternatively, Texas could ask the federal court below to stay the decision and permit it to hold elections under the illegal plan.

"The Trouble With Texas"

The National Journal

March 4, 2006

Stuart Taylor, Jr.

A dispiriting reality sank in as the Supreme Court worked through two hours of arguments on March 1 about the egregious gerrymander that Tom DeLay helped ram through the Texas Legislature in 2003: The Court has no intention of fixing—and no idea how to fix—the mess that it has made of our politics (with ample help from politicians) over more than four decades. And nobody else seems to have a good idea, either.

This mess is not just in Texas. Nor will it be ameliorated by whatever the Court does in the Texas case. Not even in the highly unlikely event of a decision to strike down the congressional redistricting map that knocked off five Democratic incumbents in 2004, while delivering 21 of Texas's 32 House seats to Republicans, up from 15 in 2002.

The mess to which I refer is state legislatures' use of gerrymandering—manipulating election district lines to help or hurt a particular candidate or group—to make 80 to 90 percent of the nation's 435 House districts so lopsidedly Republican or Democratic that the out party has almost no chance of winning.

The paucity of competitive general elections for House seats, bad enough in itself, has also helped polarize our politics into the bitter liberal-conservative brawling that litters the landscape today. Primaries, dominated by the most fervently partisan voters, are the only real contests. So victory goes to the most liberal of Democrats and the most conservative of Republicans.

Moderates, who used to grease the wheels of conciliation and compromise, have almost disappeared.

The polarization that has poisoned the House has also infected the Senate to a lesser extent. Senators run statewide. But many climbed the ladder by being liberal or conservative enough to win in gerrymandered House or state legislative districts.

There will never be a better opportunity than the Texas case for the Supreme Court to do something about this. This is not because of the much-publicized hijinks and other particulars (described by National Journal's Richard E. Cohen last week) of the DeLay-driven decision to draw new districts to defeat incumbent Democrats. It is because the case raises all of the big questions that bear on redistricting, and because it will be the first opportunity for Chief Justice John Roberts and Justice Samuel Alito to address them.

Are partisan gerrymanders ever unconstitutional? If so, how to decide how extreme is too extreme? How many black-controlled and Hispanic-controlled districts must the state create (or preserve) to satisfy the Voting Rights Act? Must states strive for proportional representation of racial groups? At what point do efforts to satisfy the Voting Rights Act collide with the Court's equal protection rules against drawing oddly shaped districts with race as a "predominant factor"?

The justices have made the law on all of

these issues so confusing, so internally contradictory, and so mind-numbingly complex as to be almost incomprehensible. But neither Roberts nor Alito, nor any other justice, suggested any way for the Court to improve the situation much, probably because no way exists.

"Courts ought not to enter this political thicket," Justice Felix Frankfurter wrote 60 years ago. If he and the Warren Court's liberals are still in touch, Frankfurter must be saying, "I told you so." The one-person, one-vote decisions of the early 1960s have had the unintended consequence of enabling politicians to choose their voters rather than the other way around.

Those decisions ended the gross malapportionment of congressional and legislative districts that had diluted the voting power of urban voters in much of the country. They also galvanized a national consensus that every vote should have equal weight. Indeed, when Alito was challenged during his confirmation hearing to explain a disapproving mention he made two decades ago of the reapportionment decisions, he had little choice but to endorse the one-person, one-vote principle as "a fundamental part of our constitutional law."

But Alito added a criticism of the Court for "taking it to extremes, requiring that districts be exactly equal in population, which did not seem to me to be a sensible idea." He was right.

So was Justice Lewis Powell, in a 1983 dissent warning that the Court's "uncompromising emphasis on numerical equality" would "encourage and legitimate even the most outrageously partisan gerrymandering." Requiring near-exact numerical equality made a hash of the traditional redistricting standards: city and

county lines, compactness, contiguity, and the like. Those had been the only brakes on gerrymandering.

Later, the justices' unduly broad reading of the 1982 Voting Rights Act amendments as requiring safe seats for black and Latino politicians led to the drawing of oddly shaped "majority-minority" districts.

Politicians, under legal compulsion to draw oddly shaped districts, have pursued their own purposes while they were at it. Meanwhile, computer software has allowed the party in power to draw districts with exactly the desired numbers of Democrats and Republicans.

In California and other states, the two parties have collaborated to draw safe districts for as many incumbents as possible. This is bipartisan gerrymandering. In Texas and other states, the party in power has drawn maps designed to entrench its own incumbents while hurting those of the other party. That is partisan gerrymandering.

The Court has sought since 1993 to undo some of this damage by striking down a few especially bizarre-looking racial gerrymanders. But these decisions are easily evaded, both because they bump up against the Court's own Voting Rights Act rules and because the Court allows redistricters to pack mostly Democratic black voters into bizarrely shaped districts as long as the primary goal is to create safe Democratic districts.

Meanwhile, a bare majority of the Court has suggested that a sufficiently extreme partisan gerrymander might be unconstitutional, but the Court has never struck one down.

In 2003, in *Vieth v. Jubelirer*, the four more

liberal justices wanted to strike down all or part of a 2002 gerrymander that had given Republicans 12 of the 19 House seats in Pennsylvania, which had more registered Democrats than Republicans. Four other justices said that the Court should never strike down a partisan gerrymander. Justice Anthony Kennedy, the deciding vote, said that no manageable definition of unfairness in redistricting had yet emerged, but he left the door open for future cases.

Which brings us to the 2003 Republican gerrymander in Texas. It is no more flagrant than the Pennsylvania gerrymander. Democrats, however, argue that it is uniquely outrageous because the Legislature's only reason for drawing a new Texas map was partisan advantage.

The Legislature did not need to redraw the map to comply with the one-person, one-vote rule, the Democrats stress, because a special three-judge federal district court had already done that in 2001. (The Legislature had deadlocked in 2001 without adopting any map.) Ergo, say the Democrats, the newly Republican Legislature's 2003 map was a purely partisan move to hurt Democratic incumbents and voters. Pretty persuasive, thinks I.

But wait: The state counters that it redrew the 2001 map to undo the lingering effects of a 1991 Democratic gerrymander. It enabled Democrats to win a 17-15 majority of the congressional delegation in 2002, even though Republicans had outpolled Democrats by 53 percent to 44 percent

statewide. Even more persuasive, thinks I.

But wait again: The 2001 map had actually given Republicans an advantage in 20 of the 32 districts, say the Democrats. They held 17 seats in 2002 only because the advantage of incumbency had brought crossover votes from Republicans. That clinches it, I decided—until I was reminded that incumbents tend to keep running for life, so that the 2001 map might have perpetuated a Democratic majority in a 60 percent Republican state for the rest of the decade.

Perhaps you, dear reader, can clearly discern from all this what would be the fairest outcome. But I have given up. And most of the justices seemed content to leave bad enough alone. They also seemed likely to reject most or all of the Democrats' claims that this or that district had too few or too many voters of this or that race.

Whatever the outcome, it would be nice if the justices could tidy up a bit—bringing a dollop of clarity to their rules, loosening the one-person, one-vote straitjacket, reducing the pressure to draw minority-controlled districts even in places where minority candidates have a fair shot without such manipulations.

But it's hard to imagine the justices inventing a new right to more-competitive districts, or where in the Constitution they could find it. Someone else will have to fix this mess. Otherwise, we will be stuck with it forever.

“Comments on *LULAC v. Perry*”

SCOTUSblog

June 28, 2006

Daniel H. Lowenstein

Daniel H. Lowenstein, Professor of Law at University of California, Los Angeles, has these thoughts:

Today’s Texas redistricting decision and Monday’s campaign finance decisions have certain features in common. Most obviously, the Court was badly fractured. Most importantly, the Court stayed quite close to the status quo on constitutional issues (as opposed to the Voting Rights Act portions of today’s decision, which create new doctrine). Perhaps most intriguingly, in both cases the new justices positioned themselves as moderate members of the conservative bloc.

Although specialists have been dissecting the campaign finance decision, *Randall v. Sorrell*, for signs of change, the salient features of that decision are that the unconstitutionality of spending limits was strongly reaffirmed and there was just a slight nudge on contribution limits in the direction of greater First Amendment restriction. In my opinion, the latter was necessary, because in *Shrink Missouri* the Court extended permissiveness well beyond anything *Buckley v. Valeo* had said. It is not clear whether *Randall* sets a floor beneath the *Shrink Missouri* abyss or goes further and casts doubt on *Shrink Missouri*. Either way, *Randall* is very much a reaffirmation of *Buckley*.

On partisan gerrymandering, *LULAC v. Perry* is even more clearly—though less happily—a case that leaves us where we were. In *Vieth v. Jubelirer*, a four-member

plurality would have overruled the holding in *Davis v. Bandemer* that constitutional claims against partisan gerrymandering are justiciable, because there are no manageable standards for deciding such claims. In three separate opinions, four justices dissented, each opinion proposing its own standard. The pivotal vote was cast by Justice Kennedy, who thought a manageable standard might be discovered and therefore was unwilling to find the claims nonjusticiable. But he did not think any such standard had been proposed and on that ground denied relief.

In *LULAC*, the same four justices dissented, and Justices Scalia and Thomas, members of the *Vieth* plurality, continued to hold the claims unconstitutional. Kennedy wrote the lead opinion, again saying that the question is whether the appellants’ claims offered “a manageable, reliable measure of fairness.” The answer was that they did not. The only difference was that Chief Justice Roberts and Justice Alito joined in this general statement of the problem, though they did not join Kennedy’s discussion of the particular deficiencies of the claims. Whereas in *Vieth* we had a 4-1-4 split, in *LULAC* it is 2-3-4. The important point is that the median voter still says that the issue is justiciable but the Court does not know what the law is and therefore will not grant relief.

As Scalia demonstrated in *Vieth* and as Justice Stevens also points out in *LULAC*, Kennedy’s posture is profoundly irresponsible. It is therefore disappointing to

see Roberts and Alito taking the same stance. However, in their case it is most likely a holding action. They may want some time and experience before taking a clearer position. In the meantime, they are situated on the left side of the conservative bloc, which is where they sit right now on campaign finance as well.

Where do the rest of us stand constitutionally on partisan gerrymandering? In a recently published article at 14 Cornell J. Law & Public Policy 367, I came to the surprising conclusion that, on the principle that you cannot replace something with nothing, *Davis v. Bandemer* is still good law. If I was right in that analysis, I don't see anything in *LULAC* that changes the situation.

The novel constitutional issue that received the most public attention was the mid-decade issue. On that point, I believe Kennedy was right to emphasize the preferability of redistricting being effected by legislatures rather than courts. I believe the Court's conclusion that mid-decade redistricting is neither unconstitutional nor constitutionally suspect is correct. But that does not mean mid-decade redistricting is good. The best solution to this problem would be a federal statute prohibiting a legislature from drawing congressional districts more than once in a decade. There would have to be exceptions for when a plan is declared invalid or in the case of a referendum.

The Voting Rights Act issues are very complex and I make only a few short points. First, Kennedy folds some of the racial gerrymandering concepts into his Section 2

analysis. This is bizarre, analytically unsound for reasons demonstrated by Roberts, and probably bodes no good.

Second, there is probably no good doctrinal answer to why District 23 was struck down and District 24 unsound. But there is a very good impressionistic answer. In the strongest portion of his opinion, Kennedy tells a persuasive story that District 23 was on the verge of becoming a Hispanic-controlled district and that for partisan and incumbent reasons the legislature snatched it away. The story he tells on District 24 is that the Democrats are using race as an attempted way to save a prominent, white Democratic representative.

Third, bringing the "quality" (or "style," in Roberts' expression) of a district into the Section 2 analysis is not good for politics or for minorities. It is simply another restraint on how the legislature must carry out its legal obligations. This happened to be a Republican legislature and a Republican plan, but this decision will apply to Democratic legislatures as well. And the decision compounds one of the evils of the racial gerrymandering cases, by limiting minority legislators' flexibility to accomplish their objectives as they wish.

I conclude on a note of tentativeness. I have published exegeses of both of the Court's prior partisan gerrymandering cases, *Bandemer* and *Vieth*. In both cases, major points became clear to me after repeated readings and long consideration. It is quite possible that on reflection and after hearing what others have to say, I will have a different view of *LULAC*.

“Ruling Has Texans Puzzling Over Districts”

The New York Times

July 22, 2006

Rick Lyman

Once upon a time, Congressional district lines were redrawn once a decade, after each federal census. But last month the Supreme Court made it clear that redistricting could occur far more often, and the resulting sense of impermanence was on display this week in a weather-beaten house on this city's Hispanic, working-class South Side.

A few dozen people clustered around the color-coded maps pinned to the wall, each map showing the jigsaw patterns of how South and West Texas' Congressional districts might be redrawn in the next few weeks. One keeps this part of southern Bexar County in the 28th Congressional District, another puts it in the 23rd, some split it into both and one plan divides the neighborhood among three districts.

"It's a mess," said Jimmie Casias, a military veteran and school board official from nearby Somerset. "And what's worst about it, the way things are now, if whoever's running things doesn't like the way an election turns out, they can come back and change the lines all over again."

The Supreme Court's 5-to-4 ruling said that a 2003 redistricting plan, spearheaded by Tom DeLay, the former leader of the Republican majority in the House, was not an unconstitutional gerrymander even though it resulted in the defeat of four Democratic incumbents. But the court also ruled that one district, the 23rd, stretching for 700 miles from Laredo to the outskirts of El Paso was illegal under the Voting Rights Act and needed 100,000 more Hispanics in

it to comply.

So, more than a dozen groups offered maps last week to redraw the district and those around it, including some that would distinctly hamper the re-election prospects of some Democratic and Republican congressmen. A three-judge panel in Austin will now have to decide what to do in time for the midterm elections in November.

The partisan battle is on again, and it is no longer clear whether it will ever stop.

"Redistricting is one of those areas that is partisan by its very nature," said Representative Henry Cuellar, a Democrat who represents the 28th Congressional District, stretching from Laredo to the outskirts of San Antonio, and who, with two Republican incumbents, Representatives Henry Bonilla and Lamar Smith, offered their own proposed map, one that has been derided by critics as the "incumbent protection plan."

But concern is rising that such revision will be a regular occurrence across the country, wherever a party firmly in control of a state legislature believes an advantage can be drawn.

"In the last 10 or 15 years, it's become technically possible on a desktop computer, with the right software, for anybody and their uncle to generate their own very sophisticated maps like this," said Calvin C. Jillson, a political science professor at Southern Methodist University. "So this

allows interest groups, interested members of Congress, political parties, pretty much everybody to develop their own maps. This has made the process a little more complex, but a lot more open."

Of great concern to many Democrats is a plan offered by the Texas attorney general, Greg Abbott, on behalf of the state's Republican leadership. It would draw the lines in a way that imperils an incumbent Democrat, Representative Lloyd Doggett of Austin, and divides that most liberal of Texas cities and surrounding Travis County among three districts, all solidly Republican.

"It's completely overreaching, and it's bizarre," said Alfred Stanley, a longtime Democratic political consultant in Austin. "This is just a vendetta against Lloyd Doggett, who's been a thorn in their side for years, and against Travis County, which they hate."

Mr. Abbott declined to be interviewed. Instead, a spokesman for his office passed along a statement from the Texas solicitor general, Ted Cruz, defending Mr. Abbott's map.

"The proposed plan is directly responsive to the Supreme Court's opinion upholding the statewide map," Mr. Cruz said in his statement. "It leaves 28 Congressional districts completely untouched and alters only District 23 and three adjoining districts."

And alter District 23, it does—changing it from a huge, largely Hispanic swath of the South Texas borderlands, where Mr. Bonilla was seen as vulnerable, to a handful of counties northwest of San Antonio in the predominantly non-Hispanic and Republican Hill Country.

"What the Republicans did," Mr. Jillson said, "is to come up with a way that gives all of the Republican incumbents a good opportunity to win again—including Bonilla, who some people thought might be endangered by this Supreme Court decision—and at the same time take out yet another Democratic incumbent. It's a very aggressive, partisan map."

The question, he said, is whether the three-judge panel or, on appeal, the Supreme Court will decide that it goes too far.

Jose Garza, a lawyer for the League of United Latin American Citizens, which is offering two maps, said he and most others involved in the case fully expected the judicial panel to give deference to the Republican leaders' plan, if for no other reason than such panels have historically done so. Either way, the losing side will probably pursue an appeal that could eventually head back to the Supreme Court.

Then there is the question of timing. The three-judge panel has set oral arguments for Aug. 3. The Texas secretary of state said a map was needed by Aug. 8 for ballots and precinct maps to be ready for the November voting.

Will there be time for a primary before the general election, or will there be an "open primary" in November, a kind of free-for-all of candidates followed by special general election in the affected districts soon after? Is there even time for a Supreme Court appeal before November, or will the voting take place under whatever map emerges from the three-judge panel?

As the gathering in the South San Antonio neighborhood of Harlandale showed, no matter which map prevails, one candidate's distress may be another's boon. The group

was the second this week to have been assembled by Ciro D. Rodriguez, one of the Democratic incumbents who lost his seat in 2004, and who uses the small residence as his makeshift office, keeping his political apparatus alive.

The gathering had two purposes: to look at the various maps and see how they affected Hispanic voters, especially those in southern Bexar County, and to see if any of the maps were of particular help to Mr. Rodriguez's political future.

One of the maps that might tempt Mr. Rodriguez to run, though not his favorite, is the Republican leaders' map. By edging Mr. Doggett out of the 25th Congressional District, it would provide an opportunity for Mr. Rodriguez.

"There are a few of them that offer me some real possibilities," he said. "But I'm not going to be running if some of these plans come out, especially if they break up Bexar County too much."

And of concern to Mr. Rodriguez and others, even beyond this round of partisan fighting, is whether such jockeying will become a regular part of the political calendar across the country, perhaps even seeping down to state and local races.

"I know some people look at what's happening in Texas and say, Well, it's open season on redistricting," Mr. Stanley said. "But I'm hopeful that the bitterness that people will see will cause them to reel back in horror from trying this in their own states."

“New Texas Congressional Districts”

SCOTUSblog

August 4, 2006

Lyle Denniston

Responding to the Supreme Court's decision partly nullifying a 2003 Texas congressional redistricting plan, a special three-judge U.S. District Court (Marshall Division) on Friday drew up a new map that changes the boundaries of five existing districts. The District Court adopted its own plan, refusing to embrace any of the 14 proposals submitted to it. It acted one day after holding a hearing on how to adapt the districts to the Supreme Court's ruling June 28 in *League of United Latin American Citizens v. Perry* (05-204, and companion cases). The District Court order in case 03-354 is [here](#), and its opinion explaining the result is [here](#).

It was obvious, from the swiftness of the District Court's action, that it had been redrawing the lines on its own before the Thursday hearing. It was acting quickly partly because Texas state officials had said they needed a new plan by next Monday, Aug. 7.

Only political analysts familiar with the voting patterns of Texans will be able to judge the actual political impact of the changes on the Texas delegation in the House, but the District Court said its new plan (1438C) allows all incumbents to run "in their old districts," with some modifications. One potential impact of the revision is to ease the chances of Democratic Rep. Lloyd Doggett of the Austin area to win reelection; the new map proposed by the state GOP had wanted to split up his district even more than it had been under the prior plan. Another indication was that Republican Rep. Henry Bonilla may have

less chance of being reelected in his newly drawn District 23, because the District Court has put more Latino voters back into that district, and Latinos have been deserting Bonilla in recent elections. It was because of defections of Latinos that the GOP-dominated legislature put together a plan to take Latinos out of District 23, and put more white Republicans into it.

Bonilla's District 23 was the only one expressly found illegal by the Supreme Court, under the Voting Rights Act, for its impact on Latino voters in south Texas. The District Court said its changes in that district's lines "restore Latino voting strength....without dividing communities of interest."

In order to implement its plan for this year's election in the five newly crafted districts, the District Court ordered a special election under Texas law which provides for filling vacancies in House seats, but it will be held on the same day as other elections this year—Nov. 7. Under the Court's order, candidates must file to run for the House by Aug. 25, the secretary of state must certify by Sept. 6 the names of candidates who will go on the ballot for the five changed districts, and the election will be held on Nov. 7. If no candidate gets 50 percent of the vote in any of the districts, a runoff date will be held. Candidates for the state's other 27 House seats chosen in primary elections in March will remain on the general election ballot (although whether former Republican Rep. Tom DeLay will remain on the ballot in District 22 in the Houston area is still at

CAMPAIGN FINANCE

“Justices Reject Vermont’s Campaign Finance Law”

The Washington Post

June 27, 2006

Charles Lane

The Supreme Court struck down Vermont's strict limits on campaign contributions and spending yesterday, in a splintered ruling that left intact the constitutional basis of current campaign finance laws but may make it difficult to put new curbs on money in politics.

Vermont's law, approved in 1997, was the toughest in the country with regard to setting limits on the amount individuals and parties may contribute to campaigns and, perhaps more significantly, on how much candidates may spend on their campaigns.

The measure was enacted as a direct challenge to *Buckley v. Valeo*, the 30-year-old Supreme Court ruling that has generally been read to permit limits on campaign contributions, for the purpose of stopping corruption or apparent corruption—and to bar limits on candidates' spending as a violation of free speech.

A ruling in Vermont's favor would have opened the door to state and federal restrictions on spending by candidates. But, in a 6 to 3 vote, the justices opted to reject the state's law.

Although the court said the government retains the power to restrict contributions, for the first time it declared specific limits to be too low—perhaps opening the way to challenges on some long-standing restrictions, such as the 30-year-old \$5,000

contribution limit for political action committees.

"This is a setback for reformers who were hoping to expand what the government could regulate," said Jan W. Baran, a former counsel for the Republican National Committee. "This is the first time the Supreme Court has struck down a contribution limit—on the grounds that it was too low."

But Fred Wertheimer, president of Democracy 21, an organization that lobbies for campaign finance laws, cautioned against interpreting the ruling as a green light for opponents of contribution limits to challenge existing rules as too restrictive.

The court "has not disturbed the constitutional doctrine under which we've been winning cases for years," Wertheimer said. "It's a status quo opinion. It preserves the decision upholding the constitutionality of the soft money ban, and of prohibitions on corporate and labor union contributions and expenditures, among others."

Predicting the case's impact is difficult because the court produced no majority opinion yesterday, but instead split three ways.

The court's two newest members, Chief Justice John G. Roberts Jr. and Justice Samuel A. Alito Jr., joined Justice Stephen

G. Breyer in ruling that, under *Buckley*, any limits on the amount candidates may spend on their campaigns violate freedom of speech. The three justices also ruled that although contribution limits are permissible, Vermont's were so low that they skewed political competition.

Because it was the narrowest reasoning in the majority, Breyer's opinion controls the case.

Yet it also had the appearance of damage control by Breyer, who has generally favored campaign finance regulation. The justices in the Breyer-led trio were the only members of the court to agree on his interpretation of *Buckley*.

The other three votes against Vermont came from justices Anthony M. Kennedy, Antonin Scalia and Clarence Thomas. They opposed the Vermont law on broad free-speech reasoning that would have scrapped or changed *Buckley's* limits on campaign contributions.

Vermont could muster support only from dissenters John Paul Stevens, Ruth Bader Ginsburg and David H. Souter in favor of its reading of *Buckley*, which would have permitted spending limits under some circumstances.

The result appears to doom any future efforts to impose spending limits on state or federal campaigns, legal analysts said.

The Vermont law at issue in yesterday's ruling was enacted by the state legislature and signed into law by then-Gov. Howard Dean (D) in 1997.

The statute was written by advocates of tougher campaign laws who knew that its limits on spending, which ranged from

\$2,500 for state House candidates to \$300,000 for gubernatorial candidates, ran counter to *Buckley*. But they wanted to generate a case that would force the Supreme Court to revisit and reinterpret the precedent.

Emphasizing society's "reliance on settled precedent," Breyer rejected Vermont's plea. He noted that it "amounts to no more than an invitation so to limit *Buckley's* holding as to effectively overrule it."

Breyer wrote that Vermont's rationale for spending limits—to cut back on the time candidates must spend raising cash—was not new, as the state had argued, but had already been factored into the court's ruling in *Buckley*.

Breyer moved on to the contribution limits for individuals and parties, which range from \$200 per two-year election cycle—primary and general elections included—for state House candidates, to \$400 for statewide candidates.

Reading a summary of his opinion in court yesterday, Breyer said the \$200-per-election limit on contributions for statewide races is "way, way, way lower" than the \$1,000 federal limit approved in *Buckley*—95 percent lower, adjusted for inflation. As such, he said, it endangers the ability of some candidates, especially challengers, to get their message out.

In his written opinion, he noted four additional problems: that the limits are not adjusted to inflation; that they also apply to political parties, harming their right to association; that the level of political corruption in Vermont did not seem unusually serious; and that the law would force volunteers to count their expenses as campaign contributions.

A volunteer who "offers a campaign the use of her house along with coffee and doughnuts for a few dozen neighbors to meet the candidate, say, two or three times during the campaign" might run afoul of the law, Breyer wrote.

In a concurring opinion joined by Scalia, Thomas argued that Breyer's opinion provided no "workable inquiry to be performed by States attempting to comply with this Court's jurisprudence." He repeated his previous call to scrap *Buckley*. In a separate opinion, Kennedy said the post-*Buckley* "new order" "may cause more problems than it solves," but stopped short of calling for the decision's overruling.

In dissent, Souter, joined by Stevens and Ginsburg, agreed with Vermont that its contribution limits were constitutional,

saying they "are not remarkable departures either from those previously upheld by this Court or from those lately adopted by other States."

Souter and Ginsburg also would have interpreted *Buckley* to allow the state to defend its limits in court, based on what Souter called "the impact of the money chase on the democratic process."

Stevens, who was on the court in 1976 but did not vote in *Buckley*, went further, saying he had concluded that "the time has come to overrule" *Buckley's* spending limits. He wrote that "a candidate need not flood the airways with ceaseless sound-bites of trivial information in order to provide voters with reasons to support her."

Staff writer Jeffrey H. Birnbaum contributed to this report.

“Vermont Campaign Limits Get Cool Reception at Court”

The New York Times

March 1, 2006

Linda Greenhouse

The Supreme Court displayed little appetite on Tuesday for making basic changes in its approach to campaign finance law, under which the government may place limits on political contributions but not on a candidate's spending.

Vermont's aggressive effort to drive much private money out of politics, through a law it enacted in 1997 that set tight limits on both contributions and expenditures, appeared unlikely to withstand the court's scrutiny after an argument that included a low-key but withering cross-examination by Chief Justice John G. Roberts Jr. of Vermont's attorney general, William H. Sorrell.

The chief justice challenged the attorney general's assertion that money was a corrupting influence on Vermont's political system, the state's main rationale for its law. "How many prosecutions for political corruption have you brought?" he asked the state official.

"Not any," Mr. Sorrell replied.

"Do you think corruption in Vermont is a serious problem?"

"It is," the attorney general replied, noting that polls showed that most state residents thought corporations and wealthy individuals exerted an undue influence in the state.

The chief justice persisted. "Would you describe your state as clean or corrupt?" he

asked.

"We have got a problem in Vermont," Mr. Sorrell repeated.

The chief justice pressed further. If voters think "someone has been bought," he said, "I assume they act accordingly" at the next election and throw the incumbent out.

He also challenged a line from the attorney general's 50-page brief, an assertion that donations from special-interest groups "often determine what positions candidates and officials take on issues." Could the attorney general provide an example of such an issue, Chief Justice Roberts asked. Mr. Sorrell could not, eventually conceding that "influence" would have been a better word than "determine."

By the end of the argument, it appeared clear that Vermont's spending limits would fall, and that its contribution limits, the lowest in the country, were hanging by a thread.

Justice Stephen G. Breyer said he was concerned that the limits, \$400 over a two-year election cycle to candidates for statewide office down to \$200 for the state's House, were so low as to "give incumbents a tremendous advantage" and "really shut off the possibility of a challenge" by a candidate who had to raise and spend more money to make an impact. Political parties face the same limits on contributions to their own candidates.

On the expenditure side, the limits go from

\$300,000 over a two-year cycle for a governor's race down to \$2,000 for a seat in the House. The law makes no adjustments for candidates who have to run in a primary in addition to the general election. Incumbents are held to 85 percent or 90 percent of what a challenger may spend, depending on the office.

"I'd like to know why the limits are not far too low," Justice Breyer said to Mr. Sorrell.

The attorney general replied that the law's limits were sufficient, with rare exceptions, to cover the unusually low cost of campaigning in Vermont, where three 30-second spots on a Burlington cable television station can be bought for \$45. Legislative districts have only 4,000 residents and much campaigning is door-to-door, he said.

"You're going to have outliers" for whom the rules may be a problem, Mr. Sorrell said, "but we have a core constitutional interest in trying to increase the integrity of our campaigns."

Six years ago, the court upheld Missouri's contribution limit of \$1,075 against the argument that it did not permit candidates to raise enough money to run effective campaigns. Justice Breyer voted with the majority but said that the question was close and that any lower limit might be too protective of incumbents.

A second lawyer, Brenda Wright, also argued in defense of the law, representing a coalition of Vermont residents and organizations. Lack of proof of the corrupting role of money should not be held against the law, Ms. Wright said, because serious incidents of money buying "undue influence" typically do not ever become public.

Justice Samuel A. Alito Jr. asked Ms. Wright whether candidates could run effective campaigns with the contribution limits in place, but without expenditure limits. Yes, she replied. That is, in fact, the system that exists in Vermont today, under lower courts' rulings in this case, *Randall v. Sorrell*, No. 04-1528.

The Federal District Court in Burlington upheld the contribution limits but struck down the spending limits under the Supreme Court's leading precedent on the subject, *Buckley v. Valeo*, from 1976. The United States Court of Appeals for the Second Circuit, which sits in New York and covers Vermont, affirmed on the contribution limits. Its approach to the spending limits was more complex.

The appeals court panel held by a 2-to-1 vote that the *Buckley* precedent was not a complete bar to Vermont's ability to defend its spending limits. The state had demonstrated a "compelling state interest" in using the limits to combat corruption as well as to relieve officeholders of the burden of continual fund-raising, the appeals court said. But rather than let the spending limits take effect, it then sent the case back to the district court to see whether alternatives, like public financing, might achieve the same result without coming so close to the constitutional line.

James Bopp Jr., arguing for the challengers to the law, a coalition that includes the Vermont Right-to-Life Committee, the Vermont Republican Party and the American Civil Liberties Union, said the appeals court's ruling on the spending limits was incorrect as a matter of law. There was no point in permitting the case to go back to the district court, Mr. Bopp said.

Asked by several justices whether any set of circumstances could justify spending limits, Mr. Bopp said that while he would not rule out a justification as a theoretical matter, he could not think of one that would pass constitutional muster. He said the First Amendment demanded that candidates "be allowed freely to express themselves."

Mr. Bopp said that "a general cynicism about politics and government has existed since the first colonists." That was what led to the American system of checks and balances, he added. But he said the definition of corruption invoked to justify the Vermont law was far too broad.

"As long as Vermont has periodic elections, incumbents will look to the next election" and to some extent tailor their behavior accordingly, he said, adding that "if that's a definition of corruption, it's sufficient to abolish elections generally."

Mr. Bopp said the Vermont limits were too low to permit meaningful campaigns, amounting to "an unprecedented restriction on speech."

Among his allies on the court was Justice Anthony M. Kennedy. In past opinions, he has expressed serious doubts about limits about both spending and contributions, suggesting reliance on public disclosure instead.

"Let's assume that some members of the court simply accept the proposition that money buys access," Justice Kennedy said to Mr. Bopp. "It's a common-sense conclusion. I tend to think that money does buy access. But what follows from that?"

He then answered his own question. "Isn't the answer that voters can see what's going on and throw the incumbents out?"

“Some Initial Thoughts on the Vermont Campaign Finance Decision”

SCOTUSblog

June 26, 2006

Rick Hasen

Rick Hasen has these thoughts (which are cross posted at Election Law) on today's decision:

The decision in *Randall v. Sorrell* today is a monumental one, because it marks the first time that the two new Justices have considered a campaign finance case. Though the decision is a defeat for Vermont and for those who supported Vermont's campaign finance laws, this is about the best decision that (realistic) supporters of campaign finance regulation could have hoped for from the new Roberts Court. The language about the rights of political parties may also turn out to be very important, suggesting laws regulating campaign financing must give them a special role in fundraising. In sum, this is something of a split decision for those who support and oppose campaign finance regulation.

I would say these are the headlines of the opinion in a nutshell:

Chief Justice Roberts and Justice Alito agree that some campaign contribution limits are consistent with the First Amendment. This was a huge question for those of us in the field. Justice Breyer wrote a plurality decision joined by these two Justices, which, on the question of contribution limits, *distinguishes* rather than overrules recent cases such as *McConnell* and *Shrink Missouri* upholding campaign contribution limits. Now it might be that Chief Justice Roberts and Justice Alito will evolve toward the Scalia-Thomas-Kennedy position that all (or most, in the case of

Kennedy) contribution limits violate the First Amendment. But for now, you have these three Justices, along with dissenting Justices Ginsburg, Souter, and Stevens, who believe that a great many of the country's campaign contribution laws are constitutional. This is a very big deal and good news for those of us who support such limits. Justice Kennedy would have struck the limits down as well, though one senses that if he wrote the majority opinion, it would have called into question many more state and local (not to mention federal) campaign contribution laws.

Battles will rage across the country over the constitutionality of particular contribution limit laws. Justice Breyer has set out a two part test to judge when a campaign contribution limit is too low, and in typical Supreme Court fashion, the second part of the test has five parts. This plurality opinion (because it is narrower than the position taken by the three dissenters) will set out the controlling test. Under the first part of the test, courts will look for “danger signs” that a contribution limit is so low as to stifle electoral competition. If the limit is too low, there are five factors that led the plurality to conclude the Vermont limits were too low:

- a. The contribution limits appear to significantly restrict the amount of money available to challengers to run competitive elections.
- b. The same low limits are imposed on political parties, harming the right to

association.

c. The law treats volunteer expenses too harshly. In the context of very low contribution limits, this imposes too high a First Amendment cost.

d. The limits are not adjusted for inflation.

e. The record does not show a particular danger of corruption to justify such stringent limits on constitutional rights.

The dissenters would have upheld the contribution limits, seeing them as not much different than the ones upheld in *Shrink Missouri*.

In lower courts, the question will be whether the contribution limits are too much like Vermont's to be constitutional.

3. Political parties may now start arguing for additional constitutional protections under the third factor listed above. Cases such as *McConnell* and *Colorado Republican II* rejected the argument that

political parties should have special First Amendment rights because of how they facilitate association. This case may revive that line of authority, and that could turn out to be quite significant in the long run.

4. The nail in the coffin for expenditure limits. From the moment I heard that the supporters of the law (who won in the Second Circuit) were supporting the cert. petition, I knew it was a mistake (and said so many times on the blog). The Court was poised to move away from its deferential position in the campaign finance cases, and there was no need to hasten it. In any case, part of the mission of some of the plaintiffs' lawyers had been to get the Court to accept expenditure limits. What we got instead is a firm majority on the Court rejecting the idea that expenditure limits are constitutional, even under the "time preservation rationale," though there's enough room in the opinions for someone to raise the argument again one day, through a more frontal attack on *Buckley* and enough argumentation to satisfy Justice Alito (see his concurring opinion) that the issue was fairly raised.

“There’s No Future in the Past of Campaign Finance”

National Review
June 28, 2006
Ronald D. Rotunda

The Supreme Court’s greatest opinions—the ones that live for years and speak eternal truths—are pithy. John Marshall’s opinion in *Marbury v. Madison* (1803) was 26 pages in the U.S. Reporter system. *Brown v. Board of Education* (1954) was only 13 pages.

In contrast, the longer the opinions, the less likely they will live a long life: the opinions in *Buckley v. Valeo* (1976) total 294 pages. That case recognized that the First Amendment protects campaign financing because money talks; if a candidate is allowed to speak, but the government can restrict him from raising and spending money to rent a large hall and megaphones, then no one can hear what he has to say. The Court also recognized the incestuous danger presented when campaigning becomes a regulated industry, because the incumbent politicians will be regulating the challengers who oppose them.

Buckley upheld many (but not all) regulations of campaign financing after drawing a distinction of constitutional magnitude between restrictions on *expenditures* (which “impose direct and substantial restraints on the quality of political speech” and thus merit more constitutional protection) and on *contributions* (“only a marginal restriction on the contributor’s ability to engage in free communication”). This distinction, the complexities it created, and the rationales it generated account for the length of the opinion.

McConnell v. Federal Election Commission

(2003) upheld almost all of the Bipartisan Campaign Reform Act of 2002, in opinions that totaled nearly 300 pages. The case was a loss for groups like the ACLU, the AFL-CIO, and the Chamber of Commerce, which filed briefs opposing the restrictions on grounds of free speech. (Newspapers routinely report that only “conservatives” oppose these restrictions; they must not read who signs the briefs.) And it was a tremendous victory for those who support government regulation.

That victory did not last long. *Randall v. Sorrell* (2006) is the latest campaign finance decision in a long line of long opinions—nearly 70 pages long, with no majority. The Court was as fractured as the nose of a punch-drunk boxer; six justices (using various rationales) concluded that Vermont’s statute (Act 64) violates free speech. Breyer, joined by Chief Justice Roberts (and by Alito in part) invalidated Vermont’s strict spending and contribution limits. Alito, in a separate opinion, allowed that he might overrule *Buckley* in a different case. Kennedy concurred in the judgment given his skepticism regarding the Court’s entire campaign finance caselaw. Thomas, joined by Scalia, agreed that Act 64 is unconstitutional and argued that the Court should overrule *Buckley*.

Stevens, dissenting, also argued that *Buckley* should go, because he believed it protected free speech *too much*. He yearned for the cost-free campaigns represented by the Lincoln-Douglas debates, but neglected to mention that in that long-ago time, they

campaigned for the Senate before there was a Seventeenth Amendment, when there was no popular election for U.S. Senators. (Of the seven debates, none were in Chicago, the most populous city in Illinois, because the state legislature appointed the U.S. Senators.) Souter also dissented, joined by Ginsburg (and by Stevens in part), and would have simply upheld the Vermont law.

Act 64 limited campaign *expenditures* to a maximum of \$300,000 for gubernatorial candidates and \$2,000 for those running for state representative, indexed for inflation. *Buckley* had invalidated a federal limit on campaign expenditures, arguing that it violated free speech “by restricting the number of issues discussed, the depth of their exploration and the size of the audience reached.” *Randall* agreed.

Act 64 also limited political *contributions* to \$400 to gubernatorial contenders and \$200 to state representatives, and limited contributions by political parties attempting to aid their candidates. These limits were *not* indexed for inflation. Breyer’s plurality concluded that these very low limits made effective campaigning impossible. “A failure to index limits means that limits which are already suspiciously low, will almost inevitably become too low over time.” When Breyer read a summary of his opinion in Court, he added, “even if we’re wrong, eventually we would be right,” because of

the failure to index for inflation. Only six years earlier, the Court (in a Souter opinion) had specifically expressed no concern that contribution limits were not inflation-adjusted.

It had been a decade since the Court invalidated a campaign finance law (where the Court, also with no majority opinion, struck a Colorado law that forbade uncoordinated expenditures by a political party). And *Randall* marks the first time the Court has ever invalidated a limitation on individual or party *contributions* to a candidate.

What will the future bring? Longer opinions, if the Court tries to keep the complex distinctions of the prior cases.

There are hints, however, that the Court may not do that. Breyer’s plurality (joined by Roberts and Alito) advised that the appellate courts should review the record “independently,” and not defer to the lower courts to make sure that the restrictions on campaign financing are “narrowly tailored.”

So perhaps hope is warranted for a shorter decision in the future, one that remedies the confusion created by the Court’s past decisions on campaign finance.

Ronald D. Rotunda teaches law at George Mason University

**“Supreme Court Ruling Could Spur Partisan Judicial Campaigns
Justices void restrictions on Minnesota judges’ soliciting of money and declaring party
ties.”**

The Los Angeles Times

January 24, 2006

David G. Savage

The Supreme Court took another step Monday toward transforming state elections for judges from nonpartisan, low-key affairs into big-money contests.

The justices let stand a lower court ruling in a Minnesota case that voids rules forbidding judicial candidates from personally soliciting money or from identifying themselves as Republicans or Democrats.

The rules were voided using the rationale that they deprive candidates of free speech. About 30 states with similar provisions could be affected if the ruling spreads beyond the U.S. 8th Circuit Court of Appeals.

Monday's decision "could open the floodgates of money into America's courtrooms," said the Washington-based group Justice at Stake. It will "ratchet up special-interest pressure on courts that are supposed to be fair and impartial."

Minnesota sought to preserve the rules against such spending, contending they are "critical to ensuring that the state's judiciary is—and is seen to be—above party politics and the corrupting influences of money."

Thirty states are set to elect justices to their supreme courts this year. The court ruling comes against a backdrop of increased spending for judicial races by 45% between 2002 and 2004.

The Supreme Court decision will not

necessarily have any immediate consequences in California, said Richard L. Hasen, an election law expert at Loyola Law School.

He said the decision, which left in place a ruling by the 8th Circuit, is not binding on the 9th Circuit, which handles appeals from California and eight other western states.

California's Supreme Court justices are appointed by the governor for set terms, but must run to retain their seats. Judges of the state's superior courts are elected in nonpartisan races. Some legal experts said Monday's action by the high court suggested judges and judicial candidates were now free to run partisan campaigns.

"The implication for California is that the trial court judges could run as a Democrat or as a Republican. Before, they could be disciplined for doing that," said Georgetown University law professor Roy A. Schotland, who had urged the Supreme Court to preserve the current rules for judges.

Hasen said there was nothing in the Supreme Court decision that would require California to elect judges through a partisan election.

But he said it was possible that a candidate might run a partisan campaign with the hope that the existing state law eventually would be overturned.

The high court triggered the move toward more expensive and partisan state judicial

ances four years ago, in Minnesota. It struck down the state's code of conduct that barred judges and judicial candidates from announcing their views on issues that might come before the courts.

In a 5-4 ruling, the justices said the 1st Amendment's guarantee of freedom of speech gave judges a right to speak out on controversies, even if their pronouncements might undercut their appearance of impartiality.

Since then, a series of other rules that restrict judicial candidates have been challenged in the lower courts, and nearly all of them have been struck down on free-speech grounds.

"This means we are moving toward no-holds-barred elections for judges. It also means the public will view judges like other pols and probably have less respect for courts," said Schotland.

James Bopp Jr., who successfully challenged the rules on behalf of the Republican Party of Minnesota, agreed the high court's action would probably have a wide impact.

"It's becoming clear the 1st Amendment has a broad application to judicial elections and that the original foundation for the regulation of judicial elections has been pretty well destroyed," he said.

Federal judges, including justices of the Supreme Court, are appointed by the president and confirmed by the Senate for life terms on the bench.

Though most other judges are elected, nearly all the states enforce judicial codes of conduct that limit the partisan political activity of sitting judges. Minnesota forbids its judges and judicial candidates from speaking at a political party's meeting or

from seeking a party's endorsement.

In August, the full U.S. 8th Circuit Court of Appeals declared unconstitutional Minnesota's rules forbidding judges from engaging in partisan activity and from personally seeking campaign funds.

The state appealed to the high court.

Minnesota was supported by the American Bar Assn., the Conference of (state) Chief Justices and 39 of the nation's largest corporations. They included Dow Chemical, General Electric, General Motors, Johnson & Johnson, Time Warner and Wal-Mart.

These companies voiced concern at "the prospect of increasingly costly, divisive and partisan judicial elections." Its officials also said they "often find themselves between a rock and a hard place" when a judge asks for campaign money. Giving "to even the most promising candidate has the potential to create an appearance of seeking favor in any future litigation," the company lawyers said. "That potential is only compounded when the judge himself makes the request."

Unswayed, the Supreme Court, without comment, turned down the appeal Monday in the case of *Dimick vs. Republican Party of Minnesota*, leaving the lower court's decision intact.

In another election-related case, the justices said political activists may be able to air some broadcast ads that mention federal candidates, despite the McCain-Feingold Act and its ban on corporate-funded attack ads within 60 days of an election.

Two years ago, the Supreme Court upheld this law and said its limited ban on pre-election broadcast ads did not, in principle, violate the 1st Amendment. But that

decision did not necessarily forbid specific challenges, the justices said in a brief 9-0 ruling on Monday.

Times staff writers Henry Weinstein and Jill Leovy contributed to this report.

CAMPAIGN-TIME BROADCASTS

"Advocacy Groups Can Challenge Limit on 'Issue Ads'"

USA Today
January 24, 2006
Joan Biskupic

The U.S. Supreme Court ruled unanimously Monday that a Wisconsin anti-abortion group may go to court to challenge a federal ban on issue-oriented ads that mention a particular candidate in the weeks before an election. The group says the ban infringes on its First Amendment right to free speech.

The advertising ban, part of a 2002 overhaul of federal campaign-finance law, was intended to ensure that wealthy interests such as corporations and labor unions do not have undue influence on federal elections. But Wisconsin Right to Life, backed by an unusual coalition of conservative and liberal groups, argued that the ban sometimes infringes on legitimate grass-roots lobbying. The Wisconsin group was appealing a decision by a lower court that threw out the group's claim that the "issue ad" blackout violated its speech rights.

On Monday, the justices spurned the Justice Department, which argued that allowing individual challenges to the ban on certain ads would force federal judges to assess the political intentions of campaign ads and could lead to disruptive lawsuits just before elections.

Under the federal law, corporations and unions may not use their general funds to broadcast issue ads that refer to a candidate for federal office within 30 days of a primary or 60 days of a general election. The ban is part of the 2002 campaign overhaul known as the McCain-Feingold law, after its

Senate sponsors John McCain, R-Ariz., and Russ Feingold, D-Wis. In 2003, the Supreme Court said the law was constitutional.

Wisconsin Right to Life sued the Federal Election Commission the following year, contending that the ban on issue-oriented ads interfered with its plans to air a spot that criticized Democratic-sponsored Senate filibusters of judicial candidates. The group's ad identified Feingold, then running for re-election, by name. The group argued that it was trying to generate public pressure on Feingold not to support filibusters of the Bush administration's judicial nominees.

However, a three-judge appeals panel in Washington, D.C., suggested the anti-filibuster message linked to Feingold was the kind of ad that Congress wanted to bar in the weeks just before elections. The panel noted that the anti-abortion group, in earlier ads, had made clear that it opposed Feingold. But the panel did not rule on the merits of Wisconsin Right to Life's claim that the ad ban violated its speech rights. Rather, it said the Supreme Court's 2003 ruling barred such specific constitutional challenges to the ban.

In reversing the lower court, the justices said that although they had upheld the provision in question, "we did not purport to resolve future . . . challenges" to it.

Chief Justice John Roberts read parts of the three-page opinion from the bench and noted the decision was unanimous. The case now goes back to the appeals court, which will consider the merits of the Wisconsin group's claim.

"The lower court must now confront the real merits of this case . . . that there is no constitutional justification for prohibiting grass-roots lobbying about upcoming votes in Congress, just because we are in an election season," said lawyer James Bopp, who represented the Wisconsin group.

Nan Aron, of the liberal Alliance for Justice, also praised the ruling. "Prohibiting ads on important legislative matters facing Congress, regardless of the election calendar, violates the First Amendment rights of non-profit organizations."

The Justice Department had no comment.

"The battle goes on," said Fred Wertheimer, president of Democracy 21, a group that backed the ad ban. "There's a very powerful case to establish that these ads were about defeating Sen. Feingold, not lobbying him."

“Electioneering Blackout Upheld”

SCOTUSblog

May 9, 2006

Lyle Denniston

This is another in a continuing series of reports on the aftermath of Supreme Court decisions or orders. The Court in 2003 upheld against a facial attack the provisions of the 2002 federal election finance law that bar corporations and labor unions from using their own funds to pay for a broadcast, cable or satellite message that mentions a federal candidate 30 days before a primary election and 60 days before a general election (*McConnell v. Federal Election Commission*). However, on January 23, in *Wisconsin Right to Life v. FEC* (docket 04-1581), the Court ruled summarily that "as-applied" challenges could be made to enforcement of the electioneering blackout. The following is a District Court's reaction to that ruling, in another case.

A three-judge U.S. District Court in Washington on Tuesday ruled that the FEC may forbid a Maine group that opposes same-sex marriage from running ads, planned to start on Wednesday, urging that state's voters to write to their two U.S. Senators to urge them to support a federal constitutional amendment outlawing such marriages nationwide. One of the two Senators, Olympia Snowe, a Republican, is running in the primary election in Maine set for June 13—thus, the planned ad campaign would be running during the 30-day blackout period that federal law imposes.

The Maine group is Christian Civic League of Maine, Inc. It has planned to spend about \$4,000 on a radio advertisement naming Sen. Snowe and her GOP colleague, Sen. Susan Collins. The group said it expects the Senate to be debating and voting on the

proposed constitutional amendment early in June, so it wanted the campaign to unfold at a time that could generate voter pressure on the Senators.

(The *Wisconsin Right to Life* case, which involved a 2004 ad campaign that named Sen. Russ Feingold, Democrat, has returned to U.S. District Court in Washington [docket 04-1260]. A hearing on it, before a different panel of three judges, is now scheduled for September 18. Thus, the Maine case moved on a faster track.)

At this stage, the case of *Christian Civil League of Maine v. FEC* (docket 06-614), only involved a request by the League for a preliminary injunction to bar the FEC from enforcing the electioneering blackout during the planned pre-primary period. The group had asked for a broader injunction, against any enforcement against any ad campaign involving "grass roots lobbying," but the District Court confined its ruling to the specific ad that was to run beginning this week. (The Court noted that the League could go ahead with the ad campaign if it did not use its own treasury funds to pay for it, but the League has opted not to do so, in order to test the constitutionality of any enforcement against a "grass roots lobbying" broadcast.)

In its ruling, which can be found [here](#), the District Court said that "enforcement of the electioneering communications provision to bar the League's proposed advertisement appears problematic under the First Amendment." It noted that the First Amendment protects corporate speech on

matters of public concern, and that the planned ad "would address a legislative issue at a time when that issue is likely to be under consideration in the Senate. And the advertisement does not mention Sen. Snowe's candidacy, which is unopposed."

But, the Court went on, the blackout provision "appears narrowly tailored to serve a compelling governmental interest. . . . Particularly after *McConnell*, there can be no question that the government interest in maintaining the integrity of the electoral process is compelling." It again noted that the League could run the campaign with money other than from its own treasury. "Here, the Act does not bar the proposed advertisement; it only requires that the League fund it through a political action committee," the Court declared. And it could even use its own money if it put the ad in something other than broadcast format, such as in a newspaper, a leaflet, an e-mail, or a telephone bank message. Further, it said, the ad could even be financed out of corporate funds, so long as it did not clearly identify Sen. Snowe.

The Court said that the planned ad "appears to be functionally equivalent to the sham issue advertisements identified in *McConnell*." The ad, it noted, calls Snowe's prior vote against the marriage amendment "unfortunate," and thus "is the sort of veiled attack that the Supreme Court has warned may improperly influence an election." The Court speculated that the ad might encourage a new candidate to run against Snowe, reducing her primary votes, weakening her for the general election, "or otherwise undermining her efforts to gather such support, including by raising funds for her reelection."

A "grass roots lobbying" exception to the blackout provision, it said, "would seriously impair the government's compelling interest in protecting the integrity of the electoral process."

It concluded that the League had not shown "a substantial likelihood" that its First Amendment challenge to enforcement would succeed when the case proceeds to the merits.

“Court Refuses To Speed Election Case”

SCOTUSblog
May 15, 2006
Lyle Denniston

UPDATE: The Supreme Court on Monday afternoon denied a request from a Maine group to speed up the Justices' consideration of a constitutional challenge to federal limits on broadcast of a message opposing same-sex marriage during the month prior to Maine's primary election for a U.S. Senate seat on June 13. The Court's order reads: "The motion of appellant to expedite consideration of the appeal and to consolidate briefing is denied." □

As a result, the Federal Election Commission's response to the appeal is due June 12. Monday's order, plus the Court's likely conclusion of its current Term near the end of June, very likely means that the case will go over to the new Term starting Oct. 2. By then, it could be moot, or there could be a new appeal later, after further proceedings in U.S. District Court. The Maine group involved has said it plans to run similar broadcast messages during the general election campaign this Fall. (The following is an earlier post on the case.)

Solicitor General Paul D. Clement on Monday opposed expedited review of a new appeal challenging the constitutionality of federal limits on broadcasts of so-called "grass roots lobbying" in the pre-election season. The opposition urged the Court to let the case of *Christian Civic League of Maine v. Federal Election Commission* (05-1447) play out on the usual schedule, meaning it probably would not come up for review until the new Term starting Oct. 2.

Also joining in opposing the speedy review of the case were two U.S. senators and three

members of the House of Representatives, proponents of campaign finance laws who have been in the case in lower courts as intervenors. They argued that "nothing in this case justifies" the "extraordinary action" of swift review and a decision.

Attorneys for the Maine organization had asked the Court to put their appeal on a fast track, with only one round of briefs, and with a prompt hearing. The request included a plea for the FEC to file its response on the merits by Wednesday of this week.

The Solicitor General's response argued that the group would be free to broadcast its Maine message targeting same-sex marriage after the Senate primary election in that state on June 13. So, it said, the District Court's denial of a preliminary injunction "is likely to become moot" before the Court could rule on the merits, unless there was unusual expedition of Court review.

"The Court," Clement argued, "has no obligation to reorder its calendar and issue a decision in this case under the extraordinarily expedited schedule proposed by CCLM simply to ensure that the appeal of an interlocutory order in the case is decided while a live controversy remains with respect to the validity of the district court's preliminary injunction. . . . No statute requires the Court to expedite its consideration of the interlocutory appeal in this case."

Thus, Clement said, the Court should deny the motion to expedite and consolidate briefing "and permit the FEC to respond to

CCLM's jurisdictional statement in the ordinary course." Any ruling on as-applied challenges to the federal law's restriction on "electioneering communications" would be likely to spell out general standards for such challenges, he added, and the parties if pushed to act rapidly would be likely to brief those issues in truncated form. The Court would have only a narrow window of time—less than three weeks—to hear oral argument and issue a decision "during what is otherwise one of the busiest times of the Court's year," he said.

In addition, the Solicitor General said that, even if expedition is denied, the Maine group may still ask the District Court to provide relief after further facts are developed. Thus, he argued, "this Court should await a case in which the record concerning the communications at issue has been fully developed, and the Court is able to engage in its customary decisionmaking process rather than the truncated procedure proposed by CCLM." The choice, he said, "is not between now and never, but between orderly review in due course or rushed proceedings at an interlocutory stage."

The government filing suggested that the particular advertisement in question, promoting a federal constitutional amendment against same-sex marriage and specifically mentioning Sen. Olympia Snowe, a Republican seeking reelection and appearing in the state's June 13 primary, was "designed so as to create a test case" by triggering the federal law's ban on corporate financing of such communications. It notes

that the Maine league agreed to put on the ad after the message was composed by a related group, Focus on the Family, and after Focus on the Family had sent out e-mails to the League and other organizations to recruit them to mount legal action.

The five members of Congress who joined in opposing fast-track review also related for the Court the story of how the ad in question had been the result of an attempt to create a test case, "thus undercutting any claim of significant injury." The lawmakers said that the Focus on the Family e-mail to various organizations had included an attachment from a lawyer, offering to pursue the case "at no charge" and anticipating an appeal to the Supreme Court, resulting in "a landmark ruling."

Later Monday, the League filed its reply, accusing the FEC and the lawmakers of engaging in manipulation of the federal courts and scuttling any litigation over the communications blackout provision to "grass roots lobbying" broadcasts. The other side, it said, wants the case to be allowed to become moot and then allow it to proceed further in District Court. Calling the tactic "bait and switch," the League said that, "if tolerated," it "would put citizen groups in an endless loop of being mooted but never ripe in their efforts to obtain this Court's constitutional judgment on this important public issue."

With that reply in hand, the Court is expected to respond promptly to the question of expediting the case.

VOTING RIGHTS

“Bush Signs Voting Rights Act Extension President vows to build on “legal equality” won in Civil Rights Era.”

The Washington Post

July 28, 2006

Hamil R. Harris and Michael Abramwitz

Joined by stalwarts of the civil rights movement, President Bush yesterday signed into law a 25-year extension of the Voting Rights Act, the historic legislation that opened the ballot box to millions of blacks across the South in the 1960s.

Under the legislation, the Justice Department will maintain the authority to review changes in ballot procedures, legislative districts and other electoral rules in several states, mainly in the South, to ensure that African Americans and other minorities maintain influence in elections.

"By reauthorizing this act, Congress has reaffirmed its belief that all men are created equal," Bush said as he looked into a crowd of people waving church fans bearing the image of the American flag. He vowed "to continue to build on the legal equality won by the civil rights movement to help ensure that every person enjoys the opportunity that this great land of liberty offers."

GOP leaders have been eager to renew the act before the fall elections, but the measure had faced trouble in the House over concern from some Republicans that it unfairly targeted certain Southern states. But House leaders managed to defeat amendments they regarded as politically embarrassing, and the Senate passed the measure last week with little debate.

Bush signed the bill with considerable fanfare on the White House's South Lawn, joined by civil rights leaders who often have been at odds with his administration. They included NAACP Board Chairman Julian Bond, Jesse L. Jackson and Al Sharpton. Also present were family members of three prominent civil rights figures whose names are attached to the legislation: Rosa Parks, Coretta Scott King and Fannie Lou Hamer, who was beaten and jailed in 1962 trying to register to vote in Mississippi.

Sen. Arlen Specter (R-Pa.) called the ceremony historic because of those who attended. "It is enormously impressive to see George Bush and Julian Bond exchange salutes. It is a great day for America," he said. Congressional Black Caucus Chairman Melvin Watt (D-N.C.) said that even though Bush signed the Voting Rights bill, the relationship between Bush and black America has not changed. "He is the same George Bush; on some issues we work together, and on most issues we are not able to work together," he said.

Also present at the ceremony was Rep. William J. Jefferson (D-La.), who is under federal investigation in a corruption case. Jefferson said he felt compelled to come to the White House because, he said, "I grew up in a time when my mother couldn't vote. This is real big step for many of us."

“Voting Rights Act Extension Passes In Senate 98 to 0”

The Washington Post

July 21, 2006

Charles Babington

The Senate voted 98 to 0 to renew key provisions of the Voting Rights Act yesterday, permitting the federal government to continue its broad oversight of state voting procedures for the next quarter-century, and allowing Republicans to claim equality with Democrats in protecting minorities' clout at the ballot box.

The act requires several states, mostly in the South, to obtain Justice Department approval before changing precinct boundaries, polling places, legislative districts, ballot formats and other voting procedures. It also requires many jurisdictions throughout the nation to provide bilingual ballots or interpreters for voters whose English is not strong.

Those two provisions caused a mini-revolt among House Republicans last week. GOP leaders had to scramble—and rely on heavy Democratic support—to defeat proposed amendments that they said would dilute the bill and prove politically embarrassing.

The law, first passed in 1965, retains near-iconic status in civil rights circles, even though some elected officials say it is no longer needed. GOP leaders were eager to renew it before the November elections. Unlike the House, where some Southern Republicans opposed provisions that focus on their states, the Senate passed the bill unanimously after hours of one-sided debate in which member after member praised leaders of the 1960s desegregation movement.

President Bush, addressing the NAACP's annual convention while the debate was underway, said he looked forward to signing the measure. "A generation of Americans that has grown up in the last few decades may not appreciate what this act has meant," he said. "Condi Rice understands what this act has meant," Bush said, referring to the secretary of state, an African American who grew up in Alabama in the 1950s and '60s.

The disharmony evident during the House's deliberations on the act barely touched yesterday's Senate proceedings, in which lawmakers from both parties and all regions agreed that the Voting Rights Act remains pertinent and necessary. Several black House members—including Rep. John Lewis (D-Ga.), who worked alongside the Rev. Martin Luther King Jr. in the 1960s—were on the Senate floor for the vote. Sen. Edward M. Kennedy (D-Mass.) shook hands with Rep. Melvin Watt (D-N.C.), chairman of the Congressional Black Caucus, when the result was announced.

"As we reflect on the true wrongs that existed in the 1950s and 1960s and where those wrongs may have taken place, we owe it to history . . . to pay tribute to those who took the law and made it a reality," Sen. Johnny Isakson (R-Ga.), whose House colleagues led the opposition in the other chamber, said during the debate.

Sen. Saxby Chambliss (R-Ga.) was a bit more grudging. "While I support this bill, I continue to have some serious concerns with several aspects of it," including its

"extension for an extraordinary 25 years," he said from the floor. The defeated House amendments, he said, "would have strengthened this bill and updated it to reflect the reality of profoundly improved race relations" in Georgia.

The act, originally signed by President Lyndon B. Johnson, outlawed practices such as poll taxes and literacy tests that many Southern jurisdictions used to depress black voter turnout. As amended over the years, it required such jurisdictions to obtain federal "pre-clearance" for an array of voting-related practices that might have the effect of reducing minority voters' influence.

Some local and national officials say the targeted oversight is no longer justified and is a relic of days when Southern states could not be trusted to treat all citizens justly. But others say abuses still occur. "Where would the citizens of Georgia be—particularly low-income and minority citizens—if they were required to produce a government-issued identification or pay \$20 every five years in order to vote?" Sen. John F. Kerry (D-Mass.) asked in reference to measures approved by the Georgia Legislature but challenged in federal courts under the Voting Rights Act.

Civil rights activist Jesse L. Jackson said in

an interview that the Senate vote called for "restrained celebration," because the Bush administration's Justice Department has shown tepid enthusiasm for enforcing the voting law. "This Justice Department, right down the line, has chosen states' rights," Jackson said.

Senate Majority Leader Bill Frist (R-Tenn.) called the vote a major success. "The Voting Rights Act has worked," he said. "We need to build upon that progress by extending expiring provisions."

Sen. Patrick J. Leahy (D-Vt.) called the act "the cornerstone of our civil rights laws. We honor those who fought through the years for equality by extending the Voting Rights Act to ensure that their struggles are not forsaken and not forgotten, and that the progress we have made not be sacrificed."

Caroline Fredrickson, director of the ACLU's Washington Legislative Office, praised the extension of the law's key provisions and urged vigilant enforcement. "We must look ahead to make sure the promise is as true and strong as it was in 1965," she said. "Malicious attempts by lawmakers to derail reauthorization show the continuing need for this law and its enforcement." She urged Bush "to sign this legislation as soon as possible."

“More Racial Gerrymanders”

The National Journal

May 13, 2006

Stuart Taylor, Jr.

When conservative Republicans such as House Speaker Dennis Hastert and Senate Majority Leader Bill Frist jointly sponsor Voting Rights Act amendments with such liberal Democrats as Rep. John Conyers and Sen. Edward Kennedy, be suspicious.

They are steamrolling through Congress bipartisan legislation to renew for the next 25 years a much-misunderstood, largely anachronistic provision (Section 5) of the Voting Rights Act, including amendments that are driven by racial-identity politics and that would aggravate ideological polarization.

The amendments would turn back the clock on racial progress by requiring even more racial gerrymandering of election districts than under current law. And the extension of Section 5, as currently drafted, would perpetuate an extraordinarily punitive oversight regime that gives to federal political appointees and not-exactly-apolitical bureaucrats at the Justice Department unreviewable power to dictate state and local election rules in nine (mostly Southern) states and some other jurisdictions.

Why would broad bipartisan majorities of House and Senate incumbents want to do that? To help themselves win re-election, for starters. More specifically, Democrats are pandering to the demands of black and Hispanic politicians for safe seats and to the ideological obsessions of the civil-rights lobby, which still sees America as so steeped in racism that whites just won't vote for minority candidates.

Never mind that Douglas Wilder, an African-American, was elected governor of Virginia in 1989; Bill Richardson, a Hispanic, was elected governor of New Mexico in 2002; Colin Powell might well have been elected president of the United States had he run in 1996; nine of the 34 Georgia officials elected statewide are black; and so on, and so on.

As for the Republicans, they are terrified of being characterized as racists if they oppose anything that carries the "voting-rights" label. Such demagoguing works because most Americans don't understand that this legislation is not mainly about the basic right to cast a meaningful ballot—which is secure—but about mandating safe seats for incumbents and other minority politicians.

Second, many Republicans also believe—perhaps incorrectly—that drawing so-called "majority-minority" urban districts for black and Hispanic Democrats will "bleach" the surrounding suburban districts and thus help Republicans beat white, moderate Democrats there. That was the result of the racial gerrymanders of the 1990s: The number of (very liberal) black and Hispanic Democrats in the House went up; the number of (more moderate) white Democrats went down—and this helped Republicans take and keep control of the House. This was good for black and Hispanic politicians. It was not so good for black and Hispanic voters.

But Republicans who think that they will benefit by renewing their alliance of

convenience with the civil-rights lobby may be in for a surprise, as explained below.

In any event, the pending legislation "will ensure heavily packed minority congressional districts that stifle competition, ideologically polarize elections, and insulate Republican representatives from minorities and minority representatives from Republicans," as Edward Blum, a scholar at the American Enterprise Institute, said in congressional testimony.

Bad as this is for the body politic, writes Roger Clegg of the Center for Equal Opportunity, it is good for incumbent politicians: "Both parties, especially Republicans, are politically happy with segregated districts and uncompetitive contests."

While Blum and Clegg are conservatives, leading liberal scholars have also raised concerns about the wisdom and the constitutionality of major aspects of the pending legislation to extend and amend Section 5, and have called for reducing the Justice Department's power to dictate state and local voting rules.

"It is far from clear that the injustices that justified Section 5 in 1965 can justify its unqualified re-enactment today," said professor Samuel Issacharoff, a leading liberal expert on election law at New York University Law School, in Senate testimony on May 9. He also noted that federal Section 5 interventions in statewide redistricting have been "rife with accusations of partisan motivation." And he questioned whether "minority voters are well served by being packed in increasingly concentrated minority districts."

The Voting Rights Act's permanent provisions protect against the vestiges of discrimination in voting that no doubt

remain, especially in scattered localities where old-fashioned racism remains strong. Section 2, for example, supports court challenges to dilution of minority voting power.

Section 5, on the other hand, was adopted in 1965 as a temporary measure to prevent evasion by the state and local governments with the worst histories of suppressing the black vote. They must obtain Justice Department "preclearance" of redistricting plans and of even the smallest change in voting rules.

But so effective have other Voting Rights Act provisions been that little evidence exists that most governments in the nine covered states are more hostile to minority voters than are governments that the law doesn't cover. Indeed, there is little evidence of systematic discrimination by any state government, despite a huge research effort by the civil-rights lobby to find and magnify such evidence.

Not only are the terms of the proposed re-enactment unduly strong medicine for what discrimination in voting rules remains; enforcement of Section 5 has actually aggravated racial gerrymandering and has sometimes been partisan.

The Justice Department earned a rebuke from the Supreme Court in 1995 for insisting that Georgia, among other states, adopt a racial gerrymander of its congressional districts so extreme as to violate the Constitution's equal protection clause. The George H.W. Bush Justice Department, in its alliance of convenience with the civil-rights lobby, had pushed for such racial gerrymanders. But Republicans should beware what the next Democratic president's Justice Department might do, especially with some of the pending

amendments.

One would overrule a 2003 Supreme Court decision to bar states from replacing any of their existing majority-minority districts—safe seats for black or Hispanic politicians—with districts that are more racially integrated. This despite strong evidence that more-integrated districts would be better both for minority voters and for attaining what Rep. John Lewis, D-Ga., a civil-rights icon, once called the goal of a community "where we would be able to forget about race and color, and see people as people, as human beings, just as citizens."

Justice Sandra Day O'Connor quoted Lewis's words in her majority opinion in the 2003 ruling *Georgia v. Ashcroft*. She added that a central purpose of the Voting Rights Act was "to foster our transformation to a society that is no longer fixated on race." Accordingly, she held that a state may, if it chooses, reduce the number of majority-minority districts in order to increase overall minority voting power by creating larger numbers of more-integrated "influence districts." Those are districts controlled by coalitions of minority and white Democrats.

Influence districts also tend to be more competitive and to choose candidates who are more moderate than the extreme liberals who tend to dominate majority-minority districts and the extreme conservatives who tend to dominate "bleached" suburban districts.

But now Congress is poised to require more segregated districts, and thus to enhance both our fixation on race and our ideological polarization. John Lewis—who has sadly let party loyalty and solidarity with racist allies trump his nobler principles—is a co-

sponsor.

Other pending amendments to Section 5 would effectively overrule two other Supreme Court decisions, in 1997 and 2000, by allowing Justice Department officials to veto any change in voting rules that they subjectively label unfair to minorities, even if the change leaves minority voters no worse off than before. This would make it especially easy for Justice Department officials to devise pretexts for grinding partisan taxes.

Which brings us back to why House Republicans may be in for a surprise if they hope to reap the same political gains that they did in the 1990s from helping the civil-rights lobby create majority-minority districts.

Once Democrats win the presidency, they will have the motive, the means, and the opportunity to stick it to Republicans by manipulating the Justice Department's enlarged power over state and local voting rules in the nine covered states—all of them red. And Democrats have become more adept since the 1990s at creating fairly safe seats for black and Hispanic Democrats without making the adjacent suburban districts safe for Republicans.

So by casting aside their supposed color-blind principles in pursuit of political self-preservation, among other sins, Republicans may be paving the way for their own return to permanent minority status, at least in the House.

This they richly deserve, for many a reason. I wish that I could be confident that a Democratic majority will be better.

DeLAY BALLOT

“DeLay Must Stay on Ballot as Court Rejects Appeal”

The New York Times

August 8, 2006

Ralph Blumenthal

The United States Supreme Court dealt a final blow on Monday to efforts by the Texas Republican Party to replace former Representative Tom DeLay on the Congressional ballot in November, leaving him the reluctant party nominee from his longtime district.

Three state and federal courts had already ruled that Mr. DeLay had to remain the party's choice despite his assertions that he had moved to Virginia from Texas. In April, he announced he would give up his re-election campaign and resign his seat to allow the party to select another candidate while he battled legal charges.

On Monday, Republican lawyers filed a final appeal to the Supreme Court, but it was rejected hours later without comment by the circuit justice, Antonin Scalia.

“There's nothing else we're going to do legally,” said James Bopp Jr., the lawyer who argued the case for the Republicans. “We've certainly exhausted our appeals.”

The court's refusal to intervene handed a major victory to Democrats, who have fought to keep Mr. DeLay in the spotlight as a reminder of the Washington lobbying scandal involving his associate Jack Abramoff. It will make it harder for Republicans to retain Mr. DeLay's old seat and will allow Democrats to send a wider message that change is needed on Capitol Hill.

It is unclear whether Mr. DeLay, 59, the former House majority leader, who first won the seat in 1984, will now actively campaign in an election he has said he does not belong in. During the appeals, he never said whether he would run if he remained on the ballot, and Dani DeLay Ferro, his daughter and spokeswoman, said after the Supreme Court decision that he had no immediate statement.

Mr. Bopp said he did not know whether Mr. DeLay would actively run for the seat, but he suggested the outcome might not be as predetermined as Democrats believe.

“It's now up to the voters to determine if the Democrats will be happy on Election Day for choosing Tom DeLay,” he said.

Mr. DeLay, who had been criticized repeatedly by the House Ethics Committee for his fund-raising tactics, was indicted in Texas in September on charges of violating campaign finance law.

The court rulings prevented the Republicans from choosing a successor out of several eager contenders. The Democrats, though, have long had a nominee in the 22nd District: former Representative Nick Lampson, who lost his neighboring seat after the 2003 redistricting engineered by Mr. DeLay.

In a statement, Mr. Lampson said, “I welcome a strong issue-based campaign

against Tom DeLay.”

The Texas Democratic Party chairman, Boyd Richie, applauded the Supreme Court’s refusal to block the lower court orders preventing the Republican Party chairwoman, Tina J. Benkiser, from trying to select another nominee.

“We are not surprised that Justice Scalia has denied the Republicans’ motion to stay,” Mr. Richie said. “Every judge involved in the case so far has agreed with us on the merits of our argument. It is time for Tom DeLay and the Republican Party to get out of the courtroom and quit this abuse of the voters, who have been without representation for months. Both parties have candidates, and it is now time to move forward and allow voters to participate in a fair and meaningful election.”

The legal issue hinged in part on whether party officials could replace a nominee who had been selected by the voters. Having decisively won a hard-fought four-way primary in March, Mr. DeLay upended Texas politics by unexpectedly declaring that he would drop his campaign and resign his 22-year seat to move to Virginia.

But a Texas judge, a federal judge in Austin and a three-judge federal appeals panel in New Orleans blocked the Republican Party from choosing a replacement under provisions of Texas election law and the Constitution that barred tampering with

candidate lists and election standards.

The federal courts ruled that the only residency requirement for House candidates under the Constitution was that they lived in the state they were running in “when elected.” No one could know now whether Mr. DeLay would be a resident of Texas in November, the judges said, rejecting claims by Ms. Benkiser that the party could name a replacement because Mr. DeLay had shown documentation of his move to Virginia.

With the clock ticking toward November and the Republicans and Mr. DeLay saying he was ineligible to run in Texas, Mr. Bopp, the lawyer, filed Monday for a Supreme Court stay, arguing that the Democrats, by insisting on Mr. DeLay as the nominee, were infringing on the Republicans’ constitutional right of free association and intruding in Republican Party affairs.

But the appellate judges had ruled that they saw the move more as an effort by Republicans to replace a wounded candidate in ways unfair to the Democrats, and Justice Scalia, in turning down the final appeal, said nothing to indicate that he saw it differently.

Cris Feldman, a lawyer for the Democrats, said: “Five judges to date have agreed the Texas Republican Party violated state and federal law, and it’s apparent that Justice Scalia agrees with us. Now it’s time for Tom DeLay to decide whether he will cut or run.”

“DeLay Ballot Issue Heads For Court”

SCOTUSblog
August 3, 2006
Lyle Denniston

The head of the Texas Republican Party, seeking to clear a space on the November election ballot for a new GOP candidate for the House of Representatives, announced plans Thursday to file an appeal to the Supreme Court on an expedited basis, after the Fifth Circuit Court kept former Rep. Tom DeLay on the ballot. The plan means that the state GOP will bypass any chance for *en banc* review in the Circuit Court, and go directly to the Supreme Court.

The case potentially could result in a clarification of states' power to decide when a candidate for the national legislature has lost eligibility—an issue that implicates the constitutional definition of qualifications for a congressional candidate.

Tina Benkiser, chair of the state party, said in a statement that the GOP considers DeLay no longer eligible to be a candidate, because he has moved to Virginia and plans to remain there. He resigned from the House in April, amid spreading difficulties over campaign finance and lobbying scandals and said he would not run for reelection. He resigned after he had won the GOP primary in Texas' 22d congressional district in March; for the time being, he remains on the ballot.

James Bopp, Jr., the attorney for the state Republicans, said the state's Democratic Party had sued to keep DeLay on the ballot in order to force him to formally withdraw "so that their nominee runs unopposed, or to force Tom DeLay to run . . . so that their nominee will be running against a candidate that is ineligible to serve. This makes a

mockery of our democratic system and denies voters a meaningful choice."

If DeLay is ineligible, under state law, he can be replaced on the ballot. If he withdraws, however, it is too late to replace him, according to state law.

Democrats want DeLay on the ballot because they believe his highly publicized troubles with the law create a campaign issue and thus a greater opportunity for their candidate, former Rep. Nick Lampson. They also contend that replacing DeLay now would harm Lampson's chances of winning by changing a campaign that is well under way and would require Democrats to raise new funds to pay for a changed election strategy.

The Fifth Circuit, in a 25-page ruling, available [here](#), ruled that GOP chair Benkiser had acted unconstitutionally on June 7 in declaring DeLay ineligible for the ballot. The Constitution requires a member of the House to reside in a state on the day of election, the Circuit Court said, so declaring DeLay ineligible in June adds an invalid residency qualification for the office. The Court also ruled that the GOP had no followed the standards of the state law on candidate eligibility because it has not been "conclusively established" that DeLay would not be a resident of Texas on election day. Although records showing that DeLay lives in Virginia now, the Court said that is not enough to prove he will not be a Texas resident when the election is held in November.

In appealing to the Supreme Court, the Texas GOP expects not only to challenge the ruling on the constitutional issue, but also to contest the state Democrats' right to bring the challenge at all (the "standing" issue). Since the Circuit Court also refused to issue

a stay pending appeal, the GOP is also likely to seek a stay from the Supreme Court, or from Justice Antonin Scalia as the Circuit Justice. At present, state officials are barred by a District Court injunction from taking DeLay's name off the ballot, and the GOP is barred from naming a replacement.

**“DeLay Departing On Own Terms
First, Congressman Wanted to Defeat GOP Challengers”**

The Washington Post

April 5, 2006

R. Jeffrey Smith and Jonathan Weisman

Under siege from state and federal probes into his actions and those of his closest aides and advisers, Rep. Tom DeLay had considered resigning on several occasions over the past four months. But he waited until after he had vanquished his challengers in the Republican primary to deny them the chance to become his successor, associates said.

DeLay's decision was also provoked by recent poll results that showed he faced a stiff challenge in November, the associates said.

They also cited what the Texas Republican has privately described at his frustration at no longer being a part of the House leadership, and his diminished satisfaction with rank-and-file congressional life. The lawmaker was forced to relinquish the post of majority leader after being indicted in Texas on a felony money-laundering charge last October; he had served in the job since 2002 and had been majority whip before then.

DeLay's decision allowed him to set the terms of his departure, avoiding what could have been a personally devastating loss at the polls in November. DeLay was determined to hang on to his seat at least through the primary, said Carl Forti, spokesman for the National Republican Congressional Committee. That was because he considered his three Republican challengers gadflies and traitors and he was determined to try to block them from succeeding him.

Several associates said DeLay was particularly influenced by poll results he received after his victory in the Republican primary on March 7, which made clear that his "negatives" in the district—a routine tally of voters' emotional hostility toward him—were high. That meant a close race would be won only with substantial effort and cash.

An additional impetus for putting off the resignation until now was suggested by John Feehery, a former aide to DeLay and House Speaker J. Dennis Hastert (R-Ill.). "He needed to raise money for the defense fund. That was the bottom line," Feehery said. "He wanted to make sure he could take care of himself in the court of law." Under federal campaign rules, any reelection money a lawmaker raises can be used to pay legal fees stemming from official duties.

DeLay's decision to resign from the chamber he once ruled with a clenched fist gave some Republicans hope that the party can move beyond a burgeoning corruption scandal as the congressional election season heats up. That scandal so far has led to guilty pleas to corruption charges by lobbyist Jack Abramoff, once a close ally of DeLay's, and former DeLay aides Michael Scanlon and Tony C. Rudy, who worked with Abramoff after leaving their Capitol Hill jobs.

But Democrats vowed that they would not let their opponents slip the noose of what they have labeled a "culture of corruption."

"When a person steps down, it inflates the severity of the situation, and if they think after Tony Rudy, Jack Abramoff and the

other guys the country will stop debate on these issues, they've got another thing coming," Rep. Rahm Emanuel (Ill.), chairman of the Democratic Congressional Campaign Committee, said yesterday. "Federal prosecutors don't care about Republican spin."

In a lengthy videotaped statement, DeLay formally said he will resign the suburban Houston seat he has held for 11 terms, taking his trademark jabs at "liberal Democrats" eager for an election fight and those he said are ready to misinterpret his every move.

"With the news of my decision, there of course will be great speculation among the political pundits and media about my reasons both for this decision and its timing. I'm quite certain most will put forth their opinions and conclusions devoid of and unencumbered by accuracy, facts and truth," he said. "I have no fear whatsoever about any investigation into me or my personal or professional activities."

The associates acknowledged that DeLay made his decision against the backdrop of a felony criminal charge in Texas that is unlikely to be resolved quickly, and amid growing interest by the Justice Department and the FBI in his family finances and the official actions he took at the behest of aides who recently pleaded guilty to involvement in a criminal conspiracy.

But DeLay—as well as his associates—said the decision resulted from his desire to avoid a defeat at the hands of voters in his district rather than a calculated effort to deflect any investigation.

GOP leaders were quick to praise the man who helped secure Republican control of the House and turn Washington into a bastion of

Republican support. But when pushed, several Republicans conceded that DeLay bore some responsibility for the scandals that drove him from power—scandals that reached into his House leadership offices.

"At the end of the day, the members are responsible for what happens in their offices and are responsible for their staff," said House Majority Leader John A. Boehner (R-Ohio), who now occupies the leadership suite where Rudy and Abramoff say they traded funds and favor for legislative action. "And clearly, there were several . . . former staffers for Tom who ran off the road, and it is sad and unfortunate."

DeLay's potential legal challenges have increased in the past three months, as Abramoff, Scanlon and Rudy struck deals with a federal task force to gain reduced prison terms in exchange for their cooperation in a continuing public corruption probe. DeLay alluded in a Time magazine interview this week to being "hit" as a result of Abramoff's guilty plea in January.

As a government official familiar with the investigation said, a noteworthy aspect of the plea deals is the "dramatic premium" the Justice Department evidently places on obtaining information that might implicate others. For DeLay, this official said, "the federal case is going to get worse before it gets better."

But Richard Cullen, a key member of DeLay's defense team, said the resignation decision was not provoked by anything federal investigators have recently said. Several of DeLay's associates said that yesterday's announcement was jarring only to those not privy to DeLay's political anxieties stretching back to the 2004 race, when he won by his slimmest margin ever.

"You get concerned" when you barely win against a middling opponent, a top DeLay adviser said.

Starting in December, DeLay's private polling pointed out serious political problems. At first, it suggested a roughly even voter split with former congressman Nick Lampson, the Democratic nominee. But it also showed that nearly eight in 10 voters were already firmly decided on one of the two candidates—a rarity for a House race, especially considering that the general election was 11 months away. That meant changing minds would be costly.

The March 7 primary in which DeLay defeated three little-known Republicans with 62 percent provided a temporary boost for his campaign. But a poll DeLay commissioned two weeks ago to measure his progress with voters since December found no shift in the overall electorate since January.

That survey stoked concern in the DeLay operation because he had experienced a relatively positive run of media coverage in the past few months, and some fretted that if that was his high-water mark, he would be hard-pressed to win in November. The tally weighed heavily on DeLay after it was presented to him last week.

Rep. Henry Bonilla (R-Tex.), one of DeLay's strongest allies, said that although the former majority leader had "a sense of euphoria" after winning his primary race, this elation evaporated after he realized he would have to raise as much as \$10 million to compete in the general election.

DeLay discussed his decision with Cullen last Wednesday, and he started informing others about it on Thursday. Few lawmakers or associates tried to talk him out of it, one

of his advisers and others said.

"I don't think there was encouragement [for him to leave], but I think there's a great deal of relief," Feehery said. "It was a soap opera, and people are tired of soap operas. They want to get to work."

With DeLay expected to be out of Congress by mid-June, the National Republican Congressional Committee and Texas Republican officials expressed confidence that Republicans could easily retain a district that gave President Bush 64 percent of the vote in 2004. Former GOP congressman Steve Stockman, who threatened to run in the general election as an independent, said he may run as a Republican instead, joining a wide field of potential DeLay successors. They include Sugar Land Mayor David Wallace, who is organizing a campaign; Harris County Judge Robert Eckels; Tom Campbell, the second-place finisher in last month's Texas primary; Houston City Council member Shelley Sekula-Gibbs; former state district judge John Devine; and state Rep. Robert Talton.

DeLay said he would move his official residence to Alexandria and vowed to stay involved in grass-roots conservative causes and expand a foster-care program he started in Texas.

Friends and associates of DeLay say they think he can make a prosperous future for himself as a corporate-paid legislative strategist, book author and speaker.

Washingtonpost.com staff writer Chris Cillizza in Washington and Post staff writers Juliet Eilperin, Jim VandeHei and Jeffrey H. Birnbaum in Washington and Sylvia Moreno in Sugar Land, Tex., contributed to this report.