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SYMPOSIUM

THE LAW OF DEMOCRACY

FOREWORD

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As this issue of the *Law Review* goes to press, the country is once again embroiled in a series of controversies over basic questions concerning our democracy and electoral system. Those who thought the 2000 election might represent the exception now fear it may be the rule: courts have become deeply involved in almost every aspect of our electoral process. This Symposium represents an attempt by our nation's leading election law scholars to grapple with some of the novel and fundamental questions concerning the law of democracy that have presented themselves over the past few years.

This issue of the *Law Review* represents the end product of a "live" Symposium that took place at the University of Pennsylvania Law School on February 6-7, 2004. Bradley Smith, the Chairman of the Federal Election Commission, began the program with a keynote address that described the false hope of a perfect election. Emphasiz-

ing the battle over the 2000 election and the current controversies over campaign finance, Chairman Smith explained how a relentless pursuit of purging the government of corruption or its appearance, like the quixotic quest for a problem-free election, is more than can be expected of any democracy. The first panel picked up on the theme of campaign finance, and in particular, the Supreme Court's recent decision in *McConnell v. FEC*, which upheld the Bipartisan Campaign Reform Act (BCRA). That panel produced the articles authored by Robert Bauer, Richard Hasen, Spencer Overton, Kelli Lammie, and myself. The *McConnell* opinion represents what is perhaps the most sweeping treatment of the issues of political money, corporate political speech, and the rights of parties in the campaign finance system. The effects of the decision and the law it upheld were felt almost immediately by the parties and candidates in the 2004 campaign, who now needed to grapple with an environment in which corporate and union treasury money was banned both from the parties and from the airwaves. Each of the articles here examines the case from a different, and often conflicting, perspective, as Heather Gerken's commentary on the articles explains.

The second panel explored "New Issues in the Law of Democracy" and produced the Symposium papers authored by Richard Briffault, Elizabeth Garrett, and William Marshall. Both Marshall and Briffault's articles investigate the regulation of campaign-related speech. Marshall explores the issues involved with the regulation of false campaign speech, while Briffault examines the implications of a recent Supreme Court case, *Republican Party of Minnesota v. White*, which struck down regulations of campaign speech in judicial elections. Elizabeth Garrett's article discusses what might have been the most newsworthy event in the law of democracy over the previous year: the California recall. She examines the law of democracy through the lens of the California recall controversy, paying attention to what the recall effort and the related court cases say about political parties and regulation of the ballot.

The third panel, titled "New Issues in Minority Representation," included presentations from Pamela Karlan, Ellen Katz, Jonathan Nagler, and Michael Alvarez. In a paper not published here, Karlan examined the Supreme Court's recent decision in *Georgia v. Ashcroft*, which redefined (to her dismay) the retrogression standard under Section Five of the Voting Rights Act. Ellen Katz's article grapples with issues at the intersection of voting rights law and regulation of political parties. In particular, she looks at the voting rights implica-

tions of restrictive primary systems: that is, whether the type of party primary used in a district ought to affect the legal requirements with respect to the racial composition of the district. Finally, Nagler and Alvarez examine the challenges of situating Hispanics in a voting rights paradigm that has largely been preoccupied with the comparatively clear problems concerning dilution of the African American vote, particularly in the South.

The fourth panel, titled “Redistricting: Case Law and Consequences,” featured papers from Guy-Uriel Charles, Daniel Ortiz, Stephen Ansolabehere, and Jim Snyder. Charles’s paper, not published here, presented an argument as to why the single-member district system we use for legislative and congressional representation in this country is unconstitutional. Inserting himself into the recent contentious debate over pro-incumbent and partisan gerrymandering, Ortiz takes on those who urge judicial restraint in this area due to the unavailability of judicially administrable standards. Turning the clock back away from these more contentious, recent controversies, Ansolabehere and Snyder’s article examines the political effects of the one person, one vote cases, paying particular attention to potential policy consequences in the realms of civil rights, social welfare, and economic policy.

In the fifth and final panel, Heather Gerken, Samuel Issacharoff, Pamela Karlan, Richard Pildes, and I discussed the recent partisan gerrymandering cases coming from Pennsylvania and Texas. Soon after the “live” Symposium the Supreme Court issued its opinion in *Vieth v. Jubelirer*, upholding the gerrymander of Pennsylvania’s congressional districts, and later summarily affirmed a district court decision striking down, on one person, one vote grounds, a pro-Democratic gerrymander of the Georgia state legislature. As this issue goes to press, the Court has remanded the Texas case, which upheld a Republican gerrymander of congressional districts, for proceedings consistent with its opinion (or more accurately, set of opinions) in *Vieth*. In short, the issue of the constitutional constraints on partisan gerrymandering remains very much alive and contentious. Samuel Issacharoff and Pamela Karlan graciously agreed to add an article to this Symposium to try to come to grips with several of these cases.

This Symposium issue represents the latest gathering of experts in the subfield of “the law of democracy” or “election law.” We were saddened by the fact that one of the greats in our field could not join us for the symposium, however. John Hart Ely, who died last year, was a giant in the field of constitutional law and a frequent participant in

the many dialogues among these later generations of law professors studying law and the political process. His seminal work, *Democracy and Distrust*, remains not only one of the most important constitutional law books in the past century, but also the progenitor of so much of the work that appears in this and similar volumes. His coherent and revolutionary theory of judicial review as principally concerned with problems of protecting minority rights and clearing the channels of political change can be seen as the inspiration for many of the articles in this volume and much of the work of these authors. His intelligence, insight, erudition, and humor are sorely missed, but he lives on in the ideas he helped spawn.