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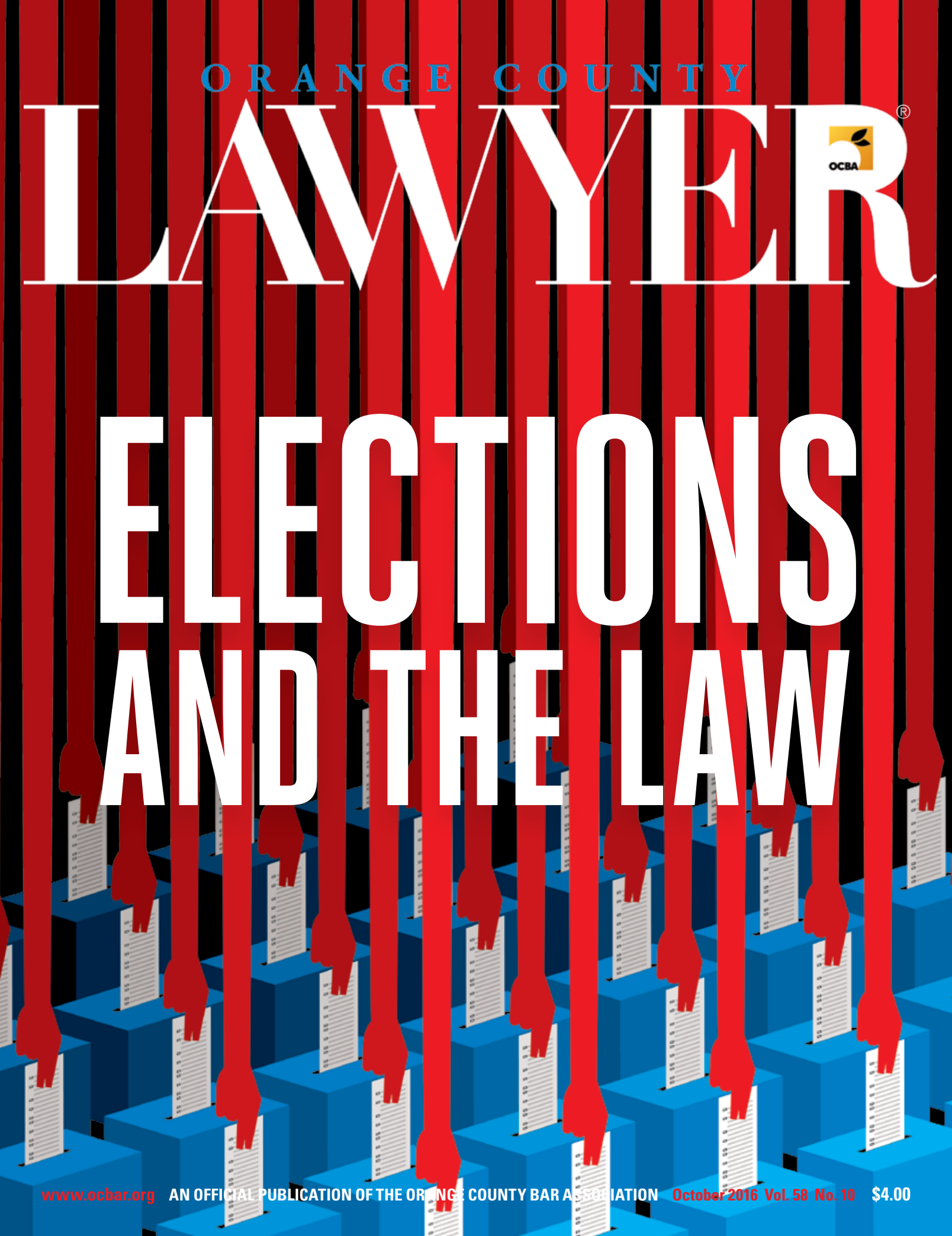

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VOTING FOR CHANGE:
THE SUPREME COURT'S ELECTION LAW CASES AFTER SCALIA

by RICHARD L. HASEN

With the unexpected death of Associate Justice Antonin Scalia in February 2016, the United States Supreme Court is at a crossroads. The Court is now evenly divided between four liberals and four conservatives, and at the time of this writing the Senate has blocked President Obama's nomination of Merrick Garland, Chief Judge of the United States Court of Appeals for the D.C. Circuit, to fill Justice Scalia's seat. Even if that seat is filled, the next president likely will have multiple appointments to the Court, given the age of Justices Stephen Breyer (78), Ruth Bader Ginsburg (83), and Anthony Kennedy (80). The average age that a Justice has left the Court since the 1960s is 79, Justice Scalia's age when he passed away suddenly at a Texas ranch.

On questions from gun rights to consumer arbitration, and from abortion to affirmative action, we know that these days Justices appointed by a Democratic president are likely to have different, more liberal views in the Court's most contentious cases than Justices appointed by a Republican president. As the balance of power on the Court shifts with new personnel, we could see major doctrinal shifts in these and other areas either to the left or the right depending on who is appointed. The Court's decisions in the upcoming decade are likely to affect American life for a far longer period than the length of the next president's term.

Beginning in the 1960s with *Baker v. Carr*, *Reynolds v. Sims*, and the one person, one vote cases, the Court has long dealt with deep ideological splits in cases concerning law and politics. Division has intensified in the last two decades, achieving its greatest public prominence in *Bush v. Gore*, which ended the 2000 Florida recount and assured the election of Republican George W. Bush over Democrat Al Gore (*Bush v. Gore*, 531 U.S. 98 (2000));, and *Citizens United v. Federal Election Commission*, a controversial 2010 campaign finance case freeing up corporate money in candidate elections (*Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010)).

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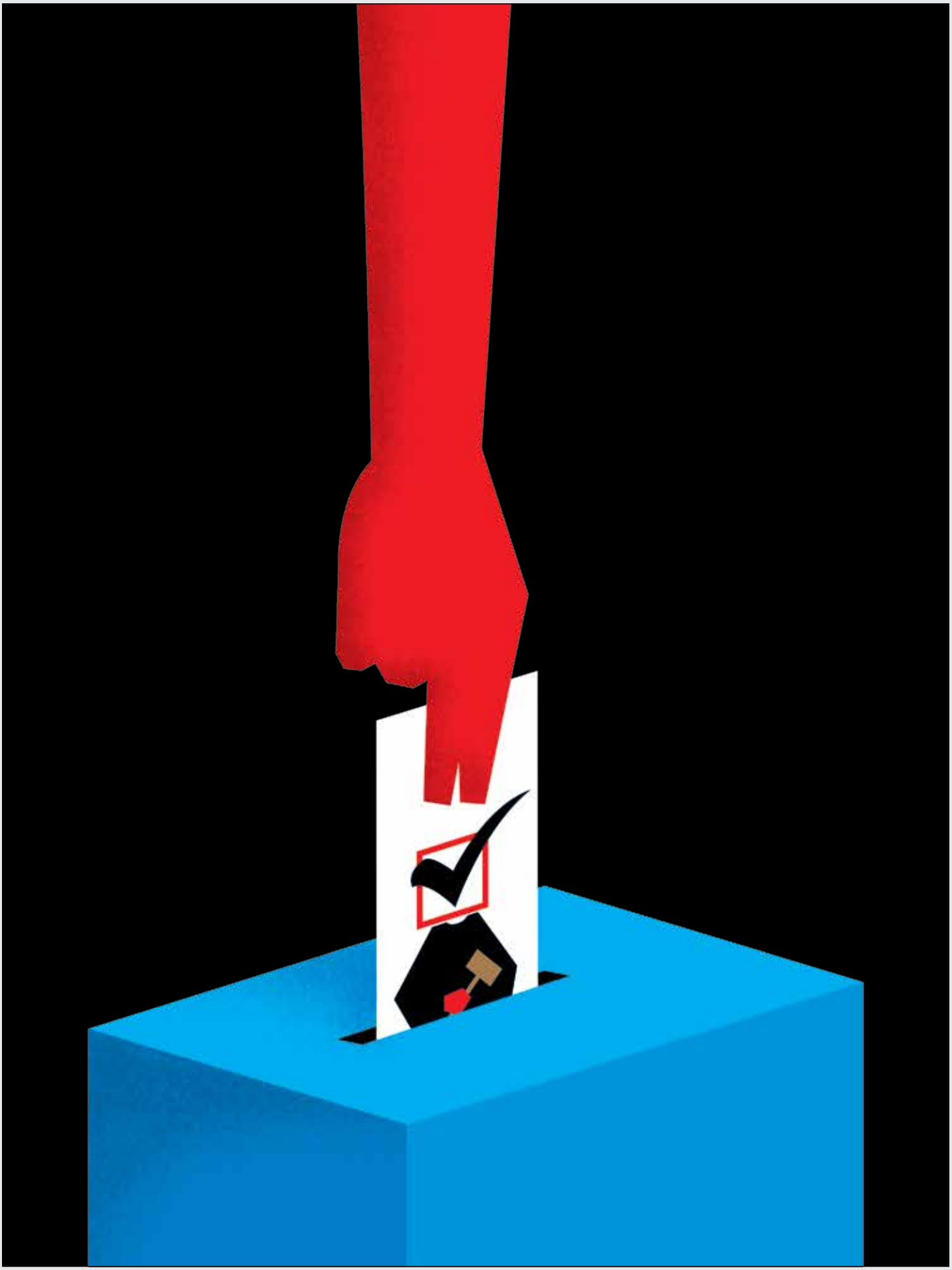
With the Supreme Court gaining unknown new personnel, in the upcoming decade we are likely to see the Court split on ideological and partisan grounds about election law issues from campaign finance to voting rights to partisan gerrymandering with very different outcomes depending upon whether a Democratic or Republican president gets to appoint the next Justices. In this article, I discuss how the upcoming new Supreme Court majority may set the ground rules for our democracy.

Follow the Money: The Court and Campaign Finance

Since the 1970s, the Supreme Court has passed over the constitutionality of a broad set of campaign finance laws that opponents have challenged as violating the U.S. Constitution's First Amendment rights of free speech and association. The Court's decisions have swung dramatically between periods of deference to a legislative desire to limiting money in elections and periods of skepticism about the constitutionality of such laws.

The Court set the parameters of constitutional review in the 1976 case, *Buckley v. Valeo*, which upheld some parts and struck down other parts of the 1974 amendments to the Federal Election Campaign Act, a law enacted in the wake of the Watergate scandal. *Buckley v. Valeo*,



424 U.S. 1 (1976). Roughly speaking, the Court held it was permissible to limit the amounts that people could contribute to candidates, on grounds that such limits prevent corruption and the appearance of corruption. But the Court held it was impermissible for Congress to limit how much someone could spend to promote or attack a candidate independent of that candidate. The Court held, quite controversially, that independent spending, which is not coordinated with a candidate, could neither corrupt nor create the appearance of corruption. Additionally, the Court rejected the idea that Congress could limit money in elections to level the playing field and promote political equality, an idea the Court held was "wholly foreign to the First Amendment . . . ." *Id.* at 49.

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Despite *Buckley*'s holding that the government could not limit independent spending of individuals on anti-corruption grounds, the Court upheld limits applied to independent political spending by for-profit corporations in the 1990 case, *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), *overruled by Citizens United*, 558 U.S. 310 (2010). In *Austin*, the Court held that such limits were justified by what the Court termed a "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas." *Id.* at 660. Although couched in the language of corruption, the justification seemed to be one about inequality, the interest the Court had rejected in *Buckley*. Justices Kennedy, O'Connor, and Scalia vigorously dissented, holding the limits violated the First Amendment.

In the period after *Austin*, the Court in a series of mostly 5-4 cases upheld a wide variety of campaign finance limits. By the early 2000s, Justice O'Connor had switched sides on the campaign finance question, providing the crucial fifth vote in the 2003 case of *McConnell v. Federal Election Commission* to uphold additional limits Congress imposed on for-profit corporations, labor unions, and political parties in the 2002 Bipartisan Campaign Reform Act (commonly known as the "McCain-Feingold" law for its two Senate sponsors). *McConnell v. Fed. Election Comm'n*, 540 U.S. 93 (2003), overruled in part by *Citizens United*, 558 U.S. 310 (2010).

When Justice O'Connor left the Court in 2006, and was replaced by George W. Bush appointee Samuel Alito, the Supreme Court's approach to campaign finance shifted 180 degrees, from a 5-4 majority voting usually to uphold campaign finance limits to a 5-4 majority voting to strike such limits down.

The most prominent of these cases was the 2010 *Citizens United* case, which overruled *Austin* and part of the *McConnell* case that had approved McCain-Feingold's new limits on independent corporate and union campaign spending. The Court in *Citizens United* held that the *Austin* interest was not one about corruption but about inequality, and that inequality was an impermissible basis to limit money in politics. As a result of this holding, the Court in *Citizens United* set into motion a series of follow-on cases and administrative rulings at the Federal Election Commission, which have shifted a great deal of money to outside groups such as "Super PACs" that raise unlimited sums from wealthy individuals, corporations, and labor unions to spend independently in campaigns.

With Justice Scalia's death, the Court became equally divided on the constitutional question. The four *Citizens United* dissenters have called for the case to be overturned, and Democratic presidential candidate Hillary Clinton has said she will appoint Justices who would vote to overturn *Citizens United*. With a new Democratic-led majority on the Supreme Court, it is possible we could return to the days of deference, where Congress, the states, and localities, have much more leeway in passing campaign finance laws without running afoul of the First Amendment.

However, if Donald Trump follows through on a promise to appoint Justices approved by the Federalist Society, many of whom follow the jurisprudence of Justice Scalia, we could see the Court strike down even more campaign finance laws. For example, there is currently a lower court challenge to the "soft money" limits in the 2002 McCain-Feingold law, which the Supreme Court upheld in the 2003 *McConnell* case and which the Court did not reconsider in *Citizens United*. A new, conservative majority on the Supreme Court could kill those soft money limits, which would once again allow the wealthy to make six- or seven-figure donations to political parties in exchange for access to the top elected officials in each party. A new conservative Court could also strike down another federal law that limits the ability of corporations to contribute directly to candidates.

It is fair to say that the future parameters of money in politics depend on who wins the next election and who gets appointed to the Supreme Court.

Voting Rights and Wrongs

Conservative Supreme Court Justices have also disagreed strongly with liberal Supreme Court Justices in key voting rights cases. In the 2013 Supreme Court case of *Shelby County v. Holder*, the Court on a 5-4 vote struck down a key provision of the Federal Voting Rights Act which required jurisdictions with a history of racial discrimination in voting to get permission from the U.S. Department of Justice or a federal court in Washington, D.C. before making changes to their voting rules. *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). The only way to obtain such "preclearance" was for those jurisdictions to demonstrate that the proposed voting laws did not have the purpose or effect of making minority voters worse off.

The majority in *Shelby County* held that the law infringed on states' rights to equal sovereignty because Congress, in renewing the preclearance provisions of the Act, did not show that covered jurisdictions still were likely to engage in intentional racial discrimination in voting. The dissenters argued that the preclearance provision acted as a deterrent, and without this deterrent some of these jurisdictions would go back to discriminating.

In the 2008 case of *Crawford v. Marion County Election Board*, the Court divided

3-3-3 over the constitutionality of Indiana's strict voter identification law, which required photographic proof of identity before voting. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008). Six of the Justices believed this law did not violate the U.S. Constitution's Equal Protection Clause. They held the law was justified by the government's interest in preventing voter fraud and promoting voter confidence. (These Justices reached this conclusion despite the lack of any evidence of any impersonation fraud in Indiana's history.) But among those six Justices, there was a split. Three Justices, led by Justice Stevens, wrote that voters facing special burdens in obtaining the right form of identification for voting (such as the inability to produce a birth certificate) should be constitutionally exempt from the law. Three Justices, led by Justice Scalia, wrote that because the law requiring proof of identification was a minor burden for *most* voters, *no* voters (even those facing special burdens) could challenge it. Three dissenters, led by Justice Souter, argued that the law was unconstitutional because the state could not prove its law was necessary to prevent fraud or voter confidence, and it burdened many voters. The dissenters believed the law, which passed on a party line vote in Indiana, was adopted by Republican legislators to make it harder for likely Democratic voters to vote.

In the wake of the *Shelby County* and *Crawford* decisions, a number of jurisdictions with Republican-majority legislatures have passed new laws making it harder to register and vote, including laws, such as Texas's, imposing even stricter voter identification requirements. Challenges to these laws have been working their way to the Supreme Court, but before Justice Scalia's death, the Court had not considered any of these challenges.

As in the campaign finance cases, when the voting rights cases get back to the Court, their resolution likely will depend upon who sits on the Supreme Court. Liberal Justices are much more likely to favor federal court involvement to protect voting rights, while conservative Justices are much more likely to leave most of these election administration decisions to the states themselves. What liberals see as means of vote suppression, conservatives see as fraud prevention and states' prerogative to control voting.

Drawing a Line on Partisan Gerrymandering

The final election law area in which ideological control of the Supreme Court may matter a great deal is in the realm of partisan gerrymandering. Thanks to the Supreme Court's one person, one vote cases from the 1960s, after the census each decade, redistricting bodies must redraw legislative and congressional districts to ensure they have roughly equal populations. But even given this parameter, it is possible to draw districts that favor one political party over another, a practice known as partisan gerrymandering. This tool lets a party maximize its influence in a legislative body, or in the state's congressional delegation, to the detriment of the other party.

In the 1986 case of *Davis v. Bandemer*, the Supreme Court held, without a majority opinion, that under certain conditions drawing district lines to hurt the political chances of the opposing party in district elections violated the Constitution's Equal Protection clause. *Davis v. Bandemer*, 478 U.S. 109 (1986). Yet the *Bandemer* case established such a difficult test for proving partisan gerrymandering that no court had recognized a partisan gerrymander for the eighteen years that *Bandemer* was good law.

Things got murky when the Court revisited the question in the 2004 case, *Vieth v. Jubelirer*, which concerned allegations that a Pennsylvania congressional districting plan was a Republican gerrymander. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

In *Vieth*, the Supreme Court split in an unusual way, 4-1-4. Four conservative Justices, led by Justice Scalia, held that cases alleging partisan gerrymandering were nonjusticiable, meaning courts could not hear such cases because there were no "judicially manageable" standards for determining when those doing redistricting take party considerations too much into account in drawing district lines. The Court's liberals dissented, arguing that partisan gerrymandering claims are justiciable. They offered a variety of tests to separate permissible from impermissible consideration of party in drawing district lines.

Justice Kennedy, for himself alone, cast the decisive vote. He agreed with the Court's liberals that partisan gerrymandering claims could be heard by courts. But he also agreed with the conservatives that all of the tests that had been proposed, including those from the *Vieth* dissenters, did not do an adequate job defining what counts as an impermissible partisan gerrymander. He left the door open for future litigants to suggest new standards for judging such gerrymanders.

Since *Vieth v. Jubelirer*, opponents of partisan gerrymandering have filed new cases, including cases challenging districting plans in Wisconsin and Maryland. These cases have been designed to offer a standard that could attract Justice Kennedy, although no one knows if they will do so or whether he will remain the deciding vote when these cases reach the Supreme Court, likely in the new term that begins this month.

With partisan gerrymandering, like campaign finance and voting rights, who becomes president can well determine who sits on the Supreme Court, and who sits on the Court will continue to affect the nature and shape of our democracy.

There is a lot riding on November's Election Day, not the least of which is the question of what our future elections look like.

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