

Courts, Election Law, and the Impact on Party Systems: Representation without Competition?

***By David K. Ryden
Hope College***

“Constitutional law also now shapes the contours of fair political representation and political equality, as well as the role of group identities in the design of democratic institutions. . . . Hardly any issue concerning the institutions of governance or the conduct of elections is outside the reach of contemporary constitutional law.” (Pildes 35)

Introduction

The constitutionalizing of the American political process continues unabated. In the past couple years alone, the U.S. Supreme Court has weighed in on the most significant dimensions of elections – race-based redistricting, campaign finance reform, partisan gerrymandering, even what state judicial candidates can and cannot say in their campaigns. As I write this essay, the Court has announced the addition of another campaign finance dispute to its 2005-2006 docket. The Court has been unchastened by the controversy and outrage that accompanied its *Bush v. Gore* intervention; it is poised to maintain, if not extend, its central role in shaping the rules of politics, democracy, and representation.

Despite the Court’s willingness to involve itself in election law, it is no closer to a doctrine that might lend consistency to its jurisprudence. The Court has neither an “organizing principle” or a generally defined political structure around which the expanding constitutional ‘law of politics’ might emerge. (Pildes, 39)

Its minimalist approach to the law generally is on full display in election law cases. Shunning formal, bright-line, or theory driven approaches, the decisions are highly fact-oriented, issue specific, and case bound. (Maveety 38-39)

This is equally true of the Court's treatment of parties within the broader framework of representation law. It exhibits neither a normative understanding of parties nor an appreciation of their role and functions. (Ryden 1999: 52) The Court does not see itself as having an affirmative responsibility to promote fair or effective representation through parties. This unsettledness in the constitutional analysis of parties is unsurprising given their absence from the Constitution itself. Without textual sanction, party organizations and the traditions of party governance developed outside the formal constitutional framework. As "an anomaly engrafted onto a constitutional system that did not plan for them," (Lowenstein 1995: 298) they do not neatly conform "to lawyerly doctrinal categories." (Maveety 1991: 187). The Court's inability to carve out a coherent party jurisprudence mirrors the lack of consensus among political scientists around a theory of parties and democracy that might inform the jurisprudence.

The upshot is an ironic and prickly puzzle. The well being of the political system rests in significant part on (1) an anti-majoritarian, undemocratic institution (the Court), (2) assuming major responsibility for mediating and regulating the behavior of those institutions at the center of the practice of representative democracy (the parties), but (3) lacking the doctrinal tools to do so effectively. It is fruitless to argue that the Court ought not to be the guardian of representative principles as embodied in parties. It is, and will continue to be. The best we can do is to scrutinize those decisions that touch on parties, examining their repercussions to better inform the resolution of future election law issues.

In this essay, I parse two recent Supreme Court decisions, not to determine if they adhere to some high minded theoretical justification for parties, but to discern the impact they have had, and are likely to have, on party systems – in particular, on parties’ functional capacity to meet the demands of representative democracy. The Court in *McConnell v. FEC* (2003) and *Vieth v. Jubelirer* (2004) weighed the constitutional validity of two central facets of the contemporary campaign and election landscape, campaign finance practices and partisan redistricting. In each case, the Court struck a largely deferential pose. In *McConnell*, it upheld most of the Bipartisan Campaign Reform Act (BCRA), enacted by Congress in 2002. In *Vieth* it refused to interfere with the party-based redistricting scheme imposed by the Pennsylvania state General Assembly.

The implications of these decisions for party systems are complex and crosscutting. The cases intersect, however, at the point of the Court’s tacit complicity in election laws that have left the congressional electoral system virtually devoid of meaningful competition. The Court, particularly in its refusal to rein in blatant party gerrymandering, bears no small blame for a legal regime within which congressional parties fail to satisfy basic representational criteria. Partisan gerrymandering, along with other incumbent advantages, has give us congressional parties so entrenched and ossified that they no longer approximate general shifts in public preferences for parties and policies. Until the Court raises its consciousness of the functional attributes of parties – including circumstances where party systems break down – and gauges its decisions accordingly, it will continue to aid and abet in the erosion of basic representative government.

The Cases

In each of the *McConnell* and *Vieth* cases, the Court's approach was marked by deference to elected officials. A functional analysis of the two cases leads to opposite conclusions regarding the appropriateness of that deference. In *McConnell*, the complexities and uncertainties surrounding the likely practical ramifications of BCRA necessitated giving Congress wide latitude to experiment with reform. In *Vieth*, however, the deeply ingrained self-interest of state legislators obligated the Court to more assertively police the composition of new districts to safeguard the interests of fair and effective representation.

In *McConnell*, the Court undertook a review of the Bipartisan Campaign Reform Act (BCRA), which Congress finally passed in 2002 after years of repeated failure and hotly contested debates. The statute's thrust was threefold. First, it banned soft money contributions that had become so prominent in recent campaigns. Second, it constrained the practice of issue advocacy by corporations, unions, and interest groups. Finally, it increased the hard money caps on contributions that individuals could make to candidates, parties, and campaigns. The previous limits had remained unchanged since the early 1970s. The above measures worked a reshaping of party financing greater than "any other campaign finance regulation adopted in the past century, with the possible exception of the 1907 Tillman Act . . . ban on corporate contributions." (Corrado, 1)

The opposition to BCRA focused on the deleterious impact it would wreak on political parties. Invoking the rhetoric of responsible parties, BCRA opponents contended that the elimination of soft money would weaken the aims of

responsible parties – accountability, competitive elections, and effective governance. They speculated that parties would be unable to fund serious challengers or make congressional and senate races competitive. Since BCRA left soft money untouched as a source for non-party organizations, some saw parties as being subordinated to these private groups. Others argued that the reform would undermine party coherence and integration, by discouraging cooperation between state and national committees and by making coordination between parties and their candidates more difficult. These fears forecast a future of enfeebled parties unable to run coherent, focused campaigns, and ultimately leading to less workable, representative or accountable governance.

These arguments failed to move the Court. It upheld virtually all of BCRA's main provisions. In doing so, the Court explicitly displayed "proper deference" to Congress and its expertise in weighing constitutional interests surrounding campaign finance. The Court would not second-guess Congress's attributing corruption or its appearance to large contributions to the national party organizations. The close relationship between candidates and parties, and the parties' willingness to trade on that relationship, rendered all soft money contributions to national parties suspect. The Court dismissed the equal protection claim that BCRA discriminated against parties relative to other groups, noting that parties have power and influence far exceeding that of any interest group.

The Court did strike down a provision of BCRA that would have made it more difficult for parties to engage in unlimited independent spending. The Court nullified a requirement that parties choose, at the time a candidate is nominated,

between coordinated or independent expenditures. This was found to breach the parties' constitutional right to engage in unlimited independent expenditures.

In *Vieth*, the Supreme Court adopted a similarly deferential posture, but in a much different context. The case involved a challenge to the Pennsylvania General Assembly's congressional redistricting plan subsequent to the 2000 census. That census cost Pennsylvania two congressional seats. Republicans controlled both houses of the state legislature at the time, and occupied the governor's mansion. When pressured by national Republican leadership to engage in partisan gerrymandering as payback for earlier Democratic redistricting efforts, the state Republicans complied. The resulting plan was quickly challenged by Democratic voters as a violation of the 14th Amendment equal protection clause.

The Court's fractured, split decision left it unable to make a constitutional dent in what is one of the most deep seated American political pathologies, the practice of partisan-based gerrymandering (Pildes, 56). Nearly two decades had elapsed since *Davis v. Bandemer* (1986), a case in which the Court determined that partisan gerrymandering could be found unconstitutional. But *Bandemer* required plaintiffs to demonstrate that the gerrymander had the effect of shutting them out of the political process. It set the bar so high that a finding of unconstitutionality proved practically impossible. Numerous lower court claims that followed all were successful. Meanwhile, the combination of computer sophistication and the growing brazenness of those drawing the lines continued to leave fewer and fewer congressional seats in the competitive column.

For those who view party gerrymandering as a fundamental threat to the system's integrity, the result in *Vieth* was sorely disappointing. On one side stood a plurality of four justices who would have found the entire question of partisan gerrymandering nonjusticiable, due to a lack of manageable standards or a workable approach. On the opposing side were four dissenters who found the gerrymander in question to be unconstitutional, but who were unable to cohere around a single standard to apply. By penning four distinct dissents proffering four alternative standards, they actually lent credence to the plurality's claims of the nonmanageability of the entire enterprise.

Standing astride the two opposing blocs of justices was Justice Anthony Kennedy, who drafted the controlling but singularly unhelpful opinion. To Kennedy, partisan gerrymandering presented the potential for serious harm to "representational rights." He cited a "first Amendment interest of not burdening or penalizing citizens because of their . . . their association with a political party, . . ." (at 1797) A partisan gerrymandering raised First Amendment concerns where "an apportionment has the purpose and effect of burdening a group of voters' representational rights." Kennedy acknowledged that similar burdens on voters and parties in other first amendment contexts "are unconstitutional absent a compelling government interest." (at 1797) But he made no attempt to articulate a compelling governmental interest that might justify the gerrymandering at issue. The inquiry simply was "whether political classifications were used to burden a group's representational rights. . . ."

Even though there was little dispute over the burdensomeness of the redistricting plan to Pennsylvania Democrats, Kennedy refused to strike down the gerrymander at issue in the case. The constitutional challenge could not succeed without “clear, manageable, and politically neutral standards” by which to measure the effect of apportionment or the burdens imposed on the voters of a party. (at 1793, 1797) Meanwhile he held out a reed of hope that future partisan gerrymanders might be found unconstitutional were a workable standard to emerge.(at 1795-96) The upshot of *Vieth* is that the constitutional constraints on partisan gerrymandering, while existing in theory, are for all practical purposes absent in fact. In short, the law remains unchanged.

Party Functions and the Maintenance of Constitutional Values

“Parties occupy a space in the American political system at the interstices of government, civil society, and individual identity. We ought to read the Constitution, the framers of which never anticipated a party system like the one that has developed, as providing crude but necessary tools for judicial line-drawing between state authority, party autonomy, and individual rights. The more that scholars and courts recognize the unique constitutional position of political parties and the need to construct rules that account for their uniqueness, the richer the debate will become on which party functions, if any, judges ought to protect.” (Persily 823-24)

Vieth and *McConnell* are in line with the Court’s past performance in the realm of the law of politics. Neither opinion reflects a distinct sense or coherent view of parties as representative entities. It is clear the Court does not embrace a

particular theoretical approach.¹ To the extent individual justices reveal some understanding of parties, those views vary widely from justice to justice.

Both cases were characterized by judicial deference to parties as enactors of policy within government.² The Court's reluctance to interfere with campaign finance regulation or redistricting may have reflected a view that it is not the Court's job to protect the parties (organizationally) from their own actions (as parties in government).³ Or it may be a wariness of being too intrusive in an area where the Court's limitations are evident and its institutional legitimacy fragile.

Nevertheless, these cases raise serious questions about the Court's role in the law of politics. A judicial predisposition favoring party autonomy makes sense in the context of party organizations engaged in campaign and election activities. But parties within government may not deserve the same presumption of deference. They cannot be relied upon to legally promote representative functions

¹ If there is a unifying theme in the Court's party jurisprudence, it is the Court's respect for organizational autonomy and not any specific or discernible theory of party-based representation (Maveety, 31; see *California Democratic Party v. Jones* 2002). Some legal scholars would argue otherwise. Richard Hasen asserts that "the Supreme Court has proven itself quite enamored of the responsible party government position" and has even "adopted [the responsible party government scholars] viewpoint . . ." (2001; 819, 820) It is beyond the scope of this paper to fully debate this point. But I content that one can only reach this conclusion by adopting a caricatured view of the responsible party model. Hasen essentially reduces its justifications to (1) promoting political stability, (2) minimizing factions, and (3) providing a voting cue for voters. (818). While valid goals, these hardly begin to capture the positive rationale that the theory is thought to advance.

² I have previously argued that the Court has shown a willingness to intervene in the electoral process to advance the interests of institutional and democratic legitimacy, even if it meant protecting the parties from themselves. It has not sat back and let parties undermine their own legitimacy or that of the political process. (Ryden 2003) These cases suggest a different, hands-off attitude.

³ Richard Hasen has argued against First Amendment protection for parties in the electoral process, asserting that, if anything, the parties' "pervasive control over the political process should militate toward lesser, rather than greater" judicial protection." (Hasen 2001: 835) They are equipped to protect themselves in the election law arena, or, as Dan Lowenstein has remarked, the "parties are 'grown-ups' who should be expected to take care of themselves." (Hasen 2001; 835)

by partisan campaign organizations. On the contrary, parties (and party leaders) in Congress are the ones who are motivated, and who in turn motivate state party officials, to engage in partisan gerrymandering and other acts that undermine those functions parties in theory are to carry out. The partisan self-interest that leads to entrenchment within government is deleterious to basic standards of representativeness, and undercuts a standing policy of judicial deference.

This problem is most prominent when the Court is asked to review efforts to reform the political process. On occasion, it has facilitated reforms by condoning broader rules regarding primary participation and rejecting further restrictions on the initiative process. More frequently, it has proven a significant obstacle to political reform. Until *McConnell*, its doctrinal analysis equating money to political speech hindered reform in the campaign finance context. Its nullification of term limits for House and Senate in *U.S. Term Limits v. Thornton* (1995) effectively pre-empted a popular grass roots movement. Its reinforcement of the two-party system in *Timmons v. Twin Cities Area New Party* (1997) thwarted efforts by minor and new parties to crack the major parties' lock on electoral politics. In *California Democratic Party v. Jones* (2002), it sided with the major parties against a popular movement to broaden participation through an initiative-imposed blanket primary system.

It is the Court's role neither to provoke reform nor to stanch it. That would require that the Court buy into a particular, and likely contestable, political theory. A proper sense of judicial modesty should prevent the Court from substituting its notions of good government for those of legislatures. The Court correctly stood

aside to allow Congress to experiment with reforms of campaign finance. At other times, however, judicial intercession is the only means of preserving constitutional values. Judicial deference in the redistricting context is contrary to the maintenance of constitutional fundamentals, further ensconcing the parties in power and ossifying partisan structures. A more assertive judicial role is not to impose reform by judicial fiat, but only to free up the system to allow for the possibility of reform. Particularly in states without the ballot initiatives, the legislators' self-interest is paramount, insulating them from challenge and warranting more forceful judicial scrutiny.

But can these cases be distinguished by something more than intuition or a fuzzy sense of fairness? I assert that they can be, if one applies a functionally derived *party-conscious* standard rather than a theory-driven one. A party-conscious jurisprudence is grounded in an acknowledgement that parties, even in their imperfect form, are instrumental to the realization of democratic values of consent, responsiveness, equality, public choice, and accountability.⁴ The constitutional order should acknowledge and make room for political parties based on their functional capabilities and notwithstanding their extra-constitutional status. (Ryden 1999: 52; Maveety 1991: 66) A constitutional law

⁴ Parties are integral to building consensus across branches and levels of government, without which effective governance would be inconceivable. Party subsystems are crucial representational linkages, meshing and melding individuals, groups, and states into a representative pluralist democracy. They channel group influence while diffusing faction, balance majority rule and minority rights, and simultaneously pursue multiple democratic aims of aggregation, consensus, compromise, and civic education. In sum, only parties are constituted to consolidate and accommodate the competing strands of representation; by acknowledging the host of channels through which representation operates, party structures engender a richer, more effective system of representation. (Ryden 1996: 115-122)

of democracy must be cognizant of parties and mindful of the consequences
judicial decisions may hold for them. Says Bruce Cain:

“Even though parties are not mentioned in the federal Constitution, their existence is logically implied in the electoral rules established by the states. . . Political parties are part of the informal constitution – institutions that fill in the implied functions that arise out of the formal electoral structure. Political parties are no accident. They derive from the need to organize efforts to solicit voter support for candidates and to coordinate legislative action around a common program. (Cain 2003: 806-07)

The same can be said for constitutional values such as competition, choice, and majoritarianism. Parties are the structural prisms for realizing these values.

A party-conscious approach to constitutional questions does not mean a doctrine that squares neatly with party theories. It is beyond the institutional competence of the judiciary to resolve “deeply contested claims resting largely on normative theory.” (Issicharoff 311) Nor would such an approach necessarily be advantageous. Parties perform their various representational tasks informally and flexibly, without explicit legal intervention. In doing so, they paper over contradictions in democratic theory and practice, in ways that vary with circumstances and defy categorization. (Fitts 2003, 98) It may be preferable that parties’ constitutional status remain ambiguous, the better to perform these functions. The adaptability and resilience of parties that makes them difficult to integrate into traditional legal doctrine is what allows them to perform an array of functions effectively; doctrinally forcing them into a preferred theoretical box would only dampen that elasticity. In short, “[the parties] functional virtue is their doctrinal vice.” (Fitts 2003: 98) A settled constitutional vision or definition of rights is an ill fit for a constantly evolving system of parties and politics.

Instead, the parties' legal status should stem from the functions they play in American democracy. (Persily 752) A functional approach gauges the measure of constitutional protections to which parties are entitled by the degree to which they perform representative functions. (Issacharoff 276). Parties' First Amendment speech and associational rights will correspond to how well they advance constitutional values of competition, majority rule, and aggregation. As the constitutionalizing of the law of politics continues, a nuanced functional approach to parties could guide courts through the conceptual maze of the complexities of election law.

A functional analysis of *McConnell* confirms the wisdom of the Court's willingness to allow the practical ramifications of BCRA to play out. In contrast, viewing *Vieth* through a functional lens indicates a stronger judicial presence was needed to safeguard against manipulation of the electoral rules for partisan advantage. (Persily 2001: 750, 753)

Considering the Impact of BCRA/McConnell on Party Systems

What practical impact has BCRA, as modified by *McConnell*, had on party systems? Viewing the alterations to the campaign finance rules through a functional lens yields a fuzzy picture at best, and one that is decidedly incomplete. The litany of woes that campaign finance reform was to have visited upon political parties has not materialized, at least not after a single presidential election cycle. Indeed, the report card for party performance in 2004 shows relatively high marks. At this point in the post-BCRA/*McConnell* history, we know the following relative to the parties' fundraising capabilities:

- Contrary to the predictions of BCRA opponents, the financial role of the national political party organizations did not flag. Parties proved highly successful in adapting to the statute, ultimately raising records sums of money (Corrado, 13). The parties' fundraising success exceeded levels that even BCRA supporters had thought possible.
- The parties managed to compensate for, and even overcome, the loss of soft money through dramatic increases in hard money. They realized an unprecedented increase in party givers, particularly small donors (under \$200). Unitemized small donors rose from \$59 million to \$166 million for the DNC and from \$91 to \$157 million for the RNC between 2000 and 2004 (Malbin), a "historic [increase] by any standard." (Corrado, 8)
- At the same time, 527s surfaced as major finance players and potential competitors to parties vying for money and influence with candidates and voters.

At a glance, parties in the post-BCRA/*McConnell* era look as strong as they did prior to the reforms, perhaps even stronger. Financing reforms have not seriously eroded party functions. In some regards the legislation may actually have strengthened them. At the least, the 2004 campaigns confirm the remarkable resilience and adaptability of partisan organizations in adjusting to, even thriving in, altered legal environs.

Consider the *democratizing* function that parties play in *mobilizing* people to political participation and shaping that participation into something meaningful. The parties' *mobilizing* efforts in 2004 did not suffer from BCRA/*McConnell*. From all accounts, the parties' hard money fundraising success enabled them to sustain party-building activities that previously had been funded through soft money. Both parties waged intensive, highly sophisticated voter outreach and mobilization efforts (Corrado 13). The Bush/Kerry match was hotly contested, engendering as much popular interest and involvement as any recent presidential election. The 60% voter turnout testified to the parties' powers of mobilization in

a post-BCRA world. The parties acquitted themselves well as democratizing institutions with responsibility for engaging and activating the electorate.

Likewise the increase in the recruitment of small donors of hard money arguably made parties *more representative* of rank and file members. The parties made major gains in their grass roots organizational development notwithstanding BCRA, at least in targeted areas of the nation. (Corrado, 14) This development could translate into the party organizations being less wedded to wealthy voices, either individual or collective, and more attuned and responsive to their members in the electorate. The rise of 527s has complicated this picture.

Nor did the reforms come at the expense of the parties' *expressive function*. The 2004 presidential campaigns were characterized by robust, widespread speech and debate. The presidential race was a relatively substantive and issue-oriented campaign. The rise of 527s meant that parties yielded some degree of control over the content of campaign speech. But this was minimized by party success in overlaying their identity upon that of the 527s, with many in 527 leadership positions having had prior histories with the parties.

Gauging the impact of BCRA and *McConnell* on other party functions is more difficult to ascertain, and suggests a more guarded assessment is in order. Party functions do not occur in a vacuum, but depend upon the parties' standing relative to other actors whose influence may come at the expense of party effectiveness. For example, the effectiveness of parties' *aggregation* and *governance* functions depends upon parties having some control over other groups. Parties are believed to simultaneously give voice to groups and collective

interests, while also modulating, controlling and channeling them. As parties build coalitions and construct platforms in pursuit of electoral success, they winnow, rearrange, and prioritize the interests within their coalition. Thus they are “an indispensable means of aggregating interest groups into the American political system.” (Persily 2001, 750) Likewise parties within government are distinct in coordinating action across levels and branches of government, providing the organization and impetus needed to accomplish things. They alone can work compromise, within and between partisan entities, to make formal action possible in a system of constitutionally fragmented and dispersed power.

Any appraisal of these functions must take into account the parallel universe of 527 fundraising and spending that sprang up in 2004. The extent to which parties aggregate and govern rests in part on their ability to channel group influence while diffusing it, as they impose democratic aims of consensus and compromise on narrow and self interested groups. Groups operating outside the party framework diminish the parties’ aggregative and governing capabilities. (Ryden 1996: 115-122) In this respect, the parties’ functional capacity to mute and constrain outside voices was undoubtedly affected, and to some extent undermined, by BCRA. The magnitude of the harm could have been much greater, had not both parties been successful in putting their stamp on many of the 527s. Given the level of involvement of former party officials with 527s, there was substantial overlap and shadowing of party identification. The result was more cooperation and coordination than otherwise might have been expected.

Moreover, the parties' governing capabilities are related to the leverage they can wield over members in office to enforce party discipline. That leverage is in part a byproduct of campaign support and benefits party organizations provide to candidates seeking election. As parties wane in their electoral usefulness to candidates, the less leverage and control they are likely to have over those candidates once in office. Again, the rise of 527s as potential rivals in boosting candidates into office has the potential to undermine party loyalty.

Consequently, the development of the 527s is a key, but as yet largely unknown, determinant of the future of the parties' aggregation and governance functions. While parties proved versatile in adapting to BCRA and *McConnell*, so too did the non-profit organizations. They quickly stepped in as "willing conduits for . . . the flow of 'soft money' . . . that had previously gone to the national and state parties." (Holman and Claybrook, 238) A relatively small group of wealthy individuals (many of them newcomers to financial political activity) gave large sums of money to fund 527s; about two dozen individual donors gave \$2 million or more to 527s in 2004, with 265 giving \$100,000 or more. Moreover this is only a hint of the future vitality of 527s. (Malbin 10) While many 527 donors were former soft money contributors who ratcheted up their contributions, other soft money givers sat out 2004. Thus the fundraising potential of ex-soft money donors remains to be tapped. 527s are the "genie[s] of huge contributions" that, having escaped the bottle in 2004, are unlikely to return (Malbin 14).⁵

⁵ Other commentators share Malbin's prediction of the future growth of 527s. Weissman and Hassan believe the 527 system will only expand and become more complex in the future (Weissman and Hassan, 15). Homan and Claybrook likewise conclude that 527s "invariably will play a larger role in federal elections following . . . BCRA." (Holman and Claybrook 251)

Whether 527s grow to more directly threaten the centrality of parties in elections remains to be seen. It is not implausible that 527s might diminish in their financial commitment to elections. Wealthy individuals who spent millions in 2004 with little tangible payoff might be inclined to pull back or even out of campaign funding. 527 donors tend to be motivated by purer ideological dispositions than former soft money donors; they could conceivably lack the long term commitment that characterizes parties. Indeed, some of the most aggressive Democratic-leaning 527s have faltered since November 2004, raising questions about their ongoing viability. (Suellentrop)

On the other hand, if these groups follow through on their stated intentions of sustaining their efforts in future elections, the parties' chances of extending their 2004 fundraising success will be complicated by competition from 527s. Pluralist theory presupposes group activity occurring within the framework of party systems. 527s exist as an independent source of financial support for candidates. Their further expansion would undermine the parties as countervailing dampers on rampant interest group politics. (Maveety 1991;172-73; Ryden 1999: 61). More influential 527s could substantially erode, if not replace outright, the parties' instrumental functions. A more likely scenario is that parties, if forced to compete with 527s for dollars, will perform their functions differently and less effectively. If 527s pursue those who gave to the parties in 2004, the parties' survival instinct will move them in the direction of 527s to give donors the incentives to "invest in party politics, rather than the initiatives of more specialized organized groups." (Corrado, 15)

This could impact parties' representative nature. 527s and those who fund them differ from parties and the individual and group donors who previously kept parties' soft money accounts filled. They are more purist than pragmatic, more idealist than practical. They are driven by issues and ideology more than partisan commitment. Their fealty is to liberalism more than Democrats, conservatism more than Republicans. They are less compromising. Unlike parties, they are not accountable or responsible to voters for their conduct. If parties want their funds, the parties will need to reflect their ideologically driven perspective. This could render parties more polarized and responsive to wealthy elites, favoring "millionaires over workers, and ideologues over pragmatists." (Bai New York Times).⁶ As Chris Suellentrop describes the Democrats' relation to 527s in 2004:

Liberals erected a massive, parallel structure that's beholden to its super rich funders and not to the Washington political establishment. That structure may prove to be enormously beneficial to the Democratic Party, it may have a negligible effect on party politics, or, who knows, it may even be harmful. But no matter what happens, Howard Dean's leadership of the Democratic National Committee will have little or nothing to do with it." (Suellentrop)

Suellentrop surely overstates the irrelevancy of the national party committees. But the potential for damage to traditional party functions is real.

Finally, the respective positions of parties and other groups will hinge on the likelihood of additional reforms, and the direction those might take. BCRA's sponsors viewed it as only the first step toward more comprehensive reform.

⁶ Some have already suggested that we are in a "post-party world," with power moving out of party headquarters and into a "decentralized network of grass-roots groups, donors and Internet impresarios." (Bai, New York Times)

Their hope was that passage of BCRA would grease the legislative skids, making the enactment of further reform easier.⁷

On one hand, *McConnell* paves the way for broader regulation of parties as perceived agents of corruption and special access, by essentially equating access to officeholders with corruption per se. On the other hand, it is far more likely at present that the next round of regulations would target 527s, as parties' competitors and the current beneficiaries of soft money. *McConnell* worried about contributions sufficiently large so as to "foster, or appear to foster, 'politicians too compliant with the wishes of large contributors.'" Similar concerns could be triggered by soft money and independent spending by 527s, especially if individuals who had been closely associated with party and campaign leaders are intimately involved in organizing and leading 527s. Were 527s to become more or less identified with the parties, it would "recreat[e] the corruption threat of the former party soft money system" (Weissman and Hassan, 15)⁸

There is no move at present in Congress to follow the path that the Court left open toward greater party regulation. The reforms currently under consideration would work to the competitive advantage of parties over 527s and other private groups. One proposal would prohibit 527s from raising soft money. Another would actually raise limits in aggregate giving to parties and remove all

⁷ *McConnell* has been read as clearing the path for more regulation by "vastly expand[ing] the constitutional parameters of the type of activity that may be subject to regulation." (Holman and Claybrook, 251).

⁸ Weissman and Hassan query whether 527 groups spending independently to support or oppose candidates in large enough amounts will lead to a danger of candidates and parties feeling obligated and hence the exercise of "undue influence on an officeholder's judgment." The authors are of the view that independent spending does not carry the same threat of corruption as coordinated spending or contributions, so as not to justify limiting political speech. (Weissman and Hassan, 15)

limits on coordinated spending. But none has ignited a groundswell of support, and ongoing reform efforts are becoming increasingly fragmented and contradictory. At this stage imminent passage of additional reforms is unlikely.

In the end, it simply is too early to make definitive predictions regarding the long term viability or influence of parties relative to other group competitors. A single election cycle is not a solid foundation upon which to base meaningful conclusions as to the effects of BCRA and *McConnell*. That is especially true with the 2004 elections, which took place in an environment framed by war and other big debates over the future of American domestic and foreign priorities. There was a sense among activists and electorate alike that this election really mattered. The energy and polarization it produced skewed the fundraising field. It was:

a powerful mix, . . . ‘a perfect storm’ for party fundraising. It produced strong donor incentives, an unprecedented surge in party contributions, and historic levels of individual participation in party funding. As a result, both parties raised record sums of money, and many of the problems anticipated at the time BCRA was adopted failed to emerge.” (Corrado, 6)

Hence, one should be wary of extrapolating BCRA’s effects from 2004. Too many fundamental questions remain over the future direction of campaign financing, what it might mean for party systems, and how parties will respond.

The mixed and very open-ended legacy of BCRA after a single election cycle validates the Court’s deference to Congress in *McConnell*. The divergence of opinion on the likely merits and impact of campaign finance reform rightly gave the Court pause in deciding the case. Political scientists have been, and continue to be, at great odds over the likely consequences of various campaign finance reform measures. The 2004 elections left us with a marginally clearer

view of the impact of BCRA, but the complexities of the financing system render any analysis highly speculative. For the Court to have struck down the law based on hypothetical or empirically untested fears would have constituted judicial activism.⁹ The Court rightly concluded that the effects of campaign finance laws are simply too complex to justify judicial superseding of congressional judgments.¹⁰ (Pildes, 146)

Vieth, Parties, and the Disappearance of Competition

“[F]unctional principles of competition and representation form the core of a unique First Amendment freedom of association that distinguishes political parties from other organizations.” (Persily, 816)

Vieth stands in stark contrast to *McConnell*. The functional impact of the Court’s deference to parties within government in *Vieth* is plain; the unconstrained redrawing of lines to maximize safe seats for the majority party has been a primary contributor to the near obliteration of *competition* in the U.S. House of Representatives. When there is no clear majority control of state government, the parties substitute the bipartisan variety of gerrymandering to maximize incumbency on both sides of the aisle. Competition is the casualty of redistricting done without fear of judicial intervention. In this context, the Court’s

⁹ Mike Fitts agreed that the complexities of campaign finance required “humility and deference to private political forces – at least initially.” (Fitts 111) Dan Lowenstein likewise lauded the Court’s restraint in view of the practical questions of the campaign finance system and the “vast areas of empirical uncertainty that exist.” (Lowenstein 301)

¹⁰ Whether the Court can maintain its restraint in this problematic area of election law is another question altogether. It already has yielded to temptation by adding another campaign finance case to its 2005-2006 docket. The case involves a challenge to the state of Vermont’s campaign financing laws, which impose severe spending and contribution caps on state races. Those state laws do not neatly parallel the federal legal regime, but certainly will give the Court the opportunity to revisit, and possibly change, the basic tenets of the doctrinal treatment of campaign spending that has existed since *Buckley v. Valeo* (1976).

involvement is essential to saving the parties from themselves. Without it, meaningful choice is a rarity for voters in congressional elections.

The dearth of competition, and the role of partisan gerrymandering in contributing to it, is clear. According to the Cook Political Report, safe House seats rose from 281 in 1992 to 356 in 2002. By the close of the 2002 elections, only 45 House seats were ultimately rated as competitive. (Kilgore) Gary Jacobson demonstrates how redistricting reduced competitive House seats by strengthening marginal incumbents. He concludes that “three quarters of the marginal districts in the country were made safer through redistricting.” As a result, only four of 382 incumbents seeking reelection in 2002 lost. (Jacobson 2)

The paucity of competition only worsened in 2004, as redistricting led to the lowest level of House competition ever. (Jacobson 3) CQ ratings in the October before the vote numbered 37 competitive races, or 9%. Only ten districts out of 435 ultimately were decided by less than 5%. On the state level, the most notable experiences were those of Florida and California. In California, not one of 173 House and state legislative races changed hands in 2004. In Florida, incumbents have won all but one of the last 140 races.

At the center of the practice of partisan gerrymandering (whether by majority party or of the bipartisan variety) is the desire for safe, noncompetitive electoral districts. Highly sophisticated software placed in the hands of audaciously unrestrained and politically motivated line drawers has led to the extinction of legitimate competition in the House of Representatives. The near complete absence of competition is the defining trait of congressional institutions.

The parties themselves are mostly responsible for it. In the practice of redistricting, the parties have abandoned the function of cultivating competition.

Competition is a pre-requisite for representative government. It is a core value of the constitutional structure. Without legitimate choice, voting means little. This is why proponents of a party-friendly constitutional doctrine pin their arguments on parties' capacity for promoting competition. (see Persily 2001: 752) But parties are as capable of stamping out competition as they are of engendering it, as election laws aptly illustrate. When they wield power unreasonably to squelch competition, the check of the judiciary is in order.

The lack of competition caused by redistricting has a trickle down effect as well, leading to the erosion of other functional attributes of parties. The parties' propensities for the mobilizing, democratizing, and expressive functions are maximized in the context of highly competitive elections (since energized parties eager to win are motivated to pursue these functions vigorously). Conversely, party organizations provide little support for a challenger with little or no hope of winning. Uncompetitive races dampen enthusiasm. Without party volunteers for GOTV drives or money for an ad campaign, mobilization flags. The expressive element is muted. Turnout sinks. As congressional competition withers, so too do other important party functions.

The Court's refusal to rein in partisan gerrymandering impacts the parties' *governing capabilities* in more subtle, but just as real, ways. Party gerrymandering is readily credited with adding to the widening ideological gulf between the two major parties in Congress. In this respect, *Vieth* and the

redistricting dilemma provide an apt illustration of the shortcomings of a theoretically driven jurisprudential approach and why a functional approach is preferable. Those who advocate a theoretical guide to party-conscious constitutionalism usually invoke the “responsible party” model of government. The responsible party model in this context is a justification for the indefensible.

At first glance, partisan gerrymandering does not necessarily offend, and may even advance, responsible party government. By maximizing safe seats, partisan gerrymandering leads to more conservative and liberal incumbents, and more conservative and liberal party caucuses respectively. The upshot is parties which are distinct and differentiated, and presumably more unified and disciplined (i.e. responsible). To responsible party adherents, this ideal of disciplined parties is key to meaningful elections and decisive, accountable government. Redistricting produces clarity of choices and competing alternative programs which actually bolster the responsible party ideal.

This is where neatly constructed theories of party government run headlong into the constitutional reality of fragmented, dispersed, and diffused power structures. A disciplined House majority party finds its successes frustrated and stymied at countless other points, starting with the Senate’s ample checks on majority rule. An ideologically polarized House is less effective in its purity than if it were forced to be more pragmatic, compromising, and centrist at the outset.

More importantly, blind pursuit of an abstract ideal of responsible parties is to lose sight of the most basic measure of party legitimacy, their ability to function in service of representative democracy. Responsible parties are supposed

to be primary agents of effective representation. They should institutionalize public opinion rather than distort it. They are to discern and reflect majority sentiment, not obscure it. Responsible parties are desirable only as channels through which representative government is assured by public consent and accountability through competitive elections. (Ryden 2003: 80-81). Party-based redistricting eviscerates this overarching objective, producing a false polarity grounded in the lack of meaningful electoral choices. Over time, redistricting produces congressional parties that fail to reflect the broad electorate. It gives us less representative government, not more.

This is especially true when party gerrymandering undermines basic principles of majority rule. Parties legitimize government by converting majority sentiment into majority governance. When they frustrate that function rather than ensure it, it raises serious problems of legitimacy. The integrity of the entire electoral system is compromised. Justice Breyer noted this in his dissent in *Vieth*, when he argued for a functional approach that would strike down gerrymanders which thwarted majoritarian principles.

“There must also be a method for transforming the will of the majority into effective government . . . [P]olitical parties play a necessary role in that transformation. At a minimum, they help voters assign responsibility for current circumstances, thereby enabling those voters, through their votes for individual candidates, to express satisfaction or dissatisfaction with the political status quo. . . . A party-based political system that satisfies this minimal condition encourages democratic responsibility. It facilitates the transformation of the voters’ will into a government that reflects that will.” (608-09)

Realignment in a Non-competitive Age?

The failure of congressional parties to engender more than token competition is the point at which campaign finance and redistricting practices converge. When melded, they produce a congressional party system that fails the threshold test of representativeness. Looking for signs of partisan realignment in this non-competitive age is almost a pointless exercise. The self-entrenchment of the parties leaves most incumbents immune to serious electoral challenge. Consequently, the make-up and control of the House is so resistant to changes in public partisan preferences that party systems barely qualify as representative.

Consider again the question of competitiveness in the 2004 elections. The 2004 elections yielded a positive picture, provided one focuses on the spirited and highly competitive presidential race. If BCRA was intended to give us more competitive elections in Congress, it was a failure. While the national parties thrived in their 2004 fundraising, the House and Senate committees did significantly less well. Their flagging fundraising leaves real questions about their future ability to remain competitive in the world of 527s.

Any impact that BCRA and *McConnell* might have had on congressional elections was overwhelmed by more fundamental considerations that favored congressional incumbents. Campaign financing is still dictated by free market considerations and cost/benefit analysis. The money follows the competition. The ever-decreasing number of competitive house races is a huge disincentive for donors to give money to contests where the odds are long. The uncompetitiveness of congressional elections – due to redistricting and other incumbent advantages –

is perpetuated and amplified by the habits of financial campaign supporters. It is difficult to see how any campaign rule could reverse these realities.¹¹

The representative shortcomings of these party systems are apparent when looking for evidence of partisan realignment. The search for signs of realignment is more than a parlor game to keep political scientists entertained. Realignment is an important baseline for gauging deeper movements in the electorate's partisan attachments, and how those movements translate into changes in the parties in government. Realignment presupposes party systems that are responsive to shifts in the public's partisan preferences. The possibility of realignment carries with it the hope that legislatures are indeed "collectively responsive to the popular will." (*Reynolds v. Sims*, 377 at 565).

But the dearth of non-competition in the House defeats this pre-supposition. It enables a minority through redistricting to entrench itself in power. It is ironic that so few competitive congressional seats exist in a political environment of relative parity between the major parties. The practical result of that irony is that shifts in public sentiment (unless they rise to the level of the "tsunami" of 1994) fail to significantly impact the make-up of Congress. In sum, it is difficult to have realignment in an era of non-competitive House elections.

Consider the projections that it would take at a minimum a 57% aggregate Democratic vote in House elections in 2006 for the party to gain majority control

¹¹ Donors concentrated on the presidential race and select senate races that were in play. Significant independent spending by parties in the House was limited to a few districts that were already highly competitive, serving only to increase the already grossly lopsided distribution of campaign resources in the House. (Malbin, 12) Michael Malbin finds solace in the fact that no limits exist on what the parties can spend independently for congressional candidates. Provided the committees can successfully raise the hard money (which they did in 2004), they will continue to be "forces to reckon with." (Malbin 191) Of course, it is the raising of the funds that will be the challenge for the House committees.

of the institution. Is this an institution “collectively responsive to the popular will?” Or the fact that, despite parity in party affiliation of voters, in election after election the odds are exceedingly slim that the majority status in the House will change hands. Incumbent entrenchment measures like redistricting make it far more difficult for voters “to remove those responsible for a government they do not want, and . . . democratic values are diminished.” (Vieth, Breyer dissent at ____). Redistricting is so inimical to party structures as representative linkages that it compels some means of policing. For lack of alternatives, that policing must come from the courts.

For better or worse, courts are the “primary American institution capable under current circumstances of addressing the central structural problem of self-entrenchment.” (Pildes, 83) The Court simply cannot avoid responsibility for securing the necessary pre-conditions for genuine partisan competition. If the Court will not address the structural problems of self-entrenching laws within the political domain, those laws will go unaddressed. (Pildes, 54)

A functionally based constitutional treatment of political parties is rooted in “constitutional values of preventing incumbent entrenchment through manipulation of the rules of the game.” (Persily 794). The gerrymandering of favorable electoral districts is such a manipulation. A legal threshold below which the law of politics should not go is that democracy does not allow for those in power to wield that power in ways that freeze the status quo. (Persily 795) Yet partisan line drawing does exactly that, to the detriment of representative principles of accountability, responsiveness, and majority rule.

A Suggestion: “Conflict of Interest” Rightly Understood

“The major role that constitutional law can justifiably assume in this area is that of ensuring that laws do not inappropriately undermine robust competition between political parties. . . the court has been insufficiently attentive to the role of ensuring that election laws are not anticompetitive devices for limiting partisan competition inappropriately.” (Pildes, 102)

“Constitutional analysis of parties’ associational claims . . . must ground itself in the parties’ role in interest group representation and electoral competition.” (Persily, 766)

The Court is sure to continue to wield a central formative influence on key aspects of democratic structures and processes, including political parties. Election law, and its treatment of partisan organizations as prime actors in elections, will be shaped by “a Supreme Court increasingly constitutionalizing the structures of democracy.” (Pildes, 39) Despite the thorny nature of questions such as campaign finance and regulating partisan redistricting, the Court is unlikely to gradually recede from the realm of election law. Even if that were deemed desirable, contemporary legal and political circumstances are certain to “spawn recurring challenges to existing democratic structures.” (Pildes, 39)

First among these circumstances are the potentially far reaching practical implications of *Bush v. Gore*, and its unbounded application of the equal protection clause to voting rights. The *Bush v. Gore* majority’s reliance upon equal protection to bring the Florida recounts to an end stands as an open invitation to future litigation over campaign and election practices. A second factor is Congress’ enactment of HAVA (Help America Vote Act) in the wake of the Florida imbroglio in 2000. That legislation has further enriched the election soil out of which litigation is likely to sprout. Finally, the system is dominated by

two polarized political parties, whose standing with the electorate is at near parity. Those parties are intensely motivated to pursue every avenue that might lead them to an electoral majority, including the way of litigation. This was evident in the flurry of pre-emptive litigation prior to the 2004 elections, as well as the legal battalions each party recruited to dispatch to whatever hot spot might erupt on election day. In sum, litigation and legal challenges to electoral practices are likely to increase, further ensnaring the Court and implicating the Constitution.

Given the complex multiplicity of forms, paths, and practices bound up in political representation, it is delusional to expect from the Court anything even hinting of an integrated jurisprudential theory of democratic governance. At most, one might hope that the Court could identify basic facets of representation implicated by various constitutional questions, and be able to craft mediating principles that would apply. In closing, let me suggest a standard by which the courts might set a doctrinal path that better captures the intricacies of political representation. It starts with an acknowledgement that parties are essential to accommodating and arbitrating conflicting group interests in a pluralist system. It would functionally evaluate parties' legal status and in the process decide cases that implicate that status.

The "conflict of interest" concept is one with which lawyers and judges are well familiar; it also is an idea that distinguishes between party functions that promote the positive goals of fair and effective representation, and behaviors that undermine it. Hence it could serve as a useful tool of legal analysis in this context.

Conflict of interest, as typically understood by lawyers and judges, is of a negative kind. It acts as a constraint on a decision maker whose personal stake in the matter at hand renders him incapable of acting fairly or objectively. It triggers greater scrutiny of those wielding power whose self-interest is at odds with outcomes that serve the greater or general good; if intense enough, the conflict may necessitate disqualifying those in power from wielding such power.

In the context of elections, this type of conflict of interest is implicated whenever officeholders undertake to change the election rules which are responsible for putting them in office or keeping them there. Conflicts exist whenever officeholders consider rules pertaining to financing elections, redrawing electoral district lines, primary rules, or other legislation that impacts voting processes and procedures. Their self-preservation is at issue whenever they consider passing or altering election rules, hence the conflict of interest.

This naturally implicates political parties as the organizing entities within government. The conflict of interest standard would legally or constitutionally restrain those in power (in the form of parties in government) when their instincts of self-preservation lead them to legally entrench themselves in ways contrary to healthy political representation. In these instances, the courts must be ready to intervene to ensure that democratic principles of choice, competition, and representation survive self-interested legislation by parties in government. Under this standard, the Court got it wrong in *Vieth*. The prime example of an unacceptable conflict is presented when the party (or parties) in power wield the

redistricting pen (either in partisan or bipartisan fashion) to preserve the safety of incumbents against legitimate competition.

But “conflict of interest” can carry a positive dimension too. As envisioned by Schattschneider, conflict was central to political participation and representation. The more widespread the political conflict and the greater the number of interests and voices involved, the healthier and more representative the political system. It was parties who were responsible for widening constructive conflict among and between interests. A functional view of parties as channels of representation has them bringing a broader array of interests into the political arena. Then parties further provide a means of mediating and resolving those conflicts and differences to make governance possible.

As an aid to constitutional analysis, this notion of conflict of interests implies judgments sympathetic to parties when they are serving to create a more inclusive political arena. Whether a question of party autonomy, regulation, or rights, parties should receive more generous constitutional treatment when they are widening the interests involved in politics, and subsequently working to effectively reconcile and modulate those interests. So with respect to campaign finance, the Court, like many political observers, tends to treat parties and interest groups as indistinguishable at best. At worst, parties are a greater source of corruption than interest groups or private actors, and hence a greater threat to the integrity of elections. A “conflict of interest” perspective, however, reaches a different conclusion. It would view parties as preferable to interest groups in the realm of campaigns and elections when parties seek to assemble majority

coalitions consisting of a variety of interests and views. In the process, no single view or interest wields undue power or influence, but each is moderated and controlled within the overarching party messages and goals. As decisions are made through intra-party primary contests, inter-party competition, and majority versus minority party relations within government, the values of compromise, accommodation, and moderation are served.¹² Through party politics, interests are activated, then controlled. Outside of parties, the politics is win-lose, the interests polarized and unrestrained, and representation is but a crude imitation of what it should be.

¹² This is not to say that the Court necessarily got it wrong in *McConnell* by not offering up more constitutional protection to the parties. But it does suggest that the Court's musing would be more reassuring if it grasped the functional differences between parties and other group actors, and the unique attributes of the former.

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