

The Supreme Court's Confused Election Law Jurisprudence: Should Competitiveness Matter?

I. INTRODUCTION

The Roberts Court handed down two election law decisions in its first Term. The decisions did not create significant change in the constitutional framework of election law. However, they did not leave a stable status quo, as the decisions, to a degree, contradict each other. In *Randall v. Sorrell*, six Justices struck down a Vermont campaign finance law but disagreed why it was unconstitutional.¹ In *League of United Latin American Citizens v. Perry (LULAC)*, five Justices declined to sustain a partisan gerrymandering claim, but disagreed on whether such claims could even state a valid cause of action.² Each lead opinion produced significant criticism from the concurring Justices, as well as vigorous dissents. The varied positions of the Justices suggest that the Court's temporary position on election law is unstable.

The rationales of *Randall* and *LULAC* exhibit a contradiction concerning electoral competitiveness. Justice Breyer's plurality opinion in *Randall* relied on the anticompetitive effects of the campaign finance law at issue to strike it down.³ However, Justice Kennedy's plurality opinion in *LULAC* ignored the anticompetitive effects of gerrymandering over the objections of the dissenters.⁴ It is difficult to see why electoral competitiveness should be important to the Constitution in one context but irrelevant in another, yet the Court's holdings yield just that result. Because electoral competitiveness involves important constitutional considerations, the Supreme Court should treat it consistently.

This Comment will explore the tension between these two decisions and the idea of electoral competitiveness as a factor in evaluating the constitutionality of election laws. Part II presents a brief survey of the degree and effects of electoral competitiveness in American politics. Part III gives a background on Supreme Court election law jurisprudence. Part IV examines *Randall* in depth, while Part V treats *LULAC*. Part VI

1. See 126 S. Ct. 2479 (2006).

2. See 126 S. Ct. 2594 (2006).

3. See *Randall*, 126 S. Ct. at 2495.

4. See *LULAC*, 126 S. Ct. at 2626.

analyzes the positions espoused by the Justices on the current Court and suggests possible directions that the Supreme Court could take to resolve the discrepancies in its electoral jurisprudence.

II. THE IMPORTANCE OF ELECTORAL COMPETITIVENESS

Despite the closeness of the last two presidential elections, American elections are not generally competitive. Gerrymandering⁵ has greatly reduced the degree of electoral competitiveness in the House of Representatives, as well as in many state legislatures.⁶ For example, American politics expert Michael Barone notes that the post-2000 Census redistricting cycle yielded “many bipartisan incumbent protection plans that left few seats at risk for either party.”⁷ The 2002 elections resulted in a House of Representatives in which only 39 out of 435 members had won with less than 55 percent of the vote.⁸ After 2004, this dropped to 26 members.⁹ Only twenty-three House elections in 2004 had a margin of less than 10 percent between the winning candidate and the runner-up.¹⁰ While the 2006 elections were more competitive, election

5. “The practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition’s voting strength.” BLACK’S LAW DICTIONARY 304 (2d pocket ed. 2005). Note that this definition of gerrymandering is incomplete, because some gerrymandering plans are bipartisan in nature, designed to protect all *incumbents* from competition, both those in the majority and those in the minority. See *infra* text accompanying note 7.

6. Gerrymandering is not the only explanation for general incumbent success, as incumbents enjoy several advantages in seeking reelection compared to their challengers. Incumbents tend to have higher name recognition, greater access to campaign funds, and fewer and less serious primary challengers, among other advantages. See, e.g., JOHN L. MOORE, *Incumbency*, in ELECTIONS A TO Z 226 (2003), available at <http://library.cqpress.com/elections/document.php?id=elaz2d-156-7510-403308&type=hitlist&num=10&> (discussing advantages of incumbency). However, incumbent advantage does not entirely explain the noncompetitiveness of most elections for the House of Representatives.

7. MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2004, at 44 (2003); see also David Lublin & Michael P. McDonald, *Is It Time To Draw the Line?: The Impact of Redistricting on Competition in State House Elections*, 5 ELECTION L.J. 144, 144 n.3 (2006) (“The claim that redistricting has reduced competitive elections appears in editorial pages across the political spectrum.”); Kenneth Jost, *Redistricting Disputes: Should the Courts Limit Partisan Gerrymandering?*, 14 CQ RESEARCHER NO. 10 (March 12, 2004), available at <http://library.cqpress.com/cqresearcher/document.php?id=cqresrre2004031200>

&type=query&num=redistricting+disputes& (“Republican-drawn maps in some key states helped the GOP gain House seats in the 2002 midterm congressional elections, which saw significantly less turnover than in similar elections during the last 30 years.”).

8. BARONE & COHEN, *supra* note 7, at 1786.

9. MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2006, at 1863 (2005).

10. CQ’S POLITICS IN AMERICA 2006, at vii (Jackie Koszczuk & H. Amy Stern eds., 2005).

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years of revolutionary change are the exception rather than the norm in American politics.¹¹

The general lack of electoral competitiveness causes many problems. That only 6 percent of the elections for the House of Representatives in 2004 were particularly competitive is troubling since the Founders intended the House, with its frequent elections, to be the part of the Federal Government closest to and most representative of the voters. James Madison thought that the Constitution would ensure that the House would “have an immediate dependence on, and an intimate sympathy with, the people.”¹² Particularly ironic is his statement that “we cannot doubt that . . . biennial elections, under the federal system, cannot possibly be dangerous to the requisite dependence of the House of Representatives on their constituents.”¹³ Today most Representatives are easily reelected if they want to stay in office. While the Constitution does not explicitly mandate that elections to the House be competitive, it seems likely that Madison would be surprised at how noncompetitive House elections have become.

Furthermore, bipartisan gerrymanders designed to protect incumbents arguably hurt the interests of the national political parties for the benefit of the incumbent politicians. For instance, pundits commenting before the 2006 elections noted that the Democrats, despite facing a weaker Republican party than in previous elections, faced difficulties recapturing a House majority because gerrymandering had reduced the number of seats in play.¹⁴ Analysis after the election suggests that Democrats captured fewer seats than they might otherwise have been able to absent gerrymandering.¹⁵ A political party that

11. To illustrate, partisan control of the House of Representatives has only switched twice since the mid-1950s: in 1994 and 2006. Over that same period, the Senate, less insulated from swings in public opinion, switched in 1980, 1986, 1994, 2001, 2002, and 2006.

12. THE FEDERALIST NO. 52, at 286 (James Madison) (J.R. Pole ed., 2005).

13. *Id.* at 287.

14. See Mickey Kaus, Re: Cake-baking, Kausfiles, Sept. 11, 2006, <http://www.slate.com/id/2149332/&#pelosihack> (last visited Jan. 25, 2007) (sarcastically observing that “[a]t least Nancy ‘I’m-going-to-become-Speaker’ Pelosi wasn’t such a shortsighted party hack that she raised money to defeat the [anti-gerrymandering] measure that would have gotten her party a third of the seats it needs [to regain control of the House]”); Larry J. Sabato, 2006 House, Sabato’s Crystal Ball, <http://www.centerforpolitics.org/crystalball/2006/house/> (last visited Jan. 25, 2007) (“Thanks largely to redistricting in recent years, Democratic efforts to ‘expand the playing field’ of competitive House races so as to make contestable the GOP’s relatively slim margin (within the broader historical context) have gone down in flames.”).

15. See, e.g., RealClearPolitics Poll Averages, http://www.realclearpolitics.com/polls/archive/?poll_id=14#data (last visited Jan. 25, 2007). The RCP poll averages from the run-up to the election show that the Democrats had a 11.5% lead on Republicans in the generic House vote. *Id.*

gerrymanders can protect some of its incumbents if the electorate turns against it; the cost of such insurance is that it foregoes the opportunity to gain more seats if the electorate turns against its opponents.

Lack of electoral competition causes other harms. Conventional wisdom among political pundits is that competitive races increase voter turnout, while noncompetitive races depress it. Political scientist André Blais analyzed several studies testing this conventional wisdom:

[T]he verdict is crystal clear with respect to closeness: closeness has been found to increase turnout in 27 of the 32 different studies that have tested the relationship, in many different settings and with diverse methodologies. There are strong reasons to believe that . . . more people vote when the election is close.¹⁶

Empirical data shows that when elections are close, more people vote; conversely, voters have less incentive to vote if they are gerrymandered into districts in which their votes will not affect the outcome.

Noncompetitive general elections may also lead to increased polarization of legislatures.¹⁷ Representatives who know that large majorities of voters in their districts are unlikely to vote for candidates of the other party are freer to discount views and positions of voters and legislators of that party. Furthermore, such representatives are likely to be more attentive to those voters who choose to vote in primary elections; those who vote in primaries tend to be more partisan and less moderate than voters in general elections.¹⁸ By focusing on the most partisan voters, legislators are more likely to favor extreme positions and to be less representative of the political center. Thus, a lack of electoral

This would translate into a 244-191 partisan split in the House if the election results perfectly mirrored voter preferences. However, the actual partisan split in the House for the 110th Congress appears (at this writing) to be 233-202. *CNN.com Elections 2006: House of Representatives*, CNN.COM, <http://www.cnn.com/ELECTION/2006/pages/results/house/> (last visited January 25, 2007). Conceivably, Democrats could have gained more seats in close races if gerrymanders had been replaced with more competitive plans.

16. ANDRÉ BLAIS, *TO VOTE OR NOT TO VOTE* 60 (2000).

17. See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 SUP. CT. REV. 409, 430 (“[B]ipartisan gerrymanders should predictably lead to greater polarization in congressional delegations.”); Samuel Issacharoff & Pamela S. Karlan, *Where To Draw the Line?: Judicial Review of Political Gerrymanders*, 153 U. PA. L. REV. 541, 574 (2004); Adam Raviv, *Unsafe Harbors: One Person, One Vote and Partisan Redistricting*, 7 U. PA. J. CONST. L. 1001, 1068 (2005) (“The creation of so many safe seats contributes to the polarization of American politics.”).

18. See Karen M. Kaufmann et al., *A Promise Fulfilled? Open Primaries and Representation*, 65 J. POL. 457, 465 (2003) (discussing research showing moderating influence of open primaries on primary electorates).

competition can lead to deadlocked legislatures in which extreme positions are overrepresented at the expense of more moderate (and perhaps representative) views.

Just as noncompetitive elections can harm the political process, competitive elections can help it. Competitive elections matter because political campaigns can have a positive influence on the electorate. For example, vigorous campaigns can benefit democracy by increasing voter knowledge.¹⁹ Candidates try to educate voters about their positions on issues that voters will likely view favorably, as well as to inform voters about their opponents' positions on issues that voters will likely view unfavorably. Thus, voters' knowledge of candidates' positions on issues improves as candidates get their messages out. Candidates disseminate messages in a variety of ways. Some ways are relatively costless—for instance, discussing issue positions during interviews with interested media outlets.²⁰ However, effectively disseminating campaign messages in a modern campaign for any congressional office also requires spending money—sending messages through mailings, telephone calls, radio or television advertisements, and even billboards.²¹ Generally, the more money candidates spend, the more effectively they can disseminate their preferred messages to the electorate. Some level of effective campaign spending is an essential prerequisite for a challenger to run a successful (or even competitive) campaign.²²

Conversely, less money will be spent educating the electorate by candidates challenging incumbents in noncompetitive districts. Donors tend to give strategically to candidates who have a significant chance of winning and to decline to fund candidates who are unlikely to win,

19. See John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757, 783 (2000) (“Our findings suggest that a stronger, though not unqualified, case can be made for the beneficial effects of spending. Overall, campaign spending neither increases nor decreases political trust, efficacy, or interest in and attention to campaigns. Spending does contribute to knowledge and affect. Accurate perceptions of the incumbent’s record are generally improved by incumbent spending and reduced by challenger spending, in practice typically producing a net result of more accuracy and more competitiveness that we believe benefits democratic elections.”).

20. JOHN L. MOORE, *Campaign, Basic Stages of*, in ELECTIONS A TO Z, *supra* note 6 (“Ads on television are the largest single expense in many campaigns, and candidates welcome free guest spots on TV and radio news and talk shows.”).

21. *See id.*

22. See Alan Gerber, *Estimating the Effect of Campaign Spending on Senate Election Outcomes Using Instrumental Variables*, 92 AM. POL. SCI. REV. 401, 410 (1998) (“I find that spending by both the challenger and the incumbent has large and statistically significant effects on vote shares. . . . Campaign finance, and specifically the level of incumbent spending, is a potentially critical factor in the competitiveness of congressional elections.”).

making it difficult for long-shot candidates to raise much money.²³ Thus, voters in noncompetitive districts tend not to hear the messages of challengers to the incumbent officeholder or incumbent party. Even incumbents in safe districts have less incentive to educate the general electorate, as such incumbents are unlikely to face significant opposition.

American elections are not as competitive as they could be. This lack of competitiveness causes harms including less informed voters, polarization of legislatures, decreased voter interest, and decline of democratic accountability to popular will by elected representatives. However, the Supreme Court has not systematically addressed these harms, though it has chosen to address other election-related harms, as discussed in the following Part.

III. SUPREME COURT ELECTION LAW PRECEDENTS

The Supreme Court began a major series of election law decisions in the 1960s with its “one person, one vote”²⁴ jurisprudence. It later addressed electoral districting and campaign finance.

A. One Person, One Vote

The Supreme Court began intervening in the “political thicket”²⁵ of election law in the early 1960s. In a series of cases from 1962 to 1964, the Warren Court invalidated malapportionment and instituted the one person, one vote standard at both the federal (House) and state (legislative) levels.²⁶ This standard is easy for courts to administer, as they must merely check to see if congressional and state legislative districts contain equal populations.²⁷

It is worth noting, however, that calling the constitutional rule the “one person, one vote” standard is somewhat misleading. The standard implies that each voter’s chance to affect an election is equal. However, voters’ chances of influencing an election can vary widely. In practice,

23. See JOHN L. MOORE, Incumbency, in ELECTIONS A TO Z, *supra* note 6, at 226.

24. Reynolds v. Sims, 377 U.S. 533, 558 (1964) (quoting Gray v. Sanders, 372 U.S. 368, 381 (1963)).

25. *Id.* at 566.

26. See *id.* at 568 (“[T]he Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”); Wesberry v. Sanders, 376 U.S. 1, 7–8 (1964) (“[A]s nearly as is practicable one man’s vote in a congressional election is to be worth as much as another’s.”); Baker v. Carr, 369 U.S. 186, 237 (1962) (holding that claims of inequitable malapportionment of state legislatures state a federal cause of action).

27. See 25 AM. JUR. 2D Elections § 12 (2006).

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the standard means that representatives represent approximately equal numbers of people, but that voters' chances to influence an election are not equal. Representatives do not even represent the same number of voters, as districts contain varying percentages of persons ineligible to vote due to age, statutory ineligibility, or noncitizenship.²⁸ Thus, a voter's chances of affecting the outcome of an election are not mathematically equal to those of voters in other districts, even before competitiveness is taken into account.

The disparity between voters' chances to affect elections is even greater when competitiveness is taken into account. Ironically, while fewer voters tend to vote in noncompetitive elections (meaning that each voter's vote is a larger fraction of the total votes cast), a voter's chances of affecting an election are greater in a higher-turnout, more competitive election because such an election tends to be closer. For instance, in a gerrymandered safe district in which sixty-five percent of voters identify with the incumbent's party, a voter of either party is unlikely to influence the election. In such a situation, voters can (and do) vote, but they are likely to realize that their votes did not influence the outcome, even if they supported the incumbent. However, in a more competitive district, such as one in which fifty-two percent of voters more closely identify with the incumbent's party and forty-eight percent of voters more closely identify with the challenger's party, a voter's vote is much more likely to influence the outcome. Supporters of a victorious incumbent are less likely to assume that she takes their votes for granted, and even supporters of a defeated challenger are more likely to think the incumbent must take their views into account, as her margin of support is slim enough that every vote will count in the next election.

The Supreme Court's statement that "one man's vote in a congressional election is to be worth as much as another's"²⁹ is not fulfilled through its equal population standard because a voter in a noncompetitive district has considerably less influence on the outcome of the race than a voter in a competitive district.³⁰ Electoral competitiveness and other factors affect a voter's ability to influence an election, so the

28. See, e.g., *Reapportionment: The Number of Seats*, in GUIDE TO U.S. ELECTIONS (John L. Moore, Jon P. Preimesberger & David R. Tarr eds., vol. 2, 2001), available at <http://library.cqpress.com/elections/gusel2-153-7238-393331> (noting that illegal aliens are included in population totals for reapportionment purposes).

29. *Wesberry*, 376 U.S. at 8.

30. See Nathaniel Persily, Thad Kousser & Patrick Egan, *The Complicated Impact of One Person, One Vote on Political Competition and Representation*, 80 N.C. L. REV. 1299, 1313 (2002).

Supreme Court's one person, one vote standard does not completely fulfill its stated goal.

The judiciary's involvement in election law did not end with ensuring that states followed the one person, one vote standard in their electoral districting. The Voting Rights Act, first passed by Congress in 1965,³¹ produced a flood of litigation, including several high-profile Supreme Court cases upholding and interpreting that statute.³²

The Supreme Court did not directly attack partisan gerrymandering as part of this burst of judicial activity on election law, deciding that gerrymandering remained a political question outside the competence of the courts.³³ In the early 1970s, Justice White noted for the Court that "we have not yet deemed it a denial of equal protection to deny legislative seats to losing candidates, even in those so-called 'safe' districts where the same party wins year after year."³⁴ In another majority opinion, he wrote that "[i]t would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it. Our cases indicate quite the contrary."³⁵

B. Partisan Gerrymandering

The Supreme Court later retreated from Justice White's sweeping language that safe seats and political gerrymanders were nonjusticiable. The Court implied that states violate the Constitution's guarantee of equal protection by gerrymandering voters into noncompetitive districts,³⁶ but then consistently failed to implement the rule in practice.³⁷

In 1986, while addressing the Republican-controlled Indiana Legislature's districting plan, the Court in *Davis v. Bandemer* held for the first time that partisan gerrymandering claims were justiciable.³⁸ However, the Justices did not agree on a standard to manage such claims,

31. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973-1973bb-4 (2006)).

32. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Perkins v. Matthews*, 400 U.S. 379 (1971); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

33. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971).

34. *Id.*

35. *Gaffney v. Cummings*, 412 U.S. 735, 752 (1973) (citations omitted).

36. See *Davis v. Bandemer*, 478 U.S. 109, 113 (1986).

37. See *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004).

38. *Bandemer*, 478 U.S. at 113.

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and did not strike down the Indiana plan as a partisan gerrymander.³⁹ Justices Brennan, White, Marshall, and Blackmun supported finding partisan gerrymandering justiciable. However, they declined to use a standard of only requiring plaintiffs to show a lack of proportionate representation of political parties.⁴⁰ Showing that the party that won forty percent of the vote did not capture forty percent of the seats would not be enough. Rather, the plurality would require showing that “the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively,”⁴¹ as well as “a threshold showing of discriminatory vote dilution.”⁴²

Justices Powell and Stevens would have applied a less demanding standard, directing courts to weigh factors including “shapes of voting districts,” “adherence to established political subdivision boundaries,” “the nature of the legislative procedures by which the apportionment law was adopted,” and “legislative history reflecting contemporaneous legislative goals.”⁴³ On the other hand, then-Chief Justice Burger and Justices Rehnquist and O’Connor would have held partisan gerrymandering claims to be nonjusticiable political questions.⁴⁴

After letting the lower courts grapple with the *Bandemer* result for nearly two decades, the Court revisited the partisan gerrymandering issue in 2004 in *Vieth v. Jubelirer*.⁴⁵ In *Vieth*, the Court analyzed another Republican-created gerrymandering plan, crafted by the Pennsylvania Legislature, but the Court again failed to reach consensus on how partisan gerrymandering claims should be handled.⁴⁶

Justice Scalia, joined by then-Chief Justice Rehnquist and Justices O’Connor and Thomas, argued that partisan gerrymandering cases were nonjusticiable due to “a lack of judicially discoverable and manageable standards for resolving [them].”⁴⁷ He argued that eighteen years of lower courts’ attempts to craft a manageable standard had been fruitless as the *Bandemer* plurality’s holding “has almost invariably produced the same

39. *Id.*

40. *Id.* at 132.

41. *Id.* at 133.

42. *Id.* at 143.

43. *Id.* at 173 (Powell, J., dissenting).

44. *Id.* at 144 (O’Connor, J., concurring).

45. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

46. *Id.*

47. *Id.* at 277–78 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

result (except for the incurring of attorney's fees) as would have obtained if the question were nonjusticiable."⁴⁸

Justice Kennedy, while concurring in the judgment, broke with the four-Justice plurality and argued that judicial review could be available for a partisan gerrymandering claim "if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases."⁴⁹ He suggested that technological advancement "may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties. That would facilitate court efforts to identify and remedy the burdens, with judicial intervention limited by the derived standards."⁵⁰

Justices Stevens, Souter, Ginsburg, and Breyer all dissented, presenting various standards they would have applied to gerrymandering claims. Justice Stevens would have required showing a lack of neutral criteria to justify a map that appeared to be drawn to maximize partisan advantage.⁵¹ Justices Souter and Ginsburg suggested a five-prong test⁵² including a showing of intentional "packing"⁵³ or "cracking"⁵⁴ and a departure from traditional districting principles, including "contiguity, compactness, respect for political subdivisions, and conformity with geographic features."⁵⁵ Justice Breyer suggested an analysis of several factors, including the frequency of redistricting, the departure from traditional redistricting criteria, the failure of a majority party to capture a majority of legislative seats, and the absence of mitigating factors, such as a third party upsetting the two-party status quo.⁵⁶ While the dissenters presented different standards to analyze partisan gerrymandering claims, they agreed that such claims should be justiciable.

48. *Id.* at 279.

49. *Id.* at 306 (Kennedy, J., concurring).

50. *Id.* at 313.

51. *Id.* at 339 (Stevens, J., dissenting).

52. *Id.* at 347-51 (Souter, J., dissenting).

53. "A gerrymandering technique in which a dominant political or racial group minimizes minority representation by concentrating the minority into as few districts as possible." BLACK'S LAW DICTIONARY, *supra* note 5, at 1140.

54. "A gerrymandering technique in which a geographically concentrated political or racial group that is large enough to constitute a district's dominant force is broken up by district lines and dispersed throughout two or more districts." *Id.* at 395.

55. *Vieth*, 541 U.S. at 348 (Souter, J., dissenting).

56. *Id.* at 365-67 (Breyer, J., dissenting).

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Two decades of arguing about partisan gerrymandering claims still left the Supreme Court deeply divided, with pluralities forcefully arguing each side of the question. Meanwhile, Justice Kennedy straddled the middle of the divide.

C. Campaign Finance

The Court has exhibited similar disagreement in its campaign finance jurisprudence. *Buckley v. Valeo*, decided in 1976, is the major precedent.⁵⁷ At issue in *Buckley* were significant amendments to the campaign finance laws that were enacted by Congress following the 1972 election.⁵⁸ While *Buckley's* sprawling per curiam opinion treated many issues raised by the complex legislation, the major holdings relevant to later campaign finance controversies established that a contribution limit imposed on donors did not violate political speech rights protected by the First Amendment, but that an expenditure limit imposed on candidates did.⁵⁹

With the passage of the Bipartisan Campaign Reform Act of 2002,⁶⁰ Congress gave the Supreme Court an opportunity to revisit many issues raised in *Buckley*. In *McConnell v. FEC*, a deeply divided Court used *Buckley* to largely uphold the newer, more restrictive campaign finance legislation against various plaintiffs' allegations that the legislation impermissibly burdened their political advocacy in violation of the First Amendment.⁶¹ However, the Court's long and complex opinion drew several dissents, from Justices Scalia⁶² and Thomas,⁶³ who criticized the precedents that the *Buckley* Court created,⁶⁴ and from Justice Kennedy⁶⁵

57. *Buckley v. Valeo*, 424 U.S. 1 (1976).

58. *See id.* at 6.

59. *See id.* at 58–59.

60. Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (2002) (codified as amended in scattered sections of titles 2, 18, 28, 36, and 47 U.S.C. (2006)).

61. *See McConnell v. FEC*, 540 U.S. 93 (2003).

62. *Id.* at 248 (Scalia, J., concurring in part and dissenting in part).

63. *Id.* at 266 (Thomas, J., concurring in part and dissenting in part).

64. *See, e.g., id.* at 257–58 (Scalia, J., concurring in part and dissenting in part) (criticizing the Court's decision in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which refused to strike down a statute which prevented corporate expenditures on behalf of a state political candidate as a violation of the First Amendment); *id.* at 272 (Thomas, J., concurring in the judgment in part and dissenting in part) (criticizing the majority's holding as “continu[ing] a disturbing trend: the steady decrease in the level of scrutiny applied to restrictions on core political speech”).

65. *Id.* at 286–87 (Kennedy, J., concurring in the judgment in part and dissenting in part).

and then-Chief Justice Rehnquist,⁶⁶ who criticized the way that the majority applied *Buckley*.

Nearly thirty years after *Buckley*, the Court's campaign finance precedents rested on the votes of a narrow five-Justice majority, including Justice O'Connor. Her retirement created the possibility that the Court could change direction on the constitutionality of campaign finance regulation under the First Amendment. With two new Justices, the Roberts Court addressed the issue of campaign finance restrictions in 2006 in *Randall v. Sorrell*.⁶⁷

IV. *RANDALL V. SORRELL*

A. *Facts*

In 1997, Vermont enacted the campaign finance law at issue in *Randall*.⁶⁸ The statute imposed strict expenditure limitations on candidates for statewide offices and seats in the state legislature, with incumbents facing slightly more restrictive limits on campaign spending than challengers.⁶⁹ The statute also imposed contribution limits on individuals, political committees, and political parties.⁷⁰ While the expenditure limits were indexed to inflation, the contribution limits were not.⁷¹ In addition, the contribution limits were the lowest of any state.⁷²

B. *Initial Judicial Review*

Various plaintiffs who had participated in the Vermont electoral process brought suit in federal district court, arguing that the campaign finance statute was unconstitutional in light of the First Amendment and the Supreme Court's *Buckley* precedent.⁷³ The district court found that

66. *Id.* at 351 (Rehnquist, C.J., dissenting in part).

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

68. *See* 1997 Vt. Acts & Resolves 63.

69. *See Randall*, 126 S. Ct. at 2486 (citing VT. STAT. ANN. tit. 17, § 2805a(a)–(e) (2002)). For example, non-incumbent candidates for governor could spend \$300,000 per two-year election cycle, while candidates for state representative in a single-member district could spend \$2000 per cycle. *Id.* Incumbents seeking reelection could spend \$255,000 and \$1800, respectively. *Id.*

70. *Id.* (citing VT. STAT. ANN. tit. 17, § 2805a). For example, individuals could not give more than \$400 to a gubernatorial campaign or more than \$200 to a campaign for a state representative. *Id.*

71. *Id.* at 2486.

72. *Id.* at 2493.

73. *See id.* at 2487.

the expenditure limits violated the First Amendment, but that most of the contribution limits were constitutional.⁷⁴ A divided Second Circuit panel largely disagreed. The circuit court found that all of the contribution limits were constitutional. It also found that the expenditure limits could be constitutional if narrowly tailored to the state's compelling interest in preventing corruption or the appearance thereof, and to its compelling interest in limiting the time incumbents spend fundraising.⁷⁵ All parties petitioned for certiorari, which the Supreme Court granted in 2005.⁷⁶

C. Supreme Court Review

A divided Supreme Court overturned both the expenditure limits and the contribution limits.⁷⁷ Justice Breyer wrote the plurality opinion for the Court, but only Chief Justice Roberts and Justice Alito joined his opinion.⁷⁸ Justice Kennedy filed a separate concurrence, as did Justice Thomas, with whom Justice Scalia joined.⁷⁹ Justices Stevens and Souter (joined by Justice Ginsburg) each wrote dissents.⁸⁰

Justice Breyer's plurality opinion held that the Court's precedent in *Buckley* necessarily controlled the outcome of the case with respect to the expenditure limitations and declined to reconsider *Buckley*'s holding that such limitations were unconstitutional.⁸¹ With respect to the contribution limits, Justice Breyer noted that *Buckley* did hold that limits "closely drawn" to a "sufficiently important interest," such as preventing corruption and the appearance thereof, were constitutional.⁸² However, he noted that the decision implied that at a certain point the limits become so strict that they run afoul of the First Amendment because they "magnify the advantages of incumbency to the point where they place challengers at a significant disadvantage."⁸³ Justice Breyer thus found that at some point, low contribution limits hurt electoral competitiveness too much, and that Vermont's limits seemed to fall below that point. He

74. *Id.*; The district court's opinion is reported as *Landell v. Sorrell*, 118 F. Supp. 2d 459 (D. Vt. 2000).

75. *Randall*, 126 S. Ct. at 2487; *Landell v. Sorrell*, 382 F.3d 91 (2d Cir. 2004).

76. *Randall*, 126 S. Ct. at 2487.

77. *Id.* at 2500.

78. Justice Alito did not join Parts II.B.1 and II.B.2 of the opinion, dealing with whether *Buckley* should be reconsidered. *Id.* at 2500 (Alito, J., concurring).

79. *Id.* at 2485 (plurality opinion).

80. *Id.*

81. *Id.* at 2491.

82. *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 25 (1976)).

83. *Id.* at 2492.

argued that “contribution limits that are too low can also harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing democratic accountability.”⁸⁴ Justice Breyer’s opinion thus signaled that electoral competitiveness is an important constitutional consideration.

Justice Breyer analyzed five factors with respect to the campaign finance law’s contribution limits: first, the suggestion in the trial record that the limits “will significantly restrict the amount of funding available for challengers to run competitive campaigns”;⁸⁵ second, the law’s effect on political parties, which held them to the same limits as individuals;⁸⁶ third, the law’s limits on volunteer services on behalf of a candidate;⁸⁷ fourth, the law’s failure to adjust the limits for inflation;⁸⁸ and fifth, the lack of special justification for the extremely restrictive nature of the limits.⁸⁹ Justice Breyer argued that these five factors suggested that the contribution limits were “not narrowly tailored” and “disproportionately burden[ed] numerous First Amendment interests.”⁹⁰ The First Amendment’s interest in protecting political speech and association rights thus overcame any state interest in regulating campaign finance. Because Justice Breyer used the law’s effect on electoral competitiveness as a factor in his analysis (particularly with respect to the first factor he listed), the plurality implicitly held that electoral competitiveness is an important interest protected by the First Amendment.

Justice Alito largely concurred with Justice Breyer, but as he thought the case did not directly present an opportunity to analyze whether *Buckley* should be overruled, he did not join the opinion as it pertained to whether revisiting *Buckley* in an appropriate case might be proper.⁹¹

Justice Kennedy, who had already opposed the Court’s application of *Buckley*,⁹² concurred that the contribution limits were unconstitutional by using the same reasoning he had already used to oppose a broad reading of *Buckley*, noting that important First Amendment speech and association rights were at stake.⁹³ He also noted that the Court’s

84. *Id.*

85. *Id.* at 2495.

86. *Id.* at 2496–97.

87. *Id.* at 2498.

88. *Id.* at 2499.

89. *Id.*

90. *Id.* at 2499–500.

91. *Id.* at 2500–01 (Alito, J., concurring).

92. *See supra* note 65 and accompanying text.

93. *Randall*, 126 S. Ct. at 2501 (Kennedy, J., concurring).

approach created difficulties, “requir[ing] us to explain why \$200 is too restrictive a limit while \$1,500 is not.”⁹⁴

Justices Thomas and Scalia also concurred in the result but disagreed with Justice Breyer’s *Buckley*-based rationale. They reiterated their opposition to the *Buckley* regime of limiting campaign contributions.⁹⁵ They “continue[d] to believe that *Buckley* provides insufficient protection to political speech, the core of the First Amendment.”⁹⁶ Rather than concerns about electoral competitiveness, they were motivated by a reading of the First Amendment as protecting political speech from regulation regardless of its effects.

Justice Stevens also disagreed with *Buckley*, but he dissented from the judgment.⁹⁷ Rather than disagreeing with *Buckley*’s holding on contribution limits, he would have overruled *Buckley*’s holding that expenditure limits are unconstitutional.⁹⁸ He argued that candidates could disseminate messages in ways that do not involve spending money, and that “a candidate need not flood the airways with ceaseless sound-bites of trivial information in order to provide voters with reasons to support her.”⁹⁹ Justice Stevens noted the free publicity that accompanied high-profile debates between presidential candidates in the elections of 1860, 1900, and 1960.¹⁰⁰ He also argued that expenditure limits are good policy because they reduce the time that candidates and their staffs spend fundraising.¹⁰¹ Like Justice Stevens, Justices Souter and Ginsburg also expressed doubt as to *Buckley*’s precedent on expenditure limits and thought that the contribution limits were not too low to survive judicial scrutiny under *Buckley*.¹⁰²

Figure 1 illustrates how the Justices voted in *Randall*, and whether they justified their votes with a concern for electoral competitiveness.

Rationale

94. *Id.*

95. *Id.* at 2501–02 (Thomas, J., concurring).

96. *Id.* at 2502.

97. *Id.* at 2506 (Stevens, J., dissenting).

98. *Id.*

99. *Id.* at 2508–09.

100. *See id.* at 2509.

101. *Id.* It is worth noting that candidates could spend less time fundraising if they were not required to raise funds from donors facing contribution limits. In a sense, therefore, the government creates the problem of increased time spent fundraising that it is attempting to solve by imposing expenditure limits.

102. *Id.* at 2511 (Souter, J., dissenting).

	<i>Randall</i>	Should not interfere with competitiveness	Interference with competitiveness allowed and/or irrelevant
Vote	Uphold the campaign finance scheme		Justice Stevens Justice Souter Justice Ginsburg
	Strike down the campaign finance scheme	Chief Justice Roberts Justice Breyer Justice Alito	Justice Kennedy Justice Scalia Justice Thomas

Figure 1: *Randall* Justice distribution.

While *Buckley* had purported to set forth the constitutional status of contribution and expenditure limits, support for its continuing influence was weak on the *Randall* Court. Of the nine Justices, three (Justices Kennedy, Scalia, and Thomas) expressly opposed strict contribution and expenditure limits, and three (Justices Stevens, Souter, and Ginsburg) expressly supported them.¹⁰³ The remaining three Justices (Chief Justice Roberts and Justices Breyer and Alito) applied *Buckley* to strike down Vermont's expenditure limits as completely barred and its contribution limits as too low in light of their effects.¹⁰⁴ A major justification for the plurality's decision to strike down Vermont's contribution limits as too strict was a concern for electoral competitiveness. However, concern for electoral competitiveness was less evident in the plurality decision in the Supreme Court's next election law opinion, *LULAC v. Perry*,¹⁰⁵ handed down two days after *Randall*.

V. *LULAC v. PERRY*

A. Facts

LULAC involved the 2003 redistricting plan that Texas Republicans drew to replace a court-imposed plan that had been used for the 2002 elections.¹⁰⁶ While the 2003 plan was indisputably gerrymandered to favor Republicans, the 2002 judge-drawn plan had largely left intact the 1991 gerrymander created by Democrats to favor Democratic

103. See fig.1.

104. See *id.*

105. *LULAC v. Perry*, 126 S. Ct. 2594, 2606 (2006).

106. *Id.*

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candidates.¹⁰⁷ In the 2000 elections, carried out under the 1991 plan, Democrats won seventeen of thirty House seats.¹⁰⁸ In the 2002 elections, under the court-drawn plan, the Democrats won seventeen of thirty-two seats.¹⁰⁹ The 2004 elections, under the new Republican gerrymander, left Democrats with eleven of the thirty-two seats.¹¹⁰ Meanwhile, voter preferences shifted toward the Republican Party as the Republican share of the statewide vote rose from 47 percent in 1990 to 58 percent of the vote in statewide races in 2004.¹¹¹

The various gerrymanders did not lead to electoral competitiveness. In 1992, only two candidates for Texas House seats won with less than 55 percent of the vote.¹¹² In 2002, only four candidates won with less than 55 percent of the vote.¹¹³ In 2004, only two successful candidates captured less than 55 percent of the vote.¹¹⁴ This same result occurred in 2006, despite some changes to the plan required by the Supreme Court's ruling.¹¹⁵

B. Initial Judicial Review

After the 2003 plan was enacted, various plaintiffs filed suit “alleging a host of constitutional and statutory violations,” including partisan gerrymandering claims and allegations that the redistricting plan violated the Voting Rights Act.¹¹⁶ The district court initially held that the plan was legal, but the Supreme Court vacated and remanded that decision in 2004 in light of its just-issued *Vieth* decision.¹¹⁷ On remand, the district court judge would have struck down the plan on the theory that mid-decade redistricting violates the one-person, one-vote standard,

107. *Id.* at 2605–06.

108. *Id.* at 2606.

109. *Id.*

110. *Id.*

111. *Id.* at 2605–06.

112. Office of the Secretary of State, Race Summary Report (Nov. 3, 1992), <http://elections.sos.state.tx.us/elchist.exe> (select “1992 General Election” and click “Submit”).

113. Office of the Secretary of State, Race Summary Report (Nov. 5, 2002), <http://elections.sos.state.tx.us/elchist.exe> (select “2002 General Election” and click “Submit”).

114. Office of the Secretary of State, Race Summary Report (Nov. 2, 2004), <http://elections.sos.state.tx.us/elchist.exe> (select “2004 General Election” and click “Submit”).

115. See CNN.COM, State Races: Texas, <http://www.cnn.com/ELECTION/2006//pages/results/states/TX/index.html> (last visited Jan. 25, 2007). A *LULAC* plurality did strike down one district on statutory grounds as violating the Voting Rights Act; this required slight changes to the Texas map, despite the fact that the rest of the map survived the constitutional challenges.

116. *LULAC*, 126 S. Ct. at 2607.

117. *Id.* *Vieth* is discussed *supra* in text accompanying notes 45–56.

but refrained from doing so because he believed that that argument was outside the scope of the Supreme Court's remand.¹¹⁸ The Supreme Court again granted review of the district court's decision, analyzing the 2003 plan in light of constitutional equal protection requirements and statutory requirements under the Voting Rights Act. For purposes of this Comment, only the constitutional claims are considered.

C. Supreme Court Review

Justice Kennedy wrote the opinion of the Court, largely upholding the 2003 plan.¹¹⁹ He stated that a majority of the Court still believed, as it had in *Vieth*, that partisan gerrymandering claims could be justiciable.¹²⁰ He then proceeded to analyze whether the plaintiffs presented a manageable standard for judicial analysis of partisan gerrymandering claims that the Court could apply.¹²¹ Justice Kennedy declined to adopt the plaintiffs' theory that mid-decade redistricting should be considered presumptively unconstitutional under the Equal Protection Clause and First Amendment.¹²² He also rejected their theory that mid-decade redistricting violated the one person, one vote standard, noting that the plurality "disagree[d] with appellants' view that a legislature's decision to override a valid, court-drawn plan mid-decade is sufficiently suspect to give shape to a reliable standard for identifying unconstitutional political gerrymanders."¹²³ Thus, Justice Kennedy still favored treating partisan gerrymandering claims as justiciable, but again gave no standard for the courts to analyze such claims. His vote, along with the votes of Chief Justice Roberts and Justices Scalia, Thomas, and Alito (discussed below), enabled the plan to withstand the partisan gerrymandering challenge, over dissent from the other four Justices.

Justice Stevens, joined by Justice Breyer, would have held mid-decade redistricting plans created for partisan reasons unconstitutional as political gerrymanders.¹²⁴ Analyzing the Texas plan, Justice Stevens highlighted electoral competitiveness concerns by arguing that

118. *LULAC*, 126 S. Ct. at 2607.

119. *Id.* at 2605. Justice Kennedy did join the four dissenting Justices to strike down one district as violating the Voting Rights Act; this facet of the decision is outside the scope of this Comment. *See id.*

120. *Id.* at 2607.

121. *Id.*

122. *Id.* at 2609.

123. *Id.* at 2611–12.

124. *Id.* at 2626, 2634 (Stevens, J., concurring in part and dissenting in part).

Republican legislators from safe seats would be less likely to represent the needs of Democratic constituents.¹²⁵ He also noted that “[s]afe seats may harm the democratic process in other ways,” including diminishing voter interest, reducing turnout, and polarizing legislatures.¹²⁶

Justice Souter, joined by Justice Ginsburg, voted to dismiss the partisan gerrymandering challenge in light of the Court’s continued inability to agree on a standard for impermissible gerrymanders, and thus considered that issue “the subject of an improvident grant of certiorari.”¹²⁷ However, he reiterated his desire to find a standard that the Court could agree on and noted that he disagreed with Justice Kennedy’s “seemingly flat rejection of any test of gerrymander turning on the process followed in redistricting.”¹²⁸ Justice Breyer also wrote separately to discuss his opposition to the Texas gerrymander as it, in his view, violated the Equal Protection Clause by “overwhelmingly rel[ying] upon the unjustified use of purely partisan line-drawing considerations.”¹²⁹

On the other hand, Chief Justice Roberts, joined by Justice Alito, reserved judgment on whether partisan gerrymandering claims are justiciable.¹³⁰ Justice Scalia, joined by Justice Thomas, reiterated his opposition to treating gerrymandering claims as justiciable.¹³¹ He criticized Justice Kennedy’s opinion for “conclud[ing] that the appellants have failed to state a claim as to political gerrymandering, without ever articulating what the elements of such a claim consist of. . . . [W]e again dispose of this claim in a way that . . . perpetuates a cause of action with no discernable content.”¹³²

Figure 2 illustrates how the Justices voted in *LULAC*, and whether they justified their votes with a concern for electoral competitiveness.

Rationale

<i>LULAC</i>	Should not interfere with competitiveness	Interference with competitiveness allowed and/or not mentioned
Uphold the gerrymander		Chief Justice Roberts Justice Scalia

Vote

125. *Id.* at 2639.

126. *Id.* at 2640 n.10 (citations omitted).

127. *Id.* at 2647 (Souter, J., concurring in part and dissenting in part).

128. *Id.* (citation omitted).

129. *Id.* at 2652 (Breyer, J., concurring in part and dissenting in part).

130. *Id.* (Roberts, C.J., concurring in part and dissenting in part).

131. *Id.* at 2663 (Scalia, J., concurring in part and dissenting in part).

132. *Id.*

		Justice Kennedy Justice Souter* Justice Thomas Justice Ginsburg* Justice Alito
Strike down the gerrymander	Justice Stevens	Justice Breyer

*Only voted to dismiss constitutional challenge because the Justices could not agree on a standard (*see supra* note 127 and accompanying text).

Figure 2: *LULAC* Justice distribution.

Thus, five Justices (Stevens, Kennedy, Souter, Ginsburg, and Breyer) agreed that partisan gerrymandering claims are justiciable, but did not agree on a standard for courts to apply to such claims.¹³³ Justice Kennedy voted to uphold the plan, while the other four would have preferred to strike it down as overly partisan under their preferred standards.¹³⁴ Justice Stevens highlighted concerns with the plan's effect on electoral competitiveness, but no other Justice directly addressed the issue.¹³⁵ Two Justices (Scalia and Thomas) treated partisan gerrymandering claims as nonjusticiable, while the Court's newest two Justices (Chief Justice Roberts and Justice Alito) reserved judgment on the issue.¹³⁶

VI. ANALYSIS

In one Term, the Supreme Court held that campaign finance laws cannot overly impinge on electoral competitiveness, but refrained from making a similar holding with respect to electoral districting. The *Randall* plurality held that overrestrictive campaign finance regulations harm electoral competitiveness, and that too much harm to electoral competitiveness violates First Amendment rights in the context of campaign finance restrictions.¹³⁷ However, most of the Justices who voted to strike down the campaign finance regulations at issue in *Randall* voted to uphold the Texas Legislature's anticompetitive gerrymander in *LULAC*.¹³⁸ These Justices implicitly held that competitiveness is not a

133. *See* fig. 2.

134. *Id.*

135. *Id.*

136. *Id.*

137. *See supra* notes 81–90 and accompanying text.

138. Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Alito voted with the plurality in both cases.

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fundamental consideration when analyzing redistricting, either under the First Amendment or under the Equal Protection Clause. Thus, insofar as the same constitutional values should govern all areas of election law, the Justices' rationales and positions do not seem to be entirely consistent. Electoral competitiveness seems to matter greatly in one context, but not in another. This Part gives a rough analysis of each Justice's position with respect to this conflict and looks at possible ways to harmonize the Court's jurisprudence to make it more coherent.

Figure 3 illustrates whether the Justices justify their votes with a concern for electoral competitiveness in campaign finance regulation and electoral districting cases, while Figure 4 shows how the Justices have actually voted in such cases.

Campaign Finance Regulation

Electoral Districting		Explicitly favors electoral competitiveness as constitutionally relevant (<i>Randall</i> plurality)	Interference with electoral competitiveness ignored
	Explicitly favors electoral competitiveness as constitutionally relevant	QUADRANT 1	QUADRANT 3 Justice Stevens
	Interference with electoral competitiveness ignored (<i>LULAC</i> plurality)	QUADRANT 4 Chief Justice Roberts Justice Breyer Justice Alito	QUADRANT 2 Justice Scalia Justice Kennedy Justice Souter Justice Thomas Justice Ginsburg

Figure 3: Rationales

Campaign Finance Regulation

Electoral Districting		Votes for electoral competitiveness outcome (<i>Randall</i> plurality)	Votes against electoral competitiveness outcome
	Votes for electoral competitiveness outcome	Justice Breyer	Justice Stevens Justice Souter Justice Ginsburg
	Votes against electoral	Chief Justice Roberts	

competitiveness outcome (LULAC plurality)	Justice Scalia Justice Kennedy* Justice Thomas* Justice Scalia*	
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*Declined to join holding that electoral competitiveness is important.

Figure 4: Actual votes

A. The Justices' Positions

1. Justice Breyer

Justice Breyer's position is perhaps the most internally coherent. In *LULAC*, he voted to treat partisan gerrymanders as a violation of the Equal Protection Clause,¹³⁹ and his opinion in *Randall* demonstrates concern about the effects of restrictive campaign finance regulations on electoral competitiveness.¹⁴⁰ His positions on both issues can be reconciled with a desire to treat electoral competitiveness as an important value protected by the Constitution.

2. Justice Kennedy

Justice Kennedy's position is similar to Justice Breyer's. He expressed "skepticism" at how much campaign finance restriction the Court allows¹⁴¹ and concern about the effects of gerrymandering on the political process.¹⁴² However, unlike Justice Breyer, Justice Kennedy seems to oppose campaign finance restrictions on First Amendment grounds without regard to electoral competitiveness. Justice Kennedy also departs with Justice Breyer in that he has not actually voted to strike down a state electoral districting plan. Instead, he expressed concern over finding an appropriate role for the courts in settling partisan gerrymandering disputes. Rather than "commit federal and state courts to unprecedented intervention in the American political process," he would apply "some limited and precise rationale . . . to correct an established violation of the Constitution in some redistricting cases."¹⁴³ However, he has not yet approved of any such standard.¹⁴⁴ Justice Kennedy, while

139. *LULAC*, 126 S. Ct. at 2652 (Breyer, J., concurring in part and dissenting in part).

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

141. *Id.* at 2501 (Kennedy, J., concurring in the judgment).

142. *See Vieth v. Jubelirer*, 541 U.S. 267, 316–17 (2004) (Kennedy, J., concurring).

143. *Id.* at 306.

144. *See LULAC*, 126 S. Ct. at 2611.

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appearing to value electoral competitiveness, treats other values such as judicial caution as more important than competitiveness.

3. Justice Stevens

Although he most directly addressed the anticompetitive effects of the Texas gerrymander in *LULAC*,¹⁴⁵ Justice Stevens showed little concern for the anticompetitive effects of the law at issue in *Randall*. His *Randall* opinion's only discussion of electoral competitiveness was to note that available evidence did not conclusively prove that all expenditure limits were designed to or actually did protect incumbents from challengers.¹⁴⁶ Problematically, his argument that "a legislative judgment" on campaign finance "should command the greatest possible deference from judges"¹⁴⁷ fails to explain how courts should preserve electoral competitiveness if legislators craft campaign finance laws that encumber their opponents' ability to mount effective challenges.

Rather than letting candidates spend time and money crafting issue advertising to appeal to an inattentive public, Justice Stevens would have candidates rely more on free publicity, such as media and debates.¹⁴⁸ However, his examples of publicity attending high-profile presidential debates are likely unpersuasive to a congressional candidate challenging an entrenched incumbent. The media is less interested in races without interesting storylines, and many voters are generally inattentive to politics. While presidential candidates can generate much free publicity, candidates for less prominent offices simply cannot rely on a generous media to disseminate their messages. Candidates at all levels use paid advertising—television and radio commercials, mail, and even telephone calls.¹⁴⁹ All of these methods cost money—money that Justice Stevens' approach could leave unavailable. Because a significant amount of campaign spending is necessary to run a competitive campaign in most circumstances, Justice Stevens' jurisprudence would offer little protection to electoral competitiveness in a spending context, regardless of his stated desire to overturn all anticompetitive partisan gerrymanders.

145. *See id.* at 2640 (Stevens, J., concurring in part and dissenting in part).

146. *Randall*, 126 S. Ct. at 2510 (Stevens, J., dissenting).

147. *Id.*

148. *Id.* at 2508–09.

149. *See supra* notes 20–22 and accompanying text.

4. *Justices Souter and Ginsburg*

Justices Souter and Ginsburg both take an approach similar to Justice Stevens, though they do not attack the anticompetitive nature of gerrymandering as strongly as Justice Stevens did in *LULAC*. Both Justices' opinions are hostile to gerrymandering, but supportive of regulation of candidates' campaign financing in both competitive and noncompetitive races.¹⁵⁰

5. *Justices Scalia and Thomas*

While Justices Scalia and Thomas have repeatedly reiterated their opposition to limiting what candidates for office can say and spend,¹⁵¹ they promote less of a judicial role in regulating the districts in which the candidates run for office. Neither would allow a cause of action for partisan gerrymandering, allowing the most anticompetitive districting plans to stand.¹⁵² Thus, their approach is inconsistent with the *Randall* plurality's attention to electoral competitiveness in evaluating campaign finance regulations. They note this disagreement in their concurrence: "[t]he illegitimacy of *Buckley* is further underscored by the continuing inability of the Court (and the plurality here) to apply *Buckley* in a coherent and principled fashion."¹⁵³ These Justices would prefer to strike down campaign finance regulations under the First Amendment without regard to electoral competitiveness, and they view the courts as unable to address the effects of gerrymandering on electoral competitiveness.

6. *Chief Justice Roberts and Justice Alito*

While Chief Justice Roberts did not directly express doubt about *Buckley*'s continued viability in the same way that Justice Alito did,¹⁵⁴ both Justices' positions are similar. Though both Justices seem to be weak supporters of *Buckley*, neither was moved by the anticompetitive nature of the partisan gerrymander that they declined to strike down in *LULAC*. They did, however, reserve judgment on whether any partisan gerrymandering standard could be crafted in a future case that presented

150. See, e.g., *LULAC*, 126 S. Ct. at 2647 (Souter, J., concurring in part and dissenting in part); *Randall*, 126 S. Ct. at 2511 (Souter, J., dissenting).

151. See, e.g., *Randall*, 126 S. Ct. at 2502 (Thomas, J., dissenting).

152. See *LULAC*, 126 S. Ct. at 2663 (Scalia, J., concurring in part and dissenting in part).

153. *Randall*, 126 S. Ct. at 2502 (Thomas, J., dissenting).

154. *Id.* at 2500–01 (Alito, J., concurring in part).

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the issue more directly to the Court.¹⁵⁵ These two Justices' positions seem the most inconsistent—they joined Justice Breyer in saying the competitiveness is important, but voted against him to uphold an anticompetitive gerrymander. The Court's newest Justices will be forced to face the tension between the rationales for their votes in *Randall* and *LULAC* as they continue to craft their Supreme Court jurisprudence.

B. Potential Solutions

Though the Supreme Court's jurisprudence regarding election law is somewhat internally inconsistent, it could attain a more coherent jurisprudence. The Constitution does not explicitly mandate that legislative elections be as competitive as possible, though the Framers certainly seemed to expect that frequent elections would keep the government dependent on the people, not lead to entrenched incumbency in the House of Representatives.¹⁵⁶ The Court therefore can craft a coherent jurisprudence without demanding that the courts enforce electoral competitiveness as a constitutional value. However, the Court faces a more difficult task in attempting to create a persuasive jurisprudence in which electoral competitiveness is treated as an essential value under the First Amendment in one context but irrelevant in another. The Justices' positions in *Randall* and *LULAC* suggest four possible broad approaches to this dilemma, two of which are internally consistent, while two are inconsistent. This section first analyzes the consistent solutions, followed by the inconsistent ones.

1. Consistent solutions

*a. Electoral competitiveness as a constitutional value (quadrant 1).*¹⁵⁷ One solution to the current inconsistency would be for the Court to explicitly embrace electoral competitiveness as a value implied by the First and Fourteenth Amendments. The *Randall* plurality held that the potential for noncompetitive elections showed that the campaign finance law at issue infringed on the First Amendment's protection of democratic discourse too much.¹⁵⁸ Meanwhile, the *LULAC* Justices who dissented as to the partisan gerrymander claim noted the First Amendment value of

155. *LULAC*, 126 S. Ct. at 2652 (Roberts, C.J., concurring in part and dissenting in part).

156. See *supra* notes 12–13 and accompanying text.

157. See fig.3.

158. See *Randall*, 126 S. Ct. at 2485, 2495.

political association and the Fourteenth Amendment value of equal protection to justify their desire to strike down partisan gerrymanders.¹⁵⁹

If Justice Kennedy finds a standard that he supports by which courts can evaluate excessively partisan gerrymanders, and begins voting to strike down such plans, this approach—valuing electoral competitiveness as a constitutional value—would likely result. In any event, Justice Kennedy seems close to this approach now, as does Justice Breyer. Chief Justice Roberts and Justice Alito, who reserved judgment on whether a standard to judicially manage partisan gerrymandering claims could exist, could also pursue this approach if they decide that such standards exist when evaluating a case that squarely presents the issue. If they move in this direction, the Court could conceivably have a bloc of up to seven Justices—every Justice except Justices Scalia and Thomas—voting to impose some type of standard whereby courts could invalidate excessive gerrymandering. Meanwhile, a plurality (Chief Justice Roberts and Justices Breyer and Alito) would skeptically evaluate campaign finance regulations in light of their effect on electoral competitiveness, and join with the Justices who oppose all campaign finance regulation to strike down schemes that unduly limit the ability of challengers to mount a competitive campaign. This approach would lead to judicial protection of electoral competitiveness in multiple contexts in election law.

A major criticism of this approach is that it would invite much judicial involvement in the political thicket of election law. Further, any standard that could seriously curtail the amount of gerrymandering in American politics would likely invite immediate litigation in many states, and could lead to significant litigation after every decennial redistricting. State (and federal) legislators would likely resent that degree of intrusion by courts into their election law legislation. Justice Kennedy's reluctance to pick a standard seems significantly motivated by this concern.¹⁶⁰ Nevertheless, selecting a clear standard could put states on notice such that they could craft acceptable plans in the first instance. *Baker* and its one person, one vote progeny led to considerable litigation as states were forced to reapportion election districts to comply

159. See *LULAC*, 126 S. Ct. at 2634–35 (Stevens, J., concurring in part and dissenting in part). Also see Justice Kennedy's *Vieth* concurrence: "If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest." *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring).

160. See Persily et al., *supra* note 30, at 1314 ("Standards of equally sized districts are much easier to administer than would be similar ones that might be needed to regulate partisan gerrymandering.").

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with the equal population standard, but states now routinely ensure that their districting can withstand equal-population scrutiny.¹⁶¹ Similarly, if the Supreme Court hands down a clear standard that articulates how much gerrymandering is too much, states can ensure that they are on the proper side of the line as they redistrict. Just as *Baker*, though controversial at first, is now an accepted principle of constitutional law, an anti-gerrymandering principle, if relatively simple to apply, could become a settled, relatively non-controversial principle in a few years.

While it would be difficult for the Court to articulate a clear standard of required electoral competitiveness in redistricting, it would likely be even harder for the Court to articulate a standard for measuring campaign finance regulations in light of electoral competitiveness. The line-drawing problem highlighted by Justice Kennedy is significant,¹⁶² and courts could expect much litigation at the margins as states try to probe how restrictive they could be without curtailing competitiveness too much. While this criticism is significant, however, it is worth noting that involving the courts to a high degree is inevitable as long as the Court attempts to chart a course between complete deference to legislatures and complete prohibition of legislative regulation of campaign financing.

*b. Electoral competitiveness as a value unprotected by the Constitution (quadrant 2).*¹⁶³ Another alternative would be to retreat from the above position and hold that electoral competitiveness is a nonjusticiable political question that the Constitution does not command the courts to address. Justices Scalia and Thomas already take this position, justifying their opposition to campaign finance regulations on other grounds.¹⁶⁴ That campaign finance regulations can stifle electoral competition is irrelevant to the fact that, in these Justices' views, the regulations violate the First Amendment's protection of political speech.¹⁶⁵ Chief Justice Roberts and Justice Alito may also be sympathetic to this view; future campaign finance cases will show whether they continue to forge compromise plurality opinions with Justice Breyer or whether they move closer to Justices Scalia and

161. *See id.* at 1301; *see also Reapportionment and Redistricting: An Introduction*, in GUIDE TO U.S. ELECTIONS (John L. Moore, Jon P. Preimesberger & David R. Tarr eds., vol. 2, 2001), available at <http://library.cqpress.com/elections/gusel2-153-7238-393327> (last visited Jan. 15, 2007).

162. *See supra* text accompanying note 94.

163. *See* fig.3.

164. *See supra* notes 95–96 and accompanying text.

165. *Id.*

Thomas on this issue. If they take the latter course, the Court will likely have a bloc of five Justices who are skeptical of campaign finance regulations on First Amendment grounds, but who do not use an electoral competitiveness rationale to strike them down.

This approach would leave *Randall* as an outlier in the Supreme Court's jurisprudence. Campaign finance schemes would still be analyzed by the courts, but electoral competitiveness would not be considered in evaluating election laws.

Insofar as Justice Kennedy continues to vote to uphold gerrymandering plans, the Court would ignore electoral competitiveness in that realm as well. If Justice Kennedy ever voted for a standard by which to measure partisan gerrymanders, greater electoral competitiveness could result, but the rationale for the standard could be based on some other principle of constitutional law, such as a First Amendment right to be free from political classifications that curtail representational rights.¹⁶⁶

A potential criticism of this approach is that it could lead to increased judicial involvement in campaign finance if Justices Scalia and Thomas carry the day and are able to strike down more campaign finance schemes as incompatible with the First Amendment. On the other hand, their standards are likely easier for lower courts to apply than Justice Breyer's case-by-case multi-factor evaluation of a law's effects, implying that if Justices Scalia and Thomas carry the day, less litigation may result once existing campaign finance schemes are brought in harmony with their views of the First Amendment. However, the harms caused by gerrymandering would still exist absent Justice Kennedy finding a standard he supports, unless political processes curtail gerrymandering some other way.

2. *Inconsistent solutions*

*a. Electoral competitiveness as relevant to districting but not campaign finance (quadrant 3).*¹⁶⁷ A third alternative would be essentially the opposite of the current disparity established by *Randall* and *LULAC*. This approach would be to hold that partisan gerrymanders are unjustified because of their anticompetitive effects, but anticompetitive effects of campaign finance regulations will largely be upheld, notwithstanding the First Amendment. This view, which requires

166. See *Vieth v. Jubelirer*, 541 U.S. 267, 315 (2004) (Kennedy, J., concurring).

167. See fig.3.

one to compartmentalize a constitutional right and the freedom to spend money exercising that right, seems difficult to defend.¹⁶⁸ Justices Stevens, Souter, and Ginsburg are closest to this approach, but do not clearly articulate what they would do if a campaign finance regulation were shown to inhibit electoral competitiveness.

While fairly high contribution and/or expenditure limits may not directly influence electoral competitiveness in obvious ways, low limits at some point will benefit incumbents at the expense of challengers. If a legislature were to completely ban campaign expenditures, incumbents would have a significant electoral advantage because of greater name recognition and the ability to use the resources of their offices to reach out to constituents.¹⁶⁹ Challengers, meanwhile, would find it almost impossible to educate the electorate about their campaigns. Thus, an expenditure limit of \$0 per campaign or a contribution limit of \$0 per donor would inhibit electoral competitiveness.

While it may not be clear that Vermont's lowest-in-the-nation contribution limits and associated expenditure limits inhibited electoral competitiveness to that degree, the *Randall* dissenters' approach gives little confidence that the judiciary would restrain self-dealing legislators who attempted to implement an anticompetitive campaign finance scheme. This suggests that, insofar as the *Randall* dissenters rely on a principle of electoral competitiveness to attack partisan gerrymandering, their approach is inconsistent with their laissez-faire treatment of campaign finance. This approach, despite being hostile to anticompetitive gerrymandering, does not offer robust protection to the value of electoral competitiveness more generally.

*b. The current confusion (quadrant 4).*¹⁷⁰ In any event, the Court has yet to agree on any of the above positions and has an inconsistent electoral competitiveness jurisprudence. Insofar as Chief Justice Roberts and Justice Alito rely on anticompetitive effects of campaign finance regulations to strike them down, their jurisprudence is inconsistent with

168. See Eugene Volokh, *Money and Speech*, THE VOLOKH CONSPIRACY, June 28, 2006, <http://www.opinionjournal.com/federation/feature/?id=110008575> ("Just consider some analogies. Would we say 'money is abortion'? I doubt it, but a law that banned the spending of money would surely be a serious restriction on abortion rights (whether or not you think that the [C]ourt was right to recognize such rights). A law that capped the spending of money for abortions at a small amount, far smaller than abortions often cost, would likewise be a burden on abortion rights, and dismissing this argument as 'it is quite wrong to equate money and abortion' would be unsound.")

169. See *supra* note 6 regarding incumbent advantage.

170. See fig.3.

their decision ignoring the anticompetitive effects of the partisan gerrymander they upheld. Insofar as Justice Stevens relies on anticompetitiveness in gerrymandering to strike it down, his position is consistent with the *Randall* plurality's use of electoral competitiveness as an important First Amendment value, but is inconsistent with his *Randall* opinion. Insofar as Justice Kennedy dislikes the anticompetitiveness of campaign finance regulations but cannot decide on a standard by which to measure the numerous partisan gerrymanders throughout the country, his approach is inconsistent with the *Randall* plurality. The Court should clarify its jurisprudence and make it more internally consistent, by moving toward one of the consistent solutions outlined above.

VII. CONCLUSION

The Supreme Court's two most recent election law decisions are fundamentally at odds with one another. In the context of campaign finance, lower courts are instructed to treat electoral competitiveness as an essential First Amendment value, while in the context of gerrymandering, they are told that competitiveness is largely irrelevant. The tension between these two decisions suggests that the Supreme Court's current position on election law is unstable. The Court should revisit its holdings on electoral competitiveness and develop a coherent jurisprudence that treats the value of competitiveness consistently.

Peter J. Jenkins

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Supreme Court's Confused Election Law Jurisprudence