VOTING RIGHTS AND ELECTION LAW

Second Edition

2018 Supplement

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TABLE OF CONTENTS

Chapter 1

VOTING QUALIFICATIONS

A. Introduction

Page 6. After the two references to *Rice v. Cayetano*, 528 U.S. 469, add these references to a new case:

In the first full paragraph:

Davis v. Commonwealth Election Commission, 844 F.3d 1087 (9th Cir. 2016) (striking down a provision of the Northern Mariana Constitution restricting voting to individuals of "Northern Marianas descent");

In the second full paragraph:

Davis, 844 F.3d at 1093 (treating the Northern Mariana ancestry-based voting restriction as race-based because "the stated intent of the provision is to make ethnic distinctions");

B. Defining the Community and Excluding Outsiders

2. The Poor

Page 45. Add the following Note after Note 8:

8a. Is there any constitutional difference between requiring people to pay a fee in order to vote and requiring people to pay a fee for *failing* to vote? Is there a fundamental right *not* to vote? *See* Glenn Blain, *New Yorkers Who Don't Vote Would Pay $10 Fine Under Assemblywoman's Bill*, N.Y. DAILY NEWS (Mar. 17, 2017), *at* http://www.nydailynews.com/news/politics/new-yorkers-don-vote-pay-10-proposed-bill-article-1.3001499?cid=bitly.

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.

Page 54. Add the following citation to Note 6:

See Hand v. Scott, 285 F. Supp. 3d 1289 (N.D. Fla. 2018) (striking down Florida's procedure for restoring felons' voting rights, which provided "unfettered discretion" to the state's Executive Clemency Board), *appeal pending*.

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.").

5. The Newly Resident

Page 96. Add the following to the end of footnote o:

Cf. Texas Dep't of Housing & Community Affairs v. Inclusive Communities Project, Inc., 135 S. Ct. 2507 (2015) (5-4) (interpreting the Fair Housing Act, 42 U.S.C. § 3605(a), which prohibits discrimination "because of race, color, religion, sex, handicap, familial status, or national origin," to prohibit not only conscious discrimination but also actions that have a disparate impact on racial groups and are not "necessary to achieve a valid interest." *Id*. at 2523.

Page 99. Split Note 3 in half by beginning a new Note with "May a person…." Strike out the first half of Note 3 and replace with the following:

Generally speaking, people are able to vote in the place where they are domiciled, even if the state law governing eligibility speaks in terms of "residence." *See Wit v. Berman*, 306 F.3d 1256, 1261 (2d Cir. 2002); Annotation, *Residence of Students for Voting Purposes*, 44 A.L.R.3d 797 § 2, at 801 (1972). College students, however, typically do not intend to reside permanently in the place where they attend school, so they are not domiciliaries there, even if they are residents of their college town. Should college students be able to vote where they temporarily live, even if they do not intend to stay after graduation? *See Hershkoff v. Board of Registrars of Voters of Worcester*, 321 N.E.2d 656 (Mass. 1974) (permitting students to establish a domicile in the place where they attended school).

Recently there has been controversy in New Hampshire about that state's attempt to delineate the residency requirements for voting. As a result of a 2015 ruling, college students and other non-permanent residents could be considered domiciliaries and thus qualified to vote, but might not be "residents" obligated to comply with other laws, such as ones requiring residents to register motor vehicles in the state and to obtain a state driver's license. *See Guare v. State*, 117 A.3d 731 (N.H. 2015). (Strangely, New Hampshire law provided that residents had to establish both domicile and an intent to remain "for the indefinite future." Domiciliaries, on the other hand, merely needed to show "a physical presence and . . . an intent to maintain a single continuous presence for domestic, social, and civil purposes relevant to participating in democratic self-government.") In response to the *Guare* decision, New Hampshire passed a law

that re-defined "residence" by deleting "for the indefinite future," and thus making the definition of "residence" "effectively the same" as that of "domicile." *In re: Request of the Governor and Council*, __ A.3d __, 2018 WL 3404752 (N.H. 2018), at *6. Under the new law, anyone who has sufficient connection with the state to qualify that person to vote must also comply with the other obligations of state residency. The state supreme court upheld the constitutionality of the 2018 law by a 3-2 vote. *See In re: Request of the Governor and Council*, *supra*.

Page 100. Add the following to the end of Note 4:

Keep in mind that intentional discrimination against young voters may violate the Twenty-Sixth Amendment. *See League of Women Voters v. Detzner*, __ F. Supp. 3d __, 2018 WL 3545079 (N.D. Fla. 2018) (striking down a ban on early-voting at college or university campuses).

Chapter 2

POLITICAL QUESTIONS

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

Page 159. Add to Note 7:

In 2015 the Supreme Court rejected a challenge to a state independent commission responsible for redrawing congressional districts. *Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 135 S. Ct. 2652 (2015). The challengers argued that the Elections Clause, U.S. CONST., Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators."), meant that only the state legislature itself could draw lines for congressional districts. In a 5-4 decision, the Court rejected the argument. The majority held that the Clause did not prevent a state from creating a redistricting commission by initiative. The dissent argued that the Clause should be literally interpreted, and unambiguously authorized only a state legislature to redraw such lines. *See also League of Women Voters v. Commonwealth*, 178 A.3d 282 (Pa. 2018) (holding, by a 4-3 vote, that political gerrymandering of congressional districts violated the Pennsylvania Constitution, and also rejecting the argument that such a holding violates the U.S. Constitution's Elections Clause), *stay denied*, 138 S. Ct. 1323 (2018), *cert. pending*.

For a discussion of, and contribution to, the social-science literature comparing the work of legislatures or partisan commissions to the work of independent, non-partisan redistricting commissions, see John A. Henderson, et al., *Gerrymandering Incumbency: Does Nonpartisan Redistricting Increase Electoral Competition?*, 80 J. POL. 1011 (2018) (finding little difference in the electoral security of incumbents in districts drawn by different kinds of bodies).

Page 159. Add to Note 9:

Since *Vieth*, various lower courts have continued to address whether appropriate standards can be developed and applied to find partisan gerrymanders unlawful. A unanimous Court itself in *Shapiro v. McManus*, 136 S. Ct. 450 (2015), held that a challenge based on Justice Kennedy's concurring opinion in *Vieth* was not frivolous and that a three-judge district court should be convened to hear the case. One three-judge district court, *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), held (2-1) in a lengthy and ambitious decision that Wisconsin had enacted an unconstitutional partisan gerrymander for its state legislative districts, in violation of the First Amendment and the Equal Protection Clause. The court held that the plan had discriminatory intent and effects by entrenching the Republican Party in power over the decennial period, and by impeding the ability of Democratic voters to translate their votes into legislative seats.

The Supreme Court heard the case on direct appeal, and, after oral argument, the Court agreed to hear another three-judge district-court decision involving allegations of partisan gerrymandering. The district-court decision in that case, *Benisek v. Lamone*, 266 F. Supp. 3d 799

(D. Md. 2017) (2-1), denied relief in a political-gerrymandering suit regarding Maryland's congressional districts. In an anti-climactic conclusion to the two much-anticipated cases, the Court on the same day disposed of both cases without reaching the merits. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court, in an opinion by Chief Justice Roberts, held that the plaintiffs had not shown under their own theory of the case that they were injured, and hence they lacked standing. The plaintiffs argued that the asymmetry in the number of statewide Democratic votes, and the disproportionately low number of Democratic state legislators elected, reflected partisan gerrymandering through an "efficiency gap" and "wasted" votes. But the Court held that no plaintiff voter had shown that he lived in a "packed" or "cracked" district, which would be necessary to show the kind of "district specific" injury that the Court was willing to recognize. The Court stated that this was a "case about group political interests, not individual legal rights. But this Court is not responsible for vindicating generalized partisan differences." The Court remanded for further proceedings to give the plaintiffs the opportunity to present evidence that they or others had standing. In a lengthy concurring opinion, Justice Kagan, joined by three other Justices, argued that, on remand, standing by plaintiffs in particular districts could be easily demonstrated. In another concurring opinion, Justices Thomas and Gorsuch agreed with most of the lead opinion, but argued that rather than remand, the Court should order the case dismissed for lack of jurisdiction.

In the other case, the Court, in a relatively short and unanimous *per curiam* decision, affirmed the lower court, holding that even if the plaintiffs were to succeed on the merits, "the balance of equities and the public interest tilted against their request for a preliminary injunction." *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018). The primary reason was that the plaintiffs had not pursued their claims with reasonable diligence: They "did not move for a preliminary injunction in the District Court until six years, and three general elections, after the 2011 map was adopted, and over three years after the plaintiffs' first complaint was filed." *Id*.

The Court will no doubt be confronted with political-gerrymandering claims on direct appeal in the future. The still-active *Gill* litigation might return to the Court, and it is not the only case that might do so. Shortly after the decisions were announced in *Gill* and *Benisek*, the Supreme Court remanded another political-gerrymandering case—this one involving the congressional map in North Carolina—for further proceedings in light of *Gill*. *Common Cause v. Rucho*, 138 S. Ct. __, 86 U.S.L.W. 3636 (2018) (*per curiam*).

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, *rev'd*, 836 F.3d 1019 (9th Cir. 2016) (*en banc*).

Does such a system violate the Constitution? A panel of the Ninth Circuit initially held the system unconstitutional, but the *en banc* court struck it down. 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*. The *en banc* court held that Tucson's system was "a careful, longstanding choice . . . as to how best to achieve a city council with members who represent Tucson as a whole but reflect and understand all of the city's wards." 836 F.3d at 1020.

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.

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[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

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

allocated to States? The Framers' solution, now known as the Great Compromise, was to provide 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

[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.

be determined solely by the number of inhabitants." 376 U.S., at 13. "While it may not be 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. * * *

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

[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.

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. * * *

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

[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.

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. * * *

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*, 837 F.3d 135 (1st Cir. 2016) (holding a similar districting plan constitutional, and reasoning that under *Evenwel* "the decision whether to include * * * prisoners in Cranston's apportionment is one for the political process") *rev'g* 188 F. Supp. 3d 146, 149-51 (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*, 172 F. Supp 3d 1292 (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 4

PRECLEARANCE UNDER THE VOTING RIGHTS ACT

D. The Constitutionality of Section 5 Revisited

Page 263. Add the following new Note after Note 7:

7a. What effect did preclearance have on the representatives elected from districts that were subject to § 5? A recent article found that representatives from such districts were more likely to be supportive of civil-rights legislation than were other representatives, especially if the precleared districts were competitive or had an exceptionally high proportion of black constituents. *See* Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AM. J. POL. SCI. 513 (2017).

Page 263. Replace the last paragraph (carrying over to page 264) with the following:

Texas is the battleground for bail-in under VRA Section 3. In several different post-*Shelby County* cases, courts have found that Texas or its political subdivisions intentionally discriminated against minorities. *See Perez v. Abbott*, 2017 U.S. Dist. LEXIS 66428 (W.D. Tex. 2017) (three-judge court) (2-1) (finding intentional discrimination in the drawing of congressional districts); *Veasey v. Abbott*, 2017 U.S. Dist. LEXIS 54253 (S.D. Tex. 2017) (finding discriminatory intent in passage of voter-ID law). And in one case, a federal district court took the next step and bailed-in the city of Pasadena, Texas, after finding intentional discrimination against Latinos in the City's creation of an at-large district. Having found that the City had thus violated the Constitution, the court invoked VRA § 3 to bail-in the City, making it subject to preclearance for the next six years. *See Patino v. City of Pasadena, Texas*, 2017 U.S. Dist. LEXIS 6620 (S.D. Tex. 2017), *stay denied* 2017 U.S. App. LEXIS 2068 (5th Cir. 2017).

Chapter 5

DISTRICTING BY RACE

C. Section 2's Post-1982 Results Test

Page 300. Add a new Note after Note 4:

4a. How should a court assess determine whether there is intentional vote dilution against a racial minority if a Republican legislature minimizes minorities' voting power not because of any racial animus but because of a desire to advance Republican prospects? In a word, it is "complicated." *Abbott v. Perez*, 138 S. Ct. 2305, 2314 (2018). "[B]ecause a voter's race sometimes correlates closely with political party preference, *see Cooper v. Harris*, 581 U.S. ——, ——– – ——, 137 S. Ct. 1455, 1473–1474 (2017); *Easley v. Cromartie*, 532 U.S. 234, 243 (2001), it may be very difficult for a court to determine whether a districting decision was based on race or party preference." *Perez*, 138 S. Ct. at 2314. *Bolden* may suggest that a legislature's desire to advance one party's prospects would not be racially discriminatory even if a minority's voting power was minimized as the *means* of achieving the political goal. Some cases, however, suggest that a measure intentionally minimizing the voting power of a racial minority may be discriminatory even if the measure is undertaken for political reasons.

For a recent example of the issue in action, see *Michigan State A. Philip Randolph Institute v. Johnson*, __ F. Supp. 3d __, 2018 WL 3640439, *30-*31 (E.D. Mich. 2018) ("[E]liminating the Democratic Party's success with straight-ticket voters—success especially driven by African-Americans residing in communities with high voting-age African-American populations—was a motivating consideration in the Michigan Legislature's [elimination of straight-ticket voting]. The goal of ending the Democratic Party's success with straight-ticket voters, therefore, was achieved at the expense of African-Americans' access to the ballot. Thus, the Michigan Legislature intentionally discriminated against African-Americans [even though there was no evidence of racial animus]."). *See also One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wis. 2016) (finding intentional racial discrimination in a measure reducing absentee voting as a way of suppressing minority votes for Democratic candidates).

Realistically, of course, everybody realizes that most minority groups prefer Democrats to Republicans. Given that understanding, is there a meaningful difference between a party-motivated Republican measure that minimizes Democratic votes, including minority votes, and a racially discriminatory Republican measure that minimizes minority votes as a way of minimizing Democratic success? Would it be better to ask only whether the legislature is motivated by a desire to harm a racial minority because of animus, as opposed to a desire to harm an opposition party even if there is an incidental effect on a racial minority?

Page 324. Add the following paragraph to the end of Note 1:

Consider *Patino v. City of Pasadena, Texas*, 2017 U.S. Dist. LEXIS 6620 (S.D. Tex. 2017), *stay denied* 2017 U.S. App. LEXIS 2068 (5th Cir. 2017). Members of the city council had been elected in eight single-member districts, but the city changed that system and adopted a plan that combined six single-member districts with one two-member district. The district court found a

dilution of Latinos' voting rights under VRA § 2, even though Latinos, who were just less than half the City's population, elected their preferred candidate to four of the eight council seats, including one of the two at-large seats. Furthermore, Latinos represented nearly 70% of the citizen voting-age population in one of the single-member districts that did not elect the Latinos' preferred candidate. Nevertheless, the district court discounted the importance of Latinos' success in the one election held under the new plan, because two of the successful Latino candidates had Anglo surnames and were incumbents. Do you think that Latino voters in Pasadena lacked an equal opportunity to elect representatives of their choice?

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 379. Add to the end of Note 1:

In *Bethune-Hill v. Virginia State Board of Elections*, 580 U.S. __, 137 S. Ct. 788 (2017), the Supreme Court reinforced *Miller* and stressed that a racial gerrymander may be unconstitutional even if the state does not disregard traditional districting principles. The key is the "legislative purpose and intent," whether proven by circumstantial evidence (such as the districts' shape) or by direct evidence. If race predominates in the drawing of district lines, there is a racial gerrymander, whether or not the districts are misshapen. And if race does not predominate, states are free to have districts that have an uncouth shape. In the Court's words, "[t]he Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." 137 S. Ct. at 798.

Page 381. Add the following to the end of Note 5:

The Court's most recent discussion of the issue suggests (although it does not hold) that a state may intentionally create a majority-minority district without race being the predominant factor in the districting. In *Bethune-Hill v. Virginia Board of Elections*, *supra*, the Court considered a challenge to twelve majority-minority districts. It was "undisputed that the boundary lines for the 12 districts at issue were drawn with a goal of ensuring that each district would have a black voting-age population (BVAP) of at least 55%." 580 U.S. at __, 137 S. Ct. at 794. As to eleven of the districts, the district court nonetheless concluded that race was not the

predominant factor in drawing the district lines because the lines conformed to traditional districting principles. As discussed in Note 1, *supra*, the Supreme Court reversed, instructing the district court that "a conflict or inconsistency between the enacted plan and traditional redistricting criteria is not a threshold requirement or a mandatory precondition in order for a challenger to establish a claim of racial gerrymandering." *Id*. at 799. The Court remanded the case to the district court to determine whether, in fact, "race directed the shape of these 11 districts."

Because such a remand would not be necessary if race necessarily predominated in the creation of a majority-minority district, the Court's disposition likely means that a state could intentionally create such a district without using race as the predominant factor. Justice Kennedy wrote the opinion of the Court, which was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan. Justices Thomas and Alito protested that strict scrutiny should apply to every intentionally created majority-minority district. *Id*. at 803 (Alito, J., concurring in part and concurring in the judgment); *id*. at 803 (Thomas, J., concurring in the judgment in part and dissenting in part). *But see Cooper v. Harris*, 581 U.S. __, 137 S. Ct. 1455, 1469 (2017) ("Faced with this body of evidence—showing an announced racial target that subordinated other districting criteria and produced boundaries amplifying divisions between blacks and whites—the District Court did not clearly err in finding that race predominated in drawing [majority-minority] District 1. Indeed, as all three judges recognized, the court could hardly have concluded anything but.").

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*, 831 F.3d 204, 233 (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.").

Page 384. Add the following Note after Note 10:

10a. North Carolina's District 12 was back before the Supreme Court yet again in *Cooper v. Harris*, 581 U.S. __, 137 S. Ct. 1455 (2017). Although *Harris* did not purport to undermine *Easley v. Cromartie*, the deference *Harris* showed to the district court's conclusions was in tension with the Court's approach in *Easley*. In *Easley*, the district court concluded that considerations of race predominated in the drawing of pro-Democratic district lines, but the Supreme Court reversed that finding as clearly erroneous and insisted that politics, not race, was

the predominant factor. Legislators, in the opinion of the Court, manipulated the district's population of blacks, but they did so in order to draw districts favoring Democrats.

By the time of *Harris*, the North Carolina legislature was controlled by Republicans, and the districts they drew favored their party by packing blacks into majority-minority districts. The district court again held that race predominated, and this time the Supreme Court deferred to the district court's assessment of the motives of the line-drawers. As the Court explained, deference is appropriate so long as the lower court's factual finding "is 'plausible'; we reverse only when 'left with the definite and firm conviction that a mistake has been committed.'" 137 S. Ct. at 1474 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985)).

In confronting the problem of distinguishing between racial and political motivations, *Harris* elaborated as follows:

> "[I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. See *Vera*, 517 U.S., at 968-970 (plurality opinion). In other words, the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics."

Id. at 1473 n.7. The Court appears to have believed that the Democratic legislators in *Easley* packed District 12 with reliable Democratic voters (who, incidentally, were black), whereas the Republican legislators in *Harris* packed District 12 with black voters (who, incidentally, were Democrats). *See id*. at 1478 (noting "that the districting plan's own architects had repeatedly described the influx of African-Americans into District 12 as a § 5 compliance measure, not a side-effect of political gerrymandering"). Is that analysis consistent with *Easley*?

F. Resolving the *Shaw*/VRA Conflict

Page 404. Add the following Note after Note 5:

5a. The never-ending saga of Texas redistricting continued with *Abbott v. Perez*, 585 U.S. __, 138 S. Ct. 2305 (2018). *Perez* was the culmination of several years of litigation about redistricting following the 2010 census. The Texas legislature initially drafted a plan in 2011, but that plan was challenged in court and never implemented. Rather, a court-drawn plan was put into place for the 2012 elections, and the legislature adopted that court-drawn plan as its own (with only slight changes) in 2013. Despite the fact that the Texas legislature had adopted the court-drawn plan as a way of avoiding further litigation, the 2013 plan was challenged and the three-judge district court in Texas struck it down. According to the district court, the 2011 plan had intentionally diluted the votes of minorities, and the 2013 plan had not sufficiently purged the "taint" of the earlier intentional discrimination.

The Supreme Court reversed in relevant part. It held that the intent of the 2013 legislature was "what matters," 138 S. Ct. at 2325, but that a legislature is not under an obligation to purge itself of any taint stemming from the intentional discrimination of its predecessors. Thus, even if the 2011 legislature had engaged in intentional discrimination, that did not prove the illegality of the 2013 plan, although "the intent of the 2011 Legislature . . . [is] relevant to the extent that [it] naturally give[s] rise to—or tend[s] to refute—inferences regarding the intent of the 2013 Legislature." *Id*. at 2327. Significantly, however, even accepting that there had been intentional

discrimination in 2011, "it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent." 138 S. Ct. at 2325.

Abbott v. Perez struck down one district in the 2013 plan. House District 90, the Court concluded, was an unconstitutional racial gerrymander because of its predominant use of race in creating a district that could be controlled by Latinos. The state admitted that "race was the predominant factor in the design of" the district, but sought to defend on the ground that race was used to ensure that the plan could not be subject to a challenge under VRA § 2. The Court disagreed, saying that the state had not carried its burden under the *Shaw* line of cases to demonstrate that it had "good reason" for thinking that it was necessary to use race to avoid a § 2 violation. Texas pointed out that the Mexican-American Legal (or Legislative) Caucus (a group of Texas legislators representing majority-Hispanic constituencies) demanded that more Latinos be added to the district. The fact that such a group advocates for a broad reading of § 2 does not, however, mean that such a reading actually describes the scope of § 2. Texas also noted that the Democratic primary elections in 2012 and 2014 were very close, with the Latino candidate of choice narrowly losing in 2014 and narrowly winning in 2014. The Court concluded that these data, while they "may be suggestive," "were not enough to give the State good reason to conclude that it had to alter the district's lines solely on the basis of race." 138 S. Ct. at 2334.

Chapter 6

THE ROLES AND RIGHTS OF POLITICAL PARTIES

B. State Action

Page 441. Add the following after Note 11:

12. *Problem*. The State of Metropolitana requires parties to choose their nominees for certain offices by primary election, and further provides that the winners of major parties' primaries receive automatic ballot positions on the general election. Metropolitana also requires candidates seeking to appear on a party's primary ballot to submit petitions with a certain number of signatures. According to state law, both the petition-signers and the petition-witnesses must be registered members of the political party whose nomination the candidate is seeking. Petition-signers must be registered voters and residents of the political subdivision in which the office is being sought, but the state law requires merely that the petition-witnesses be registered voters in the state. The Whig Party passes a rule, however, providing that candidates for that party's nomination must have their petitions witnessed by persons who are registered voters in the political subdivision in which the office is being sought.

The party rule is challenged by James Gordon, a candidate for district attorney of Gotham County who is seeking the nomination of the Whig Party, and persons who live outside Gotham County but who are willing to witness petitions signed by registered voters in the county. The challengers argue that the rule interferes with their freedom of speech, assembly, and petition, and additionally deprives them of the equal protection of the laws by treating them differently based on the political subdivision in which they live. The Party moves to dismiss on the ground that it is not a state actor. Should the motion be granted? *See Yassky v. Kings County Democratic County Committee*, 259 F. Supp. 2d 210 (E.D.N.Y. 2003).

13. *Problem*. In New York State, parties nominate judicial candidates at party conventions held in each judicial district. (For more details about this process, see *New York State Board of Elections v. López Torres*, 552 U.S. 196 (2008), which appears as a principal case at page 543 of the Casebook.) Kings County (Brooklyn) comprises one judicial district, and the Democratic Party is dominant within the County. The Party creates a screening committee to evaluate applicants for the Party's nominations to judgeships. The committee ranks applicants as "qualified" or "not qualified," and any candidate receiving a rating of "not qualified" is ineligible to receive the support of the Party's executive committee. Although the executive committee's endorsement is undoubtedly significant, it is possible for a candidate rated as "not qualified" to receive the nomination by convincing other convention delegates to support his candidacy. Are the members of the screening committee behaving as state actors in their evaluation of candidates? Does it matter if the committee is alleged to be discriminating against candidates on the basis of race? What about ideology? What if the candidate simply claims that the committee has deprived her of the equal protection of the laws by rating her lower than other similarly qualified candidates? *See Jacobson v. Kings County Democratic Committee* (E.D.N.Y., motions to dismiss pending).

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*, 833 F.3d 1119 (9th Cir. 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," *id*. at 1121, 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.

D. Third Parties, Independent Candidates, and Ballot Access

Page 547. Add the following after Note 2:

3. In 2016, when Senator Bernie Sanders challenged former Secretary of State Hillary Clinton for the Democratic presidential nomination, Sanders supporters objected to the influence of "superdelegates" at the Democratic National Convention. Because the superdelegates were uncommitted, meaning that they could vote for the candidate of their choice regardless of the results of any primary election, the superdelegates reduced the voting power of the delegates chosen through primary elections, and thereby undermined the power of the voters in primary elections. A Sanders supporter challenged the Democrats' use of superdelegates, arguing that it violated the First and Fourteenth Amendments. Relying on *López Torres*, however, the district court held that any right that the supporter had to participate in the nomination process did "not give him an absolute right to control the internal processes and priorities of" the Party and did

not guarantee him a "fair shot" at influencing the Party's nomination. *Kurzon v. Democratic National Committee*, 197 F. Supp. 3d 638, 642-43 (S.D.N.Y. 2016). Furthermore, the court noted that prohibiting the Democratic Party from using superdelegates would "clearly infringe[]" the Party's "countervailing First Amendment rights." *Id*. at 643.

Chapter 8

POLITICAL SPEECH

A. Introduction

Page 572. Add the following after the last full paragraph:

A good, real-life example of the distinction between "content-based" and "viewpoint-based" restrictions can be seen in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). There, a local ordinance distinguished between types of signs posted by private parties, and provided greater protection to some types than to others. For example, the ordinance imposed greater restrictions on "ideological signs" (a category for signs "communicating a message or ideas" and not covered by any of twenty-three other categories), "political signs" (any "temporary sign designed to influence the outcome of an election called by a public body"), and "temporary directional" signs (signs directing the public to an event), than it imposed on other classes of signs. "Political signs," for example, were restricted to a period close to an election; "directional signs" could be displayed no more than twelve hours before the event and one hour after. The Court of Appeals had upheld the ordinance on the grounds that the town "did not adopt its regulation of speech [based on] disagree[ment] with the message conveyed." *Reed v. Town of Gilbert*, 707 F.3d 1057, 1071 (9th Cir. 2013). The Supreme Court disagreed. While the lack of animus toward the message meant that the ordinance was not "viewpoint-based," it was nonetheless still "content-based" because it placed heavier burdens on a "political" sign than on, *e.g.*, a garage-sale sign, specifically because of the former's political content. The Supreme Court applied strict scrutiny and found the ordinance unconstitutional.

Page 572. Add at the end of the last full paragraph:

See Matal v. Tam, 137 S. Ct. 1744 (2017) (striking down a law prohibiting the registration of any trademark that might "disparage . . . or bring . . . into contemp[t] or disrepute" any "persons, living or dead.")

B. Defamation and the Problem of False Statements

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. Replace the Hasen citation in Problem 6c with the following:

Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53 (2013).

Page 602, Note 6. Add the following to the end of Problem 6c:

The Supreme Court has indicated in dictum that the government "may prohibit messages intended to mislead voters about voting requirements and procedures." *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876, 1889 n.4 (2018).

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 themselves as members of those professions. 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). *Cf. National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-72 ("Speech is not unprotected merely because it is uttered by 'professionals.'").

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). *Cf. Lee v. Weisman*, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting) ("[I]nterior decorating is a rock-hard science compared to psychology practiced by amateurs.").

Page 602. Add the following Notes after Note 6.

7. *Problem*. California's "Truth in Political Advertising Act," Cal. Elec. Code § 20010, prohibits a person, with actual malice, from superimposing an image of a candidate on another photograph, or superimposing another image on a photo of a candidate, unless accompanied by a disclaimer stating, "This picture is not an accurate representation of fact." If the Act were applied to punish the speech in the following examples, would it violate the First Amendment?

a. Karo Tarossian, a candidate for Los Angeles City Council, distributes campaign mailers showing the head of Tarossian's opponent, Monica Rodriguez, superimposed on a photo of a woman in front of an oil-drilling operation. The woman is holding a sign that says, "I am funded by Chevron." *See* Dakota Smith, *Campaign Mailer with Photoshopped Images Draws Accusations in L.A. City Council Race for Valley Seat*, L.A. TIMES, Apr. 10, 2017, *at* http://www.latimes.com/local/lanow/la-me-ln-mailer-council-race-20170410-story.html.

b. The same Monica Rodriguez, in an earlier election, distributed a campaign advertisement featuring the head of her opponent superimposed on the image of a cartoon frog, so as to make the point that the opponent hopped from job to job. *See id*.

c. A candidate doctors a photo to make it appear as if his opponent marched in a gay-pride parade, and then sends the photo to conservative voters.

8. The 2016 election brought to the fore the question of what quickly became known as "fake news." Narrowly defined, "fake news" refers to false stories on-line, presented as if coming from authentic news sources so as to deceive readers about their truthfulness. For example, one site purports to be the on-line site of the "Boston Tribune," a non-existent newspaper. Others closely copy the name and appearance of authentic news organizations, such as the fake news website ABCNews.com.co. More broadly, the term now is often used to refer to any news story with incorrect facts, or even lacking in context. Thus, President Trump has sometimes labeled traditional media outlets as "fake news."

In one well publicized incident, a North Carolina man read a "fake news" story that a child-prostitution ring was being run out of a pizza parlor in Washington, D.C., by associates of Democratic presidential candidate Hillary Clinton. Angered, the man drove to Washington and was arrested after firing a shot inside the restaurant (no one was hurt). *See* Cecilia Kang & Adam Goldman, *In Washington Pizzeria Attack, Fake News Brought Real Guns,* N.Y. TIMES, Dec. 5, 2016, *available at* https://www.nytimes.com/2016/12/05/business/media/comet-ping-pong-pizza-shooting-fake-news-consequences.html.

Do *Alvarez* and *Susan B. Anthony List* allow room for the government to regulate "fake news"? What would be some of the pros and cons of allowing the government to regulate "fake news"?

D. Anonymous Speech

Page 663, add the following new Note before the last paragraph on the page:

4. How much detail can a state require in a disclaimer? Under federal law, for example, if an organization—we'll call it Citizens for Democratic Socialism—independently funds a radio advertisement supporting a candidate's election, the advertisement must include the following disclaimer:

> "Paid for by Citizens for Democratic Socialism, www.citizensfordemocraticsocialism.org, not authorized by any candidate or candidate's committee. Citizens for Democratic Socialism is responsible for the content of this advertising."

See 2 U.S.C. § 441d; 11 C.F.R. §§ 110.11(b)-(c). How fast can you say this disclaimer? For most people, speaking quickly, it takes at least six seconds, or twenty percent of a thirty-second ad. Six seconds may not seem like a lot, but consider what else an ad might say in six seconds: "Give me liberty, or give me death;" "We have nothing to fear but fear itself;" "It's time we start caring about one another—this year, vote for Joe Smith, Democratic Socialist."

Is all of the required disclaimer really necessary? How much is redundant? In *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018), the Supreme Court considered a California statute requiring crisis-pregnancy centers to provide specific notices to pregnant women. In finding the statute unconstitutional, the Court noted that the statute "imposes a government-scripted, speaker-based disclosure requirement that is wholly disconnected from California's informational interest." *Id*. at 2377. The California statute would have, in certain circumstances, required a government notice much longer than the speaker's own message, thus, "drown[ing] out the facility's own message." *Id*. at 2377-78. Political-disclaimer laws do not require so lengthy a message, but is there a lesser point at which the disclaimer notice could effectively harm a speaker's ability to communicate its desired message? Is there really a strong governmental information interest? Consider the statement that candidates for federal office have been required to make on broadcast ads since 2003: "I'm XXX, and I approve this message." Remembering that the ad must already state that it is authorized by the candidate, do voters wonder if a candidate approves an ad urging election, or defeat of the opponent? The requirement has provided a significant amount of mockery—*see*, *e.g.*, https://www.youtube.com/watch?v=7M-cmNdiFuI. Has it really provided important information to the public?

In short, beyond the claims of a right to anonymity included in *McIntyre* and *Abell*, are disclaimer requirements vulnerable to challenge if they simply become too extensive? Where would a court draw the line?

F. Government Speech

Page 697, Note 2. Add the following to the end of the first paragraph of the Note:

How would you classify stickers distributed to voters that say, "Vote in Honor of a Veteran"? What if the stickers also include the name of the Secretary of State? What if the secretary of state is expected to run in the next election for lieutenant governor? *See* Geoff Pender, *Campaigning on Your Dime? Complaint over Hosemann Stickers Raises Long-Running Issue*, CLARION-LEDGER (Jackson, Miss), June 7, 2018, *available at* https://www.clarionledger.com/story/news/politics/2018/06/06/candidate-questions-hosemanns-vote-veteran-stickers-polls/677963002/.

I. Judicial Candidates' Speech

Page 786. Replace Problem 7(b) with the following:

b. Laws prohibiting judicial candidates from seeking, accepting, or using party endorsements. *See French v. Jones*, 876 F.3d 1228 (9th Cir. 2017), *cert. denied* 138 S. Ct. 1598 (2018); *Republican Party v. White*, *supra*.

Page 786. Add another problem to the end of Note 3:

g. Laws prohibiting judicial candidates from soliciting or receiving campaign contributions except during a fundraising window beginning four months before a primary election. *See Platt v. Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court*, 894 F.3d 235 (6th Cir. 2018).

Page 786. Add the following after Note 3:

3a. *Problem*. Michconsota prohibits judicial candidates from "misrepresent[ing] the identity, qualifications, present position, or other fact concerning the candidate or an opponent." The canon further provides that a judicial candidate "should not knowingly make representations that, although true, are misleading, or knowingly make statements that are likely to confuse the public with respect to the proper role of judges and lawyers in the American adversary system."

Candidate A, a former district attorney, runs against Candidate B, a former public defender. In one of his campaign advertisements, Candidate A charges that Candidate B "worked to put criminals on the street. Like Reuben Rapist, who raped an 11-year-old girl with learning disabilities. Candidate B found a loophole. Rapist went on to molest another child."

Each of those statements is, literally, true. As a criminal defense attorney, Candidate B did work to put criminals on the street. Candidate B did represent Rapist on appeal of his rape conviction. Candidate B achieved a reversal of Rapist's conviction by pointing to an error at Rapist's trial, although Rapist did commit the rape. And, after being released from prison, Rapist did rape another child.

What the advertisement did not mention, however, was that the reversal of Rapist's conviction was itself reversed by the state supreme court because the trial error was harmless. Rapist thus served his full sentence, and raped the second child after serving the entire sentence

imposed after his trial. None of Candidate B's efforts did anything to increase the likelihood that the second rape would occur.

Is it constitutional to discipline Candidate A for making a "misrepresent[ation]" about Candidate B? Would it be constitutional to discipline a judicial candidate on the ground that his campaign statements, while literally true, are misleading? *See In re Judicial Disciplinary Proceedings Against Gableman*, 784 N.W.2d 631 (Wis. 2010) (opinion of three justices concluding that candidates may not be disciplined for such statements); *In re Judicial Disciplinary Proceedings Against Gableman*, 784 N.W.2d 605 (Wis. 2010) (statement of three other justices concluding that candidates may be disciplined for such statements).

Should the constitutional standard be any different for a candidate running for a judicial office than for a candidate running for a legislative or executive one? *See Rickert v. Public Disclosure Comm'n*, 168 P.3d 826 (Wash. 2007) (striking down a law banning false statements, and overturning a penalty imposed on a legislative candidate for making false statements about an opponent). *Cf. United States v. Alvarez*, 567 U.S. __, 132 S. Ct. 2537 (2012) [p. 592] (overturning the conviction of a water-district board member for lying about having received the Congressional Medal of Honor).

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).

Page 786. After Note 5, add the following:

For one lower court's attempt to decide some of the questions raised by *Williams-Yulee* and *White*, consider the following case:

WINTER v. WOLNITZEK

United States Court of Appeals for the Sixth Circuit
834 F.3d 681 (2016)

SUTTON, Circuit Judge [with whom COLE, Chief Judge, and COOK, Circuit Judge, join].

* * * A growing line of cases grapples with the States' authority to create a system of judicial elections on the one hand and regulate judicial campaign speech on the other. *See Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656 (2015) [p. 774]; *Republican Party of Minn. v. White*, 536 U.S. 765 (2002) [p. 756]; *Carey v. Wolnitzek*, 614 F.3d 189 (6th Cir. 2010). At issue today are several clauses in Kentucky's judicial canons—from prohibitions on "campaign[ing] as a member of a political organization," to "endors[ing] . . . a candidate for public office," to "mak[ing] a contribution to a political organization," to making any "commitments" with respect to "cases, controversies, or issues" likely to come before the court, to making "false" or "misleading" statements. * * *

Robert Winter's campaign literature identified him as a "lifelong Republican" and informed voters that his opponents were registered Democrats. The Judicial Conduct Commission, which enforces the Code, sent him a "probable cause" letter, stating that his mailers may have violated the canon prohibiting "campaign[ing] as a member of a political organization."

Incumbent Allison Jones asked voters to "re-elect" her, even though she was initially appointed to her seat, and she promised to "work with the legislative and executive branches to ensure that the law provides stiff penalties for heroin dealers and that the judiciary has the tools necessary to reduce recidivism among heroin addicts that are arrested and sentenced." Her "re-elect" statement, the Commission wrote in its probable cause letter, potentially violated the canon prohibiting "false and misleading statements." And her "stiff penalties" comment potentially constituted an impermissible "commitment" on an issue likely to come before her court.

Cameron Blau, an aspiring judge, wants to give speeches supporting the Republican Party, to hold Republican fundraisers, to seek and receive endorsements from Republican candidates, and to donate to candidates and to the party. The Code bans all of that, which left Blau "fear[ful] [to] engag[e]" in any of it due to the risk of public reprimand, disbarment from the practice of law, or eventual suspension without pay and removal from office. * * *

The plaintiffs challenge eight features of the Commonwealth's Code of Judicial Conduct.

(1) *Campaigning clause*. "Except as permitted by law," Canon 5(A)(1)(a) says, "a judge or a candidate for election to judicial office shall not[] campaign as a member of a political organization." The Kentucky Supreme Court * * * held that this clause prohibits candidates from "portray[ing] themselves, either directly or by implication, as the official nominee of a political party." Interpreted that way, the district court held, the canon is vague and unconstitutionally overbroad. We agree.

The problem with this canon is that it's unclear when candidates go from permissibly affiliating with a party to illegally implying that they are the nominee of a party. On the one hand, the First Amendment establishes that a State may not prevent judicial candidates from publicly taking a stance on "matters of current public importance." *White*, 536 U.S. at 781-82 (quoting *Wood v. Georgia*, 370 U.S. 375, 395 (1962)). Saying "I am a Republican" is shorthand for just that, which means candidates have a constitutional right to portray themselves as a member of a political party. *Carey*, 614 F.3d at 201-02. On the other hand, Kentucky has a right to prevent candidates from identifying themselves as *the* nominee of a political party for a judicial seat. That's because Kentucky runs its judicial elections on a nonpartisan basis. There is no Democratic or Republican nominee for each seat because political parties don't officially endorse Kentucky judicial candidates, and indeed the two candidates vying in a general election for the same seat could each support the same party.

[T]he Kentucky Supreme Court construed the canon to prohibit "suggesting to the voters that the candidate is *the* endorsed nominee of a political party." A candidate for judicial office, it explained, may say that he is "a Republican" or "a Democrat," or "the only Republican" or "the only Democrat," because those phrases don't imply an endorsement. Those claims merely portray a candidate as a member of a party. So far so good. But claiming to be "the Liberal Democrat" or "the Conservative Republican," it added, implies an endorsement—due to the definite article—and therefore violates the canon.

This last point makes the canon, as construed by Kentucky's highest court, too vague to tightly regulate the problem and too vague to avoid scaring off permissible electoral speech. It's unclear when a candidate crosses the line from exercising his constitutional right to portray himself as a member of a political party to impermissibly implying the endorsement of that party. A few examples illustrate the uncertainty. Could a candidate truthfully claim to have "the endorsement of leaders of the Republican Party"? What if a candidate says, quite accurately, that "the Republicans support my campaign"? We are not sure whether this would violate Kentucky

law, making us doubt whether judicial candidates would know either. The Kentucky Supreme Court said that claiming to be "*the* Conservative Republican" would violate the canon by implying an endorsement; it thought the use of "the" was the key, while the word "conservative" was mere "surplusage." But how about claiming to be "the moderate Republican candidate" or "the most experienced conservative Republican candidate"? After reading those phrases, some might infer an endorsement, but others might infer that there are other Republicans in the race. It's hard to know when a candidate has portrayed himself as an official nominee "by implication." Because the canon (as interpreted by the Kentucky Supreme Court) gives judicial candidates little confidence about when they exercise their right to affiliate with a party or when they violate the law, the campaigning clause is vague and unconstitutionally overbroad. The district court rightly struck it in its entirety.

(2) *Speeches clause*. Suffering from a related problem is the infelicitously named speeches clause, which bans judicial candidates from "mak[ing] speeches for or against a political organization or candidate." A candidate has a free-speech right to say in a campaign speech that she is "a Republican," yet this clause by its terms bars a speech in which she says she is "for the Republican party." Because this clause does too much in one sense and too little in another, it does not narrowly address the problem at hand and thus is facially invalid.

In one sense, the speeches clause "does too little to advance the State's interest in impartiality and the avoidance of partisan influence." Kentucky allows "a judicial candidate [to] identify himself to the public as a member of a political party" in many ways. The candidate may tell any audience, no matter how big, that he is a Republican or a Democrat. He may give a speech for any political interest group, from the National Rifle Association to Planned Parenthood. And he may email, tweet, write, or say in an interview that he is for a political party. Banning him from giving a *speech* to the same effect creates serious under-inclusivity problems.

In another sense, the clause "suppresses too much speech to advance the government's interest." By banning speech functionally identical to the speech permitted by *Carey*—that he supports a particular party—the clause suffers from debilitating over-inclusivity problems. Both problems establish a fit defect and preclude the canon from running the gauntlet of strict scrutiny.

True, other circuits have upheld speeches clauses in other States' judicial codes. But they did so while reviewing more narrowly written canons. *See Wolfson v. Concannon*, 811 F.3d 1176, 1179 n.2 (9th Cir. 2016) (*en banc*) (prohibiting candidates from making "speeches *on behalf of* a political organization" (emphasis added)); *Bauer v. Shepard*, 620 F.3d 704, 711 (7th Cir. 2010) (same). The prohibitions at issue did not "prevent judicial candidates from announcing their views on disputed legal and political subjects." *Wolfson*, 811 F.3d at 1185. This one does. It is unconstitutional.

(3) *Contributions clause*. This clause prohibits judicial candidates from "mak[ing] a contribution to a political organization or candidate." As the plaintiffs see it, the provision suffers from a patent defect: If a candidate may declare "the party [he] support[s]," it also must be the case that he can "put his money where his mouth is" by contributing to that party. It is not that easy.

There is a distinction between speech-limiting regulations that limit all judges (elected or not) and those that hamstring judges in their efforts to run for election. For some time now, courts have recognized that a state "cannot have it both ways. If it wants to elect its judges, it cannot deprive its citizens of a full and robust election debate." *Geary v. Renne*, 911 F.2d 280, 294 (9th Cir. 1990) (*en banc*) (Reinhardt, J., concurring), *vacated on other grounds*, 501 U.S.

312 (1991). Kentucky, like any State, is free to staff its judiciary with elected judges. But as Justice Scalia pointed out in *White*, "the First Amendment does not permit it to achieve its goal by leaving the principle of elections in place while preventing candidates from discussing what the elections are about." 536 U.S. at 788. The campaigning and speeches clauses, invalidated above, restrict what judicial candidates may say in their own campaigns and thus violate the First Amendment. The lesson is straightforward: A State may not hold judicial elections, then prevent candidates from explaining what makes them qualified for that office.

But there is no having-it-both-ways problem with a contributions limit like this one. A contribution to a political organization or a candidate in a different campaign "is less a judge's communication about his qualifications and beliefs than an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker." *Siefert v. Alexander*, 608 F.3d 974, 984 (7th Cir. 2010). While "[j]udicial candidates have a First Amendment right to speak in support of their campaigns," *Williams-Yulee*, 135 S. Ct. at 1673, they do not have an unlimited right to contribute money to someone else's campaign. Otherwise, the Code of Conduct for United States Judges—which bans judges from "mak[ing] a contribution to a political organization or candidate"—is unconstitutional. That would come as a surprise. The "distance between" a contribution to someone else's campaign "and speech about a judge's own campaign justifies a more deferential approach to government prohibition" of contributions. *Siefert*, 608 F.3d at 984.

Financial contributions, we realize, amount to speech. *See Buckley v. Valeo*, 424 U.S. 1, 17-18 (1976) [p. 799]. But the alignment between speech and money makes a difference only with respect to Janus-faced regulations that tell judicial candidates to run for office but deny them the tools for doing so. That is not what this regulation does. A contribution of time, money, or reputation to a political organization or a candidate in a separate election, whether judicial or not, differs in kind and degree from a judicial candidate contributing the same to his own campaign. There is "a dividing line between" the speeches clause, "which impermissibly bars protected speech about the judge's own campaign," and the contributions clause, "which addresses a judge's entry into the political arena on behalf of his partisan comrades." *Siefert*, 608 F.3d at 984. * * * The contributions clause narrowly serves the Commonwealth's compelling interest in preventing the appearance that judicial candidates are no different from other elected officials when it comes to quid pro quo politics. It is constitutional.

(4) *Endorsements clause*. The endorsements clause is of a piece. It prohibits judicial candidates from "publicly endors[ing] or oppos[ing] a candidate for public office." And it too has nothing to do with the push-me-pull-me problem—being forced to run for office while being denied the means of doing so—that infects most unconstitutional regulations of speech in this area. By focusing on another candidate for office, a third party other than the judicial candidate himself, this clause narrowly addresses Kentucky's compelling interest in keeping its judges above the partisan fray of trading political favors.

Endorsements differ from a candidate's own expressions of agreement with a political party's platform or another candidate's views. When a judicial candidate endorses a particular candidate, he "support[s] or aid[s]" the other candidate, rather than supporting himself * * *. Voters understand the difference between a speech expressing, say, the judicial candidate's progressive vision for the Commonwealth and one, say, formally endorsing the Democratic nominee for Attorney General of Kentucky or President of the United States. The former helps the candidate; the latter helps the candidates for Attorney General and President. A ban on the former "impermissibly bars protected speech about the judge's own campaign." *Siefert*, 608 F.3d at 984.

But a ban on the latter permissibly "addresses a judge's entry into the political arena on behalf of his partisan comrades."

Because endorsements often are "exchanged between political actors on a quid pro quo basis," *id.*, the endorsements clause is narrowly tailored to Kentucky's compelling interest in preventing judges from becoming (or being perceived as becoming) part of partisan political machines. As long as Kentucky "does not regulate speech with regard to any underlying issues," it may target "the act of endorsement itself, which . . . is a direct expression of bias in favor of or against potential parties to a case, or at the very least, damages the appearance of impartiality." *Wersal v. Sexton*, 674 F.3d 1010, 1026 (8th Cir. 2012). A ban on such endorsements also guards against the risk that, once a judge is elected, he will not be able to (and he will not be perceived as being able to) referee disputes involving elected officials he did or did not endorse.

The clause does not suffer from the too-much and too-little coverage problems that the speeches and contributions clauses do. The plaintiffs have not identified any protected speech banned by the endorsements clause that makes it over-inclusive. It does not prohibit speech in opposition to one's *own* opponent any more than it prohibits "endorsing" oneself. Yet it does ban the endorsement of a candidate in a different race, an act that, like the personal solicitations in *Williams-Yulee*, signals the judicial candidate's "active[] engage[ment] in political campaigns." *Wolfson*, 811 F.3d at 1184 (upholding Arizona's endorsement clause).

While the clause is narrowly drawn, it is not perfectly drawn. It has a modest under-inclusivity problem because * * * a judicial candidate may "privately express[] his or her views on judicial candidates or other candidates for public office." True enough. But private expressions of approval or disapproval create far fewer quid pro quo appearance problems than the candidate formally putting his name and reputation behind another. The endorsements clause "aims squarely at the conduct most likely to undermine" non-partisanship in judicial elections and is thus narrowly tailored to that interest. *Williams-Yulee*, 135 S. Ct. at 1668.

(5) *Acting as a leader clause*. Kentucky prohibits a judge from "act[ing] as a leader or hold[ing] any office in a political organization." This clause does all that the First Amendment asks of it when it comes to Blau's facial challenge. The Commonwealth targets an admirable goal (preserving public confidence in its judges, *Williams-Yulee*, 135 S. Ct. at 1666) and uses permissible means in doing so ("diminishing reliance on political parties in judicial selection," *Carey*, 614 F.3d at 201). A judge who heads up a political party entrenches, rather than diminishes, political parties in judicial selection. Whether the candidate wishes to act as a leader of a political organization or hold office in a political organization, she cannot do so without directly undermining Kentucky's legitimate policy choice to hold nonpartisan elections for judges.

The difficulty comes in resolving Blau's as-applied challenge to the clause. The Kentucky Supreme Court read this clause broadly, interpreting it to include not just leading a political party or holding a formal office but also "hosting a political event." And that, it turns out, is one of the things Blau wants to do. There are many types of political events, and it's not clear how many this canon covers.

Happily for us, Blau identifies the one he wants to host: a "fundraiser[]." And the State, it seems to us, can comfortably ban that kind of event. *Williams-Yulee* tells us the rule when it comes to fundraising for oneself. Judicial candidates do not have a constitutional right to "supplicate campaign donors." 135 S. Ct. at 1666. And fundraising for others is controlled by our reasoning on the endorsements clause. As with endorsements, fundraisers "may be exchanged

between political actors on a quid pro quo basis" and are thus less about a judge's "qualifications and beliefs than [they are] an effort to affect a separate political campaign, or even more problematically, assume a role as political powerbroker." *Siefert*, 608 F.3d at 984. Both types of fundraisers bring "a judge's impartiality . . . into question" and can cause "the public [to] lose faith" in the promise of neutral and apolitical judging. *Wolfson*, 811 F.3d at 1184; *see also Bauer*, 620 F.3d at 712-13. Kentucky's ban on judges and judicial candidates hosting political fundraisers, together with its ban on their holding a political office or leading a political party, does not impermissibly infringe Blau's free-speech rights.

(6) *False statements clause*. This clause prohibits a judge or judicial candidate from "knowingly" or "with reckless disregard for the truth" making any "false[] statements" during a campaign. The Kentucky Supreme Court interpreted it to prohibit "untrue utterance[s]" that are "material[]" to a campaign, and to apply to Jones' request for voters to "re-elect" her even though she was initially appointed to her post.

The clause is constitutional on its face. The narrowest way to keep judges honest during their campaigns is to prohibit them from consciously making false statements about matters material to the campaign. This canon does that, and does it clearly. In the words of the district court: "Don't want to violate the Canon? Don't tell a lie on purpose or recklessly." Given the mens rea requirement, a judicial candidate will necessarily be conscious of violating this canon. *Cf. Weaver v. Bonner*, 309 F.3d 1312, 1319-20 (11th Cir. 2002).

This court, it is true, recently invalidated a false-statement ban that covered all non-judicial candidates for political office in Ohio. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473-76 (6th Cir. 2016). But the Ohio law swept more broadly than Kentucky's: It applied to all false statements, not just material ones, and it imposed liability on publishers of false statements, not just speakers, *Susan B. Anthony List*, 814 F.3d at 475. Kentucky's narrower interest in preserving public confidence in the honesty and integrity of its judiciary also is more compelling than Ohio's purported interest in protecting voters in other elected races from misinformation. *See id.* at 475. However much or however little truth-bending the public has come to expect from candidates for political jobs, "[j]udges are not politicians," and a "State's decision to elect its judiciary does not compel it to treat judicial candidates like campaigners for political office." *Williams-Yulee*, 135 S. Ct. at 1662. Kentucky has a "vital state interest" in safeguarding the public's confidence in the honesty of its judiciary, *see id.* at 1666 (quoting *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 889 (2009)), and the State's ban on materially false statements by judicial candidates survives strict scrutiny—at least facially.

As applied to Jones, however, the State's ban does not. The headwater of this problem is the Kentucky Supreme Court's ruling that Jones' "re-elect" statement qualified as a "materially false statement . . . calculated to mislead and deceive the voters." Yes, "re-elect" *could* mean what the court thought it meant: elect someone to the same position to which she was previously elected. And that was not true for Jones. The Governor had appointed her to the position; she had not been elected to it. But the term fairly could also mean "to elect for another term in office," precisely what Jones was seeking. *Webster's Third New International Dictionary* 1907. Applied to a statement such as "re-elect," readily capable of a true interpretation here, the ban outstrips the Commonwealth's interest in ensuring candidates don't tell knowing lies and thus fails to give candidates the "breathing space" necessary to free debate. *Brown v. Hartlage*, 456 U.S. 45, 60-61 (1982); *see Weaver*, 309 F.3d at 1319-20.

(7) *Misleading statements clause*. [Kentucky]'s ban on misleading statements fails across the board. If "misleading" adds anything to "false," it is to include statements that, while technically

true or ambiguous, create false implications or give rise to false inferences. But only a ban on conscious falsehoods satisfies strict scrutiny. *See Weaver*, 309 F.3d at 1319. "[E]rroneous statement is inevitable in free debate," and "[t]he chilling effect of . . . absolute accountability for factual misstatements in the course of political debate is incompatible with [an] atmosphere of free discussion." *Brown*, 456 U.S. at 60-61 (quotation omitted). "Negligent misstatements," in contrast to knowing misstatements, "must be protected in order to give protected speech the 'breathing space' it requires," even in judicial elections. *Weaver*, 309 F.3d at 1320. Unknowing lies do not undermine the integrity of the judiciary in the same way that knowing lies do, and the ability of an opponent to correct a misstatement "more than offsets the danger of a misinformed electorate." *Id.* This clause adds little to the permissible ban on false statements, and what it adds cannot be squared with the First Amendment.

(8) *Commits clause*. Judicial candidates may not, "in connection with cases, controversies, or issues that are likely to come before the court, make pledges, promises or commitments that are inconsistent with the impartial performance of the adjudicative duties of judicial office." * * *

[N]o one questions that Kentucky may prohibit judges from making commitments to decide specific cases in a certain way. "The First Amendment," after all, "permits a State to limit speech when the Due Process Clause demands nothing less." [H]owever, the canon does more than that by forbidding a judge from making "a promise with respect to 'issues' as well." * * *

Kentucky has * * * narrowed the commits clause to cover only a commitment "that [is] inconsistent with the impartial performance of the adjudicative duties of judicial office." * * * What appears to narrow the clause, the plaintiffs respond, makes it unconstitutionally vague. It is impossible to know, they contend, what is (and what is not) an issue-based commitment that is "inconsistent with the impartial performance of the adjudicative duties of judicial office."

There is something to the point, and we can understand why the district court agreed with it. While the "root meaning" of the word "impartiality" is avoiding "bias for or against either *party* to the proceeding," *White*, 536 U.S. at 775, "[n]either the commits clauses nor the [Canon's] definitions pin th[at] meaning down," *Bauer*, 620 F.3d at 716. And while we might read this clause narrowly to toe the constitutional line, it's not clear that this would respect the Commission and state judiciary's approach to the language. *See id.* We doubt, for example, that Jones' promise to "continue to work with the legislative and executive branches to ensure that the law provides stiff penalties for heroin dealers" is "inconsistent with [] impartiality" and thus anticipate that it could not be constitutionally proscribed. But we don't know if that's how the Commonwealth will construe the provision. Our inability to know how much protected speech the canon sweeps in means we could hold, as the district court did, that the clause is vague and unconstitutionally overbroad.

But again, "discretion, to say nothing of respect for a co-equal sovereign, is the better part of valor." *Carey*, 614 F.3d at 209. If Kentucky interprets "impartiality" to mean solely "impartiality as to parties," the clause may well advance a compelling interest and do so narrowly. *See White*, 536 U.S. at 775-77. [W]e think it wise to "remand this aspect of the case to the district court," which will allow the defendants to "obtain authority to remove the 'issues' language"; to adopt "an acceptable narrowing construction of the 'issues' language along with a modification to the commentary"; or to "suggest certification to the Kentucky Supreme Court." 614 F.3d at 209. * * *

Regulating campaign speech is not easy. It's not supposed to be. But treating elections for the courts just like elections for the political branches does not make sense either. Candidates for judicial office, if elected, are supposed to follow the rule of law—no matter current public

opinion, no matter the views of the political branches, no matter the views of the parties that support them. But candidates for the other offices are permitted to, indeed often expected to, listen to the views of their constituents and parties. Navigating these cross-currents is no simple task—and for that we have considerable sympathy for the efforts of the Commission. At the same time Kentucky has the right to elect its judges on a nonpartisan basis, however, it has no right to suspend the First Amendment in the process. If the Commission wishes to impose mandatory sanctions on the speech of judicial candidates for office, as opposed to non-enforceable guidelines or best practices, it must satisfy the rigors of the First Amendment in doing so.

We affirm the district court's judgment as to the campaigning, speeches, endorsements, acting as a leader, and misleading statements clauses, and as to the facial challenge to the false statements clause. We reverse the court's judgment on the contributions clause and the as-applied challenge to the false statements clause. And we vacate the court's judgment on the commits clause and remand for further consideration of that clause's meaning and validity.

Notes and Questions

1. In *Winter*, the Sixth Circuit struck down laws that limited judges' ability to campaign, but the court was far more accepting of laws that sought to remove judges from participating in, or supporting, others' campaigns. Is that line the appropriate one? What compelling interest is advanced by speech restrictions that treat judges as political actors—but only during their own campaigns?

2. The court said that the state had "a right" to prevent a judicial candidate from claiming to be the nominee of a party because Kentucky's judicial elections were non-partisan. But parties have the right to endorse candidates whether or not the ballot features the parties' names. Could Kentucky prohibit judicial candidates from accurately stating that they were endorsed in a non-partisan race? Would there be any difference if the candidate claimed to be "nominated" rather than "endorsed"? After all, "nominate" means only to propose for appointment or election to an office—a definition that might apply to partisan and non-partisan races.

3. What kinds of "political events" could a state prevent its judicial candidates from hosting? If a candidate hosts an event featuring candidates for other offices, wouldn't that present an "endorsement"?

4. The *Winter* court upheld the false-statements clause even though it had struck down a similar ban on false statements applicable to non-judicial races. *See Susan B. Anthony List v. Driehaus*, 814 F.3d 466, 473-76 (6th Cir. 2016). Was *Winter* correct that the interest in promoting the public's view of the judiciary was more compelling than the interest in protecting the public from misinformation in other elections? Does *United States v. Alvarez*, 567 U.S. __ (2012) [p. 592], not apply to judges campaigning for election?

5. What kinds of commitments are "inconsistent with the impartial performance of the adjudicative duties of judicial office"? Certainly a commitment to decide a case in favor of one party is inconsistent with impartial judging, but what about commitments to impose harsh sentences or to protect the rights of tenants in cases against landlords?

6. Normatively, the court may well be right that judges "are supposed to follow the rule of law—no matter current public opinion, no matter the views of the political branches, no matter the views of the parties that support them." But descriptively, however, we know that judges are influenced by their ideologies, their backgrounds, and the societies in which they live. Should it

be permissible for states to restrict judicial candidates' speech based on an ideal of judicial behavior when the reality is something else?

Put another way, does the compelling interest in avoiding the appearance of judicial impartiality depend on how well judges adhere to judicial impartiality in reality? One might conclude, as one recent court did, that "[a] scrupulously independent judiciary means little, after all, if the public does not view it as such." *Platt v. Board of Commissioners on Grievances and Discipline of the Ohio Supreme Court*, 894 F.3d 235 (6th Cir. 2018). But does the state have a compelling interest in ensuring that the public views the state judiciary as "scrupulously independent" of politics if the judiciary is not in actuality so independent? If not, who decides whether the judiciary is actually as independent of politics as its image would have it seem? *Platt* noted that Ohio "presume[s] . . . that judges are able to set aside any partisan interests once they have assumed judicial office and have taken an oath to decide cases on the facts and the law before them," in holding that a ban on judicial candidates' solicitating money "serves the state's interest . . . in the public's *perception* of impartiality." *Id*. at __ (quoting *In re Disqualification of Bryant*, 885 N.E.2d 246, 246 (Ohio 2006)).

Chapter 9

CAMPAIGN FINANCE

D. Limitations on Expenditures

Page 981. Add the following at end of the first full paragraph that begins "Super PACs…".

Nevertheless, in the fall of 2016, a well financed group, including three members of Congress, filed suit seeking to reverse the FEC's acquiescence in these decisions. See Complaint, *Lieu v. Federal Election Commission*, No. 16-CV-2201 (D.D.C., Nov. 4, 2016) (available at https://transition.fec.gov/law/litigation/Lieu_lieu_amend_complaint.pdf). As of the summer of 2018, the case remains pending at the D.C. District.

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), *cert. denied sub. nom. Chisholm v. Two Unnamed Petitioners*, 137 S. Ct. 77 (2016), 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 proved 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. . . . 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.

F. Government Financing of Campaigns

Page 999, Note 3. Replace the reference to *Abood* with the following:

See also Janus v. American Federation of State, County, and Municipal Employees, 138 S.Ct. 2448 (2018) (holding that a requirement that non-union members pay fees to a union constituted unconstitutionally compelled political speech).

Page 999. Add new paragraph at the end of Note 3:

May the government provide candidates with campaign funds from special assessments or levies? In 2015, the City of Seattle, Washington, launched a voucher program in which residents received vouchers that they could donate to political candidates of their choice. The program was funded by a special property-tax assessment levied on homeowners in the city. Of necessity some of the vouchers would be contributed to candidates with whom some of the homeowners disagreed. Is such a program constitutional? Or does it unconstitutionally compel dissenting homewoners to speak? *See Elster v. City of Seattle* (slip op. King County Sup. Ct # 17-2-16501-8 SEA,
Nov. 3, 2017) (available at http://www.campaignlegalcenter.org/sites/default/files/2017-11-03%20Order%20granting%20City%27s%20MTD.pdf). Does *Janus*, *supra*, affect your opinion?

Page 1025: Add the following before the paragraph beginning "Other studies….":

How far does the informational interest of voters extend? In *Independence Institute v. Federal Election Commission*, 216 F. Supp. 3d 176 (D.D.C. 2016), *sum. aff'd* 137 S. Ct. 1204 (2017), a three-judge district-court panel upheld donor-disclosure provisions of the Federal Election Campaign Act. The Independence Institute, a think tank organized under § 501(c)(3) of the Internal Revenue Code (and therefore prohibited from political-campaign activity), had, for some years, through studies and papers, advocated for federal sentencing reform. It thus sought to air the following radio advertisement:

> Let the punishment fit the crime. But for many federal crimes, that's no longer true. Unfair laws tie the hands of judges, with huge increases in prison costs that help drive up the debt. And for what purpose? Studies show that these laws don't cut crime. In fact, the soaring costs from these laws make it harder to prosecute and lock up violent felons. Fortunately, there is a bipartisan bill to help fix the problem—the Justice Safety Valve Act, bill number S. 619. It would allow judges to keep the public safe, provide rehabilitation, and deter others from committing crimes.
>
> Call Senators Michael Bennet and Mark Udall at 202-224-3121. Tell them to support S. 619, the Justice Safety Valve Act. Tell them it's time to let the punishment fit the crime.

Because Senator Bennet was up for re-election, the ad fell under the donor-disclosure provisions of the Bipartisan Campaign Reform Act.

Is the ad above, in your opinion, a campaign ad, an "issue ad," or something else? After *Citizens United* and *Independence Institute*, is there any limit as to what the government can

designate as an "electioneering communication" requiring disclosure of donors, so long as the speech mentions a candidate? Has the Court *sub silento* overruled *Buckley*'s "exacting scrutiny" requirement for compulsory donor disclosure? *See Buckley*, 424 U.S. 1, 64 (*per curiam*) (quoted *supra* at 1013). Is compulsory donor disclosure now a *de facto* "rational basis" test?

G. Reporting and Disclosure of Contributions and Expenditures

Page 1027. Add the following after the second sentence of Note 6:

See Michael D. Gilbert, *Transparency and Corruption: A General Analysis*, __ U. Chi. Leg. F. __ (2018) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3123301).

Page 1030. Add a new Note 11:

11. Requirements to report donors are related to, but separate from, so-called "disclaimer" requirements that require speakers to identify themselves on the face of an ad. Though typically called "disclaimers"—presumably from their similar positioning to the various legal limitations included in advertisements for commercial products—these provisions require the speaker to "claim" the ad in question. The best known such requirement is probably that requiring candidates for federal office to state in broadcast ads that they "approve this message." For an analysis of these requirements, see *supra* Chapter 8, pp. 644-663.

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*, 831 F.3d 204 (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.

Page 1046. Insert the following Notes after Note 10:

10a. For one to classify a voting requirement as a "burden" on the right to vote, there must be an implicit assumption about the meaning of an "unburdened" right to vote. But voting always requires at least some effort—effort that may be greater for some people (notably the poor) than for others. For example, registration, especially pre-election-day registration, and even the obligation to go to a polling place impose burdens that may not be trivial for voters who lack easy access to transportation or who have jobs that make it difficult to leave during the appropriate hours. Are those requirements vulnerable after *Crawford* if one can show that they have a "disenfranchising" effect on some number of voters relative to alternatives such as Internet voting, registration by mail, or an extended period of early (*i.e.*, pre-election-day) voting?[b]

Most people believe that a state may constitutionally limit voting to election day and the Supreme Court has upheld requirements that voters register in advance of election day. *See Marston v. Lewis*, 410 U.S. 679, 680 (1973) [p. 100] (*per curiam*) (upholding a requirement that voters register fifty days in advance of an election, and noting that "States have valid and sufficient interests in providing *some* period of time—prior to an election—in order to prepare adequate voter records and protect its electoral processes from possible fraud."); *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972) [p. 93] ("Fixing a constitutionally acceptable period [for registration prior to an election] is surely a matter of degree. It is sufficient to note here that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud. . . ."). Although many states allow early voting, nearly a third of states do not, and few people think that the Constitution requires states to amend their laws to provide for early voting. Is the constitutional issue any different if a state *does* have early voting and then eliminates or reduces it? Suppose that a state grants a period of early voting and same-day voter registration. If the state later amends the law to restrict the period of early voting and to eliminate same-day registration, is such a law unconstitutional because of its restriction on the right to vote? *See Ohio Democratic Party v. Husted*, 834 F.3d 620 (6th Cir. 2016).

[b] The Early Voting Information Center maintains a website discussing these and similar matters. *See* Early Voting Information Center, *EVIC*, http://earlyvoting.net.

10b. President Trump has alleged that millions of votes were fraudulently cast for his opponent in the 2016 election, although there appears to be no evidence to support such a claim. In May 2017, in an effort to combat such supposed voter fraud, the President issued an executive order establishing the Presidential Advisory Commission on Election Integrity. The bipartisan commission, which is chaired by Vice President Pence, is charged with submitting a report identifying "those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting, including fraudulent voter registrations and fraudulent voting," as well as those laws and practices that either enhance or undermine public confidence in the integrity of elections. The full executive order is available at this link: https://www.whitehouse.gov/the-press-office/2017/05/11/presidential-executive-order-establishment-presidential-advisory.

The commission has requested states to provide publicly available voter data (such as names, addresses, birth dates, political-party registration, a list of elections in which each voter has voted, and the last four digits of voters' Social Security numbers), and that request has created considerable controversy. Twenty-one states and the District of Columbia have refused to provide any data, while others have provided only some of the requested information. Some voters who object to the disclosure of the information have canceled their registrations in response to the request. Public-interest groups have sued to block the commission from obtaining the data, although in July 2017 the federal district court in D.C. rejected one such challenge. *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*, 2017 U.S. Dist. LEXIS 114787 (D.D.C. 2017).

10c. Some states permit voters to cast "straight-ticket" votes, in which the selection of a party automatically casts a vote for each of that party's nominees in all of that year's elections. Most states, however, require voters to vote for each candidate individually.

Should the Constitution require states to provide an option for straight-ticket voting? Does it matter if a state allowed straight-ticket voting and then eliminated it? In a recent case, Michigan voted to eliminate straight-ticket voting, but its law was enjoined on the basis that it would increase waiting times for voting, thus burdening the right to vote, and would also cause voter confusion. Challengers also provided evidence that black voters are more likely than whites to use straight-ticket voting, so the elimination of that voting method would impose a disproportionate burden on blacks. *See Michigan State A. Philip Randolph Institute v. Johnson*, 833 F.3d 656 (6th Cir. 2016).

Page 1053-54. Delete Note 6.

C. Campaign-Free Zones Around Polling Places

Page 1054. Change the section heading to "Speech Restrictions in or near Polling Places."

Page 1062. Add to Note 8:

See also Jonah Berger et al., *Contextual Priming: Where People Vote Affects How They Vote*, 105 PROCEEDINGS OF THE NAT'L ACADEMY OF SCIENCES 8846 (2008) (finding, after controlling for other factors, that people voting at schools were more likely to support a school-funding initiative). Berger et al. suggest that governments might be able to minimize the biasing effect of polling locations by, "[f]or example, having people vote in a generic multipurpose room rather than a school hallway filled with children or a church room containing religious images." *Id*. at 8848.

Pages 1061-1062. Renumber Note 5 as Note 8, renumber Notes 6-8 as Notes 5-7, and add the following after Note 8:

9. What restrictions on political speech would be permissible in a non-public forum? In *Burson v. Freeman*, the speech restriction applied in areas outside of the polling place, and only Justice Scalia would have treated that area as a non-public forum. In the next case, however, the challenged speech restriction operated *within* the polling place—an area that the Court agreed was a non-public forum. It may, then, be unsurprising that the Court was willing to accept speech restrictions in such a place. But at what point does a speech restriction—even one in a non-public forum—go too far? May a state ban voters from wearing clothing with political messages?

MINNESOTA VOTERS ALLIANCE v. MANSKY

Supreme Court of the United States
585 U.S. __, 2018 WL 2973746, 2018 U.S. LEXIS 3685 (2018)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which JUSTICE KENNEDY, JUSTICE THOMAS, JUSTICE GINSBURG, JUSTICE ALITO, JUSTICE KAGAN, and JUSTICE GORSUCH join].

Under Minnesota['s "political apparel ban," Minn. Stat. § 211B.11(1)], voters may not wear a political badge, political button, or anything bearing political insignia inside a polling place on Election Day. The question presented is whether this ban violates the Free Speech Clause of the First Amendment.

I * * *

There is no dispute that the political apparel ban applies only *within* the polling place, and covers articles of clothing and accessories with "political insignia" upon them. Minnesota election judges—temporary government employees working the polls on Election Day—have the authority to decide whether a particular item falls within the ban. If a voter shows up wearing a prohibited item, the election judge is to ask the individual to conceal or remove it. If the individual refuses, the election judge must allow him to vote, while making clear that the incident "will be recorded and referred to appropriate authorities." Violators are subject to an administrative process before the Minnesota Office of Administrative Hearings, which, upon finding a violation, may issue a reprimand or impose a civil penalty. That administrative body may also refer the complaint to the county attorney for prosecution as a petty misdemeanor; the maximum penalty is a $300 fine.

* * * Five days before the November 2010 election, [petitioner Minnesota Voters Alliance (MVA)] and other likeminded groups and individuals filed a lawsuit in Federal District Court challenging the political apparel ban on First Amendment grounds. * * * In response to the lawsuit, officials for Hennepin and Ramsey Counties distributed to election judges an "Election Day Policy," providing guidance on the enforcement of the political apparel ban. The Minnesota Secretary of State also distributed the Policy to election officials throughout the State. The Policy specified that examples of apparel falling within the ban "include, but are not limited to":

- "Any item including the name of a political party in Minnesota, such as the Republican, [Democratic–Farmer–Labor], Independence, Green or Libertarian parties.
- Any item including the name of a candidate at any election.
- Any item in support of or opposition to a ballot question at any election.
- Issue oriented material designed to influence or impact voting (including specifically the 'Please I.D. Me' buttons [worn by MVA members]).
- Material promoting a group with recognizable political views (such as the Tea Party, MoveOn.org, and so on)." * * *

* * * The District Court [subsequently] * * * granted summary judgment for the State * * *, and * * * the Court of Appeals affirmed. * * *

II

The First Amendment prohibits laws "abridging the freedom of speech." Minnesota's ban on wearing any "political badge, political button, or other political insignia" plainly restricts a form of expression within the protection of the First Amendment.

But the ban applies only in a specific location: the interior of a polling place. It therefore implicates our "'forum based' approach for assessing restrictions that the government seeks to place on the use of its property." Generally speaking, our cases recognize three types of government-controlled spaces: traditional public forums, designated public forums, and nonpublic forums. In a traditional public forum—parks, streets, sidewalks, and the like—the government may impose reasonable time, place, and manner restrictions on private speech, but restrictions based on content must satisfy strict scrutiny, and those based on viewpoint are prohibited. The same standards apply in designated public forums—spaces that have "not traditionally been regarded as a public forum" but which the government has "intentionally opened up for that purpose." In a nonpublic forum, on the other hand—a space that "is not by tradition or designation a forum for public communication"—the government has much more flexibility to craft rules limiting speech. *Perry Ed. Assn.* v. *Perry Local Educators' Assn.*, 460 U.S. 37, 46 (1983). The government may reserve such a forum "for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Ibid.* * * *

A polling place in Minnesota qualifies as a nonpublic forum. It is, at least on Election Day, government-controlled property set aside for the sole purpose of voting. * * * Rules strictly govern who may be present, for what purpose, and for how long. And while the four-Justice plurality in *Burson* [v. *Freeman*, 504 U.S. 191 (1992)] [p. 1054] and Justice Scalia's concurrence in the judgment parted ways over whether the public sidewalks and streets *surrounding* a polling place qualify as a nonpublic forum, neither opinion suggested that the interior of the building

was anything but. See 504 U.S., at 196–197, and n.2 (plurality opinion); *id.*, at 214–216 (opinion of Scalia, J.).

We therefore evaluate MVA's First Amendment challenge under the nonpublic forum standard. The text of the apparel ban makes no distinction based on the speaker's political persuasion, so MVA does not claim that the ban discriminates on the basis of viewpoint on its face. The question accordingly is whether Minnesota's ban on political apparel is "reasonable in light of the purpose served by the forum": voting.

III

A

We first consider whether Minnesota is pursuing a permissible objective in prohibiting voters from wearing particular kinds of expressive apparel or accessories while inside the polling place. The natural starting point for evaluating a First Amendment challenge to such a restriction is this Court's decision in *Burson*, which upheld a Tennessee law imposing a 100–foot campaign-free zone around polling place entrances. Under the Tennessee law * * * no person could solicit votes for or against a candidate, party, or ballot measure, distribute campaign materials, or "display . . . campaign posters, signs or other campaign materials" within the restricted zone. 504 U.S., at 193–194 (plurality opinion). The plurality found that the law withstood even the strict scrutiny applicable to speech restrictions in traditional public forums. *Id.*, at 211. In his opinion concurring in the judgment, Justice Scalia argued that the less rigorous "reasonableness" standard of review should apply, and found the law "at least reasonable" in light of the plurality's analysis. *Id.*, at 216.

That analysis emphasized the problems of fraud, voter intimidation, confusion, and general disorder that had plagued polling places in the past. See *id.,* at 200–204 (plurality opinion). Against that historical backdrop, the plurality and Justice Scalia upheld Tennessee's determination, supported by overwhelming consensus among the States and "common sense," that a campaign-free zone outside the polls was "necessary" to secure the advantages of the secret ballot and protect the right to vote. *Id.,* at 200, 206–208, 211. As the plurality explained, "[t]he State of Tennessee has decided that [the] last 15 seconds before its citizens enter the polling place should be their own, as free from interference as possible." *Id.,* at 210. That was not "an unconstitutional choice." *Ibid.*

MVA disputes the relevance of *Burson* to Minnesota's apparel ban. On MVA's reading, *Burson* considered only "active campaigning" outside the polling place by campaign workers and others trying to engage voters approaching the polls. Minnesota's law, by contrast, prohibits what MVA characterizes as "passive, silent" self-expression by voters themselves when voting. MVA also points out that the plurality focused on the extent to which the restricted zone combated "voter intimidation and election fraud," 504 U.S., at 208—concerns that, in MVA's view, have little to do with a prohibition on certain types of voter apparel.

Campaign buttons and apparel did come up in the *Burson* briefing and argument, but neither the plurality nor Justice Scalia expressly addressed such applications of the law. Nor did either opinion specifically consider the interior of the polling place as opposed to its environs, and it is true that the plurality's reasoning focused on campaign activities of a sort not likely to occur in an area where, for the most part, only voters are permitted while voting. At the same time, Tennessee's law swept broadly to ban even the plain "display" of a campaign-related message, and the Court upheld the law in full. The plurality's conclusion that the State was warranted in designating an area for the voters as "their own" as they *enter* the polling place suggests an

interest more significant, not less, *within* that place. *Id.,* at 210.

In any event, we see no basis for rejecting Minnesota's determination that some forms of advocacy should be excluded from the polling place, to set it aside as "an island of calm in which voters can peacefully contemplate their choices." Casting a vote is a weighty civic act, akin to a jury's return of a verdict, or a representative's vote on a piece of legislation. It is a time for choosing, not campaigning. The State may reasonably decide that the interior of the polling place should reflect that distinction.

To be sure, our decisions have noted the "nondisruptive" nature of expressive apparel in more mundane settings. *Board of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc.*, 482 U.S. 569, 576 (1987) (so characterizing "the wearing of a T-shirt or button that contains a political message" in an airport); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969) (students wearing black armbands to protest the Vietnam War engaged in "silent, passive expression of opinion, unaccompanied by any disorder or disturbance"). But those observations do not speak to the unique context of a polling place on Election Day. Members of the public are brought together at that place, at the end of what may have been a divisive election season, to reach considered decisions about their government and laws. The State may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most. That interest may be thwarted by displays that do not raise significant concerns in other situations.

Other States can see the matter differently, and some do. The majority, however, agree with Minnesota that at least some kinds of campaign-related clothing and accessories should stay outside. That broadly shared judgment is entitled to respect.

Thus, in light of the special purpose of the polling place itself, Minnesota may choose to prohibit certain apparel there because of the message it conveys, so that voters may focus on the important decisions immediately at hand.

B

But the State must draw a reasonable line. Although there is no requirement of narrow tailoring in a nonpublic forum, the State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out. Here, the unmoored use of the term "political" in the Minnesota law, combined with haphazard interpretations the State has provided in official guidance and representations to this Court, cause Minnesota's restriction to fail even this forgiving test.

Again, the statute prohibits wearing a "political badge, political button, or other political insignia." It does not define the term "political." And the word can be expansive. It can encompass anything "of or relating to government, a government, or the conduct of governmental affairs," Webster's Third New International Dictionary 1755 (2002), or anything "[o]f, relating to, or dealing with the structure or affairs of government, politics, or the state," American Heritage Dictionary 1401 (3d ed. 1996). Under a literal reading of those definitions, a button or T-shirt merely imploring others to "Vote!" could qualify.

The State argues that the apparel ban should not be read so broadly. According to the State, the statute does not prohibit "any conceivably 'political' message" or cover "all 'political' speech, broadly construed." Instead, the State interprets the ban to proscribe "only words and symbols that an objectively reasonable observer would perceive as conveying a message about the electoral choices at issue in [the] polling place." * * * But far from clarifying the

indeterminate scope of the political apparel provision, the State's "electoral choices" construction introduces confusing line-drawing problems.

For specific examples of what is banned under its standard, the State points to the 2010 Election Day Policy—which it continues to hold out as authoritative guidance regarding implementation of the statute. The first three examples in the Policy are clear enough: items displaying the name of a political party, items displaying the name of a candidate, and items demonstrating "support of or opposition to a ballot question."

But the next example—"[i]ssue oriented material designed to influence or impact voting"—raises more questions than it answers. What qualifies as an "issue"? The answer, as far as we can tell from the State's briefing and argument, is any subject on which a political candidate or party has taken a stance. For instance, the Election Day Policy specifically notes that the "Please I.D. Me" buttons are prohibited. But a voter identification requirement was not on the ballot in 2010, so a Minnesotan would have had no explicit "electoral choice" to make in that respect. The buttons were nonetheless covered, the State tells us, because the Republican candidates for Governor and Secretary of State had staked out positions on whether photo identification should be required.[4]

A rule whose fair enforcement requires an election judge to maintain a mental index of the platforms and positions of every candidate and party on the ballot is not reasonable. Candidates for statewide and federal office and major political parties can be expected to take positions on a wide array of subjects of local and national import. See, *e.g.*, Democratic Platform Committee, 2016 Democratic Party Platform (approved July 2016) (stating positions on over 90 issues); Republican Platform Committee, Republican Platform 2016 (approved July 2016) (similar). Would a "Support Our Troops" shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a "#MeToo" shirt, referencing the movement to increase awareness of sexual harassment and assault? At oral argument, the State indicated that the ban would cover such an item if a candidate had "brought up" the topic.

The next broad category in the Election Day Policy—any item "promoting a group with recognizable political views"—makes matters worse. The State construes the category as limited to groups with "views" about "the issues confronting voters in a given election." The State does not, however, confine that category to groups that have endorsed a candidate or taken a position on a ballot question.

Any number of associations, educational institutions, businesses, and religious organizations could have an opinion on an "issue[] confronting voters in a given election." For instance, the American Civil Liberties Union, the AARP, the World Wildlife Fund, and Ben & Jerry's all have stated positions on matters of public concern. If the views of those groups align or conflict with the position of a candidate or party on the ballot, does that mean that their insignia are banned? See [State's Br.] (representing that "AFL–CIO or Chamber of Commerce apparel" would be banned if those organizations "had objectively recognizable views on an issue in the election at hand"). Take another example: In the run-up to the 2012 election, Presidential candidates of both major parties issued public statements regarding the then-existing policy of the Boy Scouts of

[4] The State also maintains that the "Please I.D. Me" buttons were properly banned because the buttons were designed to confuse other voters about whether they needed photo identification to vote. We do not doubt that the State may prohibit messages intended to mislead voters about voting requirements and procedures. But that interest does not align with the State's construction of "political" to refer to messages "about the electoral choices at issue in [the] polling place."

America to exclude members on the basis of sexual orientation. Should a Scout leader in 2012 stopping to vote on his way to a troop meeting have been asked to cover up his uniform?

The State emphasizes that the ban covers only apparel promoting groups whose political positions are sufficiently "well-known." But that requirement, if anything, only increases the potential for erratic application. Well known by whom? The State tells us the lodestar is the "typical observer" of the item. But that measure may turn in significant part on the background knowledge and media consumption of the particular election judge applying it.

The State's "electoral choices" standard, considered together with the nonexclusive examples in the Election Day Policy, poses riddles that even the State's top lawyers struggle to solve. A shirt declaring "All Lives Matter," we are told, could be "perceived" as political. How about a shirt bearing the name of the National Rifle Association? Definitely out. That said, a shirt displaying a rainbow flag could be worn "*unless* there was an issue on the ballot" that "related somehow . . . to gay rights." A shirt simply displaying the text of the Second Amendment? Prohibited. But a shirt with the text of the *First* Amendment? "It would be allowed."

"[P]erfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward* v. *Rock Against Racism,* 491 U.S. 781, 794 (1989). But the State's difficulties with its restriction go beyond close calls on borderline or fanciful cases. And that is a serious matter when the whole point of the exercise is to prohibit the expression of political views.

It is "self-evident" that an indeterminate prohibition carries with it "[t]he opportunity for abuse, especially where [it] has received a virtually open-ended interpretation." Election judges "have the authority to decide what is political" when screening individuals at the entrance to the polls. We do not doubt that the vast majority of election judges strive to enforce the statute in an evenhanded manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views on what counts as "political." And if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest in maintaining a polling place free of distraction and disruption would be undermined by the very measure intended to further it.

That is not to say that Minnesota has set upon an impossible task. Other States have laws proscribing displays (including apparel) in more lucid terms. See, *e.g.*, Cal. Elec. Code Ann. § 319.5 (prohibiting "the visible display . . . of information that advocates for or against any candidate or measure," including the "display of a candidate's name, likeness, or logo," the "display of a ballot measure's number, title, subject, or logo," and "[b]uttons, hats," or "shirts" containing such information); Tex. Elec. Code Ann. § 61.010(a) (prohibiting the wearing of "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election"). We do not suggest that such provisions set the outer limit of what a State may proscribe, and do not pass on the constitutionality of laws that are not before us. But we do hold that if a State wishes to set its polling places apart as areas free of partisan discord, it must employ a more discernible approach than the one Minnesota has offered here.

Cases like this "present[] us with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote." *Burson,* 504 U.S., at 198 (plurality opinion). Minnesota, like other States, has sought to strike the balance in a way that affords the voter the opportunity to exercise his civic duty in a setting removed from the clamor and din of electioneering. While that choice is generally worthy of our respect, Minnesota has

not supported its good intentions with a law capable of reasoned application.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE SOTOMAYOR, with whom JUSTICE BREYER joins, dissenting.

*** * *** I would certify this case to the Minnesota Supreme Court for a definitive interpretation of the political apparel ban under Minn. Stat. § 211B.11(1), which likely would obviate the hypothetical line-drawing problems that form the basis of the Court's decision today. *** * ***

Notes and Questions

1. Because the Court held that polling places are nonpublic fora, Minnesota's political-apparel ban was constitutional if it was reasonable and viewpoint neutral. The ban was clearly viewpoint neutral, but the Court held that it was unreasonable because of the vagueness of the term "political" and the "haphazard interpretations" that the State had given to the term. Do you think the ban was reasonable? In considering that question, keep in mind that before one can determine whether a law is a reasonable way of accomplishing some goal, that goal must be identified. What was the government's goal here?

2. Would a more clearly stated prohibition on political apparel, such as the California and Texas statutes referenced in the Court's opinion, be a reasonable way of achieving the government's objective? How reasonable is it to prohibit, for example, the wearing of a t-shirt with a candidate's slogan or symbol?

3. As the Court noted, *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), held that a school could not prohibit its students from wearing black arm bands to protest the Vietnam War. *Minnesota Voters Alliance* distinguished *Tinker* on the ground that the polling place is a "unique context" that a state was entitled to keep free of "partisan discord" and "distract[ion]." Is a polling place much different from a school in that regard?

4. In footnote 4, the Court conceded that a state could "prohibit messages intended to mislead voters about voting requirements and procedures." Could a state ban "Please I.D. Me" buttons on the ground that they are intended to mislead voters about the identification requirements for voting?

Many states, in an attempt to limit vote-buying and voter coercion, have laws prohibiting voters from showing their votes to others. The rationale is that such a ban prevents voters from being able to prove how they voted; and attempts to buy a vote or to intimidate a voter into voting a certain way would be futile without a way of proving that the voter has voted the "right" way. Voters can still claim to have voted for one candidate or another, but there is no way to be sure that the voter is telling the truth.

Those restrictions have come under increasing scrutiny in recent years with the rise of cell-phone cameras and social media. Some voters have taken and posted "ballot selfies" featuring their marked ballots, raising a conflict between the voters' free-speech rights and the government's interest in combating undue influence in elections.

RIDEOUT v. GARDNER

United States Court of Appeals for the First Circuit
838 F.3d 65 (1st Cir. 2016), *cert. denied* 137 S. Ct. 1435 (2017)

LYNCH, Circuit Judge [with whom LIPEZ and THOMPSON, Circuit Judges, join].

In 2014, New Hampshire amended a statute meant to avoid vote buying and voter intimidation by newly forbidding citizens from photographing their marked ballots and publicizing such photographs. While the photographs need not show the voter, they often do and are commonly referred to as "ballot selfies." * * *

[In 1911, to prevent attempts to coerce voters into voting a certain way, the State] passed a statute[,] * * * codified in relevant part at [N.H. Rev. Stat.] section 659:35, I, which, until 2014, read: "No voter shall allow his ballot to be seen by any person with the intention of letting it be known how he is about to vote except as provided in RSA 659:20." The exception in section 659:20 allows voters who need assistance marking a ballot to receive such assistance. In 2014, the New Hampshire legislature revised section 659:35, I as follows:

> No voter shall allow his or her ballot to be seen by any person with the intention of letting it be known how he or she is about to vote or how he or she has voted except as provided in RSA 659:20. This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means.

Id. § 659:35, I (revisions underlined). The penalty for a violation of the statute is a fine of up to $1,000.

* * * HB366, the bill amending section 659:35, I * * * was introduced by State Representative Timothy Horrigan on January 3, 2013. Horrigan stated that "[t]he main reason this bill is necessary is to prevent situations where a voter could be coerced into posting proof that he or she voted a particular way." The bill started at the House Committee on Election Law, which recommended its passage, and the members of which expressed rationales for the bill similar to Horrigan's.

The bill then went to the House Committee on Criminal Justice and Public Safety. Deputy Secretary of State David Scanlan spoke in support of the bill, emphasizing the need to prevent vote buying and to protect the "privacy of [the] ballot." Though a majority of the members of the Criminal Justice Committee supported the bill, a minority disagreed and filed a report concluding that the bill was "an intrusion on free speech." In order to restrict the bill's scope to activity connected to vote buying, the minority suggested amending the bill as follows:

> This prohibition shall include taking a digital image or photograph of his or her marked ballot and distributing or sharing the image via social media or by any other means only if the distribution or sharing is for the purpose of receiving pecuniary benefit * * * or avoiding harm * * *.

The majority of the Criminal Justice Committee did not support this amendment, however, and HB366, absent the proposed limitation, proceeded to the full House of Representatives, which passed it by a vote of 198–96. * * * The Senate [then] passed the bill, and the Governor signed the bill into law, effective September 1, 2014.

The legislative history of the bill does not contain any corroborated evidence of vote buying or voter coercion in New Hampshire during the twentieth and twenty-first centuries. Representative Mary Till, who authored the House Committee on Election Law's statement of intent for the bill, provided the sole anecdotal allegation of vote buying. She asserted:

> I was told by a Goffstown resident that he knew for a fact that one of the major parties paid students from St[.] Anselm's $50 to vote in the 2012 election. I don't know whether that is true or not, but I do know that if I were going to pay someone to vote a particular way, I would want

> proof that they actually voted that way.

No evidence supported this hearsay allegation. The district court correctly held that "[t]he summary judgment record does not include any evidence that either vote buying or voter coercion has occurred in New Hampshire since the late 1800s."

As of August 11, 2015, * * * the New Hampshire Attorney General's Office had undertaken investigations of four individuals for alleged violations of section 659:35, I, arising from their publication of "ballot selfies" after voting in the September 9, 2014 Republican primary election. Three of those individuals * * * are the plaintiffs in this case. * * *

[The court first considered whether the ballot-selfie ban was a content-based or content-neutral restriction on speech. If the ban were content-based, strict scrutiny would apply, whereas if the ban were content-neutral, it would be evaluated under intermediate scrutiny. Ultimately the court held that it was unnecessary to resolve the question, because the law failed even under intermediate scrutiny.]

In order to survive intermediate scrutiny, section 659:35, I must be "narrowly tailored to serve a significant governmental interest." *McCullen* [v. *Coakley*], 134 S. Ct. [2518], 2534 [(2014)] (quoting *Ward* [v. *Rock Against Racism*], 491 U.S. [781], 796 [(1989)]). Though content-neutral laws "'need not be the least restrictive or least intrusive means of' serving the government's interests," *id*. at 2535 (quoting *Ward*, 491 U.S. at 798), "the government still 'may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals,'" *id*. (quoting *Ward*, 491 U.S. at 799). The statute fails this standard.

Secretary Gardner essentially concedes that section 659:35, I does not respond to a present "'actual problem' in need of solving." Instead, he argues that the statute serves prophylactically to "preserve the secrecy of the ballot" from potential future vote buying and voter coercion, because ballot selfies make it easier for voters to prove how they voted. He characterizes the amendment in section 659:35, I as a natural update of the older version of the statute, done in response to the development of "modern technology, such as digital photography and social media," which may facilitate a future rise in vote buying and voter intimidation schemes.

As the district court noted, the prevention of vote buying and voter coercion is unquestionably "compelling in the abstract." But intermediate scrutiny is not satisfied by the assertion of abstract interests. Broad prophylactic prohibitions that fail to "respond[] precisely to the substantive problem which legitimately concerns" the State cannot withstand intermediate scrutiny. *Members of City Council of City of L.A.* v. *Taxpayers for Vincent*, 466 U.S. 789, 810 (1984).

Digital photography, the internet, and social media are not unknown quantities—they have been ubiquitous for several election cycles, without being shown to have the effect of furthering vote buying or voter intimidation. As the plaintiffs note, "small cameras" and digital photography "have been in use for at least 15 years," and New Hampshire cannot identify a single complaint of vote buying or intimidation related to a voter's publishing a photograph of a marked ballot during that period. Indeed, Secretary Gardner has admitted that New Hampshire has not received any complaints of vote buying or voter intimidation since at least 1976, nor has he pointed to any such incidents since the nineteenth century. "[T]he government's burden is not met when a 'State offer[s] *no* evidence or anecdotes in support of its restriction.'"[6]

[6] Secretary Gardner does point to history abroad. He references the plebiscite held upon the German annexation of Austria in 1938, in which "Adolf Hitler instituted election rules that allowed voters to voluntarily show their ballot

Secretary Gardner also highlights scattered examples of cases involving vote buying from other American jurisdictions. But Secretary Gardner admits that "there is no evidence that digital photography [of a ballot shared with others by a voter] played a[ny] role in any of the examples" he cites. A few recent instances of vote buying in other states do not substantiate New Hampshire's asserted interest in targeting vote buying through banning the publication of ballot selfies. * * *

New Hampshire has "too readily forgone options that could serve its interests just as well, without substantially burdening" legitimate political speech. At least two different reasons show that New Hampshire has not attempted to tailor its solution to the potential problem it perceives. First, the prohibition on ballot selfies reaches and curtails the speech rights of all voters, not just those motivated to cast a particular vote for illegal reasons. New Hampshire does so in the name of trying to prevent a much smaller hypothetical pool of voters who, New Hampshire fears, may try to sell their votes. New Hampshire admits that no such vote-selling market has in fact emerged. And to the extent that the State hypothesizes this will make intimidation of some voters more likely, that is no reason to infringe on the rights of all voters.

Second, the State has not demonstrated that other state and federal laws prohibiting vote corruption are not already adequate to the justifications it has identified. *See* 18 U.S.C. § 597 (prohibiting buying or selling votes); 52 U.S.C. § 10307(b) (prohibiting voter coercion or intimidation); *id*. § 10307(c) (prohibiting "pay[ing] or offer[ing] to pay or accept[ing] payment either for registration to vote or for voting" in some federal elections); N.H. Rev. Stat. Ann. § 659:40, I (prohibiting vote-related bribery); *id*. § 659:40, II (prohibiting voter coercion or intimidation); *id*. § 659:37 (prohibiting interfering with voters). * * *

As the district court observed, there are less restrictive alternatives available:

> [T]he state has an obviously less restrictive way to address any concern that images of completed ballots will be used to facilitate vote buying and voter coercion: it can simply make it unlawful to use an image of a completed ballot in connection with vote buying and voter coercion schemes.

Indeed, as to narrow tailoring, the plaintiffs point to the language of the very limitation proposed by the minority of the House Criminal Justice Committee, but rejected by the majority of that Committee. The ballot-selfie prohibition is like "burn[ing down] the house to roast the pig."

There are strong First Amendment interests held by the voters in the speech that this amendment prohibits. As the Supreme Court has said, "[t]he use of illustrations or pictures . . . serves important communicative functions: it attracts the attention of the audience to the [speaker's] message, and it may also serve to impart information directly." *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 647 (1985).

The restriction affects voters who are engaged in core political speech, an area highly protected by the First Amendment. As amici point out, there is an increased use of social media and ballot selfies in particular in service of political speech by voters. A ban on ballot selfies would suppress a large swath of political speech, which "occupies the core of the protection afforded by the First Amendment." Ballot selfies have taken on a special communicative value: they both express support for a candidate and communicate that the voter has in fact given his or

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as they were voting." He also notes that Saddam Hussein employed ballots "contain[ing] a code number which he believed could be traced back to the voter." There is no evidence that these historical examples from dictatorships have any material relationship to the present political situation in the State of New Hampshire, a democracy. Indeed, the restrictions on speech imposed by this amendment are antithetical to democratic values and particularly impose on political speech.

her vote to that candidate.

Section 659:35, I reaches and prohibits innocent political speech by voters unconnected to the State's interest in avoiding vote buying or voter intimidation. The plaintiffs' examples show plainly that section 659:35, I "burden[s] substantially more speech than is necessary to further the government's legitimate interests." Indeed, several states have now expressly authorized ballot selfies, and those states have not reported an uptick in vote buying or voter intimidation.[10]

New Hampshire may not impose such a broad restriction on speech by banning ballot selfies in order to combat an unsubstantiated and hypothetical danger. We repeat the old adage: "a picture is worth a thousand words."

The judgment of the district court is *affirmed*.

Notes and Questions

1. The First Circuit in *Rideout* struck down New Hampshire's ban on "ballot selfies," but the Sixth Circuit, in *Crookston v. Johnson*, 841 F.3d 396 (6th Cir. 2016), reached a different conclusion as to Michigan's ban. The district court in *Crookston* struck down the law, but the court of appeals stayed (and later reversed) the district court's order. Most of the Sixth Circuit's opinion focused on the timing of the case—the court was unwilling to enjoin the state's law less than two weeks before the election—but the court also expressed "skeptici[sm]" about the merits of the First Amendment claim:

> The State's policy advances several serious governmental interests: preserving the privacy of other voters, avoiding delays and distractions at the polls, preventing vote buying, and preventing voter intimidation. Crookston tries to minimize the risk of vote buying as a relic of a bygone electoral era. But plenty of cases—in this circuit alone—show otherwise [citing three cases from 2013 to 2016 affirming vote-buying convictions]. The links between these problems and the prohibition on ballot exposure are not some historical accident; they are "common sense." At the same time, it is far from clear that Crookston's proposal creates no risk of delay, as ballot-selfie takers try to capture the marked ballot and face in one frame—all while trying to catch the perfect smile.
>
> Nor do we think much of Crookston's argument that the State has offered no evidence of ballot photography being used in vote-buying schemes or to intimidate voters. The Supreme Court made quick work of a similar argument in *Burson* [v. *Freeman*, 504 U.S. 191 (1992)] [p. 1054]. "The fact that these laws have been in effect for a long period of time," it reasoned, "makes it difficult for the States to put on witnesses who can testify as to what would happen without them." *Id*. at 208; see also *id*. at 214–16 (Scalia, J., concurring). Just so here.
>
> It also is not clear whether a ban on ballot selfies "significantly impinges" Crookston's First Amendment rights. A picture may be worth a thousand words, but social media users can (and do) post thousands of words about whom they vote for and why. Although the loss of any potential First Amendment freedom deserves serious consideration, the government's interests in a stay outweigh any imposition on the expressive rights of Crookston and other would-be selfie-takers—particularly given the privacy interests of other voters in not having their votes made public.
>
> As the Secretary has repeatedly made clear, moreover, there is no risk that Crookston or anyone else will be fined or face jail time for sharing photographs of their ballots. The Secretary has indicated that she will not prosecute anyone for such violations. Instead, with a hint of Solomonic wisdom, the law declares that violators will face one penalty: the vote they wanted the world to see will not count.

[10] See A.B. 1494, 2015–16 Reg. Sess. (Cal. 2016); S.B. 1287, 52d Leg., 1st Reg. Sess. (Ariz. 2015); H.B. 72, Gen. Sess. (Utah 2015); S.B. 1504, 77th Or. Leg. Assemb., 2d Reg. Sess. (Or. 2014) (effective Jan. 1, 2015); H.P. 1122, 125th Leg., 1st. Reg. Sess. (Me. 2011); R.I. State Bd. of Elections, ERLID No. 8372, Rules and Regulations for Polling Place Conduct (2016).

841 F.3d at 400. *See also Crookston v. Johnson*, 854 F.3d 852 (6th Cir. 2016) (*per curiam*) (reversing the preliminary injunction after the 2016 election, without additional analysis). Are you more persuaded by *Rideout* or *Crookston*? For a sample of commentary about whether ballot selfies should be permitted, see Richard L. Hasen, *Why the Selfie Is a Threat to Democracy*, REUTERS, Aug. 18, 2015, at http://blogs.reuters.com/great-debate/2015/08/17/why-the-selfie-is-a-threat-to-democracy/; Mark Joseph Stern, *Bring on the Ballot Selfies!*, SLATE, Oct. 1, 2012, *at* http://www.slate.com/articles/technology/future_tense/2016/09/voting_booth_ballot_selfie_bans_violate_the_first_amendment.html; and Room for Debate, *Are Voting Booth Selfies Fun or Dangerous?*, N.Y. TIMES, Nov. 4, 2016, at *http://www.nytimes.com/roomfordebate/2016/11/04/are-voting-booth-selfies-fun-or-dangerous* (online debate between Professor Hasen and Elie Mystal).

2. The *Rideout* court did not decide whether ballot-selfie bans were content-based (resulting in the application of strict scrutiny) or content-neutral (resulting in the application of intermediate scrutiny). The issue is a difficult one given the Supreme Court's shifting jurisprudence on the subject.

The Supreme Court has held that a content-neutral law is one that is "justified without reference to the content of the regulated speech." *McCullen v. Coakley*, 134 S. Ct. 2518, 2529 (2014) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Sometimes the Court applies this test by focusing on the government's purpose: If the government's interest is suppressing speech with particular content, then the law is content-based. If, however, the government's interest is something else—if it is suppressing speech with certain content in order to achieve some other result—then the law is content neutral. For example, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court held that a restriction on abortion "protest, education, or counseling" was content-neutral because the government's interest was in protecting the patients at abortion clinics, rather than in suppressing the speech because the government disagreed with it. *See also McCullen*, *supra*, 134 S. Ct. at 2530-32 (noting the content-neutral character of government interests in preserving public safety and preventing obstruction to healthcare); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49-50 (1986) (holding that a zoning law applicable to adult theatres was content-neutral because it was aimed at combating the "secondary effects" of the speech rather than the speech itself).

Other times, however, the Court appears to apply a different test: whether the law's application to speech depends on the content of the speech. For example, in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), the Court held that a restriction on yard signs was content based because it applied differently to signs depending on whether the content was "political," "ideological," or "directional." *See also McCullen*, *supra*, at 2531 (noting that whether there was a violation of the abortion-protest law did not depend on the content of what was said).

The ballot-selfie ban appears content-neutral if one focuses on the government's purposes, *e.g.*, deterring vote-buying or voter intimidation. On the other hand, the ballot-selfie ban seems content-based if one focuses on whether the law applies to the speech depending on the speech's content. The laws, after all, ban photos only if they contain particular content—a marked ballot.

3. Or perhaps the question whether the bans are content-based or content-neutral does not matter after all. *Silberberg v. Board of Elections*, 16-cv-8336 (S.D.N.Y. 2016), yet another ballot-selfie case decided shortly before the 2016 election, held that polling places were non-public fora, meaning that restrictions on speech would be constitutional so long as they were "reasonable" and "viewpoint neutral." *See International Society for Krishna Consciousness v.*

Lee, 505 U.S. 672, 678-79 (1992); *Perry Education Association v. Perry Educators' Association*, 460 U.S. 37, 46 (1983). *Burson v. Freeman*, 504 U.S. 191 (1992) [p. 1054], treated the areas *surrounding* polling places as public fora, but perhaps the interior should be viewed differently.

Might it matter that ballot selfies must be *taken* inside the voting booth, but may be *uploaded* later from a different location? Does a law abridge speech in a public forum if it prohibits people from taking photographs only in a non-public area? According to *Silberberg*, "it suffices that the statute reasonably addresses conduct that could occur inside the polling booth, and in all cases begins in the voting booth." *Rideout*, however, implicitly held differently.

Perhaps the answer depends on the specific statute at issue. Laws that prohibit *taking* photographs in polling places might be thought to be a regulation of speech in a non-public forum (thereby triggering review only for reasonableness and viewpoint-neutrality), whereas laws that prohibit *distributing* photos might be evaluated under strict or intermediate scrutiny, depending on whether one considers those laws to be content-based or content-neutral. In *Hill v. Williams*, 16-cv-02627 (D. Colo. 2016), the court enjoined the government from enforcing a law prohibiting voters from "show[ing]" their ballots to other persons, but it explicitly stated that it was not enjoining the government from enforcing policies against taking photographs or videos. *See id*. (slip op. at 17 & n.5).

If voters have a constitutional right to take ballot selfies, is there also a constitutional right to take selfies during a session of the Supreme Court? Cameras are prohibited from the courtroom during sessions, and there are only two known photographs of the Court in session. *See* Sonja West, *Smile for the Camera: The Long Lost Photos of the Supreme Court at Work—and What They Reveal*, SLATE, Oct. 1, 2012, *at* http://www.slate.com/articles/news_and_politics/jurisprudence/2012/10/the_supreme_court_forbids_cameras_in_the_courtroom_but_twice_rogue_photographers_have_snapped_a_picture_of_the_justices_at_work_.html.

4. How severely does a ballot-selfie ban interfere with free speech? Does it matter that voters are free to announce their votes, even as they are prohibited from displaying photographic proof of them?

5. Should the constitutionality of a ballot-selfie ban depend on the prevalence of vote-buying or voter intimidation? If so, how is a state supposed to demonstrate that vote-buying is a significant problem if the ban itself ensured that vote-buying could not take place?

6. The *Rideout* court held that a less-restrictive law—one that banned ballot selfies only when used in connection with vote-buying or voter intimidation—would have been a more narrowly tailored way of addressing the state's interests in avoiding those harms. Under intermediate scrutiny, however, the state need not adopt the least restrictive alternative available. Do you believe the state's law was sufficiently well tailored to survive intermediate scrutiny?

7. Recall that narrow tailoring cannot be assessed in the abstract; rather, it can be assessed only with respect to each of the government's interests. The previous Note asked whether ballot-selfie bans are sufficiently tailored to the government's interest in avoiding vote-buying and intimidation. Are the bans sufficiently tailored to the government's separate interest in avoiding delays at the polls, or should the government simply be forced to use more polling stations to handle any increase in the time it takes to vote?

8. Likewise, assuming that the government has an interest in protecting the privacy of voters

besides the self-portrait artists, is a ban on ballot selfies sufficiently tailored to protect their privacy, or should states be forced to construct voting booths that would protect the occupant from being captured in someone else's ballot selfie? The *Crookston* court noted that "many Michigan voting stalls . . . are simply tall desks, placed next to each other, with three short dividers shielding the writing surface from view. In this setting, posing for a ballot selfie could compromise the secrecy of another's ballot, distract other voters, and force a poll worker to intervene." *Crookston*, __ F.3d at __ (*2).

9. Or is your answer to all these questions "idk"? j/k lol. ☺

Chapter 11

COUNTING THE VOTES

C. The Help America Vote Act

Page 1094. Add to Note 3:

In *Husted v. A. Philip Randolph Institute*, 584 U.S. __, 138 S. Ct. 1833 (2018), the Supreme Court, in a 5-4 decision, rejected a challenge to Ohio's policy of purging registered voters from the voting rolls for not having voted in recent elections. If a registered voter failed to vote for two years, Ohio sent a postage-prepaid card to the voter to determine if he had moved. If the registered voter did not return the card and failed to vote in a subsequent election for four more years, he was presumed to have moved and was removed from the rolls. Plaintiffs argued that this process violated NVRA's Failure-to-Vote Clause, as amended by HAVA, which generally prohibits states from removing people for failure to vote. The Court disagreed, holding that the provisions only "forbid[] the use of nonvoting *as the sole criterion*" to remove a voter. 138 S. Ct. at 1842. Ohio, in contrast, used nonvoting *and* failure to respond to the notice, and therefore complied with the statutes. The dissent, suggesting that few people respond to the notice cards, argued that Ohio's procedure violated the Failure-to-Vote Clause, as well as other statutory provisions which required states to make a "reasonable effort" to remove the names of eligible voters. The majority responded that statutory provisions expressly contemplated using failure to respond to notices, and the record did not support the claim that few people use the notice cards.

At the outset of its opinion, the majority observed that it has been estimated that 24 million voter registrations, about one in eight, are either invalid or significantly inaccurate, and that about 2.75 million people are registered to vote in more than one state, citing a Pew Center report. Would greater use of same-day voter registration (or not requiring registration at all) obviate the need to purge voter rolls periodically? The majority also observed that states take a variety of approaches in culling their voting roles, and only five states besides Ohio send notices in response to nonvoting. How much leeway do states have after *Husted* to comply with the relevant NVRA provisions? *Cf. American Civil Rights Union v. Philadelphia City Commissioners*, 872 F.3d 175 (3d Cir. 2017) (holding that the NVRA permits, but does not require, the city to purge voter rolls of registered voters who are currently incarcerated due to a felony conviction, and are prohibited from voting under state law).

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).

Page 1095. Add to Note 5:

For a critique of whether and to what extent states should be able to set different standards for voter eligibility in state and federal elections, see Michael T. Morley, *Dismantling the Unitary*

Electoral System?: Uncooperative Federalism in State and Local Elections, 111 NW. U. L. REV. 103 (2017).

Page 1097. Add the following before the last paragraph:

Ranked-choice voting (RCV), which includes STV and instant-runoff systems, is enjoying a resurgence of popularity in some quarters. It is used in about ten cities, including San Francisco and Cambridge, Massachusetts. It was not used for any state-wide elections until Maine adopted it by referendum in 2016. Katherine Q. Seelye, *Maine Adopts Ranked-Choice Voting. What Is It, and How Will It Work?,* N.Y. TIMES, Dec. 4, 2016, at A27. The Maine Supreme Court subsequently held that portions of the RCV Act violated several provisions of the Maine Constitution and could not be used in the general election for state senators, representatives, and the governor. *Opinion of the Justices*, 162 A.3d 188 (Me. 2017). It was used for the first time in the *primary* elections in June of 2018. Prior to that, a federal court rejected a challenge by the state Republican Party to the use of RCV in the primary elections. The court held that RCV did not improperly burden the party's associational rights or interfere with the party's internal governance, and it advanced state interests in requiring candidates to show substantial support to appear on the general-election ballot. *Maine Republican Party v. Dunlap*, 2018 WL 2424108 (D. Me. May 29, 2018).

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); Edward B. Foley, *Due Process, Fair Play, and Excessive Partisanship: A New Principle for Judicial Review of Election Laws*, 84 U. Chi. L. Rev. 655 (2017).

C. Adjusting the Vote Totals

Page 1123. Add a new Note 5:

For a discussion and a case study of statewide recounts, comparisons to initial, election-night vote tallies, and post-election audits in general, see Stephen Ansolabehere, et al., *Learning from Recounts*, __ ELECTION L.J. __ (forthcoming 2018).

D. State Remedies for Federal Elections

Page 1139. Add to Note 2:

Lisa Marshall Manheim, *Judging Congressional Elections*, 51 GA. L. REV. 359 (2017).

Page 1139. Add to Note 3:

See generally Michael S. Kang & Joanna M. Sheppard, *Judging Law in Election Cases*, 70 VAND. L. REV. 1755 (2017); Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411 (2016).

E. Public and Private Remedies

1. Federal Civil and Criminal Enforcement

Page 1142. Add the following before the first full paragraph:

For differing perspectives on what persons or entities should be entitled to sue to enforce election law and voting rights, see *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612 (6th Cir. 2016) (assuming there was a private right of action for § 4 of the Voting Rights Act, which states that "no citizen shall be denied" the right to vote "because of his failure to comply with any test or device," but holding against plaintiffs on the merits), *cert. denied*, 137 S. Ct. __,

85 U.S.L.W. 3587 (2017); *In re: 2016 Primary Election*, 836 F.3d 584 (6th Cir. 2016) (holding that a federal court could not order extension of voting hours based on a "plaintiff-less complaint," an anonymous phone call to the district clerk's office); Perry Grossman, *The Case for State Attorney General Enforcement of the Voting Rights Act Against Local Governments*, 50 U. MICH. J. L. REF. 565 (2017).

3. Remedies for Unsuccessful Candidates

Page 1176. Add the following to Note 4:

For a recent example of the reluctance of federal courts to intervene in "garden-variety election irregularities" based on alleged failures to follow state law, see *Lecky v. Virginia State Board of Elections*, 285 F. Supp. 3d 908 (E.D. Va. 2018) (citing *Griffin*, *Hutchinson*, and other cases, and holding that the plaintiffs failed to show "that the assignment of voters to the incorrect house districts and the distribution of ballots associated with those incorrect house districts amount to the kind of broad gauged unfairness necessary to state a due process claim."). For a contrasting argument in favor of a more active federal-court role in such cases, see Ben Klein, Note, *A Vote for Clarity: Establishing a Federal Test for Intervention in Election-Related Disputes*, 86 FORD. L. REV. 1361 (2017).