# VOTING RIGHTS AND ELECTION LAW

Second Edition

2016 Supplement

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## VOTING QUALIFICATIONS

### B. Defining the Community and Excluding Outsiders

### 3. The Law-Breaking

**Page 52. Add to Note 2:**

Felon-disenfranchisement laws continue to be the subject of much reform. Delaware, which had amended its Constitution in 2013 to eliminate the five-year waiting period for the restoration of voting rights, further liberalized its laws in 2016. Under the previous law, felons had to serve their prison sentences and satisfy all financial obligations before being eligible to have their voting rights restored. Now, although they must still complete their prison sentences, a failure to satisfy the financial obligations will not render them ineligible to vote. *See Governor Signs Legislation Expanding Access to the Ballot Box, Builds on Record of Criminal Justice Reform*, NEWS.DELAWARE .GOV (July 13, 2016), *at* http://news.delaware.gov/2016/07/13/governor-signs-legislation-expanding-access-to-the-ballot-box-builds-on-record-of-criminal-justice-reform/.

Virginia's Democratic governor attempted to use his clemency power to restore the voting rights of 200,000 felons who were no longer in prison, on parole, or on probation (although the governor's executive order also included, apparently by mistake, several felons who were still in prison and 132 sex offenders under supervision). By a 4-3 vote, the Virginia Supreme Court invalidated the governor's order, holding that the governor could not grant voting rights to 200,000 felons in a single order. *Howell v. McAuliffe*, 2016 Va. LEXIS 107 (Va. 2016). In response, the governor vowed to sign individual clemency orders for each of the felons, and on August 13, 2016, the governor announced that he had restored the voting rights of 13,000 felons "after reviewing their cases individually." Margaret Chadbourn, *Va. Gov. Terry McAuliffe Restores Voting Rights of Felons*, ABC NEWS (Aug. 22, 2016), *at* http://abcnews.go.com/Politics/va-gov-terry-mcauliffe-restores-voting-rights-felons/story?id=41572956.

Of course, each side accused the other of partisanship. The governor characterized opposition to his executive order as "a disgrace" and "overtly political," while Republicans accused the governor of attempting to increase the number of Democratic voters in an attempt to improve his Hillary Clinton's chances of winning the state's presidential electors. *See* Fenit Nirappil & Jenna Portnoy, *Va. High Court Invalidates McAuliffe's Order Restoring Felon Voting Rights*, WASH. POST (July 22, 2016), *available at* https://www.washingtonpost.com/local/virginia-politics/virginia-court-invalidates-gov-terry-mcauliffes-order-restoring-felon-voting-rights/2016/07/22/3e1d45f6-5058-11e6-a7d8-13d06b37f256_story.html.

## 4. The Disinterested

**Page 70. Add the following Note after Note 10:**

10a. *Problem*. After *Kramer*, may a state impose any restrictions on the franchise so as "to promote intelligent use of the ballot," in *Lassiter*'s words? Could a state, for example, exclude from voting any person who is suffering under mental incapacity? If so, how should a state delimit the exclusion so as to satisfy *Kramer*'s demand that such a law be narrowly tailored? *See Doe v. Rowe*, 156 F. Supp. 2d 35 (D. Me. 2001) (striking down an voting exclusion applicable to persons with "mental illness" because the term did not include other mental incapacities that were just as severe); *In re Guardianship of Erickson*, 2012 Minn. Dist. LEXIS 193 (Minn. Dist. Ct. 2012) (striking down Minnesota's constitutional provision prohibiting voting by "a person under guardianship, or a person who is insane or not mentally competent," insofar as it categorically barred from voting all persons under guardianship).

**Page 87. Add the following to the end of Note 5:**

*See Little Thunder v. South Dakota*, 518 F.2d 1253 (8th Cir. 1975) (holding unconstitutional a similar South Dakota law providing that "[t]he county commissioners of any organized county to which any unorganized county is attached shall have all of the jurisdiction, rights, powers, duties, and liabilities for the administration of the affairs of the unorganized county or counties which may be attached to said organized county as they may have in the organized county, excepting in cases where it is otherwise expressly provided by law.").

## Chapter 2

## POLITICAL QUESTIONS

### C. "Well Developed and Familiar" Standards of Equal Protection

**Page 159. Add to Note 9:**

For examples of more recent cases attempting to develop standards to regulate gerrymanders, see *Shapiro v. McManus*, 136 S. Ct. 450 (2015) (holding that a challenge based on Justice Kennedy's concurring opinion in *Vieth* was not frivolous and should proceed before a three-judge district court); *Whitford v. Nichol*, 2016 U.S. Dist. LEXIS 47048 (W.D. Wis. 2016) (three-judge court) (denying motion for summary judgment and permitting a challenge based on partisan asymmetry to go to trial). *See also* Lynn Bonner & Jim Morrill, *Common Cause Sues over NC Congressional Districts*, NEWS-OBSERVER (Charlotte, N.C.) (Aug. 5, 2016), *at* http://www.newsobserver.com/news/politics-government/state-politics/article94050487.html (reporting on a new partisan-gerrymandering challenge to North Carolina's congressional districts).

## Chapter 3

## ONE PERSON, ONE VOTE

### B. The Constitutional Basis for One Person, One Vote

**Page 166. Insert the following Note after Note 4:**

4a. *Problem*. *Gray* held that "[o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote." It is clear that states have some flexibility in designating the "geographical unit." For example, as we will explore in considerable detail in Chapter 5, states may provide that certain representatives are chosen at large in multimember districts. That is, voters in a single electoral district may elect multiple representatives. Alternatively, representatives may be chosen individually from smaller districts, which in local races are often called "wards." States may also choose to have at-large elections, but to impose residency requirements so that the legislative body contains members residing in each of the wards.

The six members of Tucson, Arizona's city council are nominated in primary elections conducted in individual wards. Only residents of those wards are permitted to vote in the primaries. Once nominated, however, the two candidates run against each other in a general election in which all residents in the city are permitted to vote. The winner then receives a place on the city council, where he represents the entire city—not merely the ward that nominated him. The residents of the ward, however, could be expected to have a disproportionate influence on the councilman, however, as those ward residents would determine whether the councilman would be re-nominated. (The effect might be especially pronounced in one-party jurisdictions, where the primary election effectively controls the ultimate outcome.) *See Public Integrity Alliance v. City of Tucson*, 805 F.3d 876 (2015), *vacated and reh'g en banc granted*, 820 F.3d 1075 (9th Cir. 2016).

Does such a system violate the Constitution? A panel of the Ninth Circuit, in an opinion that was later vacated, held the system unconstitutional. In the view of the panel, "every otherwise eligible voter who will be a constituent of the winner of the general election must have an equal opportunity to participate in each election cycle through which that candidate is selected." 805 F.3d at 881. Tucson's system, in the view of the panel majority, "gives some of a representative's constituents—those in his home ward—a vote of disproportionate weight. That is the very result the Supreme Court's one person, one vote jurisprudence is meant to foreclose." *Id*.

On the other hand, each voter in the city is able to vote in the general election and in his ward's primary, so perhaps Tucson's system does not feature the kind of discrimination that caused the Supreme Court to strike down Georgia's system in *Gray*. Is it proper to view the "geographical unit" as the entire city, so that members of the ward appear to have more influence and power than voters elsewhere in the city? Alternatively, is the "geographical unit" better thought to be different for the primaries and the general election, such that the "geographical unit" for the primaries would be each ward (within which each voter in the primary election is treated equally) and the "geographical unit" for the general election would be the whole city (within which each voter in the general election is treated equally)?

**Pages 188-92. Delete Notes 8 and 9, and add the following at the end of § B:**

10a. *Which* populations must be equalized across state-legislative districts? Must a state equalize districts' total populations, or may a state equalize other populations, such as registered voters, eligible voters, voting-age population, or something else? May a districting plan that equalizes total population nonetheless violate the Constitution because of differences in the numbers of voting-eligible citizens?

The determination of which populations must be equalized depends on which equality principle one gleans from *Reynolds v. Sims*:

> While apportionment by population and apportionment by number of eligible electors normally yield precisely the same result, they are based on radically different premises and serve materially different purposes. Apportionment by raw population embodies the principle of equal representation; it assures that all persons living within a district — whether eligible to vote or not — have roughly equal representation in the governing body. A principle of equal representation serves important purposes. It assures that constituents have more or less equal access to their elected officials, by assuring that no official has a disproportionately large number of constituents to satisfy. Also, assuming that elected officials are able to obtain benefits for their districts in proportion to their share of the total membership of the governing body, it assures that constituents are not afforded unequal government services depending on the size of the population in their districts.
>
> Apportionment by proportion of eligible voters serves the principle of electoral equality. This principle recognizes that electors — persons eligible to vote — are the ones who hold the ultimate political power in our democracy. * * * Apportionment by proportion of eligible voters assures that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location.

*Garza v. County of Los Angeles*, 918 F.2d 763, 781–82 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). See also Ronald Keith Gaddie, et al., *Seats, Votes, Citizens, and the One Person, One Vote Problem*, 23 STAN. L. & POL'Y REV. 431 (2012).

Does it matter that the Fourteenth Amendment requires congressional districts to be apportioned among the states based on total population? See U.S. CONST. amend. XIV, § 2 ("Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."). Might the Constitution require equality of different populations in congressional districts as opposed to state-legislative ones?

Surprisingly, although in several cases the Court appeared to assume the permissibility (if not the necessity) of using total population as the basis for representation, the Court directly addressed the issue only once before 2016. In *Burns v. Richardson*, 384 U.S. 73 (1966), a case decided at the beginning of the reapportionment revolution, the Supreme Court upheld the constitutionality of a Hawaii state-legislative districting plan that was based on the number of registered voters, rather than the number of citizens or total persons. Because many military personnel and tourists temporarily residing on the island of Oahu were counted in the census as part of Hawaii's total population but could not vote, the choice of relevant population affected the distribution of legislative seats. The Court held that the use of registered voters was permissible, but only because such use "produced a distribution of legislators not substantially

different from that which would have resulted from the use of a permissible population basis" such as citizen population. *Id*. at 93. As the Court explained,

> [T]he Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which [] substantial population equivalency is to be measured. Although total population figures were in fact the basis of comparison in [*Reynolds* v. *Sims*] and most of the other[] [cases] decided that day, our discussion carefully left open the question what population was being referred to. At several points, we discussed substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population.[20] Indeed, in *WMCA, Inc.* v. *Lomenzo*, 377 U.S. 633, decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e.g.*, *Carrington* v. *Rash*, 380 U.S. 89 [(1965)] [p. 88], the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby.
>
> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment." Moreover, "fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years. In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.

384 U.S. at 91–93. Justice Harlan disagreed with the Court's limitation on states' ability to base apportionment calculations on the number of registered voters, arguing that *Reynolds v. Sims* required only that states use a rational system for ensuring that legislatures represent "'people,' not other interests." *Id*. at 99 (Harlan, J., concurring in the result).

In 2016, the issue of the appropriate population basis returned to the Court in the following case, *Evenwel v. Abbott*. Whereas *Burns* involved a plaintiff's allegation that the state violated the Constitution by using a population basis other than total population, *Evenwel* involved an allegation that the state violated the Constitution by equalizing total population rather than citizen-voting-age population.

[20] Thus we spoke of "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens. . . ." *Reynolds* v. *Sims*, 377 U.S., at 576. We also said: "[I]t is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters." *Id*., at 577. "[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Id*., at 579.

# EVENWEL v. ABBOTT

Supreme Court of the United States
578 U.S. __, 136 S. Ct. 1120 (2016)

JUSTICE GINSBURG delivered the opinion of the Court [in which CHIEF JUSTICE ROBERTS, JUSTICE KENNEDY, JUSTICE BREYER, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join].[a]

Texas, like all other States, draws its legislative districts on the basis of total population. Plaintiffs-appellants are Texas voters; they challenge this uniform method of districting on the ground that it produces unequal districts when measured by voter-eligible population. Voter-eligible population, not total population, they urge, must be used to ensure that their votes will not be devalued in relation to citizens' votes in other districts. We hold, based on constitutional history, this Court's decisions, and longstanding practice, that a State may draw its legislative districts based on total population. * * *

* * * After the 2010 census, Texas redrew its State Senate districts using a total-population baseline. [The plan that was ultimately adopted had a] maximum total-population deviation [of] 8.04%, safely within the presumptively permissible 10% range. But measured by a voter-population baseline—eligible voters or registered voters—the map's maximum population deviation exceeds 40%. * * *

The parties and the United States advance different positions in this case. As they did before the District Court, appellants insist that the Equal Protection Clause requires jurisdictions to draw state and local legislative districts with equal voter-eligible populations, thus protecting "voter equality," *i.e.*, "the right of eligible voters to an equal vote."[7] To comply with their proposed rule, appellants suggest, jurisdictions should design districts based on citizen-voting-age-population (CVAP) data from the Census Bureau's American Community Survey (ACS), an annual statistical sample of the U.S. population. Texas responds that jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline—including total population and voter-eligible population—so long as the choice is rational and not invidiously discriminatory. Although its use of total-population data from the census was permissible, Texas therefore argues, it could have used ACS CVAP data instead. Sharing Texas' position that the Equal Protection Clause does not mandate use of voter-eligible population, the United States urges us not to address Texas' separate assertion that the Constitution allows States to use alternative population baselines, including voter-eligible population. Equalizing total population, the United States maintains, vindicates the principle of representational equality by "ensur[ing] that the voters in each district have the power to elect a representative who represents the same number of constituents as all other representatives."

In agreement with Texas and the United States, we reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.

We begin with constitutional history. At the time of the founding, the Framers confronted a question analogous to the one at issue here: On what basis should congressional districts be allocated to States? The Framers' solution, now known as the Great Compromise, was to provide

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[a] Justice Scalia died before the decision in this case, so only eight Justices participated in the decision. –Eds.

[7] In the District Court, appellants suggested that districting bodies could also comply with the one-person, one-vote rule by equalizing the registered-voter populations of districts, but appellants have not repeated that argument before this Court.

each State the same number of seats in the Senate, and to allocate House seats based on States' total populations. * * * In other words, the basis of *representation* in the House was to include all inhabitants—although slaves were counted as only three-fifths of a person—even though States remained free to deny many of those inhabitants the right to participate in the selection of their representatives.[8] Endorsing apportionment based on total population, Alexander Hamilton declared: "There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government."

When debating what is now the Fourteenth Amendment, Congress reconsidered the proper basis for apportioning House seats. Concerned that Southern States would not willingly enfranchise freed slaves, and aware that "a slave's freedom could swell his state's population for purposes of representation in the House by one person, rather than only three-fifths," the Framers of the Fourteenth Amendment considered at length the possibility of allocating House seats to States on the basis of voter population.

* * * Supporters of apportionment based on voter population employed the same voter-equality reasoning that appellants now echo. See, *e.g., id.*, at 380 (remarks of Rep. Orth) ("[T]he true principle of representation in Congress is that voters alone should form the basis, and that each voter should have equal political weight in our Government. . . ."); *id.*, at 404 (remarks of Rep. Lawrence) (use of total population "disregards the fundamental idea of all just representation, that every voter should be equal in political power all over the Union").

Voter-based apportionment proponents encountered fierce resistance from proponents of total-population apportionment. Much of the opposition was grounded in the principle of representational equality. "As an abstract proposition," argued Representative James G. Blaine, a leading critic of allocating House seats based on voter population, "no one will deny that population is the true basis of representation; for women, children, and other non-voting classes may have as vital an interest in the legislation of the country as those who actually deposit the ballot." *Id.*, at 141. See also *id.*, at 358 (remarks of Rep. Conkling) (arguing that use of a voter-population basis "would shut out four fifths of the citizens of the country—women and children, who are citizens, who are taxed, and who are, and always have been, represented"); *id.*, at 434 (remarks of Rep. Ward) ("[W]hat becomes of that large class of non-voting tax-payers that are found in every section? Are they in no matter to be represented? They certainly should be enumerated in making up the whole number of those entitled to a representative.").

The product of these debates was § 2 of the Fourteenth Amendment, which retained total population as the congressional apportionment base. * * *

Appellants ask us to find in the Fourteenth Amendment's Equal Protection Clause a rule inconsistent with this [theory of population-based representation]. But, as the Court recognized in *Wesberry* [v. *Sanders*, 376 U.S. 1 (1964)] [p. 166], this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States. "The debates at the [Constitutional] Convention," the Court explained, "make at least one fact abundantly clear: that when the delegates agreed that the House should represent 'people,' they intended that in allocating Congressmen the number assigned to each state should be determined solely by the number of inhabitants." 376 U.S., at 13. "While it may not be

[8] As the United States observes, the "choice of constitutional language reflects the historical fact that when the Constitution was drafted and later amended, the right to vote was not closely correlated with citizenship." Restrictions on the franchise left large groups of citizens, including women and many males who did not own land, unable to cast ballots, yet the Framers understood that these citizens were nonetheless entitled to representation in government.

possible to draw congressional districts with mathematical precision," the Court acknowledged, "that is no excuse for ignoring our Constitution's plain objective of making equal representation for *equal numbers of people* the fundamental goal for the House of Representatives." *Id.*, at 18 (emphasis added). It cannot be that the Fourteenth Amendment calls for the apportionment of congressional districts based on total population, but simultaneously prohibits States from apportioning their own legislative districts on the same basis.

Cordoning off the constitutional history of congressional districting, appellants stress two points. First, they draw a distinction between allocating seats *to* States, and apportioning seats *within* States. * * * *Wesberry*, however, rejected the distinction appellants now press. Even without the weight of *Wesberry*, we would find appellants' distinction unconvincing. One can accept that federalism—or, as JUSTICE ALITO emphasizes, partisan and regional political advantage—figured in the Framers' selection of total population as the basis for allocating congressional seats. Even so, it remains beyond doubt that the principle of representational equality figured prominently in the decision to count people, whether or not they qualify as voters.

Second, appellants and JUSTICE ALITO urge, the Court has typically refused to analogize to features of the federal electoral system—here, the constitutional scheme governing congressional apportionment—when considering challenges to state and local election laws. True, in *Reynolds* [v. *Sims*, 377 U.S. 533 (1964)] [p. 173], the Court rejected Alabama's argument that it had permissibly modeled its State Senate apportionment scheme—one Senator for each county—on the United States Senate. * * * Likewise, in *Gray v. Sanders*, 372 U.S. 368, 371–372, 378 (1963) [p. 163], Georgia unsuccessfully attempted to defend, by analogy to the electoral college, its scheme of assigning a certain number of "units" to the winner of each county in statewide elections.

*Reynolds* and *Gray*, however, involved features of the federal electoral system that contravene the principles of both voter *and* representational equality to favor interests that have no relevance outside the federal context. * * * By contrast, as earlier developed, the constitutional scheme for congressional apportionment rests in part on the same representational concerns that exist regarding state and local legislative districting. The Framers' answer to the apportionment question in the congressional context therefore undermines appellants' contention that districts must be based on voter population.

Consistent with constitutional history, this Court's past decisions reinforce the conclusion that States and localities may comply with the one-person, one-vote principle by designing districts with equal total populations. Quoting language from those decisions that, in appellants' view, supports the principle of equal voting power—and emphasizing the phrase "one-person, one-vote"—appellants contend that the Court had in mind, and constantly meant, that States should equalize the voter-eligible population of districts. See *Reynolds*, 377 U.S., at 568 ("[A]n individual's right to vote for State legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."); *Gray*, 372 U.S., at 379–380 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."). Appellants, however, extract far too much from selectively chosen language and the "one-person, one-vote" slogan.

For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality. In *Reynolds*, for instance, the Court described "the fundamental principle of

representative government in this country" as "one of equal representation for equal numbers of people." 377 U.S., at 560–561. And the Court has suggested, repeatedly, that districting based on total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation. See *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693–694 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."). See also *Kirkpatrick* [v. *Preisler*], 394 U.S. [526], 531 [(1969)] [p. 192] (recognizing in a congressional-districting case that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives").[12]

Moreover, from *Reynolds* on, the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality. Appellants point to no instance in which the Court has determined the permissibility of deviation based on eligible- or registered-voter data. It would hardly make sense for the Court to have mandated voter equality *sub silentio* and then used a total-population baseline to evaluate compliance with that rule. More likely, we think, the Court has always assumed the permissibility of drawing districts to equalize total population. * * *

What constitutional history and our prior decisions strongly suggest, settled practice confirms. Adopting voter-eligible apportionment as constitutional command would upset a well-functioning approach to districting that all 50 States and countless local jurisdictions have followed for decades, even centuries. Appellants have shown no reason for the Court to disturb this longstanding use of total population. As the Framers of the Constitution and the Fourteenth Amendment comprehended, representatives serve all residents, not just those eligible or registered to vote. Nonvoters have an important stake in many policy debates—children, their parents, even their grandparents, for example, have a stake in a strong public-education system—and in receiving constituent services, such as help navigating public-benefits bureaucracies. By ensuring that each representative is subject to requests and suggestions from the same number of constituents, total-population apportionment promotes equitable and effective representation.[14]

In sum, the rule appellants urge has no mooring in the Equal Protection Clause. The Texas Senate map, we therefore conclude, complies with the requirements of the one-person, one-vote principle.[15] Because history, precedent, and practice suffice to reveal the infirmity of appellants' claims, we need not and do not resolve whether, as Texas now argues, States may draw districts to equalize voter-eligible population rather than total population. * * *

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[12] Appellants also observe that standing in one-person, one-vote cases has rested on plaintiffs' status as voters whose votes were diluted. But the Court has not considered the standing of nonvoters to challenge a map malapportioned on a total-population basis. This issue, moreover, is unlikely ever to arise given the ease of finding voters willing to serve as plaintiffs in malapportionment cases.

[14] Appellants point out that constituents have no constitutional right to equal access to their elected representatives. But a State certainly has an interest in taking reasonable, nondiscriminatory steps to facilitate access for all its residents.

[15] Insofar as appellants suggest that Texas could have roughly equalized both total population and eligible-voter population, this Court has never required jurisdictions to use multiple population baselines. In any event, appellants have never presented a map that manages to equalize both measures, perhaps because such a map does not exist, or because such a map would necessarily ignore other traditional redistricting principles, including maintaining communities of interest and respecting municipal boundaries.

JUSTICE THOMAS, concurring in the judgment.

* * * I agree with the majority that our precedents do not require a State to equalize the total number of voters in each district. States may opt to equalize total population. I therefore concur in the majority's judgment that appellants' challenge fails.

I write separately because this Court has never provided a sound basis for the one-person, one-vote principle. For 50 years, the Court has struggled to define what right that principle protects. Many of our precedents suggest that it protects the right of eligible voters to cast votes that receive equal weight. Despite that frequent explanation, our precedents often conclude that the Equal Protection Clause is satisfied when all individuals within a district—voters or not—have an equal share of representation. The majority today concedes that our cases have not produced a clear answer on this point. * * *

This inconsistency (if not opacity) is not merely a consequence of the Court's equivocal statements on one person, one vote. The problem is more fundamental. There is simply no way to make a principled choice between interpreting one person, one vote as protecting eligible voters or as protecting total inhabitants within a State. That is because, though those theories are noble, the Constitution does not make either of them the exclusive means of apportionment for state and local representatives. In guaranteeing to the States a "Republican Form of Government," Art. IV, § 4, the Constitution did not resolve whether the ultimate basis of representation is the right of citizens to cast an equal ballot or the right of all inhabitants to have equal representation. The Constitution instead reserves these matters to the people. The majority's attempt today to divine a single "theory of the Constitution"—apportionment based on representation—rests on a flawed reading of history and wrongly picks one side of a debate that the Framers did not resolve in the Constitution. * * *

Republican governments promote the common good by placing power in the hands of the people, while curtailing the majority's ability to invade the minority's fundamental rights. The Framers recognized that there is no universal formula for accomplishing these goals. At the framing, many state legislatures were bicameral, often reflecting multiple theories of representation. Only "[s]ix of the original thirteen states based representation in both houses of their state legislatures on population." In most States, it was common to base representation, at least in part, on the State's political subdivisions, even if those subdivisions varied heavily in their populations. * * *

None of the Reconstruction Amendments changed the original understanding of republican government. * * * As Justice Harlan explained in *Reynolds*, neither Amendment provides a theory of how much "weight" a vote must receive, nor do they require a State to apportion both Houses of their legislature solely on a population basis. See 377 U.S., at 595–608 (dissenting opinion). And JUSTICE ALITO quite convincingly demonstrates why the majority errs by reading a theory of equal representation into the apportionment provision in § 2 of the Fourteenth Amendment.

The Court's attempt to impose its political theory upon the States has produced a morass of problems. These problems are antithetical to the values that the Framers embraced in the Constitution. These problems confirm that the Court has been wrong to entangle itself with the political process.

*First*, in embracing one person, one vote, the Court has arrogated to the Judiciary important value judgments that the Constitution reserves to the people. In *Reynolds,* for example, the Court

proclaimed that "[l]egislators represent people, not trees or acres"; that "[l]egislators are elected by voters, not farms or cities or economic interests"; and that, accordingly, electoral districts must have roughly equal population. 377 U.S., at 562–563. As I have explained, the Constitution permits, but does not impose, this view. Beyond that, *Reynolds*' assertions are driven by the belief that there is a single, correct answer to the question of how much voting strength an individual citizen should have. These assertions overlook that, to control factions that would legislate against the common good, individual voting strength must sometimes yield to countermajoritarian checks. And this principle has no less force within States than it has for the federal system. Instead of large States versus small States, those interests may pit urban areas versus rural, manufacturing versus agriculture, or those with property versus those without. There is no single method of reconciling these competing interests. And it is not the role of this Court to calibrate democracy in the vain search for an optimum solution. * * *

*Second*, the Court's efforts to monitor the political process have failed to provide any consistent guidance for the States. Even if it were justifiable for this Court to enforce some principle of majority rule, it has been unable to do so in a principled manner. Our precedents do not address the myriad other ways that minorities (or fleeting majorities) entrench themselves in the political system. States can place policy choices in their constitutions or have supermajoritarian voting rules in a legislative assembly. In theory, of course, it does not seem to make a difference if a state legislature is unresponsive to the majority of residents because the state assembly requires a 60% vote to pass a bill or because 40% of the population elects 51% of the representatives.

So far as the Constitution is concerned, there is no single "correct" way to design a republican government. Any republic will have to reconcile giving power to the people with diminishing the influence of special interests. The wisdom of the Framers was that they recognized this dilemma and left it to the people to resolve. In trying to impose its own theory of democracy, the Court is hopelessly adrift amid political theory and interest-group politics with no guiding legal principles.

This case illustrates the confusion that our cases have wrought. The parties and the Government offer three positions on what this Court's one-person, one-vote cases require States to equalize. Under appellants' view, the Fourteenth Amendment protects the right to an equal vote. Appellees, in contrast, argue that the Fourteenth Amendment protects against invidious discrimination; in their view, no such discrimination occurs when States have a rational basis for the population base that they select, even if that base leaves eligible voters malapportioned. And, the Solicitor General suggests that reapportionment by total population is the only permissible standard because *Reynolds* recognized a right of "equal representation for equal numbers of people."

* * * Because our precedents are not consistent with appellants' position—that the only constitutionally available choice for States is to allocate districts to equalize eligible voters—the majority concludes that appellants' challenge fails.

I agree with the majority's ultimate disposition of this case. As far as the original understanding of the Constitution is concerned, a State has wide latitude in selecting its population base for apportionment. It can use total population, eligible voters, or any other nondiscriminatory voter base. And States with a bicameral legislature can have some mixture of these theories, such as one population base for its lower house and another for its upper chamber.

Our precedents do not compel a contrary conclusion. Appellants are correct that this Court's precedents have primarily based its one-person, one-vote jurisprudence on the theory that

eligible voters have a right against vote dilution. But this Court's jurisprudence has vacillated too much for me to conclude that the Court's precedents preclude States from allocating districts based on total population instead. Under these circumstances, the choice is best left for the people of the States to decide for themselves how they should apportion their legislature. * * *

JUSTICE ALITO, with whom JUSTICE THOMAS joins * * *, concurring in the judgment. * * *

Both practical considerations and precedent support the conclusion that the use of total population is consistent with the one-person, one-vote rule. The decennial census required by the Constitution tallies total population. These statistics are more reliable and less subject to manipulation and dispute than statistics concerning eligible voters. Since *Reynolds*, States have almost uniformly used total population in attempting to create legislative districts that are equal in size. And with one notable exception, *Burns v. Richardson*, 384 U.S. 73 (1966), this Court's post-*Reynolds* cases have likewise looked to total population. Moreover, much of the time, creating districts that are equal in total population also results in the creation of districts that are at least roughly equal in eligible voters. I therefore agree that States are permitted to use total population in redistricting plans. * * *

The Court does not purport to decide whether a State may base a districting plan on something other than total population, but the Court, picking up a key component of the Solicitor General's argument, suggests that the use of total population is supported by the Constitution's formula for allocating seats in the House of Representatives among the States. Because House seats are allocated based on total population, the Solicitor General argues, the one-person, one-vote principle requires districts that are equal in total population. I write separately primarily because I cannot endorse this meretricious argument. * * *

[R]eliance on the Constitution's allocation of congressional representation is profoundly ahistorical. When the formula for allocating House seats was first devised in 1787 and reconsidered at the time of the adoption of the Fourteenth Amendment in 1868, the overwhelming concern was far removed from any abstract theory about the nature of representation. Instead, the dominant consideration was the distribution of political power among the States. * * *

After the Civil War, when the Fourteenth Amendment was being drafted, the question of the apportionment formula arose again. Thaddeus Stevens, a leader of the so-called radical Republicans, unsuccessfully proposed that apportionment be based on eligible voters, rather than total population. The opinion of the Court suggests that the rejection of Stevens' proposal signified the adoption of the theory that representatives are properly understood to represent all of the residents of their districts, whether or not they are eligible to vote. As was the case in 1787, however, it was power politics, not democratic theory, that carried the day.

In making his proposal, Stevens candidly explained that the proposal's primary aim was to perpetuate the dominance of the Republican Party and the Northern States. As Stevens spelled out, if House seats were based on total population, the power of the former slave States would be magnified. Prior to the Civil War, a slave had counted for only three-fifths of a person for purposes of the apportionment of House seats. As a result of the Emancipation Proclamation and the Thirteenth Amendment, the former slaves would now be fully counted even if they were not permitted to vote. By Stevens' calculation, this would give the South 13 additional votes in both the House and the electoral college. [JUSTICE ALITO discussed additional evidence from the legislative history of the Fourteenth Amendment to demonstrate that Members of Congress who focused on voters were concerned about giving the South additional representation (because of

the freed slaves) at the expense of the States that had been loyal to the Union.] * * *

The bottom line is that in the leadup to the Fourteenth Amendment, claims about representational equality were invoked, if at all, only in service of the *real* goal: preventing southern States from acquiring too much power in the National Government.

After much debate, Congress eventually settled on the compromise that now appears in § 2 of the Fourteenth Amendment. Under that provision, House seats are apportioned based on total population, but if a State wrongfully denies the right to vote to a certain percentage of its population, its representation is supposed to be reduced proportionally. Enforcement of this remedy, however, is dependent on action by Congress, and—regrettably—the remedy was never used during the long period when voting rights were widely abridged.

In light of the history of Article I, § 2, of the original Constitution and § 2 of the Fourteenth Amendment, it is clear that the apportionment of seats in the House of Representatives was based in substantial part on the distribution of political power among the States and not merely on some theory regarding the proper nature of representation. It is impossible to draw any clear constitutional command from this complex history.

For these reasons, I would hold only that Texas permissibly used total population in drawing the challenged legislative districts. I therefore concur in the judgment of the Court.

### *Notes and Questions*

1. *Evenwel* held that the Constitution did not compel states to equalize the number of voters (or vote-eligible citizens) when drawing state-legislative districts. The Court reached this conclusion on the basis of "constitutional history, this Court's decisions, and longstanding practice." Should each of those factors be relevant? How important is each of those factors relative to the others? Why do you suppose the Court did not list "the constitutional text" as one of its reasons for reaching the result that it did?

2. It may be an easy matter to conclude, as *Evenwel* did, that there is no constitutional *obligation* to draw districts using voter-based apportionment. That is, the Constitution permits a state to base its apportionment on total population, *if the state chooses to do so*. But what if a state chooses to reject total-population apportionment in favor of equalizing citizen-voting-age population? May a state do so? In other words, *Evenwel* held that states *may* base their state-legislative-district apportionments on total population. Should a future case hold that states *must* base their state-legislative-district apportionments on total population? What does each of the opinions in *Evenwel* say (or imply) about that question?

3. *Problem*. Disney County, Florida, is the home of Castro State Penitentiary. The penitentiary houses thousands of inmates from all over the state, with the vast majority coming from outside Disney County. When it re-draws its districts for county commissioners and school board members, the County constructs districts that are equal in population. All of the inmates of the penitentiary, who cannot vote, are counted as residing in the district encompassing the penitentiary. One effect of the districting scheme is to increase the voting power of the other residents of the district, because although their district contains the same number of people as all the other districts, it contains far fewer eligible voters. Is the districting plan vulnerable to a one-person, one-vote challenge? Are prison inmates different from children or aliens, who cannot vote but who are nonetheless "represented" by their legislators? *See Davidson v. City of Cranston*, 2016 U.S. Dist. LEXIS 67674, *11-*12 (D.R.I. 2016) (finding an equal-protection violation, and distinguishing *Evenwel* on the basis that the prison inmates "don't have a stake in the Cranston public school system and they are not receiving constituent services, such as help

with public-benefits bureaucracies. They are not making requests of and suggestions to Cranston elected officials (or if they are, they are receiving no response), nor are they receiving "the protection of government," at least not from Cranston elected officials"). *See also Calvin v. Jefferson County Board of Commissioners*, 2016 U.S. Dist. LEXIS 36121, 2016 WL 1122884 (N.D. Fla. 2016) (finding an equal-protection violation, although the case was decided pre-*Evenwel*).

4. Do you agree with Justice Thomas that the Court was wrong to enter the political thicket? If so, should the cases of the reapportionment revolution be reconsidered, or should *stare decisis* insulate those decisions from challenge?

**Page 214. Add after Note 2:**

2a. In *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301 (2016), the Supreme Court clarified the standard that plaintiffs must meet when challenging population variances of less than 10% in state-legislative districts. According to *Harris*, "those attacking a state-approved plan must show that it is more probable than not that a deviation of less than 10% reflects the predominance of illegitimate reapportionment factors"—presumably including partisanship. *Id*. at 1307; *see also id*. at 1309. The Court noted its expectation that, "[g]iven the inherent difficulty of measuring and comparing factors that may legitimately account for small deviations from strict mathematical equality," such challenges would "only rarely" succeed. *Id*. at 1307. And so, even though partisanship played "some role" in the adoption of the districting plan, the principal motivation appeared to be compliance with the Voting Rights Act, and so the Court unanimously upheld the districting plan. *Id*. at 1306 (quoting the opinion below, 993 F. Supp. 2d 1042, 1046 (D. Ariz. 2014).

## Chapter 5

## DISTRICTING BY RACE

### E. Constitutional Constraints on Majority-Minority Districting

**Page 367. Add the following Note after Note 4:**

Should *candidates* have standing to challenge racial gerrymanders? If so, what cognizable injury would they suffer? In *Wittman v. Personhuballah*, 136 S. Ct. 1732 (2016), the Court considered a case where candidates complained that a racial gerrymander altered the partisan composition of their districts and made their election less likely. The Court held that the candidates lacked standing because they had not even shown that the gerrymander would have the partisan effects to which they objected. The Court did not reach the question whether such a candidate would have standing if he showed that a racial gerrymander packed his district with voters unlikely to support him.

**Page 384. Add the following to the end of Note 10:**

In *Easley*, the Court was willing to explain the state's consideration of race as being for partisan ends. Indeed, the Court held that the lower court was clearly erroneous in finding that racial concerns predominated, because the state may have considered blacks to be more reliable Democratic voters than white Democrats, and may therefore have created heavily black precincts for political reasons rather than racial ones. Consider the reverse situation. What if Republicans seek to entrench their power by diluting the power of the most reliable Democrats? If those dilutive measures purposely reduce the power of blacks—*not because they are black but because they are reliable Democrats*—is that racial discrimination? *Cf. North Carolina State Conference of the NAACP v. McCreary*, 2016 U.S. App. LEXIS 13797, *58 (4th Cir. 2016) (striking down a law establishing a voter-ID requirement and restricting early voting and same-day registration) ("[T]he General Assembly used [the challenged law] to entrench itself. It did so by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.").

## Chapter 6

## THE ROLES AND RIGHTS OF POLITICAL PARTIES

### C. Associational Rights of Parties

**Page 469. Add the following after Note 2:**

2a. It appeared from *California Democratic Party v. Jones* that blanket primaries—and likely open primaries as well—posed substantial burdens on parties' associational rights as a matter of *law*. That is, there was no need to show that the blanket primary interfered with a party's selection of any particular nominee. The Court, recall, said that it was "unnecessary to cumulate evidence" of the blanket primary's burden on parties' rights because the purpose of the blanket primary was to nominate candidates different from the candidates the parties would prefer to nominate themselves.

But the Ninth Circuit has held that the associational burden presented by a state's primary laws is a question of *fact* to be decided in each individual case, with the party bearing the burden of proof. Therefore, in *Democratic Party of Hawaii v. Nago*, 2016 U.S. App. LEXIS (2016), a case challenging the constitutionality of Hawaii's open primary, the court of appeals held that the Party could not succeed on its facial challenge because it had not proven that the open-primary system interfered with the Party's ability to select its nominees.

Should courts require evidence of the burden on parties' rights posed by primaries in which non-party members are invited to participate? Does it matter if, as in *Democratic Party of Hawaii v. Nago*, the ostensible purpose of an open primary is "to protect voter privacy and to encourage voter participation in elections," rather than to encourage the selection of moderate nominees?

If evidence is required, what kind of evidence can a party be expected to produce? In *Democratic Party of Hawaii v. Nago*, the Party pointed out that even though there were only 65,000 members of the Party in Hawaii, a quarter of a million people participated in the Party's open primaries. Thus, among voters in the Democratic primary, non-members outnumbered Party members by a factor of three to one. Still, the court of appeals found that the Party had not presented sufficient evidence of the burden imposed on its associational freedom to select its nominees. As the Court explained, the non-members who voted in the party primary may have *identified* as Democrats even though they were not members.

## Chapter 8

## POLITICAL SPEECH

### B. Defamation and the Problem of False Statements

**Page 572. Add the following after the first sentence in the second full paragraph:**

For example, in *Reed v. Town of Gilbert, Arizona*, 135 S. Ct. 2218 (2015), a local ordinance imposed greater restrictions on "political" signs (which it defined as any "temporary sign designed to influence the outcome of an election called by a public body") than on "ideological" ones. The Supreme Court held that the ordinance was content-based, and further held that the ordinance failed strict scrutiny.

**Page 601, Note 3. Add the following to the end of Note 3:**

The Sixth Circuit itself has backed away from *Pestrak* in light of *Alvarez*. In *Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 471-72 (6th Cir. 2016), the court concluded that *Alvarez* abrogated *Pestrak* by undercutting its basic assumption that false statements deserved no constitutional protection.

**Page 601, Note 4. Add the following between the two sentences of the third paragraph of Note 4:**

On appeal, the Sixth Circuit held that the Ohio law was unconstitutional. Although, in the view of the court, Ohio had compelling interests in protecting voters from confusion, fraud, and undue influence, the law was not narrowly tailored. The court reached that conclusion because complaints—even frivolous complaints, and even complaints about non-material false statements—filed against a candidate could be politically damaging and might not be resolved before the election. Thus, whether the candidate made a false statement or not, the law could not ensure the integrity of an election because the complaint might well not be resolved until after the election. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473-76 (6th Cir. 2016). *See also Commonwealth v. Lucas*, 34 N.E.3d 1242, 1257 (Mass. 2015) (striking down Massachusetts's false-statements law).

**Page 602, Note 5. Replace the first paragraph of the page with the following:**

In *281 Care Committee v. Arneson*, 766 F.3d 774, 785 (8th Cir. 2014), the Eighth Circuit struck down Minnesota's political false-statements law, which prohibited knowing or recklessly false statements about ballot questions. Do *281 Care Committee* and *Alvarez* grant constitutional protection to campaign "dirty tricks"?

**Page 602, Note 6. Add the following Problem to Note 6:**

d. A state has a professional-licensing statute prohibiting anyone other than licensed professionals from identifying himself as a professional. Bob Hartley runs for the state legislature, and identifies himself on his campaign website as a psychologist. In truth, he is not a psychologist and does not have a Ph. D. in psychology (which is a requirement to be a licensed psychologist). He did, however, complete a four-year post-doctoral fellowship in psychology at Yale, and the dissertation for his Ph.D. in education was published in *Genetic Psychology Monographs*. Hartley was a professor in the psychology departments at Yale University and Vassar College, studied under leading psychologists, and was a member of the American Psychological Association for several years.

May the state constitutionally prosecute Hartley for using the title "psychologist" on his campaign website? What if Hartley identified himself as a "psychologist" on his professional website, rather than on his campaign website? *See Serafine v. Branaman*, 810 F.3d 354, 361 (5th Cir. 2016). Would it make any difference if the state prosecuted a candidate for identifying himself as an "interior designer" when he lacked the license that would have enabled him to use that title, or for identifying himself as a "realtor" when he was a real-estate agent but not a member of the National Association of Realtors? *See Byrum v. Landreth*, 566 F.3d 442 (5th Cir. 2009).

## I. Judicial Candidates' Speech

**Page 786, Note 5. Replace the *Ohio Council 8* citation with the citation of the Sixth Circuit's affirmance of the district court's decision:**

*Ohio Council 8 American Federation of State, County & Municipal Employees v. Husted*, 814 F.3d 329 (6th Cir. 2016).

## Chapter 9

## CAMPAIGN FINANCE

### E. Coordinated Expenditures

**Page 994. Add the following before the last paragraph of Note 6:**

In *Wisconsin ex rel. Two Unnamed Petitioners v. Peterson*, 866 N.W.2d 165 (Wis. 2015), *petition for cert. filed*, (U.S. Apr. 24, 2016) (No. 15-1416), plaintiffs were subject to a criminal investigation under a Wisconsin statute that limited coordinated speech for "political purposes." Plaintiffs had allegedly coordinated various public messages with the state's governor to promote the latter's policy agenda. In accordance with Wisconsin state law, a special prosecutor was appointed to investigate. The investigation was controversial and intrusive. As described by the Wisconsin Supreme Court majority,

> "[S]earch warrants were executed at approximately 6:00 a.m. on October 3, in pre-dawn, armed, paramilitary-style raids in which bright floodlights were used to illuminate the targets' homes.
>
> "The breadth of the documents gathered pursuant to subpoenas and seized pursuant to search warrants is amazing. Millions of documents, both in digital and paper copy, were subpoenaed and/or seized. Deputies seized business papers, computer equipment, phones, and other devices, while their targets were restrained under police supervision and denied the ability to contact their attorneys. The special prosecutor obtained virtually every document possessed by the Unnamed Movants relating to every aspect of their lives, both personal and professional, over a five-year span (from 2009 to 2013). Such documents were subpoenaed and/or seized without regard to content or relevance to the alleged violations of Ch. 11. As part of this dragnet, the special prosecutor also had seized wholly irrelevant information, such as retirement income statements, personal financial account information, personal letters, and family photos."

866 N.W.2d at 183.

The court, in a 4-3 decision, terminated the investigation and held that the phrase "political purposes" in the Wisconsin statute was unconstitutionally vague and overbroad under both the United States and Wisconsin Constitutions. To save the statute, the Court narrowed its application to speech that met the *Buckley* definition of "express advocacy." *See supra* p. 811.

**Chapter 10**

**AT THE POLLS**

**B. Burdens on Casting Ballots**

**Page 1045. Replace the first full paragraph with the following:**

Lower-court challenges to many of the new laws—some based on state law and others based on federal law—have reached disparate results. Georgia's and Oklahoma's laws were upheld in state court. *Democratic Party of Georgia v. Perdue*, 707 S.E.2d 67 (Ga. 2011); *Gentges v. Oklahoma State Election Board* (Okla. St. Dist. Ct. 2016) (upholding Oklahoma's voter-ID law), *reported at* Trevor Brown, *Judge Dismisses Challenge to State's Voter ID Law*, Oklahoma Watch (Aug. 16, 2016), at http://oklahomawatch.org/2016/08/16/judge-dismisses-challenge-to-states-voter-id-law/?platform=hootsuite. Pennsylvania's was struck down in state court. *Applewhite v. Commonwealth*, 2014 Pa. Commw. LEXIS 62 (Pa. Commw. Ct. 2014). Arkansas's law was struck down by a lower court, but the Arkansas Supreme Court vacated that judgment on procedural grounds. *Arkansas State Board of Election Commissioners v. Pulaski County Election Commission*, 437 S.W.3d 80 (Ark. 2014).

Wisconsin's law has been the subject of a legal saga, including two decisions by the Seventh Circuit in 2016 alone. In 2014, the Seventh Circuit upheld Wisconsin's law (overturning a district-court judgment striking it down). *Frank v. Walker*, 768 F.3d 744 (7th Cir. 2014). In 2016, however, the court held that any eligible voter who could not obtain ID with reasonable effort was entitled to an accommodation. *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016). The district court then issued an injunction requiring the state to waive the ID requirement for any voter who merely asserted that he could not obtain an ID through reasonable effort—"even if the voter has never tried to secure one, and even if by objective standards the effort needed would be reasonable (and would succeed)." The court of appeals promptly stayed the injunction pending appeal, allowing the ID law to be enforced. *Frank v. Walker*, 2016 U.S. App. LEXIS 14917, *3 (7th Cir. 2016).

The Fourth Circuit struck down North Carolina's voter-ID law under the Federal Constitution and § 2 of the Voting Rights Act because, in the view of the court of appeals, the voter-ID law was passed with a racially discriminatory purpose. *North Carolina State Conference of the NAACP v. McCreary*, 2016 U.S. App. LEXIS 13797 (4th Cir. 2016).

And Texas's law (like South Carolina's, discussed below), was the subject of a consent decree reached after the Fifth Circuit held that Texas was required by the Voting Rights Act to accommodate voters who lacked the necessary IDs. *Veasey v. Abbott*, 2016 U.S. App. LEXIS 13255 (5th Cir. 2016) (*en banc*). Under the Texas consent decree, voters are permitted to vote if they present any government document with their name on it and if they sign an affidavit saying that they could not easily obtain one of the IDs that the law purports to require. *See* Michael Wines, *Texas Agrees to Loosen Rules on IDs for November Election*, N.Y. TIMES (Aug. 4, 2016), at A9.

**Page 1045. Delete the portion of the third full paragraph beginning with "but the Justice Department has filed suit to stop it," and replace it with the following:**

but the Fourth Circuit struck down the law. *North Carolina State Conference of the NAACP v. McCreary*, 2016 U.S. App. LEXIS 13797 (4th Cir. 2016). In addition to establishing an ID requirement, the law reduced the days available for early voting and also eliminated same-day registration. The court of appeals held that the law was passed with a racially discriminatory purpose, rejecting the district court's contrary factual finding as clearly erroneous, and therefore held that the law violated both the Constitution and § 2 of the Voting Rights Act. The Fourth Circuit relied on the fact that black voters disproportionately used the procedures that were restricted by the North Carolina law, and that blacks disproportionately lacked a satisfactory ID. The court also noted North Carolina's history of racial discrimination (although much of the post-1980 history did not involve proven *purposeful* discrimination), as well as information from the law's legislative history, including the unusually expeditious manner in which the law was enacted.

## Chapter 11

## COUNTING THE VOTES

### C. THE HELP AMERICA VOTE ACT

**Page 1094. Add to Note 4:**

For an overview and critique of NVRA, HAVA, and other federal laws, see Justin Weinstein-Tull, *Election Law Federalism*, 114 MICH. L. REV. 747 (2016).

## Chapter 12

## REMEDYING ERRORS IN ELECTIONS

### A. INTRODUCTION

**Page 1099. Add to Note a:**

EDWARD FOLEY, BALLOT BATTLES: THE HISTORY OF DISPUTED ELECTIONS IN THE UNITED STATES (2016).

### D. STATE REMEDIES FOR FEDERAL ELECTIONS

**Page 1139. Add to Note 3:**

*See generally* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016).