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## FOREWORD

### A Pivotal Moment for Election Law

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The 2016 election cycle may go down as the most bizarre—and tumultuous—in recent memory. There were surprises, twists, and turns as both Republicans and Democrats whittled down their fields to choose their presidential nominees, culminating in a hard-fought general election battle.

A significant part of the debate involved an outsized personality. Yes, one man loomed large over it all: Justice Antonin Scalia.

Indeed, while Donald Trump may have garnered the most headlines, Justice Scalia's sudden death on February 13, 2016,<sup>2</sup> remained a less discussed, yet vitally important, aspect of the presidential campaign. The politics of choosing his replacement were obvious: Democrats wanted President Obama or Hillary Clinton to select Justice Scalia's successor, while Senate Republicans stalled in the hope that a Republican candidate would win the presidency and name a conservative to the Court. On March 16, 2016, President Obama nominated Judge Merrick Garland to the Supreme Court, but the Senate refused to hold a hearing or vote on his nomination.<sup>3</sup> Trump's victory in the 2016 election means that the Republicans' gamble on refusing to consider Judge Garland paid off and that Trump will choose the next Supreme Court Justice once he takes office.

If Hillary Clinton had won the presidential election, 2016 would have represented a major turning point in various areas, including election law. Many important election law cases of the past decade have been 5–4 decisions, with

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<sup>2</sup> Adam Liptak, *Antonin Scalia, Justice on the Supreme Court, Dies at 79*, N.Y. TIMES (Feb. 13, 2016), <http://www.nytimes.com/2016/02/14/us/antonin-scalia-death.html>.

<sup>3</sup> See Juliet Eilperin & Mike DeBonis, *President Obama Nominates Merrick Garland to the Supreme Court*, WASH. POST (Mar. 16, 2016), [https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-cb7c-11e5-a6f3-21ccdbc5f74e\\_story.html](https://www.washingtonpost.com/world/national-security/president-obama-to-nominate-merrick-garland-to-the-supreme-court-sources-say/2016/03/16/3bc90bc8-cb7c-11e5-a6f3-21ccdbc5f74e_story.html).

Justice Scalia joining the conservatives in the majority.<sup>4</sup> From redistricting to the Voting Rights Act to campaign finance to election administration, a new Justice could tip the balance on these issues and alter the doctrine. That possibility seemed quite likely with most polls projecting a Hillary Clinton win, but with Donald Trump now poised to take the White House, it is more probable that his appointee—who Trump has said will be someone with views similar to Justice Scalia’s—will maintain the conservative majority on these issues.<sup>5</sup> Yet without knowing whom precisely Trump will nominate, the potential still exists that some of this doctrine could change with a new Justice. Or, on the other end of the spectrum, a Trump appointee could solidify or even extend conservative election law jurisprudence for years to come. Either way, the future of election law will depend significantly on the new Supreme Court Justice.

The timing could not have been better, then, for the *Kentucky Law Journal* to host a symposium on election law.<sup>6</sup> Not only does this Issue come out just after the presidential election, but it also contains significant election law scholarship that could impact the Court post-Scalia. With a new Justice, some of the doctrinal underpinnings of election law are open to change; the articles in this Symposium Issue will be at the forefront of these developments.

In this brief Foreword to the Symposium Issue, I chronicle the importance of Justice Scalia’s death to election law jurisprudence and highlight the articles in this Issue that will shape the debate in the coming years. Part I looks at how a replacement for Justice Scalia could change, solidify, or extend various aspects of

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<sup>4</sup> See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014) (plurality opinion); *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013); *Citizens United v. FEC*, 558 U.S. 310 (2010); *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399 (2006); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (plurality opinion).

<sup>5</sup> Robert Barnes, *Trump’s victory has enormous consequences for the Supreme Court*, WASH. POST (Nov. 9, 2016), [https://www.washingtonpost.com/politics/courts\\_law/trumps-victory-has-enormous-consequences-for-the-supreme-court/2016/11/09/1ea52b3e-a671-11e6-ba59-a7d93165c6d4\\_story.html](https://www.washingtonpost.com/politics/courts_law/trumps-victory-has-enormous-consequences-for-the-supreme-court/2016/11/09/1ea52b3e-a671-11e6-ba59-a7d93165c6d4_story.html).

<sup>6</sup> The *Kentucky Law Journal* initially planned its Symposium for January 22, 2016, but Winter Storm Jonas, which hit Kentucky with over a foot of snow, required a last-minute postponement. The *Journal* rescheduled the Symposium for March 25, 2016, with an additional panel on Ned Foley’s book, *Ballot Battles: The History of Disputed Elections in the United States*, on April 1, 2016.

The panelists at the *Kentucky Law Journal* Symposium included Professors Atiba Ellis, Luis Fuentes-Rohwer, Mike Gilbert, Rebecca Green, Steve Huefner, Michael Morley, Mike Pitts, Lori Ringhand, Michael Solimine, Nick Stephanopoulos, Dan Tokaji, and Franita Tolson; and four Kentucky lawyers who practice election law, former Kentucky Secretary of State Trey Grayson, Eric Lycan, Jennifer Moore, and Scott White. Kentucky Secretary of State Alison Lundergan Grimes gave the keynote address. At lunch, Gregory Pettit and George Mills recounted the 1973 disputed mayoral election in Lexington, Ky., deemed “The Spider Election.” Professor Gilda Daniels initially planned to speak at the January 22 event, but could not make the rescheduled date; she still, however, provided a valuable contribution in an article for this Issue. Finally, Professor Ned Foley and two University of Kentucky historians, Professors Tracy Campbell and Mark Summers, discussed Professor Foley’s book *Ballot Ballots* on April 1, a week after the main event.

election law doctrine.<sup>7</sup> Part II then summarizes the seven articles in this Symposium Issue, explaining how fresh eyes on the Court could potentially give these proposals a boost.<sup>8</sup> This is a pivotal moment for election law. The *Kentucky Law Journal* articles in this Symposium Issue will lead the way.

### I. THE IMPACT OF A NEW JUSTICE ON ELECTION LAW

Election law cases have been among the most contentious disputes the Supreme Court has considered over the past several years. The Court has split, often 5–4, on important election law issues such as redistricting, the Voting Rights Act, campaign finance, and election administration. Justice Scalia typically voted with the conservative bloc. That conservative majority made it difficult to bring a successful challenge to a partisan gerrymander,<sup>9</sup> gutted a major provision of the Voting Rights Act,<sup>10</sup> struck down almost every campaign finance regulation it encountered,<sup>11</sup> and largely deferred to states in their Election Day processes.<sup>12</sup> Much of that doctrine and its theoretical foundations could shift with a new Justice. The likelihood of changed election law jurisprudence would have been greater had Judge Garland made it through the Senate confirmation process or had Hillary Clinton won the presidency—demonstrating the sheer importance of the 2016 election. But even a Trump-appointed Justice will face these issues and could alter—in either direction—how the Court considers them.

First, a new Justice could open the door for litigants to challenge a redistricting plan as an unlawful partisan gerrymander—a legal claim that Justice Scalia vehemently opposed. Justice Scalia wrote the plurality opinion in *Vieth v. Jubelirer*,

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<sup>7</sup> I wrote a blog post with some initial thoughts on the importance of Justice Scalia's death to election law a day after he passed away. See Josh Douglas, *Justice Scalia and Election Law*, PRAWFSBLAWG (Feb. 14, 2016, 12:46 PM), <http://prawfsblawg.blogs.com/prawfsblawg/2016/02/justice-scalia-and-election-law.html>. That blog post was republished on Newsweek's website. See Josh Douglas, Opinion, *How a New Justice Could Change Our Elections*, NEWSWEEK (Feb. 18, 2016, 11:16 AM), <http://www.newsweek.com/how-new-justice-could-change-our-elections-428140>.

<sup>8</sup> My focus in this Foreword is on how Justice Scalia's death opened the possibility of *any* new Justice to alter election law jurisprudence. Admittedly, however, either Judge Garland or a Hillary Clinton appointee likely would have presented a better chance at doctrinal reform than anyone Donald Trump will select.

<sup>9</sup> See *LULAC*, 548 U.S. 399; *Vieth*, 541 U.S. 267.

<sup>10</sup> See *Shelby Cty.*, 133 S. Ct. 2612.

<sup>11</sup> See, e.g., *McCutcheon v. FEC*, 134 S. Ct. 1434 (2014); *Citizens United v. FEC*, 558 U.S. 310 (2010). The first campaign finance rule that the Roberts Court upheld was a Florida law that regulated judicial candidates. See *Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015). Chief Justice Roberts joined the traditional “liberals” to uphold the law; Justice Scalia wrote a dissent. *Id.* at 1662, 1675.

<sup>12</sup> See *Arizona v. Inter Tribal Council of Ariz.*, 133 S. Ct. 2247 (2013); *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008); see also Joshua A. Douglas, *(Mis)trusting States to Run Elections*, 92 WASH. U. L. REV. 553, 553 (2015) (explaining that “the Court has been unjustifiably deferring to state laws regarding election administration, thereby giving states tremendous power to regulate elections”).

a 2004 case from Pennsylvania in which he said that there are no manageable standards available to separate “good” politics from “bad” in the redistricting context.<sup>13</sup> That is, he ruled that claims asserting unlawful political gerrymandering are nonjusticiable.<sup>14</sup> Although three other Justices joined Justice Scalia’s opinion,<sup>15</sup> Justice Kennedy refused to do so because he did not want to foreclose any possibility of a future standard emerging, perhaps under the First Amendment right to association.<sup>16</sup> Still, Justice Kennedy agreed that no standard had yet evolved that made sense.<sup>17</sup> Combining the plurality with Justice Kennedy’s opinion concurring in the judgment, the vote was 5–4 that no judicially manageable standards existed. The four dissenters—Justices Stevens, Souter, Ginsburg, and Breyer—all suggested judicial tests they believed would root out the worst partisan abuses in redistricting.<sup>18</sup> The votes were largely the same two years later in *League of United Latin American Citizens v. Perry* (*LULAC*). In that case, the Court again split 5–4 in rejecting a proposed standard for invalidating partisan gerrymanders that a legislature passes in the middle of a decade, when states are under no obligation to redistrict.<sup>19</sup>

Replacing Justice Scalia with a jurist who would give substantive force to a cause of action for partisan gerrymandering could alter this doctrine. If Justices Sotomayor and Kagan join Justices Ginsburg and Breyer in adopting a standard (which seems quite likely), then a new Justice would create a majority on the Court that is opposite from the majority in *Vieth* and *LULAC*. This majority could sanction a rule that allows courts to root out egregious partisan gerrymandering, even without Justice Kennedy’s vote.<sup>20</sup> A new Justice thus might allow courts to provide a remedy when partisanship drives map-drawing decisions too much. Indeed, ideology need not dictate one’s views on the justiciability of a partisan

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<sup>13</sup> See *Vieth*, 541 U.S. at 281, 299.

<sup>14</sup> See *id.* at 281.

<sup>15</sup> See *id.* at 270.

<sup>16</sup> *Id.* at 306, 314 (Kennedy, J., concurring in the judgment) (“I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”).

<sup>17</sup> See *id.* at 307–08.

<sup>18</sup> See *id.* at 318, 335 (Stevens, J., dissenting); *id.* at 346 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 355 (Breyer, J., dissenting).

<sup>19</sup> See *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 423 (2006) (plurality opinion) (rejecting claim that the very fact of a mid-decade redistricting suggests an unlawful partisan gerrymander).

<sup>20</sup> The Court will likely hear such a challenge soon after a new Justice takes his or her seat, as a three-judge district court in Wisconsin threw out the state’s map as an unlawful partisan gerrymander under a newly-formulated “efficiency gap” standard. See *Whitford v. Gill*, No. 15-cv-421, 2016 WL 6837229 (W.D. Wisc. Nov. 21, 2016) (three-judge court).

In addition, at least one state court has given judicial force to its state constitutional mandate forbidding partisan gerrymanders, invalidating a state legislative map because the legislature considered politics too much when drawing it. See *In re Senate Joint Resolution of Legislative Apportionment* 1176, 83 So. 3d 597, 638, 683 (Fla. 2012).

gerrymandering claim given that both sides do it when in power, so even a Trump appointee may be sympathetic to these suits.

Second, a new Justice could impact how the Court considers the constitutionality of the Voting Rights Act (“VRA”). In 2013, a 5–4 majority of the Court—with Justice Scalia joining the other conservatives—rendered dormant a major portion of the VRA, Section 5, by invalidating the coverage formula of the preclearance mechanism.<sup>21</sup> Under the preclearance rule of Section 5, certain “covered jurisdictions” with a history of racial discrimination were required to obtain preapproval, or “preclearance,” from the Department of Justice or a three-judge federal district court before making any changes to their voting processes.<sup>22</sup> The Court, however, struck down the formula that determined which jurisdictions were “covered” and thereby had to comply with the Section 5 preclearance requirement.<sup>23</sup> Yet it did not invalidate Section 5 itself. The majority opinion instead implied, in dicta, that it might strike down Section 5 in a future case given the “substantial federalism costs” the provision imposes.<sup>24</sup> Justice Thomas, concurring, argued that the Court should have gone further and ruled Section 5 unconstitutional.<sup>25</sup> Prior to Justice Scalia’s death, the writing was on the wall that, if Congress passed a new coverage formula, or if the federal government successfully places a jurisdiction under the preclearance requirement through Section 3 of the VRA (something it has considered for North Carolina and Texas given the racially discriminatory voting laws in those states),<sup>26</sup> then the whole preclearance mechanism might be in jeopardy.<sup>27</sup> In addition, scholars and voting rights advocates have harbored significant concerns that a conservative majority might invalidate Section 2 of the VRA, which prohibits discrimination in voting nationwide, as going beyond Congress’s authority.<sup>28</sup>

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<sup>21</sup> See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

<sup>22</sup> *Id.* at 2619–20.

<sup>23</sup> *Id.* at 2631.

<sup>24</sup> *Id.* at 2621, 2627.

<sup>25</sup> *Id.* at 2631 (Thomas, J., concurring).

<sup>26</sup> See Adam Liptak & Charlie Savage, *U.S. Asks Court to Limit Texas on Ballot Rules*, N.Y. TIMES (July 25, 2013), <http://www.nytimes.com/2013/07/26/us/holder-wants-texas-to-clear-voting-changes-with-the-us.html>.

<sup>27</sup> See Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *State’s Rights, Last Rites, and Voting Rights*, 47 CONN. L. REV. 481, 486 (2014) (noting that “*Shelby County* portends a realignment in voting rights law and policy”); Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379, 393 (2014) (explaining that “at least some of the justices are convinced that the decline in overt discrimination makes the Act’s intrusion on state sovereignty unprecedented and unwarranted”).

<sup>28</sup> See Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2158 (2015) (noting that *Shelby County* provided an “accelerant” to the “[l]ooming [t]hreats to Section 2”); Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 399 (2012). Cf. Franita Tolson, *What is Abridgment?: A Critique of Two Section Twos*, 67 ALA. L. REV. 433, 438 (2015) (arguing that Section 2 of the VRA is constitutional because

Had Hillary Clinton won the presidential election, then those concerns likely would have disappeared because her nominee could have created a new majority that would uphold the VRA. Now, with Donald Trump appointing Justice Scalia's successor, the VRA is still in a precarious place, hanging on by a thread. Section 2 may be in serious jeopardy.<sup>29</sup> Thus, the 2016 election may have a profound impact on the most powerful voting rights legislation of the past fifty years by solidifying the conservative bloc's effort to dismantle it, piece by piece. Supporters of the VRA have to hope that the new Justice will depart from Justice Scalia's views regarding the Act.

Third, the 2016 election could have begun a reversal in another major election law battle: campaign finance. Of course, *Citizens United v. FEC* is the big case.<sup>30</sup> The most important aspect of that case, however, was not the Court's holding that corporations and unions have a First Amendment right to use their general treasury money to run independent ads.<sup>31</sup> Instead, the doctrinal significance was the majority's definition of corruption. In *Buckley v. Valeo*, the first major campaign finance decision, the Court said that Congress may regulate money in politics to root out corruption or its appearance.<sup>32</sup> The Court has vacillated, however, on the definition of "corruption." At times, the Court has defined it broadly to include ingratiation and access.<sup>33</sup> But in *Citizens United*, the majority adopted a narrow definition of corruption as including only direct *quid pro quo* arrangements.<sup>34</sup> A narrow definition limits significantly the kinds of regulations Congress or states may enact.<sup>35</sup> The four Justices in dissent would have employed a much broader understanding of corruption, thereby allowing Congress and the states to regulate the various ways that money can have a corrupting influence on our elections.<sup>36</sup> The arguments played themselves out predictably four years later in *McCutcheon v. FEC*, in which the five-Justice conservative majority invalidated "aggregate" contribution limits, or the total amount of money an individual may give to all campaigns during an election cycle.<sup>37</sup> The next regulation to fall may be the

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"Congress does not have to amass a record of purposeful racial discrimination or action by the state in order to enact legislation that ensures broad enfranchisement in state and federal elections").

<sup>29</sup> A new Justice might also shore up the Section 5 framework, but the validity of that provision is unlikely to reach the Court unless Congress responds to *Shelby County* by passing a new coverage formula—which seems quite unlikely in today's political environment.

<sup>30</sup> *Citizens United v. FEC*, 558 U.S. 310 (2010).

<sup>31</sup> *Id.* at 365.

<sup>32</sup> See *Buckley v. Valeo*, 424 U.S. 1, 26–29 (1976).

<sup>33</sup> *McConnell v. FEC*, 540 U.S. 93, 153–54 (2003).

<sup>34</sup> *Citizens United*, 558 U.S. at 359–60.

<sup>35</sup> The Court applied *Citizens United* to the states in *American Tradition Partnership*, another 5–4 decision. *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam); see also *id.* (Breyer, J., dissenting).

<sup>36</sup> *Citizens United*, 558 U.S. at 447–48 (Stevens, J., concurring in part and dissenting in part). Justice Stevens wrote the dissent, which Justices Ginsburg, Breyer, and Sotomayor joined. *Id.* at 393.

<sup>37</sup> *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014).

individual contribution limit,<sup>38</sup> that is, the total amount an individual can give to one federal candidate (set at \$2,700 for 2016).<sup>39</sup>

A new Justice could either change that doctrine or entrench it for years to come. In particular, a Hillary Clinton nominee probably would have created a new 5–4 majority that would have re-adopted a broader definition of corruption, upheld contribution limitations, and allowed further regulation of the flow of money in politics. As Justice Stevens poignantly suggested at the end of his *Citizens United* dissent, “[w]hile American democracy is imperfect, few outside the majority of this Court would have thought its flaws included a dearth of corporate money in politics.”<sup>40</sup> The election could have changed that majority, leading the Court to overrule *Citizens United* and expand the definition of corruption to allow greater regulation of campaign finance more generally.<sup>41</sup> A Trump appointee, however, is more likely to fall in line with the conservative wing of the Court, thus solidifying or extending stringent campaign finance doctrine that forbids most regulation of money in politics. In short, although we do not yet know who Trump will appoint or how that person will rule, a presidential election that could have been a turning point in campaign finance law instead will probably result in the same (or greater) anti-regulation jurisprudence for years to come.

Finally, a new majority on the Court could apply greater judicial scrutiny to state election processes. Under current doctrine, the Court is too deferential to states in their election administration, producing decisions that generally allow politicians to enact voting rules that will help their electoral chances.<sup>42</sup> The Court

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<sup>38</sup> See, e.g., James Bopp, Jr., et al., *Contribution Limits After McCutcheon v. FEC*, 49 VAL. U. L. REV. 361, 389 (2015) (advocating that “[b]ecause of *McCutcheon*, key circuit court decisions that previously upheld limits on direct contributions to candidates are no longer legally sound”); Richard Briffault, *The Uncertain Future of the Corporate Contribution Ban*, 49 VAL. U. L. REV. 397, 398–99 (2015) (“[A]ssuming the Court continues to recognize the constitutional validity of contribution limits and to apply a less strict standard of review to contribution restrictions than to expenditure limits—admittedly a big ‘if’—the ban on corporate donations ought to pass constitutional muster.”); Richard L. Hasen, *Super PAC Contributions, Corruption, and the Proxy War over Coordination*, 9 DUKE J. CONST. L. & PUB. POL’Y 1, 15 (2014) (“Taken as a whole, *McCutcheon* calls the constitutionality of all contribution limits into question.”).

<sup>39</sup> *Contribution Limits for 2015-2016 Federal Elections*, FEC, <http://www.fec.gov/info/contriblimitschart1516.pdf> (last visited Aug. 5, 2016).

<sup>40</sup> *Citizens United*, 558 U.S. at 479 (Stevens, J., concurring in part and dissenting in part).

<sup>41</sup> For instance, the Court could allow Congress and the states to regulate money under an equality interest. See RICHARD L. HASEN, *PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS* 11 (2016). By adopting an equality rationale, a new Justice could join a new majority in overturning two recent cases, *Arizona Free Enterprise* and *Davis v. FEC*, which had invalidated “triggers” that kicked in based on the spending of an opponent. *Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2818, 2828 (2011); *Davis v. FEC*, 554 U.S. 724, 738–40 (2008). Overruling these cases could have the effect of making it easier to level the playing field between candidates, as well as help public financing systems remain viable (because a state could set the amount of public financing that a candidate receives based on the amount of money that a privately financed candidate is spending in the race).

<sup>42</sup> See Douglas, *supra* note 12, at 555–56. Of course, the one major exception to this deferential

uses a balancing test to evaluate laws that impact the constitutional right to vote.<sup>43</sup> For instance, in *Crawford v. Marion County Election Board*, the Court refused to invalidate Indiana's voter ID law because a majority of Justices found that the plaintiffs had not presented sufficient evidence of the burdens the law would impose on voters, while the state had an important interest in ensuring "election integrity."<sup>44</sup> But the state merely asserted a generalized interest in election integrity and safeguarding voter confidence; the Court did not press the state for specific evidence of the existence of in-person impersonation that the voter ID law would root out.<sup>45</sup> The result was a 6–3 decision, with Justice Stevens joining the more conservative Justices, to uphold the law.<sup>46</sup> Yet Justice Stevens's opinion for the plurality was narrower than Justice Scalia's opinion concurring in the judgment. Justice Stevens left the door open to future as-applied challenges with better evidence, while Justice Scalia would have largely foreclosed any challenges to a voter ID requirement.<sup>47</sup> The dissents in *Crawford* would have required the state to justify its burden on the right to vote with more specificity given that the law imposed a disproportionate harm on voters without a qualifying ID.<sup>48</sup>

Justice Kagan has replaced Justice Stevens, and given her overall jurisprudence, it is highly likely that she would agree with the dissenters in *Crawford*.<sup>49</sup> This means that the new Justice who takes Justice Scalia's seat could create a 5–4 majority that is skeptical of voter ID laws or other voting rules passed primarily for partisan gain. This issue may come to the Court quite soon, as litigation is ongoing in both North Carolina and Texas over their new voter ID requirements.<sup>50</sup> In

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approach was *Bush v. Gore*, in which the conservative majority (which included Justice Scalia) did not defer to Florida's processes in counting ballots. See *Bush v. Gore*, 531 U.S. 98, 107–08 (2000) (plurality opinion).

<sup>43</sup> *Burdick v. Takushi*, 504 U.S. 428, 432–34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (discussing the balancing test applied to state election laws, which weighs the character and magnitude of the plaintiff's asserted injury against the state's asserted interests and justifications).

<sup>44</sup> *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 195–96, 200, 202 (2008) (plurality opinion); see also *id.* at 204 (Scalia, J., concurring in judgment).

<sup>45</sup> *Id.* at 194 ("The record contains no evidence of any such fraud actually occurring in Indiana at any time in its history.").

<sup>46</sup> Justice Stevens wrote the Court's plurality opinion, joined by Chief Justice Roberts and Justice Kennedy. Justice Scalia concurred in the judgment, writing a separate opinion in which Justices Thomas and Alito joined. *Id.* at 184, 204. Justice Souter wrote a dissent, which Justice Ginsburg joined. *Id.* at 209. Justice Breyer also wrote a dissent. *Id.* at 237.

<sup>47</sup> Compare *id.* at 202 (plurality opinion), with *id.* at 205 (Scalia, J., concurring in the judgment).

<sup>48</sup> See *id.* at 209, 224 (Souter, J., dissenting, joined by Ginsburg, J.); *id.* at 237 (Breyer, J., dissenting).

<sup>49</sup> Given her more liberal ideology, it is also likely that Justice Sotomayor would agree on this issue with her predecessor, Justice Souter.

<sup>50</sup> See *N.C. State Conference of the NAACP v. McCrory*, Nos. 16-1468, 16-1469, 16-1474, 16-1529, 2016 U.S. App. LEXIS 13797, at \*70–71, 79–80 (4th Cir. July 29, 2016) (invalidating North Carolina election laws, including voter ID requirement, as the product of intentional racial discrimination); *Veasey v. Abbott*, No. 14-41127, 2016 U.S. App. LEXIS 13255, at \*141 (5th Cir. July 20, 2016) (striking down applications of Texas's voting photo identification requirement).

particular, the Court may face a constitutional challenge to these states' strict voter ID laws with better evidence of the burdens the laws impose on voters or a claim that the laws discriminate against minority voters and therefore violate Section 2 of the VRA. More broadly, a new five-Justice bloc could force states to justify their election regulations with greater specificity, giving teeth to the state interest prong of the constitutional analysis. Greater judicial scrutiny on state election administration laws would improve our democratic processes, as legislative majorities would enjoy less leeway to enact regulations with the goal of achieving partisan advantage. Renewed attention to a state's justifications for its election laws also would represent a triumph for a robust understanding of the constitutional right to vote. Again, we do not yet know how a Trump appointee will rule on these issues, and perhaps it is too much to hope that he or she will significantly alter the Court's approach to voting rights. But the opportunity is there anytime there is a new Justice, especially if that person will consider the issues independently and with an open mind. The evidence demonstrates that claims of voter fraud are overblown and that states impose too many restrictions on voters for no good reason. A new Justice who understands these facts should force states to justify their laws with greater specificity.

In sum, election law is at a crossroads. Having a new Justice on the Court could impact the doctrine in all aspects of the field, particularly given the close split in many of these cases. As of the publication of this Symposium Issue, we do not yet know who Donald Trump will appoint once he takes the oath of office. But this much is certain: had Hillary Clinton won, the 2016 presidential election would have been a major turning point in the field. With Donald Trump's victory, the prospect for change is dimmer, but doctrinal developments are still possible depending on who ultimately joins the Court.

## II. SCHOLARLY COMMENTARY ON ELECTION LAW DURING A SUPREME COURT VACANCY

This Symposium Issue of the *Kentucky Law Journal* contains important legal scholarship on election law amidst a Supreme Court vacancy. The scholars who contributed to this Issue began writing their articles before Justice Scalia died, so they did not necessarily craft their proposals with a Supreme Court opening in mind. That said, the Court could be more likely to consider their suggestions with a new Justice joining the bench.

The idea that probably will have the most traction in a newly constituted Supreme Court is Professor Luis Fuentes-Rohwer's push for the Court to stem the tide of partisan gerrymandering.<sup>51</sup> Professor Fuentes-Rohwer points to Justice Kennedy's concern about the possible "floodgates" of litigation as the main reason

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<sup>51</sup> See Luis Fuentes-Rohwer, *Who's Afraid of the Hated Political Gerrymander*, 104 KY. L.J. 561 (2016).

for the Court's reticence to these claims.<sup>52</sup> But, as he notes, the Court faced this same concern after *Baker v. Carr*, when it opened the judiciary to redistricting claims in general, and yet after *Baker*, "the Court's prestige and respect grew as a result of this intervention."<sup>53</sup> Justice Kennedy can learn from this history; but perhaps more importantly, a new Justice could join Justices Ginsburg, Breyer, Sotomayor, and Kagan to form a majority that would be more willing to strike down a redistricting plan as an unlawful partisan gerrymander. Ultimately, Professor Fuentes-Rohwer's history lesson on the Court's initial foray into redistricting disputes should prove particularly useful to a new Justice, who could provide the crucial fifth vote to root out the worst partisan abuses in redistricting.

Three of the articles in this Issue provide commentary on the voter ID debate and the Court's general approach to issues of race, class, and election administration.

Professor Gilda Daniels laments the Court's decision in *Shelby County*, which gutted the Section 5 preclearance mechanism of the VRA, and calls for "voting realism" as a response: "the need for racially aware legislation that corrects for past historical discrimination that continues to have contemporaneous effects on the right to vote."<sup>54</sup> A new Justice, reconsidering the reasoning in *Shelby County* that "things have changed dramatically" for racial minorities,<sup>55</sup> could construe more favorably election legislation that considers explicitly the continuing racial barriers to democratic participation. At a minimum, even if a Trump appointee will have similar views to Justice Scalia on the VRA, he or she still will have to grapple with Professor Daniels's analysis.

Professor Atiba Ellis's idea for reviving Section 5 by taking a "voter-friendly" approach is also worthy of a new Justice's consideration.<sup>56</sup> Professor Ellis, focusing on the clash of race and class on voting rights, proposes "a modification in the way we consider the right to vote generally through taking seriously, in a voter-friendly way, the concept of disparate impact and forcing the collective to bear the burden of effecting the core promise of the right to vote."<sup>57</sup> One problematic aspect of the Court's current election law doctrine is "the state-focused utilitarian balance developed through the *Crawford* line of jurisprudence,"<sup>58</sup> or what I have identified previously as the Court's overly deferential review of a state's interests in its election regulations.<sup>59</sup> That is, when considering the constitutionality of a state election administration rule, the Court has too readily agreed with a state's generalized

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<sup>52</sup> See Fuentes-Rohwer, *supra* note 51, at 580–81.

<sup>53</sup> *Id.* at 581.

<sup>54</sup> See Gilda R. Daniels, *Voting Realism*, 104 KY. L.J. 583, 586 (2016).

<sup>55</sup> *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2625 (2013).

<sup>56</sup> See Atiba R. Ellis, *Economic Precarity, Race, and Voting Structures*, 104 KY. L.J. 607 (2016).

<sup>57</sup> *Id.* at 611.

<sup>58</sup> *Id.* at 628.

<sup>59</sup> See Douglas, *supra* note 12, at 553.

justifications for a law, without probing more deeply.<sup>60</sup> But that deference to state election processes was largely the product of the conservative majority giving states too much leeway to run their election systems without much judicial oversight, as well as Justice Stevens's explication of the constitutional test in *Crawford*, the voter ID case.<sup>61</sup> A new Justice could recognize that states should not be able to satisfy the state-interest prong of the constitutional test by using simple platitudes such as "preserving election integrity." A new Justice instead could recognize the need for a "voter-friendly" approach that takes into account the disparate impact of many voting rules on racial minorities and lower-class citizens. In the process, our election administration will become more inclusive, ultimately improving our democracy.

Professor Mike Pitts, also entering the voter ID debate, suggests a "grand election bargain" for courts that compares a strict voter ID law with a state's pre-Election Day voter registration requirement: "a state's adoption of a strict photo identification law, such as Indiana's photo identification law, would result in that state's advance-registration requirement being declared unconstitutional by either the federal or state judiciary."<sup>62</sup> He hedges by noting that he is "perhaps too hopeful that the judiciary will start taking a stand in relation to how our elections are structured."<sup>63</sup> Yet a new Justice, even one that Trump appoints, might look more skeptically at voter ID requirements or lengthy pre-registration rules as politically motivated and thus constitutionally improper. The ultimate point is that our election laws should not be based on which side they will help or hurt at the ballot box. If a new Justice agrees that partisanship infiltrates election rules too much, then he or she could consider a "grand election bargain" that tells courts to strike down advance-registration rules in the face of other so-called integrity-enhancing measures such as voter ID laws.

Moving on to campaign finance, the story that Professor Mike Gilbert and his student Emily Reeder tell in their article on *McCutcheon v. FEC* offers a warning to a new Supreme Court Justice: question your underlying assumptions about how campaign finance actually works before ruling.<sup>64</sup> Professor Gilbert's and Ms. Reeder's analysis undermines the Court's recent decision in *McCutcheon*, which invalidated federal aggregate contribution limitations,<sup>65</sup> by showing that both base and aggregate contribution limits root out corruption in different ways. Their ultimate point is that the Court must be more careful in its underlying assumptions about the various effects of campaign finance regulations. Certainly a new Justice, coming to these issues somewhat fresh (or at least without the constraints of

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<sup>60</sup> See *id.* at 554.

<sup>61</sup> See *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189–91 (2008).

<sup>62</sup> See Michael J. Pitts, *Judicial "Enforcement" of a Grand Election Bargain*, 104 KY. L.J. 631, 632 (2016).

<sup>63</sup> *Id.* at 650.

<sup>64</sup> Michael D. Gilbert & Emily Reeder, *Aggregate Corruption*, 104 KY. L.J. 651 (2016).

<sup>65</sup> See *McCutcheon v. FEC*, 134 S. Ct. 1434, 1442 (2014).

binding precedent that stem from being on a lower court), could bring a new perspective to the Court's consideration of campaign finance rules.

A fresh viewpoint also could help Professor Michael Solimine's argument that the Court should not subject the products of direct democracy—ballot initiatives and referenda—to strict scrutiny and instead should treat laws enacted in this manner like ordinary legislation.<sup>66</sup> Professor Solimine, in agreeing with Justice Thomas's recent dissent in *Arizona State Legislature v. Arizona Independent Redistricting Commission*,<sup>67</sup> argues that there is nothing particularly unique about either the process or product of direct democracy that warrants heightened judicial scrutiny. A new Justice could provide a different perspective on how to review laws passed through this mechanism.

Finally, one article in this compilation lies completely outside of the judicial realm: Professor Rebecca Green's idea to use arbitration as a way to resolve post-election disputes about the winner.<sup>68</sup> Responding to Professor Ned Foley's new book, *Ballot Battles*,<sup>69</sup> which tells the history of disputed elections in America, Professor Green posits that pre-election arbitration agreements for a disputed election "could infuse greater fairness, predictability, and finality when election outcomes are uncertain."<sup>70</sup> Professor Green points out that the "potential of embroiling the judiciary in political mire is arguably at its peak when election outcomes are in dispute," as occurred in *Bush v. Gore*.<sup>71</sup> Of course, the highly partisan battle over a replacement for Justice Scalia demonstrates how the Supreme Court has become, in many ways, an overly ideological institution. Thus, it is not so much a new Justice him or herself, but the extremely political debate over who will choose that person, that lends support to Professor Green's proposal to resolve these extremely partisan disputes outside of the judiciary.

Ultimately, the seven articles in this Symposium Issue all have, at their core, the same goal: improving our election system. Most of the articles respond to a problem or concern about recent Supreme Court jurisprudence in this field. Justice Scalia's sudden death, and thus a replacement on the Court, provides greater opportunities for this scholarship to have a meaningful impact.

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<sup>66</sup> Michael E. Solimine, *Judicial Review of Direct Democracy: A Reappraisal*, 104 KY. L.J. 671 (2016).

<sup>67</sup> *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm.*, 135 S. Ct. 2652, 2697–99 (2015) (Thomas, J., dissenting).

<sup>68</sup> Rebecca Green, *Arbitrating Ballot Battles?*, 104 KY. L.J. 699 (2016).

<sup>69</sup> EDWARD B. FOLEY, *BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES* (2016).

<sup>70</sup> Green, *supra* note 68, at 700.

<sup>71</sup> *Id.*

## CONCLUSION

The articles in this Symposium Issue on election law will enter the pages of the *Kentucky Law Journal* amidst a lot of uncertainty—particularly on the identity of the next Supreme Court Justice and how that person will view election law doctrine.

But there are two things we can say with certitude. First, Justice Scalia's death created sudden instability in various areas of election law, with the potential of altered doctrine for redistricting, the VRA, campaign finance, and election administration. Second, legal scholars can impact this field in a meaningful way, with a renewed hope that a new Justice will be more amenable to their arguments than the Court has been in recent years. Reforming the Court's election law jurisprudence could result in a better functioning democratic process; entrenching or extending harmful precedents will impede that goal. The next Justice will play an important role in resolving these issues. The *Kentucky Law Journal* Symposium articles are at the forefront of that debate.