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The Political Process

Elizabeth Garrett*

I want to thank Dean Starr, Professor Kmiec, and Pepperdine Law School for inviting me to talk about the cases from last term that deal with issues in the arena of law and politics. Just as politics can be messy, so are these cases. In the two major cases,² there are a total of twelve opinions—six in each case—and essentially no majority opinions, except for one portion of the opinion in *League of United Latin American Citizens v. Perry*.³ If Chief Justice Roberts is really serious about encouraging the Court to demonstrate more unity in its holdings and to speak “softly and unanimously,”⁴ he did not succeed in these cases. In my remarks today, I will discuss first the campaign finance cases and then conclude with the redistricting case, focusing mostly on the partisan redistricting aspect of that case, but also providing brief observations on the voting rights aspects.

This term the Court decided two campaign finance reform cases, *Wisconsin Right to Life v. Federal Election Commission*⁵ and *Randall v. Sorrell*.⁶ The most important of these is the second decision, which involved a Vermont campaign finance law that restricted both expenditures and contributions in state candidate campaigns. Two of the results from these cases were unsurprising. First, a unanimous Court held in *Wisconsin Right to Life* that as-applied challenges to the Bipartisan Campaign Reform Act (“BCRA”) will be allowed.⁷ This conclusion is consistent with the campaign finance jurisprudence of the last thirty-plus years. *Buckley v.*

agreed that the effects test in Section 5 should be extended. We had argued that the intent test, that the Supreme Court recognized in *Mobile against Bolden* -- I know you think it was wrong, but that was the Supreme Court's interpretation -- should have been extended. Again, as you said, the compromise that you and Senator Dole worked out was enacted into law and signed into law by President Reagan. And the Voting Rights Act has continued to be an important legislative tool to ensure that most precious of rights, which is preservative of all other rights. There was never any dispute about that basic proposition.

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2. *Randall v. Sorrell*, 126 S. Ct. 2479 (2006); *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

3. *Perry*, 126 S. Ct. at 2607, 2612.

4. Linda Greenhouse, *Roberts Is at Court's Helm, But He Isn't Yet in Control*, N.Y. TIMES, July 2, 2006, § 1, at 1.

5. 126 S. Ct. 1016 (2006).

6. 126 S. Ct. 2479 (2006).

7. *Wis. Right to Life*, 126 S. Ct. at 1017-18.

*Valeo*⁸ and *McConnell v. Federal Election Commission*⁹ were both facial challenges under the First Amendment, and both contained language making it clear that the Court anticipated as-applied challenges in the future.¹⁰ Not surprisingly, *Wisconsin Right to Life* was a unanimous opinion and one of the Court's shorter opinions.

The second unsurprising result, in my view, is that expenditure limits in campaign finance laws are unconstitutional. This is a clear holding of *Buckley*.¹¹ I did not expect that the ruling in *Buckley* would be revisited by the Court when it had the chance to do so—as it did this Term in *Randall v. Sorrell*.¹² A few others who study law and politics had predicted that the Court might be willing to look again at its holding in *Buckley* invalidating expenditure limits in campaigns.¹³ Some believed that the decades of experience with campaign finance laws after *Buckley* would surely convince any rational person that the *Buckley* approach is not a workable one. The *Buckley* framework—where expenditure limits are unconstitutional and assessed through a strict scrutiny lens, but contribution limits are often constitutional and receive a lesser degree of scrutiny¹⁴—has resulted in a system where the demand for campaign money is unconstrained, but the supply is limited.¹⁵ In such a market, not surprisingly, one sees evasions of the regulatory structure by candidates who need substantial funds to meet their unregulated demand. At the time of *Buckley*, a case that was decided before much experience with the federal election campaign laws, we simply did not know what a disaster this bifurcated system was going to be. Now we do. Surely, some scholars reasoned, the justices will look at the reality of the political environment and change the decision with regard to expenditure limits.¹⁶ That did not happen this Term.

8. 424 U.S. 1 (1976) (per curiam).

9. 540 U.S. 93 (2003).

10. See *Buckley*, 424 U.S. at 74; *McConnell*, 540 U.S. at 198. See also Elizabeth Garrett, *McConnell v. FEC and Disclosure*, 3 ELECTION L.J. 237, 242 (2004) (discussing challenges in as-applied challenges in campaign finance context).

11. *Buckley*, 424 U.S. at 54.

12. *Randall v. Sorrell*, 126 S. Ct. 2479, 2481 (2006).

13. See, e.g., Richard Briffault, *McConnell v. FEC and the Transformation of Campaign Finance Law*, 3 ELECTION L.J. 147, 174–76 (2004).

14. *Buckley*, 424 U.S. at 23.

15. See Kathleen M. Sullivan, *Against Campaign Finance Reform*, 1998 UTAH L. REV. 311, 311–312 (1998).

16. See, e.g., Richard L. Hasen, *Buckley is Dead, Long Live Buckley: The New Campaign Finance Incoherence of McConnell v. Federal Election Commission*, 153 U. PA. L. REV. 31, 67–68 (2004) (noting that there are various reasons the Court could use to overturn *Buckley*, but that “a change in campaign finance jurisprudence is not going to happen until five Justices are comfortable overruling the central aspect of *Buckley*”).

The second reason some thought that the Court might rethink expenditure limits comes from hints in recent cases concerning the political process. *Buckley* held that “the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.”¹⁷ There seems to be a suggestion in cases since *Buckley*, however, that the Court might be willing to reconsider its views of the equalization rationale with respect to some campaign finance restrictions. The state interest identified in *Austin v. Michigan Chamber of Commerce*¹⁸—combating “the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public’s support for the corporation’s political ideas”¹⁹—sounded to some like an equality rationale.²⁰ *McConnell* seemed to restore *Austin*’s vitality by relying on the precedent.²¹

Moreover, Justice Breyer has defended a state interest that is related to equality: the need to democratize the political process and widen political participation past the few who actively participate now.²² Most recently, he has developed this analysis in his book *Active Liberty*.²³ The participatory democracy rationale has a flavor of the equality arguments made to support expenditure limits, and some scholars saw this as a portent of a change in judicial approach. Certainly, the Court must have been aware of this line of analysis when it considered the Vermont statute because Judge Calabresi had forcefully argued in a circuit court opinion in this case that the Court’s jurisprudence is “impoverished” because it does not deal directly with egalitarian concerns which are, “perhaps, at the very heart of the problem.”²⁴

The bottom line in *Randall*, however, is that the Court will not revisit the issue of expenditure limits. Indeed, I predict that if the *Buckley* framework is overruled by this Court in a future case, it will be overruled in the other direction. I do not see a five-Justice majority willing to overrule *Buckley* in order to apply less strict scrutiny to expenditure limits. We might

17. *Buckley*, 424 U.S. at 48–49.

18. 494 U.S. 652 (1986).

19. *Id.* at 660.

20. See, e.g., Julian N. Eule, *Promoting Speaker Diversity: Austin and Metro Broadcasting*, 1990 SUP. CT. REV. 105, 108–11 (1990); Daniel Hays Lowenstein, *A Patternless Mosaic: Campaign Finance and the First Amendment After Austin*, 21 CAP. U. L. REV. 381, 412 (1992); see also John M. de Figueiredo & Elizabeth Garrett, *Paying for Politics*, 78 S. CAL. L. REV. 591, 627–34 (2005).

21. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 290 (2003).

22. See, e.g., *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring); see also Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1754–56 (2001); Hasen, *supra* note 16, at 58 (discussing Justice Breyer’s participatory democracy rationale).

23. STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 15 (2005).

24. *Landell v. Sorrell*, 406 F.3d 159, 162–64 (2d Cir. 2005) (Calabresi, J., concurring).

see, however, a five-Justice majority apply strict scrutiny to contribution limitations and hold that sort of regulation unconstitutional under the First Amendment. We can see hints of that possibility in some of the campaign finance opinions. Justices Thomas and Scalia have explicitly said that they would overturn contribution restrictions under the First Amendment,²⁵ and they reiterate that position again in *Randall*.²⁶ Justice Kennedy has somewhat less clearly signaled his view that contribution limits should be required to pass strict scrutiny,²⁷ and he does so again in *Randall*.²⁸ Justice Alito writes separately in *Randall* to underscore his view that it was not necessary for the Court to decide whether to overrule *Buckley*—thereby leaving the issue for further resolution.²⁹ When the issue is squarely presented, I predict that he will not be interested in overruling *Buckley* to let more restrictions stand, but rather to say more are unconstitutional.

Of course, we do not know from *Randall* what Chief Justice Roberts would do if the Court was faced with the decision whether to overrule the *Buckley* framework. He did not join Justice Alito's opinion. He did join Justice Breyer's plurality opinion, which included some discussion of the value of stare decisis in this area.³⁰ But my guess is that if a case comes before the Court that requires it to revisit *Buckley*, the *Buckley* framework may be in trouble, and it could well be overruled in a way that will result in more campaign finance restrictions being found unconstitutional.

So, then, what is surprising with regard to the holding in the Vermont case? The surprising holding, in my view, is that the limit on contributions contained in the Vermont statute was unconstitutional.³¹ This is unexpected because the trend in the cases had been to defer to the legislature's judgment with regard to limitations on contributions.³² The First Amendment standard of judicial scrutiny is less stringent than the standard applied to expenditure limitations; thus, restrictions on contributions more often survive judicial challenge. Furthermore, in *Nixon v. Shrink Missouri Government PAC*,³³

25. *Nixon*, 528 U.S. at 429–30 (Thomas, J., dissenting).

26. *Randall v. Sorrell*, 126 S. Ct. 2479, 2501–02 (2006) (Thomas, J., concurring).

27. *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 308–310 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part).

28. 126 S. Ct. at 2501 (Kennedy, J., concurring).

29. *Randall*, 126 S. Ct. at 2500-01 (Alito, J., concurring).

30. *Id.* at 2490.

31. *Id.* at 2499-500.

32. *See, e.g., McConnell*, 540 U.S. at 165.

33. 528 U.S. 377 (2000).

the Court had accepted relatively low campaign limits, upholding a limit of \$1,000, indexed for inflation, for certain statewide offices.³⁴

Certainly, it is true that Vermont's limits were lower than those at issue in *Nixon v. Shrink Missouri Government PAC*. For example, Vermont limited individual contributions to \$400 in statewide elections over the course of a two-year period, with the same limitation on political parties. The limits were not indexed for inflation. My view, after *Nixon v. Shrink Missouri Government PAC*, however, was that there would be no limit too low if the state legislature had decided to put it into place, given the deference the Court showed to Missouri's decision to stringently limit contributions in state elections. But the ruling in Vermont proves me wrong. There are contribution limits that are too low. These limits are too low.

What more general conclusions can we draw from *Randall* that may be relevant to future campaign finance cases? There are at least three. First, we see in the Vermont case the increasingly sophisticated use by courts of empirical evidence derived from the social sciences. This evidence is presented to courts through expert testimony, amicus briefs, and the arguments of the parties. In *Buckley*, there was no discussion of empirical evidence or social science literature because there was little such work available. We did not have experience with relatively comprehensive campaign finance regulation until passage of the Federal Election Campaign Act, the law at issue in *Buckley*'s facial challenge. In *Nixon v. Shrink Missouri Government PAC*, decided in 2000, one of the questions before the Court was to determine the quantum of evidence needed to support a legislative judgment regarding restrictions on contributions.³⁵ The Court's answer to this question in *Nixon v. Shrink Missouri Government PAC* was, "Not a lot. We'll take almost anything a legislature throws at us." The Court considered an affidavit by a legislator and it noted a few anecdotes from newspaper articles. On this scarce empirical foundation the majority accepted the contribution limitation of about \$1,000 as amply warranted to combat quid pro quo corruption and the appearance of such.³⁶

Contrast that approach with the opinions in *McConnell* and *Randall*. In *McConnell*, the record from the lower court contained 100,000 pages of evidence and testimony from more than 200 witnesses, many of them expert witnesses.³⁷ *Randall*'s plurality opinion includes a relatively sophisticated and detailed analysis of social science research. Justice Breyer discussed the

34. *Id.* at 383-84.

35. *Id.* at 391.

36. *See id.*

37. *See* David B. Magleby, *The Importance of the Record in McConnell v. FEC*, 3 ELECTION L.J. 285 *passim* (2004); WILLIAM N. ESKRIDGE, JR., PHILLIP P. FRICKEY, & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION 2004: STATUTES AND THE CREATION OF PUBLIC POLICY 28 (2004).

effect of certain levels of campaign contributions on competitive races, not on average races, which had been the lower court's approach.³⁸ Relying on work in the social sciences, he addressed the question: What do these very strict restrictions on the amount of political contributions by individuals and parties mean for outcomes in close and contested races?

This trend in campaign finance cases is noteworthy and will change the way lawyers litigate in this area. It also demonstrates that many of the current Justices were trained in the modern law school where we emphasize interdisciplinary approaches and, in particular, discover the lessons for law that can be drawn from rigorous work in the social sciences. Today's law schools do not dwell on doctrinal approaches to legal questions. Instead, what many of us teach is that case law is merely a form of policy produced by certain actors in our political system, and thus law must be analyzed with the tools provided by the empirical social sciences, as well as other disciplines.³⁹ As an administrative law scholar, Justice Breyer taught using such an approach, and he still judges from that perspective. Moreover, judges like Chief Justice Roberts and Justice Alito were trained in that sort of approach to the law, and one can see the influence of interdisciplinary legal study in these cases.

Of course, even though social science research is playing a role in the outcomes of some of the cases in law and politics, social science data cannot always conclusively resolve policy questions. Studies can inform and guide us, but they do not settle the issue. For example, debate continues in the social science literature over whether contribution limits increase competition or whether they stifle competition, and under what circumstances they will have particular effects.⁴⁰ In short, politics are complicated. It is not clear to me that even the sophisticated and well-trained Justices that we now have on the Court can fully grapple with the difficult empirical assessments necessary to construct reasonable and comprehensive policy in this arena. Rather, the necessity of this type of judgment and the need to revise policy in light of changed circumstances or better information mean that legislatures should take the lead in this area, not courts.

Second, the plurality opinion in *Randall* demonstrates a willingness to consider seriously the argument that robust competitiveness is a necessary

38. *Randall v. Sorrell*, 126 S. Ct. 2479, 2496 (2006).

39. See Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 772 (1987).

40. See, e.g., David M. Primo & Jeffrey Milyo, *Campaign Finance Laws and Political Efficacy: Evidence from the States*, 5 ELECTION L.J. 23 (2006).

condition for a healthy and well-functioning democracy. Much work in the social sciences is aimed at determining how elections can be made more competitive. Justice Breyer's description of a well-functioning participatory democracy in his scholarly work and judicial opinions seems to presume some level of political competition.⁴¹ Whether other Justices share this concern about competitiveness is not yet clear, however. Chief Justice Roberts and Justice Alito joined this part of the opinion,⁴² but whether they joined it because of its competition rationale is unclear. I am dubious that the value of political competition is doing much work for Justices other than Breyer, because, when the Court turned to the partisan gerrymandering case,⁴³ which is all about political competition, there is not much discussion of this value, and there is very little use of empirical studies concerning competitiveness. So if this is a vibrant jurisprudential theory, we would have seen it throughout *League of United Latin American Citizens v. Perry*. Yet, it is virtually nonexistent in that case that implicates competition more directly.

The discussion of competition in *Randall* is still significant, however. It demonstrates that the Justices are approaching law and political process cases, in part, from a structural perspective. Increasingly, influential scholars in the law and politics world have argued that courts should focus on ensuring that the appropriate political structures and institutional frameworks have been put in place to ensure individual rights, rather than using the traditional judicial approach that focuses more directly on individual rights.⁴⁴ Some scholars argue that political institutions should be designed to maximize political competition, and courts should determine the results of these cases using competition as the yardstick.⁴⁵ Whether one embraces competition as one of the primary objectives of institutional design or not, some sort of structural approach is apparent in virtually all the opinions in these cases, and it is certainly influential in Breyer's plurality opinion.

Third, Justice Breyer has a great deal of influence not just on the substance of this opinion—i.e., the emphasis on competitiveness, social science data, and a structural approach to political process cases—but also on the methodology of the decision. Unfortunately, that influence leads to negative consequences for political process cases because Justice Breyer

41. See BREYER, *supra* note 23, at 46–47; Stephen Breyer, *Our Democratic Constitution*, 77 N.Y.U. L. REV. 245, 252–53 (2002); *Nixon*, 528 U.S. at 401 (Breyer, J., concurring).

42. *Randall*, 126 S. Ct. at 2495–500.

43. *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

44. See, e.g., Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605 (1999); Frederick Schauer & Richard H. Pildes, *Electoral Exceptionalism and the First Amendment*, 77 TEX. L. REV. 1803 (1999).

45. See, e.g., Issacharoff & Pildes, *supra* note 44, at 644; Pildes, *supra* note 44, at 1625–26.

tends to favor complex tests that can produce unclarity. After *Randall*, not only are lawyers uncertain how to argue these cases, but lawmakers will also be uncertain how to write statutes that will withstand constitutional challenge. Justice Breyer's affinity for multi-pronged standards, with many related qualitative decisions that are hard to apply consistently and with certainty, is a feature of other areas of his jurisprudence. Those of us who study administrative law recognize this aspect of Justice Breyer's judicial approach. As a judge in administrative law cases (and as a leading scholar in this area), he often favors open-ended standards, in sharp contrast to Justice Scalia (another administrative law scholar) who advocates for bright line, clear-cut rules.⁴⁶ In the administrative law world, it is the contrast between *Mead*⁴⁷ and *Chevron*.⁴⁸

Similarly, you can see Justice Breyer's methodological approach in the plurality's First Amendment test for contribution limits. First, one looks for "danger signs"⁴⁹ with respect to the contribution limits. Several danger signs are listed: whether they are lower than limits that have been upheld in the past or lower than any state currently has; whether there is one limit per election cycle, rather than one limit for primaries and another limit for general elections; and whether the same restrictions are applied to parties as are applied to individuals.⁵⁰ So how clear is this first part of the test that will determine the intensity of review in the second part? Not very clear at all—many questions remain to be resolved in future cases. How many of the danger signs are required to trigger independent judicial assessment of the regulation, rather than judicial deference to legislative judgments? What is the hierarchy of the signs? Are they the only danger signs, or are there others that we will learn about in future cases? We do not know. We have no idea. We do not even know why these were picked as danger signs.

At any rate, analysis of danger signs is only the first part of the test. Once a court finds those danger signs—or some subset of them, or some other danger signs yet to be revealed—then it does not defer to the legislature's judgment about the appropriate restriction on campaign contributions. Instead, the court independently examines the record to see if the regulation is "closely drawn" to fit the governmental interest.⁵¹ In that

46. Compare Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363 (1986), with Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511 (1989).

47. *United States v. Mead Corp.*, 533 U.S. 218 (2001).

48. *Chevron v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

49. *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006).

50. *Id.* at 2503 (Thomas & Scalia, J.J., concurring).

51. *Id.* at 2495-500.

independent analysis in *Randall*, Justice Breyer discussed the empirical social science studies and decided he would rather focus on the effect of contributions on contested elections than on average elections.⁵² Thus, he rejected the approach of the legislature and lower courts. In short, this case muddies the water tremendously, and the Court's tendency to make the law uncertain and unclear will be a theme of mine as we continue to look at the other important law and politics case decided this Term.

In conclusion, because of the many unclaritys of *Randall v. Sorrell*, we will see more cases involving campaign finance laws coming to the Supreme Court, and it is very difficult to predict how this new Court will resolve them. I think the area of law and politics is wide open right now. What cases can we expect? We will see disclosure cases come up. Currently, there is a split among the circuits about the constitutionality of disclosure requirements, and some of these cases implicate initiative contests as well as candidate elections.⁵³ Other cases dealing with aspects of the initiative process may well reach the Supreme Court, including regulation of petition gatherers.⁵⁴ We will see cases involving political parties and campaigns because there are hints in *Randall v. Sorrell* that future cases could turn out differently from cases decided only a few years ago.⁵⁵ We will see challenges to some of the specific provisions of BCRA, like regulation of 527 organizations, regulation of campaign activities on the Internet, as-applied challenges to electioneering advertisement restrictions, and perhaps others. The Court has already agreed to hear a case next Term dealing with a state law that forbids a union from using non-members' shop fees for political purposes without first receiving authorization.⁵⁶

The second important law and politics case from the rookie year of the Roberts Court comes out of Texas, and it deals with political and racial

52. *Id.*

53. Compare *Majors v. Abell*, 361 F.3d 349, 350, 355 (7th Cir. 2004) (holding constitutional an Indiana statute requiring political advertisements expressly advocating the election or defeat of a candidate to reveal the identity of those who paid for the advertisement), with *ACLU v. Heller*, 378 F.3d 979, 981 (9th Cir. 2004) (holding that a Nevada statute requiring anyone who funds the publication of "any material or information relating to an election, candidate or any question on a ballot" to identify themselves and their addresses on any published material was an unconstitutionally overbroad means to achieve the state's otherwise legitimate interest). See also Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L.J. 295, 301-03 (2005).

54. See generally ANDREW M. GLOGER, INITIATIVE & REFERENDUM INSTITUTE, PAID PETITIONERS AFTER PRETE, (2006), available at <http://www.iandrinstitute.org/REPORT%202006-1%20Paid%20Petitioners.pdf>.

55. The Court's discussion of political parties and their involvement with campaigns in *Randall v. Sorrell*, 126 S. Ct. at 2497-98, has a different tone than that in *Federal Election Commission v. Colo. Republican Fed. Campaign Comm'n.*, 553 U.S. 431 (2001), suggesting that the current Court's approach may be different in the future.

56. *Wash. ex rel. Pub. Disclosure Comm'n v. Wash. Educ. Ass'n*, 130 P.3d 352 (Wash. 2006), cert. granted sub. nom. *Davenport v. Wash. Educ. Ass'n*, 2006 U.S. LEXIS 5417 (U.S. Sept. 26, 2006) (No. 05-1589).

gerrymandering. *League of United Latin American Citizens v. Perry*⁵⁷ is as fractured as the first case in terms of the number of opinions, but the total length of the opinions is even greater. This case follows on a 2004 case, *Vieth v. Jubelirer*,⁵⁸ another partisan gerrymandering case in which four Justices had essentially said, “No court ever strikes these partisan gerrymanders down as unconstitutional. *Davis v. Bandemer*⁵⁹ did not produce a standard that judges can apply. Therefore, we ought to hold these claims to be nonjusticiable.” Justice Kennedy wrote the pivotal opinion in *Vieth*, where he argued that the Court may someday be able to fashion a judicially manageable standard to review these cases, but he conceded that he does not know what that standard is going to be, and that no one—parties or other Justices—had suggested a workable standard in *Vieth*.⁶⁰ But he was not willing to say these cases are nonjusticiable, so courts are still open to hearing claims of unconstitutional partisan gerrymandering. That was the unsatisfying state of the law after *Vieth*.

The events in Texas were unfolding as *Vieth* was decided, and once it reached the Supreme Court, many observers thought that if any case was going to lead to Court intervention, surely this was the case. The main lesson of *Perry* is that even these facts do not warrant a holding of unconstitutional partisan gerrymandering. What is surprising to me, in light of the outcome in *Perry*, is that there are not five Justices willing to say that all partisan gerrymandering claims are nonjusticiable, thereby making it clear to parties that these cases should not be taken to court. Instead, the recourse for those objecting to districting plans is to go to Congress, to the initiative process, or to the state legislature to reform the redistricting process. The more responsible judicial response in *Perry* would have been to explicitly hold claims of partisan gerrymandering nonjusticiable, clearly signaling that litigation will not be successful in these areas, and to send those who object to redistricting plans as too partisan to other political institutions. But, again, this Court provides unclarity, confusion and uncertainty.

Had the Court decided to intervene in this case, it arguably could have fashioned a relatively clear, judicially-manageable standard aimed only at mid-decade redistricting plans. Indeed, Justice Stevens framed the central question presented by this case correctly, in my view, in his separate opinion: “[I]n every political-gerrymandering claim the Court has

57. 126 S. Ct. 2594 (2006).

58. 541 U.S. 267 (2004).

59. 478 U.S. 109 (1986).

60. *Id.* at 308-09 (Kennedy, J., concurring).

considered, the focus has been on the *map* itself, not on the decision to create the map in the first place.”⁶¹ In other words, the question before the Court was not whether district lines were drawn for purely, or primarily, partisan reasons, but whether the decision to redistrict in the first place was undertaken for purely, or primarily, partisan reasons. That decision is different in the context of mid-decade redistricting plans because, after a census, the state often has one unproblematic reason to redraw lines: to comply with the mandate of one person, one vote.⁶² Often, legislators also seek to entrench their own party or to entrench incumbents, but in the case of many redistricting plans after a census, one clearly legitimate reason exists to redraw the map. When it comes to mid-decade redistricting plans like the one in Texas, however, the state is not responding to demographic changes identified in the census, and it is often quite clear that the only reason for the new map is to give the one political party—here, the Texas Republican Party—more advantage in elections by decreasing the competition its candidates face.

But the Court refused to fashion a test or presumption targeted at mid-decade redistricting, and Justice Kennedy stated that nothing in the Constitution or case law warrants looking at these redistricting decisions with more distrust than any other decision to redistrict.⁶³ Furthermore, Kennedy’s plurality opinion focused more on the map than the decision to redistrict, and he noted that there could have been legitimate reasons for drawing the district lines: the new map “can be seen as making the party balance more congruent to statewide party power” than the map it replaced.⁶⁴ Interestingly, and in contrast to *Randall*, the plurality contains little discussion of relevant social science studies, such as the symmetry test proposed by some experts and discussed in Justice Stevens’s opinion,⁶⁵ which might have provided the Court guidance in fashioning a standard.

Let me be clear: although this case concerned a gerrymander to protect Republicans, both parties engage in this behavior. This map was a response to a Democratic gerrymander put in place the decade before—Justice Stevens’ description of the facts of the case refers to “the Texas Democratic Party’s sordid history of manipulating the electoral process to perpetuate its stranglehold on political power.”⁶⁶ One of the interesting ironies of the case is that Congressman Martin Frost was the architect of the Democratic redistricting plan designed to protect Democrats from competition, and he

61. *Id.* at 2631 (Stevens, J., concurring in part and dissenting in part) (quoting the State’s brief).

62. *Id.* at 2628 (Stevens, J., concurring in part and dissenting in part).

63. *Id.* at 2610.

64. *Id.*

65. *Id.* at 2637 (Stevens, J., concurring in part and dissenting in part).

66. *Id.* at 2627 (Stevens, J., concurring in part and dissenting in part).

was one of the members of Congress harmed by the new districts put in place by this Republican map.

As with Justice Breyer's test in *Randall*, the Court's decision in *Perry* fails to provide lawyers and policymakers with clear answers. Instead of following Justice Scalia's approach and declaring partisan gerrymandering cases to be nonjusticiable, the Court holds out hope that some cases—presumably more extreme than this one—will provide a judicial remedy. Yet, the Court's failure to provide redress here strongly suggests that litigation will be unavailing. It would have been better—and it would reflect legal reality—for the Court to have clearly stated: “We are never going to find an unconstitutional partisan gerrymander. Do not bring any more of these cases to court. Seek your solutions in the political process.” That is what Scalia wanted to say in *Vieth*, that is what he wanted to say here, and I think it would have done us all a service if at least four other Justices had joined him.

I am almost out of time, but I want to make two points with respect to the claims of racial gerrymandering in this case. First, even though I doubt any partisan gerrymandering claim will succeed after *Vieth* and *Perry*, partisan considerations often play a role in cases that come to the Court under the Voting Rights Act. In *Perry*, for example, the Court held that the redrawing of District 23's lines violated Section 2 of the Voting Rights Act because the new map impermissibly diluted the votes of Latino voters.⁶⁷ It is important to keep in mind that the borders of District 23 were changed mainly, if not entirely, to move Democrats out of Representative Bonilla's district, thereby protecting this Republican incumbent. It happened that these Democrats were Latino voters; therefore, the partisan process gave rise to a successful claim under the Voting Rights Act. Partisan considerations play a role in many cases where racial discrimination is at issue, particularly when voters of that race tend to vote as a bloc for one political party. Drawing lines to move them out of the district and reduce their partisan power is also likely to produce vote dilution claims under the Voting Rights Act.

Second, much is being made of Chief Justice Roberts's separate opinion in this case, partly because, as Professor Kmiec said in his initial remarks, Roberts did not write very many. But the opinion also has received attention because of its tone. Many have quoted the line, “It is a sordid business, this divvying us up by race,”⁶⁸ to suggest that Roberts is not going to be as open

67. *Id.* at 2614-19.

68. *Id.* at 2663 (Roberts, C.J., concurring in part, concurring in the judgment in part and dissenting in part).

to claims under the Voting Rights Act as the Court has been in the past. I think that this conclusion about the future of voting rights cases in the Roberts Court is probably accurate. Several passages in Roberts's opinion are noteworthy. For example, he refers to some of the analysis of Justice Kennedy's opinion dealing with District 23 as "blushingly ironic"⁶⁹ and terms part of its reasoning as "the majority's fig leaf."⁷⁰

This tone in Chief Justice Roberts's opinion is particularly interesting because in his analysis under Section 2 of the Voting Rights Act, Justice Kennedy resisted divvying people up by race. In the compactness analysis undertaken pursuant to *Thornburg v. Gingles*,⁷¹ the majority determined that Latinos living in Austin and Latinos living near the border with Mexico may not share a community of interests solely by virtue of the fact that they are all Latinos.⁷² Thus, the Court emphasized that people of the same race or ethnicity may not share a community of interest because they live in different places, have different experiences, espouse different viewpoints. In fact, the majority did not engage in the sort of "divvying up" by race that I thought would have been necessary to prompt Roberts's comment, suggesting that what we are seeing here may be a reaction to more than just this case, and that it may be a portent of a significant change in voting rights jurisprudence in the Roberts Court era.

QUESTIONS BY MARCIA COYLE

MARCIA COYLE: Professor Garrett, I read my local newspapers. I try to read them every day, and one of the things I have noticed is there has been a lot of talk about problems with voting machines. And I wonder: Are we going to see, do you think, a return of *Bush v. Gore*,⁷³ not in sense that the Supreme Court would be choosing our next president, but its use in other contexts even though in the language of the opinion the Court said it was deciding this case for this time?

What have you seen happening out in the land in terms of litigation involving *Bush v. Gore*?

ELIZABETH GARRETT: One of the most objectionable aspects of *Bush v. Gore* was that the Court said, in effect, "This is not an ordinary precedent. Our rationale is good for this case only."⁷⁴ The rule that judicial

69. *Id.* at 2657 (Robert, C.J., concurring in part, concurring in the judgment in part and dissenting in part).

70. *Id.* (Robert, C.J., concurring in part, concurring in the judgment in part and dissenting in part).

71. 478 U.S. 30 (1986).

72. *Perry*, 126 S. Ct. at 2618.

73. 531 U.S. 98 (2000).

74. *Id.* at 109 ("Our consideration is limited to the present circumstances, for the problem of

decisions have precedential value so that principles articulated in one decision will apply to similar decisions in the future is an important characteristic of judicial decision making. It is one way to keep judges modest—and it's necessary because, no matter how many times judges like Roberts claim to support judicial modesty, it is very hard to keep Justices modest. In fact, many do not really want to be modest; just like other political actors, they want to use the power that they have to reach results they support.

So our system uses features of institutional design to enforce modesty, and one key aspect of that design in the judicial realm is that judges will have to apply a principle articulated in one case to future cases that are similar. Judges know that in those subsequent cases, which they cannot entirely foresee when they make the initial decision, the principle may lead to decisions they are not going to like. That constrains them when they articulate the holding in the first place. Thus, the “one time only” feature of *Bush v. Gore* is particularly disturbing because the Justices are announcing that they are not going to be consistent over time, freeing themselves to ignore the equal protection holding when it would lead them to an outcome they do not like as much as selecting George W. Bush to be President.

The problem for the Supreme Court is that it cannot completely control how its decision will be used by lower courts—that is, whether lower courts will agree to view *Bush v. Gore* as precedent in the usual sense or as a “one case only” decision. The Court can enforce this only by agreeing to hear cases relying on the precedent, reversing them, and reiterating the unprincipled position that *Bush v. Gore* was a one-shot deal. Currently, a few courts have been using the equal protection holding of *Bush v. Gore* to invalidate some aspects of state election laws. We saw that in the Ninth Circuit in a case arising out of the recall of Governor Davis, where the panel relied on *Bush v. Gore* to uphold a challenge to punch card voting machines used in the most populous counties in California.⁷⁵ That decision was vacated by the Ninth Circuit sitting *en banc*,⁷⁶ but the rationale in *Bush v. Gore* is being used by lawyers arguing other election law cases, and sometimes they are succeeding in these claims.⁷⁷

equal protection in election processes generally presents many complexities.”). See also David A. Strauss, *What Were They Thinking?*, in *THE VOTE: BUSH, GORE AND THE SUPREME COURT* 184, 197-99 (Cass R. Sunstein & Richard A. Epstein eds., 2001).

75. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894 (9th Cir. 2003).

76. *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914 (9th Cir. 2003) (en banc).

77. *Black v. McGuffage*, 209 F. Supp. 2d 889, 898-99 (N.D. Ill. 2002); *Stewart v. Blackwell*, 444 F.3d 843, 859-62 (6th Cir. 2006). The decision in *Stewart* was vacated after the Sixth Circuit Court of Appeals granted a petition for rehearing of the case en banc. See Order Granting Rehearing

Certainly, if one takes the holding of *Bush v. Gore* seriously and considers it as ordinary precedent, it could have significant effects on election laws in this country, allowing claims when a state has voting machines or other practices that differ from one district to another and affect how votes are counted. Moreover, I think one could take the reasoning beyond differences within a state to use *Bush v. Gore* to attack differences in the electoral process among states. Why shouldn't we be concerned that differences in election procedures and technologies might cause an Oklahoman's vote in a national election to be treated differently from a Missourian's vote? If we take the holding in *Bush v. Gore* seriously, some of these variations in voting practices could lead to a great deal of judicial intervention, particularly because many of the rules and practices concerning elections are determined locally.

My guess is that if these cases begin to be brought to any great degree, the Supreme Court will take one of them, and we will find out if the Justices were really serious that *Bush v. Gore* was a precedent that was good for one time only.

AUDIENCE QUESTIONS FACILITATED BY PROFESSOR JAMES

PROFESSOR JAMES: Professor Garrett, one walks away from the *Sorrell* case thinking that Chief Justice Roberts wants to keep *Buckley* around basically to reflect his respect for stare decisis. Does this give us an insight into his general view on stare decisis, and can you comment on what we might look forward to in that regard?

ELIZABETH GARRETT: It is interesting that Roberts did not join Alito, who wrote, "Whether or not a case can be made for reexamining *Buckley* in whole or in part, what matters is that respondents do not do so here, and so I think it unnecessary to reach the issue."⁷⁸ This statement leaves the door open to reconsidering *Buckley*, and even signals a willingness to do so. I do not know, however, how much you can read into Chief Justice Roberts's decision to join Justice Breyer's discussion of stare decisis because I suspect he was driven by some of his "talk softly, try to speak unanimously" rhetoric. Overruling *Buckley* just was not an issue that was squarely before the Court or necessary for the decision. *Randall* could be decided in a way that Justice Alito and Chief Justice Roberts could join without taking on *Buckley*. After *Randall*, one imagines that there is going

En Banc, available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/EnBancOrder.pdf>. However, following a letter from the Appellants, and agreement by the Appellees, the case was dismissed as moot. See Order Dismissing the Case as Moot, available at <http://moritzlaw.osu.edu/blogs/tokaji/Order6C-Mootness.pdf>.

78. *Randall v. Sorrell*, 126 S. Ct. 2479, 2501 (2006) (Alito, J., concurring in part and concurring in judgment).

to be an opportunity in the future for the Court to reconsider *Buckley* in a case that presents the issue more directly and where it has been argued more thoroughly.

There are ample signs that many on the Court would be willing to reconsider *Buckley*. And that is not surprising—experience since *Buckley* strongly demonstrates that the bifurcated system it put into place makes no sense and leads to negative consequences. In my remarks, I noted the conservative Justices who I think would overrule *Buckley* and apply more rigorous scrutiny to contribution limits, but Justices from the other end of the political spectrum have also argued against the *Buckley* framework. For example, Justice Stevens writes in *Randall* that he would overrule *Buckley*, but he would allow more regulation, including expenditure limits.⁷⁹ Justice Marshall came to the conclusion that *Buckley* was flawed although he had joined the opinion in *Buckley*. Like Justice Stevens, he would have allowed more regulation of campaign finance under a new approach.⁸⁰

PROFESSOR JAMES: My follow-up to the previous question from, if one does away with *Buckley*, given your interests in providing certainty for state and local policy makers and then the PACS and folks who want to contribute, what do you replace it with? What kind of framework would you suggest?

ELIZABETH GARRETT: Whatever takes *Buckley*'s place—whether it is overruled in a way that Justices Scalia and Thomas want or whether it is revised in the direction advocated by Justice Stevens or that Justice Marshall might have wanted—it is bound to provide more certainty than the current jurisprudence. And in that respect, I suppose, either of those results would be better than the uncertainty we have now.

My own preference is to allow much more experimentation on the part of states and by the federal government. Thus, I have advocated that the Court should be especially deferential in this realm and in many cases dealing with the political process. The strength of our federal system is that we can experiment with public financing in one state, with relatively low contribution limits in another state, and with only very aggressive disclosure laws in other states. Such experimentation is my preference not only in the area of campaign finance, but in many cases dealing with various kinds of

79. *Id.* at 2506–07 (Stevens, J., dissenting).

80. *Fed. Election Comm'n v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 519 (1985) (Marshall, J., dissenting) (stating that he found no “constitutional significance” to the distinction between limitations on expenditures and restrictions on contributions).

political institutions. For example, I have argued that the Court erred in holding the blanket primary unconstitutional;⁸¹ rather, it should have been open to various forms of primaries and allowed the states to choose the form they wished, with room for change over time.⁸² Experimentation with respect to the political process—within some broad boundaries set forth by the minimal requirements of the Constitution—does not seem to be the Court’s preference, but it would be mine.

PROFESSOR KMIEC: Counting to five, you said you had difficulty doing that in the context of seeing *Buckley* overruled. There is, of course, Justice Stevens, who would overrule it, at least in the direction of suggesting limitations on expenditure. Justices Souter and Ginsburg seemed equally inclined in that direction by virtue of reminding people that *Buckley* did not eliminate restrictions on campaign expenditures, and talked about proving them by virtue of heightened scrutiny. You have no hope for the open mind of Sam Alito or John Roberts?

ELIZABETH GARRETT: I do not have much hope for Justice Alito. I think he signaled that if this issue had been presented to him squarely, he would have joined Justices Thomas and Scalia.

Chief Justice Roberts is the mystery here; Roberts is the question mark. What does it mean that he would not join Justice Alito, and that he did join the Breyer opinion concerning *stare decisis*? It is hard to figure that out just from the opinions themselves, without knowing the dynamics of the decision making within the Court and the developments as opinions were written. My guess is, given what we have seen so far, that he is more likely to be in the camp with Justices Alito, Scalia, Thomas, and Kennedy. But I think it will be interesting to learn his views in subsequent campaign finance cases.

After *McConnell*, many of us who work in this field thought, “We understand where the Court is going: it will show more deference to legislatures with respect to campaign finance laws.” Although I did not think that deference would extend to holding expenditure limitations constitutional, I thought virtually any restriction with respect to contribution limits would be held constitutional. Thus, there would be much more experimentation in this area in the states, in some cities, and, perhaps, at the federal level. After *Randall*, all bets are off. It is all unsettled again, and we are in the same position of uncertainty that we were in before *McConnell*. We need another big case to come down to give us more guidance.

81. See *Cal. Democratic Party v. Jones*, 530 U.S. 567, 571 (2000).

82. See Elizabeth Garrett, *Is the Party Over? Courts and the Political Process*, 2002 SUP. CT. REV. 95, 133 (2003).

PROFESSOR KMIEC: I guess I see—cite Justice Alito’s opinion a little bit more tentatively indicating that he just did not think the arguments had been presented, so kind of a—again, a judicial restraint exercise.

Is not Justice Stevens’s argument about the effect of expenditures the one that the public understands the best? That, in fact, it is no longer possible for most of the people in this room to run for public office and to pursue it successfully?

ELIZABETH GARRETT: Most Americans are upset with how the political process is working, and they think that the system is broken. But just as they are disturbed that it takes substantial amounts of money—spent by the candidates from their own funds or perhaps by well-to-do groups and individuals spending money for independent expenditures—to win elections in this country, there is also a common sense notion, expressed in Justice Thomas’s dissent,⁸³ that it is hard to imagine a contribution of \$251 as sufficient to corrupt a politician. Remember, those were the kinds of very stringent limits that the Court was considering here.

Do I think limitations as low as those Vermont enacted are wise policy? The answer is no. I do not see corruption at those levels. I think that is a common sense argument that Americans can understand. Do I think they are unconstitutional? No. But just because something is constitutional does not mean that it is good policy.

What the public thinks about the value of competition is another interesting question and may have some common sense answers. Some law and politics scholars think robust competition is one of the primary objectives for a political system and a value that the Court should aggressively enforce.⁸⁴ We should have really competitive elections, but we lack that now because of gerrymandering, campaign finance laws, and other incumbent-protecting structures. On the other hand, if you ask ordinary people about competition, they might want competition in other districts, but they would like to be able to be very sure that they could continue to elect somebody who shares their values and could continue to have that person represent them in office for a long time. In other words, incumbency is bad, except for their representative, and competition is good, unless it keeps them from electing the politician they want. Some political scientists have

83. *Randall*, 126 S. Ct. at 2506 (Thomas, J., concurring).

84. See, e.g., Samuel Issacharoff & Pamela S. Karlan, *Where to Draw the Line? Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 542 (2004).

observed that competition is something that scholars value more than average Americans do.⁸⁵

So I think the most you can say about the average American's view of the political process is that she thinks things are really broken, but she is not sure how to fix the process. That is why I think experimentation at the state level, together with greater judicial willingness to allow experiments with different institutions and reforms, would be a positive development for our democracy and for people's willingness to engage more actively with politics.

85. See Bruce E. Cain, *Election Law as a Field A Political Scientist's Perspective*, 32 *LOY. L.A. L. REV.* 1105, 1117–18 (1999).