

**Election Law and the Roberts Court:
An Introduction**

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The title to this brief synopsis of the papers in this symposium intentionally conveys a double meaning. First, and most straightforwardly, it is an introduction to the symposium itself. Second, however, it also connotes that the Roberts Court's first year was but an introduction to this field for this newly constituted group of nine. During the new Chief Justice's tenure, which is expected to last several decades and will likely encompass many more changes in the Court's membership, the jurisprudence of election law will undoubtedly undergo profound transformation. One wonders, when future scholars at the close of the Roberts Court look back on its treatment of election law, how much of the transformation could have been anticipated at the outset.

I. ELECTION LAW: A FIELD OF ITS OWN¹

The United States Supreme Court is a court of general jurisdiction, with cases ranging from patent law to criminal procedure. It is not a specialized tribunal devoted to election law. Therefore, it may be unfair for scholars who specialize in election law to expect the Court to have an overarching vision of election law that guides their resolution of disputes in the distinctive areas

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¹ In 1999, the *Loyola of Los Angeles Law Review* published its own symposium entitled "Election Law as Its Own Field of Study." See Richard L. Hasen, *Election Law at Puberty: Optimism and Words of Caution*, 32 *LOYOLA L.A. L. REV.* 1095 (1999) (introduction to that symposium).

of campaign finance, legislative redistricting, and voting procedures. Instead, it is understandable that the Court, when faced with a First Amendment issue in a campaign finance case, draws upon its general vision of the First Amendment, as it applies to “fighting words,” pornography, and other topics unrelated to election law. Or, when the Court confronts a claim of race discrimination in the context of legislative redistricting, it invokes principles developed in other kinds of race discrimination claims.

Still, election law is conceptually coherent as a field that unites the specific areas of campaign finance, legislative redistricting, and voting procedures—as well as other specific areas, like ballot access and the regulation of party primaries. Attorneys with candidates, parties, and other political actors as clients cut across the different sub-specialties of election law (Bob Bauer and Ben Ginsburg being prominent examples²). Scholars, too, have organized the disparate areas of election law into a single whole for the purpose of teaching the subject to law students. (All the authors of the two casebooks in the field are participants in this symposium.³) It is not unreasonable, therefore, to expect that election law practitioners and academics would offer the Supreme Court ideas and principles concerning their field as a whole, with the view that the Court would employ these ideas and principles to resolve particular cases in a way that makes the cumulative body of the Court’s precedent cohere as a sensibly unified law for this domain of human activity. In this respect, election law would be similar to other fields, like antitrust or securities regulation, whose practitioners or scholars inform the Court about guiding principles for those domains, with the expectation that the Court there will endeavor to make each new decision fit into the overall body of law for each field.

Moreover, election law as a field has affinities with constitutional law, which might be considered the Court’s specialty if any subset of law is. Not only does much of the Court’s work in election law involve the resolution of constitutional rather than statutory questions (although statutory issues exist as well, to be sure), but the function of election law in society is closely related (although not identical) to the function of constitutional law. The purpose of election law is to establish a set of ground rules for the operation of the democratic process, which will identify the government officials authorized to make the regular laws for society. The purpose of constitutional law is to establish the foundation for the exercise of governmental authority,

² Glenn Justice, *Lawyers Follow the Money, and Debate How the Candidates Can Use It*, N.Y. TIMES, Aug. 13 2004.

³ DANIEL HAYS LOWENSTEIN & RICHARD L. HASEN, *ELECTION LAW: CASES AND MATERIALS* (3d. ed. 2004); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* (2d. rev. ed. 2002).

including the lawmaking power, although constitutional law also identifies limits on that power for the purpose of protecting individual rights. Both election law and constitutional law are foundational, then, in the sense of creating frameworks for and setting in motion the exercise of conventional legislative power by democratically chosen and accountable officials.

The Court is expected to have an overall vision of constitutional law, which guides its resolution of difficult constitutional questions in particular cases. There may be intense debate on what that vision should be—originalism, fundamental fairness, democracy-enhancing (which would underscore the connection between election law and constitutional law), common law incrementalism, or something else⁴—but most observers of the Court want it to have some form of principled methodology that guides its constitutional decisions, rather than just having the Court engage in a series of arbitrary, ad hoc judgments that collectively lead to a jumble of conflicting (and confusing) precedents.⁵ For the very same reasons, the Court equally could be expected to have a vision of election law, which guides the Court's decisions that affect the structure and operation of the democratic process.

II. ELECTION LAW IN THE SUPREME COURT: NO UNIFIED VISION

There has been a sense among election law scholars, however, that the Court lacks a coherent vision of election law. Rick Hasen, among others, has characterized the Court's campaign finance jurisprudence as incoherent, both within itself and in relationship to other areas of election law—a theme he develops in his contribution to this symposium.⁶ One needs to point only to the Justice Kennedy's pivotal indecisiveness in *Vieth v. Jubelirer*,⁷ as have many of this symposium's participants, to support the proposition that the

⁴ For useful introductions to these and other theoretical perspectives on constitutional interpretation, see JOHN H. GARVEY, T. ALEXANDER ALEINIKOFF & DANIEL A. FARBER, *MODERN CONSTITUTIONAL THEORY: A READER* (5th ed. 2004); MICHAEL J. GERHARDT, THOMAS D. ROWE, JR., REBECCA L. BROWN & GIRARDEAU A. SPANN, *CONSTITUTIONAL THEORY: ARGUMENTS AND PERSPECTIVES* (2d ed. 2000).

⁵ Even the leading proponent of theoretical minimalism, Cass Sunstein, has indicated that he believes minimalism should result in an internally consistent and rationally explainable body of precedent. See, e.g., Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006); Cass R. Sunstein, *Problems with Minimalism*, 58 STAN. L. REV. 1899 (2006). In this respect, Sunstein's own version of minimalism, relying heavily on reasoning by analogy, shares affinities with common law incrementalism as an overarching methodology for the adjudication of constitutional questions.

⁶ Richard L. Hasen, *The Newer Incoherence: Competition, Social Science, and Balancing in Campaign Finance Law After Randall v. Sorrell*, 68 OHIO ST. L.J. 849 (2007).

⁷ 541 U.S. 267 (2004).

Court during Chief Justice Rehnquist's tenure developed no coherent approach to partisan gerrymandering claims. Likewise, of all the academic attacks leveled against *Bush v. Gore*,⁸ perhaps the most persistent has been that its "sub-minimalist" reasoning displays no animating vision but only result-oriented "ad hockery."⁹

With the passing of Chief Justice Rehnquist and the transition to the new Roberts Court, it is natural to ask whether this next era will generate the coherent vision of election law that the previous period lacked. Coincidentally, moreover, the first year of Chief Justice Roberts' tenure included two important election law cases on the Court's docket: *Randall v. Sorrell*,¹⁰ a campaign finance case, and *LULAC v. Perry*,¹¹ a redistricting case. Consequently, the *Ohio State Law Journal* and *Election Law @ Moritz* convened this symposium to consider, in light of these two cases or otherwise, what might be said about the Roberts Court's approach to election law—just as this new Court takes its first steps into this field.

Now that the Court has decided these cases, and this symposium has occurred,¹² the initial assessment is that the Roberts Court shows no more sign of developing an overarching vision of election law than its predecessor and that it is difficult to see one emerging without further changes in the Court's membership. Perhaps it is just still too early to tell. As Pam Karlan deftly observes in her contribution to this symposium: "When it comes to the Roberts Court and the law of democracy, the early returns are . . . provisional."¹³ But it may also be true that, for the time being, in the field of election law as in so many other areas the Roberts Court is really the Kennedy Court—and Justice Kennedy has yet to settle on an overarching vision, either one of his own or the competing ones offered to him by his colleagues on his left or right, principally Justice Breyer or Justice Scalia. In her own distillation of this symposium, Heather Gerken argues that a coherent election law jurisprudence from the Court will emerge only if and when either Justice Breyer or Justice Scalia gets a secure fifth vote.¹⁴

⁸ 531 U.S. 98 (2000).

⁹ I discuss this point in my own contribution to this symposium. See Edward B. Foley, *The Future of Bush v. Gore?*, 68 OHIO ST. L.J. (forthcoming 2007).

¹⁰ 126 S. Ct. 2479 (2006).

¹¹ 126 S. Ct. 2594 (2006).

¹² Webcasts of the panel discussions that occurred at the Moritz College of Law on September 29–30, 2006 as part of this symposium, are archived at <http://moritzlaw.osu.edu/lawjournal/symposium/2006-07/index.php>.

¹³ Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743 (2007).

¹⁴ In her words, "[w]e are still one presidential election away from knowing which coalition will choose which path the Court will take as it wends its way through the

Given the obstacles to identifying an overarching vision of election law for the Roberts Court—either descriptively, in terms of what Justice Kennedy (or his successor as the pivotal fifth voter) is likely to articulate; or prescriptively, in terms of what reasonably has a chance of persuading Justice Kennedy to embrace (instead of his persistent tentativeness)—the contributors to this symposium for the most part have chosen to focus on a single area within election law. Enough uncertainty exists within each of these areas to warrant fruitful commentary, even after the Roberts Court's first forays into these terrains. It is, therefore, perhaps more prudent to set aside for another occasion the more daunting scholarly task of offering a unified understanding of election law as a whole, at least one that has a plausible chance of prevailing during the Roberts Court era.

III. CAMPAIGN FINANCE: WAITING FOR THE COURT'S NEXT STEP

In the area of campaign finance, like Rick Hasen,¹⁵ Richard Briffault sees the Roberts Court's initial opinions as muddying the waters even further.¹⁶ Brad Smith, who himself observes that he comes to questions of campaign finance from a very different normative perspective than Hasen and Briffault, shares this descriptive assessment of the Roberts Court's early work.¹⁷ All three anticipate a deregulatory approach eventually taking hold (with Smith providing a roadmap on how the Court could get there), although just how quickly depends upon the attitude towards *stare decisis* adopted by Justice Kennedy and the two new members of the Court. The Roberts Court's next decision on campaign finance, coming soon in *Federal Election Commission v. Wisconsin Right to Life*¹⁸ (on rebound from its pre-Alito remand¹⁹), will presumably shed more light on this subject. In any event, because campaign finance is one area in which Justice Kennedy is more firm in his convictions, it may develop its own internal conceptual clarity more quickly than other specific areas, or than election law as a whole.

political thicket." Heather Gerken, *Rashomon and the Roberts Court*, 68 OHIO ST. L.J. (forthcoming 2007).

¹⁵ Hasen, *supra* note 6.

¹⁶ Richard Briffault, *WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law*, 68 OHIO ST. L.J. 807 (2007).

¹⁷ Bradley A. Smith, *The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution*, 68 OHIO ST. L.J. 891 (2007).

¹⁸ No. 06-969 (oral argument held on Apr. 25, 2007).

¹⁹ *Wisconsin Right to Life, Inc. v. FEC*, 126 S. Ct. 1016 (2006).

IV. PARTISAN GERRYMANDERS: A STATUS QUO OF INDECISION

On the topic of partisan gerrymanders, by contrast, *LULAC* revealed that Justice Kennedy remains a fence-sitter. Michael Kang characterizes Justice Kennedy's unwillingness to commit to a position on the issue as a failure of "judicial confidence," rather than failure of judicial vision.²⁰ Justice Kennedy, according to Kang, recognizes the need for judicial policing to protect the structure of democratic politics from excessive partisan gerrymanders, but lacks the "will" to impose a standard of fair representation in the absence of a consensus on its normative appeal prior to its judicial imposition—whereas the Warren Court was bold enough to impose "one person one vote" without such a consensus, which developed only afterwards.

Justice Kennedy's willingness to intervene has not likely been increased by the Democratic Party's ability to regain control of the U.S. House of Representatives despite all the gerrymandering that was thought to give the previous Republican majority a cushion in last year's midterm elections. But Sam Issacharoff, in his contribution to this symposium (co-authored with Jonathan Nagler), presents statistics showing just how sweeping the electorate's repudiation of the incumbent majority party must be before popular sentiment can overcome the insulating effect of partisan gerrymandering.²¹ For example, a 4% swing (from 52%-48% one way, to 52%-48% the other way) would not be enough to change which party controls Congress, given the power of gerrymandering to protect the incumbent party from popular responsiveness. Indeed, here in Ohio, where Democrats won most major statewide elections in 2006 (U.S. Senate, Governor, Attorney General, Treasurer, and Secretary of State), and whose candidates for the U.S. House of Representatives received a majority of statewide votes (53%-47%), the Republican Party still captured a majority of congressional seats (11 out of 18)—arguably due to a particularly effective partisan gerrymander in 2002 of the state's congressional districts.²² Whether new statistics like these can be converted into a constitutional standard that convinces Justice Kennedy, however, remains much in doubt.

²⁰ Michael S. Kang, *When Courts Won't Make Law: Paralysis and Partisan Gerrymandering*, 68 OHIO ST. L.J. (forthcoming 2007).

²¹ Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. (forthcoming 2007).

²² See Editorial, *End Gerrymandering*, COLUMBUS DISPATCH, Feb. 25, 2007; Johnathan Riskin & Jim Siegal, *District Lines in Ohio Foil Democrats*, COLUMBUS DISPATCH, Dec. 3, 2006; Edward B. Foley & Bradley Smith, *Ohio Must Get Rid of Gerrymandering*, COLUMBUS DISPATCH, Nov. 18, 2006.

V. RACIAL DISCRIMINATION IN DISTRICTING: THE *LULAC* SURPRISE

The most innovative and, to many, unexpected development of the infant Roberts Court in the field of election law was the separate holding in *LULAC* that one of the districts in the Texas redistricting plan violated section 2 of the Voting Rights Act. This holding provided further confirmation that the Roberts Court is, at least in current composition, truly the Kennedy Court, as Justice Kennedy wrote for a five-member majority on this issue, over a vigorous dissent from the new Chief Justice. Much discussion has occurred in this symposium over what to make of this Voting Rights Act holding, which by all accounts is extremely significant and may prove revolutionary. In addition to a brief summary in the paragraph that immediately follows, Heather Gerken analyzes the various contributions to this symposium that address the Voting Rights Act innovation in *LULAC*, and she adds her own thoughts about the different doctrinal directions in which it could develop (depending, in part, on which faction of the Court gains the upper hand through future appointments).²³

Rick Pildes thinks *LULAC*, despite the superficial success of the section 2 claim in the case, signals the end of protecting against the dilution of minority voting power under the traditional understanding of section 2 that has prevailed since *Thornburg v. Gingles*.²⁴ Instead, he sees *LULAC* as a potential precursor for the reinvigoration of *Shaw v. Reno*, which seeks to purge race from the districting process and thus is antagonistic to mapmaking efforts to avoid minority vote dilution. Guy Charles is not convinced that Pildes is correct on this point.²⁵ Rather, Charles suggests that Justice Kennedy's opinion in *LULAC* may reflect a more nuanced conception of racial representation that, although perhaps superseding *Gingles*, is at odds with the hostility to any form of race-based districting in *Shaw*. Ultimately, however, Charles agrees with Ellen Katz that the best understanding of Justice Kennedy's treatment of the Voting Rights Act in *LULAC* is less about racial identity than it is about political participation.²⁶ Although Charles and Katz differ in the details of their analyses, and each deserves careful attention, both see Justice Kennedy as working towards a conception of electoral competitiveness or accountability, by which a politically cohesive group of voters who have the potential of garnering a majority of votes in a

²³ Gerken, *supra* note 14.

²⁴ 478 U.S. 30 (1986). See Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. (forthcoming 2007).

²⁵ Guy-Uriel Charles, *Race, Redistricting, and Representation*, 68 OHIO ST. L.J. (forthcoming 2007).

²⁶ Ellen D. Katz, *Reviving the Right to Vote*, 68 OHIO ST. L.J. (forthcoming 2007).

district have a right to mount a competitive challenge to an incumbent whom this group considers unresponsive to its interests. On this view, *LULAC* might turn out to be the first step in the development of a constitutional standard for policing political gerrymanders after all—or, somewhat more narrowly but just as importantly, *LULAC* may signify that challenges to political gerrymanders will prevail if but only if they can be shoehorned into a race-based Voting Rights Act claim.

VI. THE SUPREME COURT AND VOTING ADMINISTRATION: BEYOND *BUSH V. GORE*

When this symposium was planned, the Roberts Court was not expected to have issued a new decision in the specific area of voting administration, which concerns the procedures for casting and counting ballots. Yet speculation on how the new Roberts Court might treat the most famous precedent of the Rehnquist Court, *Bush v. Gore*, is interesting enough, and I have devoted my own contribution to this symposium to that topic.²⁷ Analyzing the array of potential Equal Protection claims that emerge from the voting administration problems that persist in the aftermath of the 2000 presidential election, I develop a taxonomy for classifying these claims in relationship to the *Bush v. Gore* precedent, and I consider how the Roberts Court might rule on the merits of these claims as well as the likelihood that the Court would grant review in a case presenting them. I am grateful that my efforts have inspired thoughtful contributions from Dan Lowenstein, who provides an alternative and (I believe) usefully complementary taxonomy,²⁸ and John Fortier, who goes somewhat further than I do in seeing the practical significance of *Bush v. Gore* as being limited to a small subcategory of potential claims.²⁹

As it turns out, the Roberts Court did issue a voting administration precedent in October 2006, *Purcell v. Gonzalez*,³⁰ during the run-up to the midterm elections. Involving a challenge to Arizona's new voter identification law, the Supreme Court's unanimous decision was limited to the procedural ruling that the Ninth Circuit erred in issuing a preliminary injunction when the district court had refused to do so. As part of analyzing the future of *Bush v. Gore*, I consider *Purcell* as one indication among several that the judiciary—and particularly the Supreme Court—will not be

²⁷ See Foley, *supra* note 9.

²⁸ Daniel H. Lowenstein, *The Meaning of Bush v. Gore*, 68 OHIO ST. L.J. (forthcoming 2007).

²⁹ John C. Fortier, *Foley on the Future of Bush v. Gore*, 68 OHIO ST. L.J. (forthcoming 2007).

³⁰ 127 S. Ct. 5 (2006).

as receptive to the strategic use of litigation to affect the process of casting and counting votes as some have thought in light of *Bush v. Gore*. Also addressing *Purcell*, my colleague Dan Tokaji criticizes its reasoning and argues that the Court's intervention was unwarranted given the proven ability of lower courts to manage these cases in ways that both (1) distinguish meritorious from unmeritorious claims and (2) provide much-needed clarity to participants in the electoral process.³¹ As part of her survey of the Roberts Court's first forays into the field of election law, Pam Karlan observes that *Purcell*, despite the apparent innocuousness of its unanimity, has the potential for destabilizing the substance of vote dilution law,³² a point that Tokaji also makes in somewhat different terms in his own analysis of the opinion.

VII. THE COURT'S LARGELY DISCRETIONARY DOCKET: A GOOD IDEA FOR ELECTION CASES?

Unlike all the other contributors to this symposium, Michael Solimine focuses exclusively on the procedures by which election law cases reach the Supreme Court, rather than on the content of the Court's rulings once they get there.³³ But this much-neglected procedural topic is a crucial one, for the reasons Solimine himself describes as well as related observations made by both Tokaji and me in our separate analyses of potential Supreme Court review of lower court rulings in future voting administration cases. When the Court controls what cases to consider on the merits, it can select cases in a way that facilitates the development of the law in a particular direction. Conversely, when the Court is obligated to decide the merits of an elections case even if it would prefer to duck it, the Justices must render whatever rulings their consciences dictate the law requires on the facts before them, even if their consciences might not accord with their temptations—and for that reason they might prefer to leave the case alone.

It is perhaps no accident that the most interesting and significant development in the Roberts Court's consideration of election law last year came in the context of an issue that the Court likely would have declined to consider had the case not been one of the few within the Court's mandatory appellate jurisdiction. The important Voting Rights Act holding in *LULAC* was a tagalong to the much more prominent issue of partisan gerrymandering. Had the case fallen within the Court's discretionary

³¹ Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. (forthcoming 2007).

³² Karlan, *supra* note 13.

³³ Michael E. Solimine, *Institutional Process, Agenda Setting, and the Development of Election Law on the Supreme Court*, 68 OHIO ST. L.J. 767 (2007).

jurisdiction, the Court likely would have agreed to consider only the partisan gerrymandering question, leaving the Voting Rights Act issue behind. But required to rule on this issue as well, Justice Kennedy provided the fifth vote for an important and arguably surprising decision, which may be somewhat out-of-sync with Justice Kennedy's predilections regarding Voting Rights Act cases.

Given the incoherence in the Supreme Court's election law jurisprudence observed by so many of this symposium's contributors (incoherence both with each specific area of election law and across the field as whole)—and given Justice Kennedy's pivotal indecisiveness—perhaps it is time to rethink whether it is desirable for the Justices to have such wide discretion on which election law cases to review on the merits.³⁴ Perhaps if the Justices were forced to consider many more election cases presenting questions of federal law, coherence would develop as a result of the accumulation of precedent resolving particular facts. It would be harder for the Justices to overrule or distinguish precedents they personally dislike, since the bonds of precedent tying cases together would be thicker and deeper. The Justices could not select cases strategically, a practice that may enhance ideological polarization and, in turn, exacerbate incoherence, particularly when changes in the Court's composition cause shifts in the Court's own voting patterns and strategic alliances. If new Justices were pinned down on what the law requires regarding a larger range of factual circumstances, and having no choice but to consider each new case as it comes, the Justices might have less maneuverability to make ideologically motivated pronouncements that engender confusion about what the law entails. This model of mandatory judicial consideration of the merits of each case as it arises is obviously not the practice as it has developed in the Supreme Court, but it is the standard conception of common law adjudication, where the coherent wisdom of the law is supposed to emerge precisely as a result of such accretion.

Perhaps the Roberts Court will be able to develop such coherence in the field of election law without the need for this kind of procedural reform. Time will tell. Based on the views expressed in this symposium, however, it has a long way to go in this regard—and, except for the specific area of campaign finance, there is not much reason to expect that the Court will get there anytime soon.

³⁴ Solimine suggests some procedural reforms different from, but not inconsistent with, the one I tentatively mention in this Introduction. Most importantly, he demonstrates that the Court's procedures for election cases are "not necessarily outcome-neutral" and therefore deserving of the careful attention he gives them. *Id.*