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VOTING RIGHTS AND ELECTION LAW

Second Edition

2020 Supplement

Michael R. Dimino
Professor of Law
Widener University Commonwealth Law School

Bradley A. Smith
Josiah H. Blackmore II/Shirley M. Nault Professor of Law
Capital University Law School

Michael E. Solimine
Donald P. Klekamp Professor of Law
University of Cincinnati College of Law

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Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

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TABLE OF CONTENTS

Chapter 1 VOTING QUALIFICATIONS

A. Introduction ………………………………………………………………………….. 1

B. Defining the Community and Excluding Outsiders 1

2. The Poor 1
3. The Law-Breaking 1
4. The Disinterested 3
5. The Newly Resident 3

Chapter 2 POLITICAL QUESTIONS

C. "Well Developed and Familiar" Standards of Equal Protection ………………….…….. 5

Rucho v. Common Cause ………………………………………………………. 5

Notes and Questions ………………………………………………...……... 18

Chapter 3 ONE PERSON, ONE VOTE

B. The Constitutional Basis for One Person, One Vote ….. 21

Evenwel v. Abbott 24

Notes and Questions 29

Chapter 4 PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

D. The Constitutionality of Section 5 Revisited ………………………………………….… 32

Chapter 5 DISTRICTING BY RACE

C. Section 2's Post-1982 Results Test …………………………………………….......... 33

E. Constitutional Constraints on Majority-Minority Districting ……………………………. 34

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F. Resolving the *Shaw*/ VRA Conflict ………………………………………………… 36

Chapter 6 THE ROLES AND RIGHTS OF POLITICAL PARTIES

B. State Action ………………………………………………………………………. 38

C. Associational Rights of Parties ………..……………………………………….…… 39

D. Third Parties, Independent Candidates, and Ballot Access ……….…………………... 40

Chapter 8 POLITICAL SPEECH

A. Introduction ……………………………………………………………………… 41

B. Defamation and the Problem of False Statements ……………………………………... 41

D. Anonymous Speech ……………………………………………………………..... 44

F. Government Speech ……………………………………………………………… 45

H. Patronage ………………………………………………………………………… 45

I. Judicial Candidates' Speech ……………………………………………………….. 45

Winter v. Wolnitzek ………………………………………………….……...… 47

Notes and Questions ……………………………………………….…..……... 53

Chapter 9 CAMPAIGN FINANCE

B. Basic Principles ……………………………………………………………………. 55

D. Limitations on Expenditures .....………………………………………………… 55

E. Coordinated Expenditures ………………………………………..……………… 55

F. Government Financing of Campaigns …………………………………………….... 56

G. Reporting and Disclosure of Contributions and Expenditures …………………………….. 57

Chapter 10 AT THE POLLS

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B. Burdens on Casting Ballots 58

C. Campaign-Free Zones Around Polling Places 61

Minnesota Voters Alliance v. Mansky 61

Notes and Questions 67

Rideout v. Gardner 68

Notes and Questions 70

Chapter 11 COUNTING THE VOTES

C. The Help America Vote Act 74

Chapter 12 REMEDYING ERRORS IN ELECTIONS

A. Introduction 79

C. Adjusting the Vote Totals 79

D. State Remedies for Federal Elections 79

Chiafalo v. Washington 79

Notes and Questions 88

E. Public and Private Remedies 90

1. Federal Civil and Criminal Enforcement 90

2. Remedies for Unsuccessful Candidates 90

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Editors' Note

The third edition of *Voting Rights and Election Law* will be published in October 2020. This supplement brings the second edition up to date with developments as of the beginning of July 2020, including changes in election laws caused by the COVID-19 pandemic (covered in Chapter 11) and the Supreme Court's decision in *Chiafalo v. Washington* (excerpted in Chapter 12).

This supplement makes no attempt, however, to replicate the very extensive changes that have been made to the casebook for the third edition. The new edition streamlines coverage of material and reorganizes it. We believe that the third edition is a considerable improvement over the second edition. Courses beginning in the Spring 2021 semester will want to use the third edition. This update is designed to serve a very limited function: It provides updated coverage of election law for Fall 2020 classes that will begin before the third edition is available in print.

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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*,

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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*, 788 S.E.2d 706 (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 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.) (striking down Florida's procedure for restoring felons' voting rights, which provided "unfettered discretion" to the state's Executive Clemency Board), *stay granted* 888 F.3d 1206 (11th Cir. 2018) (concluding that the government was likely to succeed on the merits).

Page 55. Add the following paragraph to the end of Note 11:

Florida is currently involved in a similar controversy. In November 2018, voters passed Amendment 4, which provided that felons would have their voting rights "restored upon completion of all terms of sentence including parole or probation." The following summer, the state's Republican-controlled legislature passed, and the Republican governor signed, a law providing that the "terms of sentence" include fines and court costs, so that a felon who has been released from prison but who cannot (or will not) pay fines or court costs will not have his voting rights restored. The law was immediately challenged, and the case is pending. *See* Patricia Mazzei, *Ex-Felons' Voting Rights Face Restriction in Florida*, N.Y. Times, June 29, 2019, at A16.

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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 a 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 of their college towns, even if they are

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residents there. 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*, 191 A.3d 1245, 1254 (N.H. 2018). 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*, 314 F. Supp. 3d 1205 (N.D. Fla. 2018) (enjoining a ban on early voting at college or university campuses).

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Chapter 2

POLITICAL QUESTIONS

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

Pages 131-60. Replace *Vieth* and the Notes following the case with the following:

RUCHO v. COMMON CAUSE

Supreme Court of the United States
588 U.S. __ , 139 S. Ct. 2484 (2019)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which JUSTICE THOMAS, JUSTICE ALITO, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join]. * * *

These cases require us to consider once again whether claims of excessive partisanship in districting are "justiciable"—that is, properly suited for resolution by the federal courts. This Court has not previously struck down a districting plan as an unconstitutional partisan gerrymander, and has struggled without success over the past several decades to discern judicially manageable standards for deciding such claims. The districting plans at issue here are highly partisan, by any measure. The question is whether the courts below appropriately exercised judicial power when they found them unconstitutional as well.

I

The first case [*Rucho* v. *Common Cause*] involves a challenge to the congressional redistricting plan enacted by the Republican-controlled North Carolina General Assembly in 2016. The Republican legislators leading the redistricting effort instructed their mapmaker to use political data to draw a map that would produce a congressional delegation of ten Republicans and three Democrats. As one of the two Republicans chairing the redistricting committee stated, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country." He further explained that the map was drawn with the aim of electing ten Republicans and three Democrats because he did "not believe it [would be] possible to draw a map with 11 Republicans and 2 Democrats." One Democratic state senator objected that entrenching the 10–3 advantage for Republicans was not "fair, reasonable, [or] balanced" because, as recently as 2012, "Democratic congressional candidates had received more votes on a statewide basis than Republican candidates." The General Assembly was not swayed by that objection and approved the 2016 Plan by a party-line vote. * * *

The plaintiffs challenged the 2016 Plan on multiple constitutional grounds. First, they alleged that the Plan violated the Equal Protection Clause of the Fourteenth Amendment by intentionally diluting the electoral strength of Democratic voters. Second, they claimed that the Plan violated their First Amendment rights by retaliating against supporters of Democratic candidates on the basis of their political beliefs. Third, they asserted that the Plan usurped the right of "the People" to elect their preferred candidates for Congress, in violation of the requirement in Article I, § 2, of the Constitution that Members of the House of Representatives be chosen "by the People of the several States." Finally, they alleged that the Plan violated the Elections Clause by exceeding the State's delegated authority to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress.

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After a four-day trial, the three-judge District Court unanimously concluded that the 2016 Plan violated the Equal Protection Clause and Article I of the Constitution. The court further held, with Judge Osteen dissenting, that the Plan violated the First Amendment. * * *

The second case before us is *Lamone* v. *Benisek*. In 2011, the Maryland Legislature—dominated by Democrats—undertook to redraw the lines of that State's eight congressional districts. The Governor at the time, Democrat Martin O'Malley, led the process. He appointed a redistricting committee to help redraw the map, and asked Congressman Steny Hoyer, who has described himself as a "serial gerrymanderer," to advise the committee. The Governor later testified that his aim was to "use the redistricting process to change the overall composition of Maryland's congressional delegation to 7 Democrats and 1 Republican by flipping" one district. "[A] decision was made to go for the Sixth," which had been held by a Republican for nearly two decades. To achieve the required equal population among districts, only about 10,000 residents needed to be removed from that district. The 2011 Plan accomplished that by moving roughly 360,000 voters out of the Sixth District and moving 350,000 new voters in. Overall, the Plan reduced the number of registered Republicans in the Sixth District by about 66,000 and increased the number of registered Democrats by about 24,000. The map was adopted by a party-line vote. It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. [T]he District Court entered summary judgment for the plaintiffs. * * *

II * * *

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe.

In 1812, Governor of Massachusetts and future Vice President Elbridge Gerry notoriously approved congressional districts that the legislature had drawn to aid the Democratic-Republican Party. The moniker "gerrymander" was born when an outraged Federalist newspaper observed that one of the misshapen districts resembled a salamander. E. Griffith, The Rise and Development of the Gerrymander 17–19 (1907). "By 1840, the gerrymander was a recognized force in party politics and was generally attempted in all legislation enacted for the formation of election districts. It was generally conceded that each party would attempt to gain power which was not proportionate to its numerical strength." *Id.*, at 123.

The Framers addressed the election of Representatives to Congress in the Elections Clause. Art. I, § 4, cl. 1. That provision assigns to state legislatures the power to prescribe the "Times, Places and Manner of holding Elections" for Members of Congress, while giving Congress the power to "make or alter" any such regulations. * * *

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be "composed of contiguous territory," Act of June 25, 1842, ch. 47, 5 Stat. 491, in "an attempt to forbid the practice of the gerrymander," Griffith, *supra*, at 12. Later statutes added requirements of compactness and equality of population. Act of Jan. 16,

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1901, ch. 93, § 3, 31 Stat. 733; Act of Feb. 2, 1872, ch. 11, § 2, 17 Stat. 28. (Only the single member district requirement remains in place today. 2 U.S.C. § 2c.) * * *

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts. See *Wesberry* v. *Sanders*, 376 U.S. 1 (1964) [p. 166]; *Shaw* v. *Reno*, 509 U.S. 630 (1993) (*Shaw I*) [p. 354]. * * *

Partisan gerrymandering claims have proved far more difficult to adjudicate [than are cases in those two areas]. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering." *Hunt* v. *Cromartie*, 526 U.S. 541, 551 (1999); *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995) [p. 369]; *Shaw I*, 509 U.S., at 646). See also *Gaffney* v. *Cummings*, 412 U.S. 735, 753 (1973) [p. 206] (recognizing that "[p]olitics and political considerations are inseparable from districting and apportionment").

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth* [v. *Julelirer*], 541 U.S. [267], 296 [(2004)] [p. 131] (plurality opinion). See *League of United Latin American Citizens* v. *Perry*, 548 U.S. 399, 420 (2006) (*LULAC*) [p. 385] (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much"). * * *

III

A

In considering whether partisan gerrymandering claims are justiciable, we are mindful of Justice Kennedy's counsel in *Vieth*: Any standard for resolving such claims must be grounded in a "limited and precise rationale" and be "clear, manageable, and politically neutral." 541 U.S., at 306–308 (opinion concurring in judgment). An important reason for those careful constraints is that, as a Justice with extensive experience in state and local politics put it, "[t]he opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States." [*Davis* v.] *Bandemer*, 478 U.S. [109], 145 (opinion of O'Connor, J.). An expansive standard requiring "the correction of all election district lines drawn for partisan reasons would commit federal and state courts to unprecedented intervention in the American political process," *Vieth*, 541 U.S., at 306 (opinion of Kennedy, J.).

As noted, the question is one of degree: How to "provid[e] a standard for deciding how much partisan dominance is too much." *LULAC*, 548 U.S., at 420 (opinion of Kennedy, J.). And it is vital in such circumstances that the Court act only in accord with especially clear standards: "With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Vieth*, 541 U.S., at 307 (opinion of Kennedy, J.). If federal courts are to "inject [themselves] into the most heated partisan issues" by adjudicating partisan gerrymandering claims, *Bandemer*, 478 U.S., at 145 (opinion of O'Connor, J.), they must be armed with a standard that can reliably differentiate unconstitutional from "constitutional political gerrymandering." *Cromartie*, 526 U.S., at 551.

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B

Partisan gerrymandering claims rest on an instinct that groups with a certain level of political support should enjoy a commensurate level of political power and influence. Explicitly or implicitly, a districting map is alleged to be unconstitutional because it makes it too difficult for one party to translate statewide support into seats in the legislature. But such a claim is based on a "norm that does not exist" in our electoral system—"statewide elections for representatives along party lines." *Bandemer*, 478 U.S., at 159 (opinion of O'Connor, J.).

Partisan gerrymandering claims invariably sound in a desire for proportional representation. As Justice O'Connor put it, such claims are based on "a conviction that the greater the departure from proportionality, the more suspect an apportionment plan becomes." *Ibid.* "Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id.*, at 130 (plurality opinion).

The Founders certainly did not think proportional representation was required. For more than 50 years after ratification of the Constitution, many States elected their congressional representatives through at-large or "general ticket" elections. Such States typically sent single-party delegations to Congress. That meant that a party could garner nearly half of the vote statewide and wind up without any seats in the congressional delegation. The Whigs in Alabama suffered that fate in 1840: "their party garnered 43 percent of the statewide vote, yet did not receive a single seat." *Id.*, at 48. When Congress required single-member districts in the Apportionment Act of 1842, it was not out of a general sense of fairness, but instead a (mis)calculation by the Whigs that such a change would improve their electoral prospects.

Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters—and to rearrange the challenged districts to achieve that end. But federal courts are not equipped to apportion political power as a matter of fairness, nor is there any basis for concluding that they were authorized to do so. As Justice Scalia put it for the plurality in *Vieth*:

> "'Fairness' does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking." 541 U.S., at 291.

The initial difficulty in settling on a "clear, manageable and politically neutral" test for fairness is that it is not even clear what fairness looks like in this context. There is a large measure of "unfairness" in any winner-take-all system. Fairness may mean a greater number of competitive districts. Such a claim seeks to undo packing and cracking so that supporters of the disadvantaged party have a better shot at electing their preferred candidates. But making as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, "[i]f all or most of the districts are competitive . . . even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature." *Bandemer*, 478 U.S., at 130 (plurality opinion).

On the other hand, perhaps the ultimate objective of a "fairer" share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of

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proportionality and engaging in cracking and packing, to ensure each party its "appropriate" share of "safe" seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

Or perhaps fairness should be measured by adherence to "traditional" districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents. But protecting incumbents, for example, enshrines a particular partisan distribution. And the "natural political geography" of a State—such as the fact that urban electoral districts are often dominated by one political party—can itself lead to inherently packed districts. As Justice Kennedy has explained, traditional criteria such as compactness and contiguity "cannot promise political neutrality when used as the basis for relief. Instead, it seems, a decision under these standards would unavoidably have significant political effect, whether intended or not." *Vieth*, 541 U.S., at 308–309 (opinion concurring in judgment).

Deciding among just these different visions of fairness (you can imagine many others) poses basic questions that are political, not legal. There are no legal standards discernible in the Constitution for making such judgments, let alone limited and precise standards that are clear, manageable, and politically neutral. Any judicial decision on what is "fair" in this context would be an "unmoored determination" of the sort characteristic of a political question beyond the competence of the federal courts.

And it is only after determining how to define fairness that you can even begin to answer the determinative question: "How much is too much?" At what point does permissible partisanship become unconstitutional? If compliance with traditional districting criteria is the fairness touchstone, for example, how much deviation from those criteria is constitutionally acceptable and how should mapdrawers prioritize competing criteria? Should a court "reverse gerrymander" other parts of a State to counteract "natural" gerrymandering caused, for example, by the urban concentration of one party? If a districting plan protected half of the incumbents but redistricted the rest into head to head races, would that be constitutional? A court would have to rank the relative importance of those traditional criteria and weigh how much deviation from each to allow.

If a court instead focused on the respective number of seats in the legislature, it would have to decide the ideal number of seats for each party and determine at what point deviation from that balance went too far. If a 5–3 allocation corresponds most closely to statewide vote totals, is a 6–2 allocation permissible, given that legislatures have the authority to engage in a certain degree of partisan gerrymandering? Which seats should be packed and which cracked? Or if the goal is as many competitive districts as possible, how close does the split need to be for the district to be considered competitive? Presumably not all districts could qualify, so how to choose? Even assuming the court knew which version of fairness to be looking for, there are no discernible and manageable standards for deciding whether there has been a violation. The questions are "unguided and ill suited to the development of judicial standards," *Vieth*, 541 U.S., at 296 (plurality opinion), and "results from one gerrymandering case to the next would likely be disparate and inconsistent," *id.*, at 308 (opinion of Kennedy, J.).

Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims. But the one-person, one-vote rule is relatively easy to administer as a matter of math. The same cannot be said of partisan gerrymandering claims, because the Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly. It hardly follows from the principle that each person must have an equal say in the election of representatives that a person is entitled to have his political party achieve representation in some way commensurate to its share of statewide support.

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More fundamentally, "vote dilution" in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. * * *

Nor do our racial gerrymandering cases provide an appropriate standard for assessing partisan gerrymandering. "[N]othing in our case law compels the conclusion that racial and political gerrymanders are subject to precisely the same constitutional scrutiny. In fact, our country's long and persistent history of racial discrimination in voting—as well as our Fourteenth Amendment jurisprudence, which always has reserved the strictest scrutiny for discrimination on the basis of race—would seem to compel the opposite conclusion." *Shaw I*, 509 U.S., at 650. Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification. A partisan gerrymandering claim cannot ask for the elimination of partisanship.

IV

Appellees and the dissent propose a number of "tests" for evaluating partisan gerrymandering claims, but none meets the need for a limited and precise standard that is judicially discernible and manageable. And none provides a solid grounding for judges to take the extraordinary step of reallocating power and influence between political parties.

A

The *Common Cause* District Court * * * first required the plaintiffs to prove "that a legislative mapdrawer's predominant purpose in drawing the lines of a particular district was to 'subordinate adherents of one political party and entrench a rival party in power.'" The District Court next required a showing "that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party." Finally, after a prima facie showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are "attributable to a legitimate state interest or other neutral explanation."

The District Court's "predominant intent" prong is borrowed from the racial gerrymandering context. In racial gerrymandering cases, we rely on a "predominant intent" inquiry to determine whether race was, in fact, the reason particular district boundaries were drawn the way they were. If district lines were drawn for the purpose of separating racial groups, then they are subject to strict scrutiny because "race-based decisionmaking is inherently suspect." *Miller*, 515 U.S., at 915. But determining that lines were drawn on the basis of partisanship does not indicate that the districting was improper. A permissible intent—securing partisan advantage—does not become constitutionally impermissible, like racial discrimination, when that permissible intent "predominates."

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution "is likely to persist" to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But "[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections ... invites 'findings' on matters as to which

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neither judges nor anyone else can have any confidence." *Bandemer*, 478 U.S., at 160 (opinion of O'Connor, J.). And the test adopted by the *Common Cause* court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread. * * *

Even the most sophisticated districting maps cannot reliably account for some of the reasons voters prefer one candidate over another, or why their preferences may change. Voters elect individual candidates in individual districts, and their selections depend on the issues that matter to them, the quality of the candidates, the tone of the candidates' campaigns, the performance of an incumbent, national events or local issues that drive voter turnout, and other considerations. Many voters split their tickets. Others never register with a political party, and vote for candidates from both major parties at different points during their lifetimes. For all of those reasons, asking judges to predict how a particular districting map will perform in future elections risks basing constitutional holdings on unstable ground outside judicial expertise.

It is hard to see what the District Court's third prong—providing the defendant an opportunity to show that the discriminatory effects were due to a "legitimate redistricting objective"—adds to the inquiry. The first prong already requires the plaintiff to prove that partisan advantage predominates. Asking whether a legitimate purpose other than partisanship was the motivation for a particular districting map just restates the question.

B

The District Courts also found partisan gerrymandering claims justiciable under the First Amendment, coalescing around a basic three-part test: proof of intent to burden individuals based on their voting history or party affiliation; an actual burden on political speech or associational rights; and a causal link between the invidious intent and actual burden. Both District Courts concluded that the districting plans at issue violated the plaintiffs' First Amendment right to association. The District Court in North Carolina relied on testimony that, after the 2016 Plan was put in place, the plaintiffs faced "difficulty raising money, attracting candidates, and mobilizing voters to support the political causes and issues such Plaintiffs sought to advance." Similarly, the District Court in Maryland examined testimony that "revealed a lack of enthusiasm, indifference to voting, a sense of disenfranchisement, a sense of disconnection, and confusion," and concluded that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting."

To begin, there are no restrictions on speech, association, or any other First Amendment activities in the districting plans at issue. The plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.

The plaintiffs' argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, "[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it." *Gaffney*, 412 U.S., at 752. The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in

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these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? * * *

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no "clear" and "manageable" way of distinguishing permissible from impermissible partisan motivation. * * * The decisions below prove the prediction of the *Vieth* plurality that "a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting," contrary to our established precedent.

C

The dissent proposes using a State's own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. * * *

As an initial matter, it does not make sense to use criteria that will vary from State to State and year to year as the baseline for determining whether a gerrymander violates the Federal Constitution. The degree of partisan advantage that the Constitution tolerates should not turn on criteria offered by the gerrymanderers themselves. It is easy to imagine how different criteria could move the median map toward different partisan distributions. As a result, the same map could be constitutional or not depending solely on what the mapmakers said they set out to do. That possibility illustrates that the dissent's proposed constitutional test is indeterminate and arbitrary.

Even if we were to accept the dissent's proposed baseline, it would return us to "the original unanswerable question (How much political motivation and effect is too much?)." Would twenty percent away from the median map be okay? Forty percent? Sixty percent? Why or why not? * * * The dissent's answer says it all: "This much is too much." That is not even trying to articulate a standard or rule. * * *

D

The North Carolina District Court further concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. We are unconvinced by that novel approach.

Article I, § 2, provides that "[t]he House of Representatives shall be composed of Members chosen every second Year by the People of the several States." The Elections Clause provides that "[t]he 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." Art. I, § 4, cl. 1.

* * * [T]he plurality in *Vieth* concluded—without objection from any other Justice—that neither § 2 nor § 4 of Article I "provides a judicially enforceable limit on the political considerations that the States and Congress may take into account when districting." 541 U.S., at 305. The District Court nevertheless asserted that partisan gerrymanders violate "the core principle of [our] republican government" preserved in Art. I, § 2, "namely, that the voters should choose their representatives, not the other way around." That seems like an objection more properly grounded in the Guarantee Clause of Article IV, § 4, which "guarantee[s] to every State in [the] Union a Republican Form of Government." This Court has several times concluded, however, that the Guarantee Clause does not provide the basis for a justiciable claim. See, *e.g.*, *Pacific States Telephone & Telegraph Co.* v. *Oregon*, 223 U.S. 118 (1912) [p. 107].

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V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is "incompatible with democratic principles," *Arizona State Legislature* [v. *Arizona Independent Redistricting Comm'n*], 576 U.S. [___], ___ [(2015)] (slip op., at 1), does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. "[J]udicial action must be governed by *standard*, by *rule*," and must be "principled, rational, and based upon reasoned distinctions" found in the Constitution or laws. *Vieth*, 541 U.S., at 278, 279 (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill* [v. *Whitford*, 585 U.S. __ (2018)]: "this Court *can* address the problem of partisan gerrymandering because it *must*." 585 U.S., at ___ (slip op., at 12). That is not the test of our authority under the Constitution; that document instead "confines the federal courts to a properly judicial role."

What the appellees and dissent seek is an unprecedented expansion of judicial power. We have never struck down a partisan gerrymander as unconstitutional—despite various requests over the past 45 years. The expansion of judicial authority would not be into just any area of controversy, but into one of the most intensely partisan aspects of American political life. That intervention would be unlimited in scope and duration—it would recur over and over again around the country with each new round of districting, for state as well as federal representatives. Consideration of the impact of today's ruling on democratic principles cannot ignore the effect of the unelected and politically unaccountable branch of the Federal Government assuming such an extraordinary and unprecedented role.

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. [The Court here noted several potential methods for limiting partisan gerrymandering, including state constitutional amendments and federal legislation under the Elections Clause.]

We express no view on any of these pending proposals. We simply note that the avenue for reform established by the Framers, and used by Congress in the past, remains open.

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. * * *

The judgments [below] are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE GINSBURG, JUSTICE BREYER, and JUSTICE SOTOMAYOR join, dissenting. * * *

* * * The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the

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partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters' preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

And checking them is *not* beyond the courts. The majority's abdication comes just when courts across the country, including those below, have coalesced around manageable judicial standards to resolve partisan gerrymandering claims. Those standards satisfy the majority's own benchmarks. They do not require—indeed, they do not permit—courts to rely on their own ideas of electoral fairness, whether proportional representation or any other. And they limit courts to correcting only egregious gerrymanders, so judges do not become omnipresent players in the political process. But yes, the standards used here do allow—as well they should—judicial intervention in the worst-of-the-worst cases of democratic subversion, causing blatant constitutional harms. In other words, they allow courts to undo partisan gerrymanders of the kind we face today from North Carolina and Maryland. In giving such gerrymanders a pass from judicial review, the majority goes tragically wrong. * * *

Partisan gerrymandering of the kind before us not only subverts democracy (as if that weren't bad enough). It violates individuals' constitutional rights as well. That statement is not the lonesome cry of a dissenting Justice. This Court has recognized extreme partisan gerrymandering as such a violation for many years.

Partisan gerrymandering operates through vote dilution—the devaluation of one citizen's vote as compared to others. A mapmaker draws district lines to "pack" and "crack" voters likely to support the disfavored party. He packs supermajorities of those voters into a relatively few districts, in numbers far greater than needed for their preferred candidates to prevail. Then he cracks the rest across many more districts, spreading them so thin that their candidates will not be able to win. Whether the person is packed or cracked, his vote carries less weight—has less consequence—than it would under a neutrally drawn (non-partisan) map. In short, the mapmaker has made some votes count for less, because they are likely to go for the other party.

That practice implicates the Fourteenth Amendment's Equal Protection Clause. The Fourteenth Amendment, we long ago recognized, "guarantees the opportunity for equal participation by all voters in the election" of legislators. *Reynolds* v. *Sims*, 377 U.S. 533, 566 (1964) [p. 173]. And that opportunity "can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id.*, at 555. Based on that principle, this Court in its one-person-one-vote decisions prohibited creating districts with significantly different populations. A State could not, we explained, thus "dilut[e] the weight of votes because of place of residence." *Id.*, at 566. The constitutional injury in a partisan gerrymandering case is much the same, except that the dilution is based on party affiliation. In such a case, too, the districters have set out to reduce the weight of certain citizens' votes, and thereby deprive them of their capacity to "full[y] and effective[ly] participat[e] in the political process[ ]." *Id.*, at 565. * * *

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to "disfavored treatment"—again, counting their votes for less—precisely because of "their voting history [and] their expression of political views." *Vieth*, 541 U.S., at 314 (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative

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democracy is "unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views." *California Democratic Party* v. *Jones*, 530 U. S. 567, 574 (2000) [p. 460]. By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of "democracy embodied in the First Amendment." * * *

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. [T]he majority never disagrees; it appears to accept the "principle that each person must have an equal say in the election of representatives." And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

So the only way to understand the majority's opinion is as follows: In the face of grievous harm to democratic governance and flagrant infringements on individuals' rights—in the face of escalating partisan manipulation whose compatibility with this Nation's values and law no one defends—the majority declines to provide any remedy. For the first time in this Nation's history, the majority declares that it can do nothing about an acknowledged constitutional violation because it has searched high and low and cannot find a workable legal standard to apply. * * *

* * * Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). See also *Ohio A. Philip Randolph Inst.* [v. *Householder*], 373 F. Supp. 3d 978 [(SD Ohio 2019)]; *League of Women Voters of Michigan* v. *Benson*, 373 F. Supp. 3d 867 (ED Mich. 2019). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State's *own* criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders. * * *

Start with the standard the lower courts used. * * * [B]oth courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. * * *

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But that is wrong. True enough, that the intent to inject

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"political considerations" into districting may not raise any constitutional concerns. In *Gaffney* v. *Cummings*, for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. * * * It cannot be permissible and thus irrelevant, as the majority claims, that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. * * * Consider the sort of evidence used in North Carolina first. There, the plaintiffs demonstrated the districting plan's effects mostly by relying on what might be called the "extreme outlier approach." (Here's a spoiler: the State's plan was one.) The approach—which also has recently been used in Michigan and Ohio litigation—begins by using advanced computing technology to randomly generate a large collection of districting plans that incorporate the State's physical and political geography and meet its declared districting criteria, *except for* partisan gain. For each of those maps, the method then uses actual precinct-level votes from past elections to determine a partisan outcome (*i.e.*, the number of Democratic and Republican seats that map produces). Suppose we now have 1,000 maps, each with a partisan outcome attached to it. We can line up those maps on a continuum—the most favorable to Republicans on one end, the most favorable to Democrats on the other. We can then find the median outcome—that is, the outcome smack dab in the center—in a world with no partisan manipulation. And we can see where the State's actual plan falls on the spectrum—at or near the median or way out on one of the tails? The further out on the tail, the more extreme the partisan distortion and the more significant the vote dilution.

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that * * * had [been] employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (*e.g.*, compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.

Because the Maryland gerrymander involved just one district, the evidence in that case was far simpler—but no less powerful for that. * * * In the old Sixth, 47% of registered voters were Republicans and only 36% Democrats. But in the new Sixth, 44% of registered voters were Democrats and only 33% Republicans. That reversal of the district's partisan composition translated into four consecutive Democratic victories, including in a wave election year for Republicans (2014). In what was once a party stronghold, Republicans now have little or no chance to elect their preferred candidate. The District Court thus found that the gerrymandered Maryland map substantially dilutes Republicans' votes. * * *

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By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

The majority's broadest claim, as I've noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be "politically neutral" or "manageable." * * * Consider neutrality first. Contrary to the majority's suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State's actual map to an "ideally fair" one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn't been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge's philosophizing but of the State's own characteristics and judgments. * * * Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians' effort to entrench themselves in office.

* * * So in North Carolina, for example, all the [randomly generated comparator] maps adhered to the traditional criteria of contiguity and compactness. But the comparator maps in another State would have incorporated different objectives—say, the emphasis Arizona places on competitive districts or the requirement Iowa imposes that counties remain whole. The point is that the assemblage of maps, reflecting the characteristics and judgments of the State itself, creates a neutral baseline from which to assess whether partisanship has run amok. Extreme outlier as to what? As to the other maps the State could have produced given its unique political geography and its chosen districting criteria. *Not* as to the maps a judge, with his own view of electoral fairness, could have dreamed up.

The Maryland court lacked North Carolina's fancy evidence, but analyzed the gerrymander's effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. * * * The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override *its own* political geography and districting criteria. So much, then, for the impossibility of neutrality.

The majority's sole response misses the point. According to the majority, "it does not make sense to use" a State's own (non-partisan) districting criteria as the baseline from which to measure partisan gerrymandering because those criteria "will vary from State to State and year to year." But that is a virtue, not a vice—a feature, not a bug. Using the criteria the State itself has chosen at the relevant time prevents any judicial predilections from affecting the analysis—exactly what the majority claims it wants. At the same time, using those criteria enables a court to measure just what it should: the extent to which the pursuit of partisan advantage—by these legislators at this moment—has distorted the State's districting decisions. Sure, different non-partisan criteria could result, as the majority notes, in different partisan distributions to serve as the baseline. But that in itself raises no issue: Everyone agrees that state officials using non-partisan criteria (*e.g.*, must counties be kept together? should districts be compact?) have wide latitude in districting. The problem arises only when legislators or mapmakers substantially deviate from the baseline distribution by manipulating district lines for partisan gain. So once again, the majority's analysis falters because it equates the demand to eliminate partisan gerrymandering with a demand for a single partisan distribution—the one reflecting proportional representation. But those two demands are different, and only the former is at issue here.

The majority's "how much is too much" critique fares no better than its neutrality argument.

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How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State's political geography and districting criteria built in) reflects "too much" partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The *only one* that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that "[t]hese cases involve blatant examples of partisanship driving districting decisions." If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

And if the majority thought that approach too case-specific, it could have used the lower courts' general standard—focusing on "predominant" purpose and "substantial" effects—without fear of indeterminacy. I do not take even the majority to claim that courts are incapable of investigating whether legislators mainly intended to seek partisan advantage. That is for good reason. Although purpose inquiries carry certain hazards (which courts must attend to), they are a common form of analysis in constitutional cases. Those inquiries would be no harder here than in other contexts.

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map "substantially" dilutes the votes of a rival party's supporters from the everything-but-partisanship baseline described above. (Most of the majority's difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) * * * [C]ontrary to the majority's suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. * * *

The majority, in the end, fails to understand both the plaintiffs' claims and the decisions below. Everything in today's opinion assumes that these cases grew out of a "desire for proportional representation" or, more generally phrased, a "fair share of political power." And everything in it assumes that the courts below had to (and did) decide what that fair share would be. But that is not so. The plaintiffs objected to one specific practice—the extreme manipulation of district lines for partisan gain. Elimination of that practice could have led to proportional representation. Or it could have led to nothing close. What was left after the practice's removal could have been fair, or could have been unfair, by any number of measures. That was not the crux of this suit. The plaintiffs asked only that the courts bar politicians from entrenching themselves in power by diluting the votes of their rivals' supporters. And the courts, using neutral and manageable—and eminently legal—standards, provided that (and only that) relief. This Court should have cheered, not overturned, that restoration of the people's power to vote. * * *

* * * With respect but deep sadness, I dissent.

Notes and Questions

1. Are partisan-gerrymandering claims non-justiciable because there are no judicially

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manageable standards for adjudicating them, or because the Constitution simply contains no right to be free from excessive partisanship in districting? Both rationales might be described as holding that partisan-gerrymandering claims are "political questions," but they are significantly different. In the former, partisan gerrymandering violates the Constitution, but that violation cannot be remedied by the federal courts. In the latter, there is no constitutional violation at all. *See generally* Jonathan R. Siegel, *Political Questions and Political Remedies*, *in* NADA MOURTADA-SABBAH & BRUCE E. CAIN EDS., THE POLITICAL QUESTION DOCTRINE AND THE SUPREME COURT OF THE UNITED STATES 243 (2007); Louis Henkin, *Is There a Political Question Doctrine?*, 85 YALE L.J. 597 (1976). In thinking about your response, consider what the majority's response is to the dissent's claim that the lower courts' standards *are* judicially manageable.

2. If partisan gerrymandering does amount to a substantive violation of the Constitution, should litigants be able to receive a remedy from *state* courts that do not face the same case-or-controversy limitations that federal courts are bound to obey? *Compare* Tara Leigh Grove, *The Lost History of the Political Question Doctrine*, 90 NYU L. REV. 1908 (2015), and John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457 (2017) (no), *with* Michael Solimine, *State Courts as Forums for Partisan Gerrymandering Claims after* Common Cause v. Rucho, June 30, 2019, *at* https://electionlawblog.org/?p=105902 (yes).

3. How can the Court conclude that federal courts are powerless to determine whether partisan considerations "predominate" in districting, when, in evaluating racial-gerrymandering claims under *Miller v. Johnson*, 515 U.S. 900, 916 (1995) [p. 369], courts must determine whether considerations of race predominate in districting? Does the Court conclude that there is no judicially manageable standard for assessing whether partisanship predominates, or is the majority's objection something different?

4. The Court asserts that "securing partisan advantage" is a "permissible intent." Do you agree? If not, why should such an intent be impermissible? If you do agree that securing partisan advantage should be a permissible intent, what is the legitimate purpose served by such an intent?

5. The Court notes that the Article I objection to partisan gerrymandering closely resembles (if it does not wholly duplicate) a claim under the Guarantee Clause. Couldn't it be said that the equal-protection claim in *Baker v. Carr* closely resembled, if it did not wholly duplicate, the Guarantee Clause claim in *Colegrove v. Green*?

6. Could there be a judicially manageable standard tied to the "efficiency gap"—a measure of how well each party can translate votes into legislative seats under a given districting plan? *See* Nicholas O. Stephanopoulos & Eric M. McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015); Eric M. McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 LEG. STUDIES Q. 55 (2014). The "efficiency gap" tallies the number of "wasted" votes for each party by counting the votes for losing candidates and the extra votes for winning candidates—the number of votes in excess of the minimum necessary for that candidate to prevail—and yields a quantifiable measure of a gerrymander's effectiveness. Under this measure, the party with the fewest wasted votes has most efficiently translated its votes into seats, and has benefited most from the districting plan. Could there be a judicially manageable standard in insisting that the efficiency gap not exceed a certain number?

7. In response to the Court's persistent demand for a standard to determine "how much [partisan gerrymandering] is too much," the dissent says, "This much is too much." Is that any

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more determinate than "I know it when I see it," Justice Stewart's infamous "test" for obscenity? *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). Did Justice Kagan's dissent in effect concede that there is no standard for deciding how much is too much?

8. The dissent stresses that not all uses of partisan considerations in districting should be unconstitutional; only the most extreme partisan gerrymanders should be struck down. Do you believe that the dissent's standard, if it had been adopted by the Court, would have been so limited? Recall that when *Baker v. Carr* held that federal courts had the power to hear reapportionment cases under the Equal Protection Clause, Justices Clark and Stewart wrote concurring opinions arguing that only extreme, irrational malapportionments would be held to violate the Constitution. As we will see in Chapter 3, that is not how the doctrine evolved.

9. 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 . . . ."), meant that only the state legislature itself could draw lines for such districts. The Court rejected the challenge in a 5-4 decision, with the majority holding that the Clause did not prevent a State from creating redistricting commissions by popular initiative, as occurred in Arizona. The dissenters agreed with the challengers' literal interpretation of the Clause. *See also League of Women Voters v. Commonwealth*, 178 A.3d 282 (Pa.) (holding that political gerrymandering of congressional districts violated the Pennsylvania constitution, and further holding that the state constitution's restrictions on the state legislature's prerogative to draw district lines did not violate the Elections Clause), *cert. denied* 139 S. Ct. 445 (2018).

In *Rucho*, the majority opinion by the Chief Justice, who dissented in *Arizona State Legislature*, cited the *Arizona* decision seemingly as good law, and also cited various states' redistricting commissions as examples of how redistricting reform could take place at that level. After *Rucho*, is there any doubt that *Arizona* is good law? For further discussion of non- or bipartisan redistricting commissions, see Bruce E. Cain, *Redistricting Commissions: A Better Political Buffer?*, 121 YALE L.J. 1808 (2012). For further discussion of state-court review of political gerrymandering, see page 106 of the Casebook.

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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

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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 and 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

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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 [(1964)], decided the same day, we treated an apportionment based upon United States citizen population as presenting problems no different from apportionments using a total population measure. Neither in *Reynolds* v. *Sims* nor in any other decision has this Court suggested that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured. The decision to include or exclude any such group involves choices about the nature of representation with which we have been shown no constitutionally founded reason to interfere. Unless a choice is one the Constitution forbids, cf., *e.g.*, *Carrington* v. *Rash*, 380 U.S. 89 [(1965)] [p. 88], the resulting apportionment base offends no constitutional bar, and compliance with the rule established in *Reynolds* v. *Sims* is to be measured thereby.
>
> Use of a registered voter or actual voter basis presents an additional problem. Such a basis depends not only upon criteria such as govern state citizenship, but also upon the extent of political activity of those eligible to register and vote. Each is thus susceptible to improper influences by which those in political power might be able to perpetuate underrepresentation of groups constitutionally entitled to participate in the electoral process, or perpetuate a "ghost of prior malapportionment." Moreover, "fluctuations in the number of registered voters in a given election may be sudden and substantial, caused by such fortuitous factors as a peculiarly controversial election issue, a particularly popular candidate, or even weather conditions." Such effects must be particularly a matter of concern where, as in the case of Hawaii apportionment, registration figures derived from a single election are made controlling for as long as 10 years. In view of these considerations, we hold that the present apportionment satisfies the Equal Protection Clause only because on this record it was found to have produced a distribution of legislators not substantially different from that which would have resulted from the use of a permissible population basis.

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

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

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

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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. * * *

[W]e reject appellants' attempt to locate a voter-equality mandate in the Equal Protection Clause. As history, precedent, and practice demonstrate, it is plainly permissible for jurisdictions to measure equalization by the total population of state and local legislative districts.

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

[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.

[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.

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

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

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

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

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

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a substantial fashion diluted when compared with votes of citizens living on other parts of the State."); *Gray*, 372 U.S., at 379–380 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."). Appellants, however, extract far too much from selectively chosen language and the "one-person, one-vote" slogan.

For every sentence appellants quote from the Court's opinions, one could respond with a line casting the one-person, one-vote guarantee in terms of equality of representation, not voter equality. In *Reynolds*, for instance, the Court described "the fundamental principle of representative government in this country" as "one of equal representation for equal numbers of people." 377 U.S., at 560–561. And the Court has suggested, repeatedly, that districting based on total population serves *both* the State's interest in preventing vote dilution *and* its interest in ensuring equality of representation. See *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 693–694 (1989) ("If districts of widely unequal population elect an equal number of representatives, the voting power of each citizen in the larger constituencies is debased and the citizens in those districts have a smaller share of representation than do those in the smaller districts."). See also *Kirkpatrick* [v. *Preisler*], 394 U.S. [526], 531 [(1969)] [p. 192] (recognizing in a congressional-districting case that "[e]qual representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives").[12]

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

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

In sum, the rule appellants urge has no mooring in the Equal Protection Clause. The Texas Senate map, we therefore conclude, complies with the requirements of the one-person, one-vote

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

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

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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 the Framers did not resolve in the Constitution. * * *

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. * * * [T]o 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

[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.

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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

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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 equalizing numbers of 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 "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

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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*). For further discussion of the treatment of prisoners for population purposes, see Amee Frodle, Note, *Where Does a Prisoner Live? Furthering the Goals of Representational and Voter Equality Through Counting Prisoners*, 107 GEO. L.J. 175 (2018) (arguing that prisoners should be counted at their homes, in part because most cannot vote while imprisoned).

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?

5. In *Department of Commerce v. New York*, 588 U.S. __, 139 S. Ct. 2551 (2019), the Supreme Court addressed the highly charged issue of whether the Trump Administration could add a question about citizenship to the 2020 census forms. The census had asked the question at various times, most recently in 1950. The Secretary of Commerce added the question to the census, for the asserted reason that the information was necessary for the Department of Justice to enforce the Voting Rights Act. Critics argued that the reason was a subterfuge for the political calculation that undocumented immigrants were less likely to participate in the census if they knew they would need to answer the question, which in turn would mean there would be fewer (usually Democratic) congressional districts with those persons in the population. The Secretary was sued by the State of New York and other plaintiffs, who argued that his decision violated the Enumeration Clause, the Census Act, and the Administrative Procedure Act (APA). The District Court held for the plaintiffs on APA grounds only, and the Supreme Court granted a writ of certiorari before

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judgment from the district court, because the government argued that a swift decision was necessary because it needed to start printing the census forms in the summer of 2019.

In a lead opinion authored by Chief Justice Roberts, and joined by shifting numbers of the other Justices on various issues, the Court rejected the challenges based on the Enumeration Clause and the Census Act, affirmed the APA holding, and remanded for further proceedings. Regarding the Census Act, the Court held that the Secretary had ample authority to make the change as a matter of policy, but nonetheless upheld the challenge under the APA. The Court held that the Secretary's decision violated the APA because the evidence before the district court showed that the asserted rationale was pretextual and contrived, in that he had been planning to add the question since the early days of the administration, and only later settled on the VRA enforcement rationale.

Justice Thomas, joined by Justices Gorsuch and Kavanagh, concurred in the holdings on the Enumeration Clause and the Census Act, but dissented on the APA holding, on the basis that there was no evidence that the Secretary's decision was contrived. Justice Breyer, joined by Justices Sotomayor, Kagan, and Ginsburg, dissented in part on the basis that the Secretary's decision was "arbitrary and capricious" under Census Act and the APA. Justice Breyer argued that the Secretary failed to give appropriate deference to the findings of the Census Bureau that citizenship data could be gleaned from other sources. Justice Alito dissented in part on the basis that the Secretary's decision was not reviewable under the APA.

The majority of the Court remanded for further proceedings at the administrative level, leaving it unclear if the question might be able to be added if the Secretary were able to offer a more convincing rationale. The Trump Administration, after sending conflicting signals, eventually decided to abandon any attempt to add the question to the 2020 census.

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)).

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Chapter 4

PRECLEARANCE UNDER THE VOTING RIGHTS ACT

D. The Constitutionality of Section 5 Revisited

Page 254. Add the following new Note after Note 6:

7. One current and unsettled issue is whether a "no retrogression" standard can or should also be used as part of the "totality of circumstances" test in § 2 litigation. For different perspectives on that question, compare Ellen D. Katz, *Section 2 After Section 5: Voting Rights and the Race to the Bottom*, 59 WM. & MARY L. REV. 1561 (2018) (arguing that courts have considered past practices as part of the § 2 inquiry, and defending the practice to limit "backsliding" by states), with *Ohio Democratic Party v. Husted*, 843 F.3d 620, 623 (6th Cir. 2016) (arguing that such use would improperly create a "one-way ratchet" in § 2 litigation), and Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451 (2019) (surveying use of the ratchet argument in different voting-rights contexts and suggesting when it may and may not be appropriate).

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*, 274 F. Supp. 3d 624 (W.D. Tex. 2017) (three-judge court) (2-1) (finding intentional discrimination in the drawing of congressional districts); *Veasey v. Abbott*, 265 F. Supp. 3d 384 (S.D. Tex. 2017) (finding discriminatory intent in passage of voter-ID law), *rev'd* 888 F.3d 792 (5th Cir. 2018) (holding that discriminatory intent behind a repealed voter-ID law did not justify enjoining the law that replaced it). 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*, 230 F. Supp. 3d 667 (S.D. Tex. 2017), *stay denied* 677 Fed. Appx. 950 (5th Cir. 2017).

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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 determine whether there is intentional vote dilution against a racial minority when 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 intentionally minimizing the voting power of a racial minority may be discriminatory even if done for political reasons.

For a recent example of the issue in action, see *Michigan State A. Philip Randolph Institute v. Johnson*, 326 F. Supp. 3d 532, 569 (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*, 230 F. Supp. 3d 667 (S.D. Tex. 2017), *stay denied* 677 Fed. Appx. 950 (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 contained six single-member districts and one two-member district. The district court found a dilution of Latinos'

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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 suggested (although it did 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

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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 381. Add to Note 6:

For an ambitious attempt to reformulate the judicial standards for § 2 cases, and to account for the constitutional difficulties raised by § 2 being applied when there is only disparate impact, see Nicholas O. Stephanopolous, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566 (2019).

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*

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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

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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.

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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* No. 1:16-cv-04809 (E.D.N.Y. 2018), *appeal from dismissal pending*.

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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 themselves would prefer to nominate.

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.

Page 480. Add the following after Note 4:

4a. *Problem*. Until 2014, Utah law provided that candidates earn the right to appear on the primary ballot by competing in a caucus. If one candidate received 60% of the vote, he or she would receive the party's nomination; otherwise, the top two candidates would run in a primary election. In that year, Utah changed its law to provide an additional way of appearing on the primary ballot: In addition to the caucus route, candidates could earn a ballot position simply by collecting a certain number of signatures. The Republican Party, which prefers the old system, challenges this law, arguing that the law interferes with the Party's First Amendment rights by enabling the election of a candidate who did not succeed at the caucus. Is the Party correct? Does it matter whether the primary election is closed or open? *See* Utah Republican Party v. Cox, 885 F.3d 1219, *reh'g en banc denied* 892 F.3d 1066 (10th Cir. 2018), *cert. denied* 139 S. Ct. 1290 (2019).

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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's 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.

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Chapter 8

POLITICAL SPEECH

A. Introduction

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

See Iancu v. Brunetti, 139 S. Ct. 2294 (2019) (striking down, as viewpoint-based, a law barring the registration of "immoral" or "scandalous" trademarks); *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.").

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.

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.

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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 knowingly 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:

See also Joshua S. Sellers, *Legislating Against Lying in Campaigns and Elections*, 71 OKLA. L. REV. 141 (2018) (arguing that *Alvarez* and *Susan B. Anthony List* permit governments to sanction false statements in mandatory campaign-disclosure filings or those involving election administration). 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) [p. 62 of this Supplement].

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

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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,

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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"? *See* Cass R. Sunstein, *Falsehoods and the First Amendment* (July 25, 2019), *available at* https://ssrn.com/abstract=3426765.

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?

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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/.

H. Patronage

Page 755. Add the following to the end of Note 8:

See also Adams v. Governor of Delaware, 914 F.3d 827 (holding unconstitutional a provision of the Delaware Constitution which effectively required the Governor to make appointments to the Delaware Supreme Court so that Democratic and Republican appointees were in balance), *vacated and panel reh'g granted* 920 F.3d 878 (3d Cir. 2019). The *Adams* court, expressly disagreeing with *Newman*, held that state judges "are not policymakers because whatever decisions judges make in a given case relates to the case under review and not to partisan political interests." 914 F.3d at 829.

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).

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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. 709 (2012) [p. 592] (overturning the conviction of a water-district board member for lying about having received the Congressional Medal of Honor).

Page 786. Add the following to the end of Note 4:

After *Williams-Yulee* was decided, the Ninth Circuit reheard the case *en banc* and upheld the restrictions, in part because the court held that *Williams-Yulee* required only that the restrictions be narrowly, not "perfectly," tailored. *Wolfson v. Concannon*, 811 F.3d 1176 (9th Cir. 2016) (*en banc*).

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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

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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.

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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. * * * 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 * * * [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. * * * The

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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

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(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

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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. * * * 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.

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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. 709 (2012) [p. 592], not apply to judges campaigning for election?

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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 262 (quoting *In re Disqualification of Bryant*, 885 N.E.2d 246, 246 (Ohio 2006)).

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Chapter 9

CAMPAIGN FINANCE

B. Basic Principles

Page 824. Add the following to the end of Note 8:

For a readable introduction to the complexities of campaign finance regulation, together with a measured and skeptical appraisal of reforms, see Peter H. Schuck, *Campaign Finance Reform Revisited*, NAT'L AFFAIRS, Winter 2019, at 76-93.

D. Limitations on Expenditures

Page 980. Add a new Note after Note 8:

9. Some have argued that *Citizens United* should be overruled, by constitutional amendment if necessary. For an argument by a sharp critic of the decision against an amendment, see Richard L. Hasen, *Three Wrong Progressive Approaches (and One Right One) to Campaign Finance Reform*, 8 HARV. L. & POL'Y REV. 21 (2014) (noting that even after such an amendment, individuals could still spend; corporations could presumably (depending on the amendment's language) still spend on issues (not candidates); and it is not clear how or if an amendment could exclude media companies).

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. The district court dismissed the complaint because it held the FEC's action to be consistent with law. *See Lieu v. Federal Election Commission*, 370 F. Supp. 3d 175 (D.D.C. 2019).

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 (Wisc. 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

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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* p. 811, *supra*.

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?

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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*, 2018 U. Chi. Leg. F. 117.

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.

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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 several 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 WL 4224616, *1, 2016 U.S. App. LEXIS 14917, *3 (7th Cir. 2016). In yet another case, a district court held that any person requesting an ID would be entitled to receive a credential allowing him to vote, unless readily available information indicated that the person was not eligible to vote. *See One Wisconsin Institute, Inc. v. Thomsen*, 198 F. Supp. 3d 896 (W.D. Wisc. 2016). The state agreed to comply with that standard. *See Frank v. Walker*, 835 F.3d 649, 651-52 (7th Cir. 2016) (*en banc*) (*per curiam*) (denying petition for initial hearing *en banc*).

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*, 831 F.3d 204 (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*, 830 F.3d 216 (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.

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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 [*sic*] 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.

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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 one such challenge and the court of appeals held that the plaintiffs lacked standing. *Electronic Privacy Information Center v. Presidential Advisory Commission on Election Integrity*, 266 F. Supp. 3d 297 (D.D.C.), *aff'd* 878 F.3d 371 (D.C. Cir. 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 1046. Add a new Note 12:

12. A vigorous debate continues on whether voter ID laws, individually or collectively, disproportionately and negatively impact minority voter turnout. For different perspectives on the evidence, compare the majority opinion in U.S. Commission on Civil Rights: An Assessment of Minority Voting Rights Access in the United States (2018), with the dissent authored by Commissioner Gail Heriot; see also Ben Pryor et al., *Voter ID Laws: The Disenfranchisement of Minority Voters?*, 134 POL. SCI. Q. 63 (Spring 2019) (discussing difficulties in drawing definitive conclusions from the large social-science literature analyzing the effect of voter-ID laws, in part due to studies based on self-reporting by non-voters).

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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. __, 138 S. Ct. 1876 (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

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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

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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. * * *

[The *Burson* plurality] 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.

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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.

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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 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

[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."

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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.

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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? Consider Michael R. Dimino, Minnesota Voters Alliance v. Mansky *Strikes Down a Vague Ban on Speech in Polling Places, But Future Bans May Be Upheld*, 19 FED. SOC. REV. 134, 139 (2018) ("Wearing a 'Make America Great Again' hat or a 'Yes We Can' shirt, however, does nothing to undermine the purpose of a polling place because it does not intimidate voters or interfere with voters' ability to contemplate the questions on the ballot.").

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 of *Minnesota Voters Alliance*, 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?

5. As the Court noted, the government is prohibited from engaging in viewpoint discrimination even in a nonpublic forum. The Internet age has raised some questions about whether and how the First Amendment applies to certain online sites. For example, President Trump has used his Twitter account to communicate messages about his policies and to interact with the public. He established the account before he ran for President, however, and when he leaves office he will retain control of the account. Is the President obligated to give the public access to the account on a viewpoint-neutral basis, or may he block Twitter users who post messages critical of him? *See Knight First Amendment Institute v. Trump*, 928 F.3d 226 (2d Cir. 2019).

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

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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[.]" * * * 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. * * *

[Although the legislative history suggested that the purpose of the bill was to prevent vote buying and voter coercion, t]he 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." * * *

[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

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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]

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:

[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 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.

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> [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 [suggest that the State ban only those ballot selfies that are used "for the purpose of receiving pecuniary benefit . . . or avoiding harm"]. 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 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

[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).

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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.

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*, 573 U.S. 464, 477 (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*, 573 U.S. at 479-82 (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

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because it was aimed at combating the "secondary effects" of the speech rather than the speech itself).

Usually, 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 479-80 (noting that whether there was a violation of the content-neutral abortion-protest law at issue in that case 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. After *Minnesota Voters Alliance*, however, the question whether ballot-selfie bans are content-neutral may be irrelevant. Recall that *Minnesota Voters Alliance* held that the interiors of polling places are nonpublic fora. 138 S. Ct. at 1885-86. *See also Silberberg v. Board of Elections*, 272 F. Supp. 3d 454 (S.D.N.Y. 2017) (holding likewise in evaluating a ballot-selfie ban). As a result, speech restrictions there are constitutional so long as they are "reasonable" and "viewpoint neutral"—an easier test for the government to meet than either strict scrutiny or intermediate scrutiny. *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).

But what if ballot-selfie bans restrict conduct both within polling places and elsewhere? Ballot selfies must be *taken* inside the voting booth, but may be *uploaded* later from a different location. 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*, 2016 WL 8667798 (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*. at *8 & 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

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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 indicated 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 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*, 841 F.3d at 399.

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

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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. 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. 52 U.S.C. § 20507(b)(2). A different portion of the statute, however, permits the removal of a registrant who "(i) has failed to respond to a notice" and "(ii) has not voted or appeared to vote . . . during the period beginning on the date of the notice and ending on the day after the date of the second general election for Federal office that occurs after the date of the notice." 52 U.S.C. § 20507(d)(1)(B).

The Court held 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 identify ineligible voters before removing names from the voter rolls. The majority responded that statutory provisions expressly contemplated that states would use the failure to respond to notices as such a way of identifying ineligible voters, and the record did not support the claim that few people used the notice cards.

At the outset of its opinion, the majority observed that it has been estimated that twenty-four 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). For an extensive and critical discussion of *Husted*, see Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression*, 2018 SUP. CT. REV. 213.

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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 1095. Add a new Note 7:

The COVID-19 epidemic, which hit the United States in early 2020, brought to the fore questions about how best to protect both democracy and public health when an emergency occurs during an election. As of May 2020, several states had made changes to their electoral rules. All three branches of government have been active, with governors and public-health officials issuing orders; legislatures amending election laws; and courts entertaining claims that states' action (or inaction) abridged the right to vote. The law is changing so rapidly that any attempt to catalogue all of the developments is bound to be overtaken by events nearly as quickly as it is written. Nevertheless, the following discussion should provide a sense of some of the responses states have made to the crisis—and a sense of some of the controversies that those responses have engendered.

The Democratic National Convention was pushed back a month—from July 13-16 to August 17-20—because of concerns about the virus, with much of the convention activity being scaled back and some of the events being held through electronic media. The Republican National Convention was scheduled to be held in Charlotte, North Carolina, but when the Democratic governor and mayor refused to permit such a large in-person gathering, portions of the Convention were moved to Jacksonville, Florida.

Many states considered postponing their primary elections or holding them exclusively by mail. In Pennsylvania, for example, a law was passed at the end of March moving the state's primary from April 28 to June 2 and also delaying the deadlines for voters to register and to request mail-in ballots, which are available to all voters. In all, fifteen states delayed their primaries, some more controversially than others.

Ohio's Director of Public Health ordered the polls closed as a public-health measure less than twenty-four hours before voting in the state's March 17 primary was due to begin. The Ohio legislature shortly thereafter passed legislation creating an entirely vote-by-mail primary that required voters to submit their ballots by April 28. The vote-by-mail procedures were controversial, however. For example, even though there was no option of in-person voting, the state sent absentee ballots to only those voters that requested them. Charging that the procedures would cause thousands of Ohioans to lose their ability to vote, the new procedures were challenged in court, but a federal district court refused to issue an injunction. Michigan's secretary of state,

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on the other hand, decided—without any explicit legislative authorization—to send mail-in ballots to all voters, even those voters who did not request them.

New York canceled its presidential primary, but the cancellation was overturned in court. *Yang v. Kellner*, __ F. Supp. 3d __, 2020 WL 2129597 (S.D.N.Y. 2020). Although New York's primary could not possibly determine the presidential nominee (Joe Biden had, practically speaking, secured the Democratic nomination), the court noted that the choice of convention delegates could have implications for the party beyond choosing the nominee, and therefore the cancellation abridged the right to vote.

Texas law permits voters to vote by mail if they will be absent from the jurisdiction on election day and the entire early-voting period, if they are at least age sixty-five, or if they have a "disability" that prevents them from voting in person. A federal district court ordered the state to permit every voter to vote by mail. In addition to finding that the right to vote was impaired by an in-person voting requirement during a pandemic, the court stated that permitting no-excuse mail-in voting for voters age sixty-five and over violated the Twenty-Sixth Amendment, which prohibits abridging the right to vote on account of age for anyone at least age eighteen. *See Texas Democratic Party v. Abbott*, __ F. Supp. 3d __, 2020 WL 2541971 (W.D. Tex. 2020). Saying that the district court's order "will be remembered more for audacity than legal reasoning," the Fifth Circuit promptly issued a stay. *Texas Democratic Party v. Abbott*, __ F.3d. __, __, 2020 WL 2982937, *1 (5th Cir. 2020). The Court of Appeals held that the state was likely to succeed on the merits because the state's limitations on mail-in voting did not "absolutely prohibit[]" anyone from voting, *id*. at *10 (quoting *McDonald v. Board of Election Commissioners*, 394 U.S. 802, 808 n.7 (1969)), and the age classification was supported by a rational basis in easing the burdens on voting disproportionately felt by the aged, *see id*. at *13-*14.

In Wisconsin, as elsewhere, the COVID-19 outbreak caused a substantial increase in the number of requests for absentee ballots. The resulting backlog meant that some voters in that state did not receive their ballots until after the April 7 election day—the day that state law not only designated for in-person voting, but the day by which absentee ballots were supposed to be received by election officials. A federal district court issued an injunction extending the deadline for absentee voting until April 13 and permitting voters to mail ballots after April 7, so long as they would be received by April 13. *Democratic National Committee v. Bostelmann*, __ F. Supp. 3d __, 2020 WL 1638374 (W.D. Wis. 2020). The Supreme Court, by a 5-4 vote, stayed part of the injunction, with the result that voters had to postmark their ballots by the April 7 election day, but permitting a properly postmarked ballot to be counted even if it was not received until after April 7. *Republican National Committee v. Democratic National Committee*, 589 U.S. __, 140 S. Ct. __ (2020) (*per curiam*). The Court relied on *Purcell v. Gonzalez*, 549 U.S. 1 (2006) [p. XXX], in holding that the district court's alteration of the electoral rules was particularly problematic because it occurred so close to the election. The "*Purcell* principle" is considered in more depth in Chapter 11.

While litigation over Wisconsin's absentee ballots was pending, there was uncertainty over whether the primary would be held on April 7 at all. The day before the election, Wisconsin's governor issued a decree delaying that state's primary election. The decree was immediately challenged, and on the same day the Wisconsin Supreme Court overturned the governor's order

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by a 4-2 vote, holding that it exceeded the governor's authority under state law to respond to emergencies.

Stay-at-home orders not only made it difficult to cast ballots; they also hindered the ability to collect signatures on petitions. This hinderance took two forms. First, without exemptions for petition-circulation, stay-at-home orders prevent people from leaving their homes to collect signatures. Second, even if the circulators can leave their homes, it is much more difficult to collect signatures if stay-at-home orders prevent potential signatories from milling about in public areas. In challenges to petition requirements during the pandemic, some courts have reduced the number of required signatures. *See Goldstein v. Secretary of Commonwealth*, 142 N.E.3d 560 (Mass. 2020) (reducing the number of required signatures and extending the deadline for collecting them); *Garbett v. Herbert*, __ F. Supp. 3d __, 2020 WL 2064101 (D. Utah 2020) (reducing the number of required signatures). *But see Murray v. Cuomo*, 2020 WL 2521449 (S.D.N.Y. 2020) (denying a request for a further reduction in the number of required signatures after the governor issued an executive order reducing the requirement and shortening the time available for collecting signatures, so that they would be due three days after the order).

Two cases decided by the Sixth Circuit provide a useful comparison. In *Esshaki v. Whitmer*, __ Fed. Appx. __, 2020 WL 2185553 (6th Cir. 2020), the Court of Appeals affirmed a district-court decision enjoining Michigan from enforcing its petition requirements against a candidate who could not satisfy them because the stay-at-home order prevented people from leaving their homes to collect signatures. The Court of Appeals reversed the district court, however, as to the portion of its injunction requiring the state to reduce the number of required signatures by 50%, extending the deadline for collection of signatures, and requiring the state to accept petition signatures by mail. Thus, although the district court was within its authority in determining that Michigan's stay-at-home order made it unconstitutional to enforce the petition requirement, the district court exceeded its authority by rewriting the petition requirement to comply with constitutional requirements. In the Sixth Circuit's words, "federal courts have no authority to dictate to the States precisely how they should conduct their elections." *Id*. at __.

Thompson v. DeWine, 959 F.3d 804 (6th Cir. 2020) (*per curiam*), was even more reluctant to disrupt a state's election administration. *Thompson* stayed a district-court order that had extended Ohio's signature-gathering deadline and had enjoined the state from enforcing its requirement that petition signatures be witnessed and that they be signed in ink. The Court of Appeals concluded that the state was likely to succeed on the merits of the challenge because the restrictions put in place to control the virus did not impose a severe burden on the right to vote. The Sixth Circuit noted that, unlike the Michigan order at issue in *Esshaki*, the Ohio order exempted First-Amendment-protected activity—and specifically petition circulation—from the stay-at-home requirement. Further, the stay-at-home order ended five weeks before the petition deadline, giving petition circulators adequate time to collect signatures. The Michigan order in *Esshaki* was in effect through the deadline for circulating petitions, and it therefore presented a much more severe burden than the Ohio order did. Once again, the Sixth Circuit warned against using federal courts' injunctive powers to "'usurp[] a State's legislative authority by re-writing its statutes' to create new law." *Id*. at 812 (quoting *Esshaki* at *2) (alteration in original).

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Many jurisdictions are also looking ahead to the November 2020 elections, anticipating the possibility of disruptions in the normal election procedure. Many are expecting that, at a minimum, there will be a significant increase in the number of people requesting absentee ballots, which could increase printing and vote-tabulating expenses as well as risks of fraud. In late-March 2020, Congress passed a spending package to ease the economic effects of the coronavirus, and part of that package included $400 million in election funding to aid states in expanding voting by mail, as well as in ensuring safe in-person voting. For more discussion on election-related responses to the COVID-19 pandemic, see Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, SSRN, *available at* https://ssrn.com/abstract=3604668 (2020) (working paper).

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 (Maine 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*, 324 F. Supp. 3d 802 (D. Maine 2018).

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Chapter 12

REMEDYING ERRORS IN ELECTIONS

A. Introduction

Page 1099. Add to Note a:

EDWARD B. 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*, 17 ELECTION L.J. 100 (2018).

D. State Remedies for Federal Elections

Page 1129. Add the following case before *Coleman v. Franken*:

CHIAFALO v. WASHINGTON

Supreme Court of the United States
591 U.S. __, 140 S. Ct. __, __ L. Ed. 2d. __, 2020 WL 3633779 (2020)

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

Every four years, millions of Americans cast a ballot for a presidential candidate. Their votes, though, actually go toward selecting members of the Electoral College, whom each State appoints based on the popular returns. Those few "electors" then choose the President.

The States have devised mechanisms to ensure that the electors they appoint vote for the presidential candidate their citizens have preferred. With two partial exceptions, every State appoints a slate of electors selected by the political party whose candidate has won the State's popular vote. Most States also compel electors to pledge in advance to support the nominee of that party. This Court upheld such a pledge requirement decades ago, rejecting the argument that the Constitution "demands absolute freedom for the elector to vote his own choice." *Ray* v. *Blair*, 343 U.S. 214, 228 (1952).

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Today, we consider whether a State may also penalize an elector for breaking his pledge and voting for someone other than the presidential candidate who won his State's popular vote. We hold that a State may do so.

I * * *

* * * Article II, § 1, cl. 2 says:

> "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector."

* * * In the Nation's earliest elections, state legislatures mostly picked the electors, with the majority party sending a delegation of its choice to the Electoral College. By 1832, though, all States but one had introduced popular presidential elections. At first, citizens voted for a slate of electors put forward by a political party, expecting that the winning slate would vote for its party's presidential (and vice presidential) nominee in the Electoral College. By the early 20th century, citizens in most States voted for the presidential candidate himself; ballots increasingly did not even list the electors. After the popular vote was counted, States appointed the electors chosen by the party whose presidential nominee had won statewide, again expecting that they would vote for that candidate in the Electoral College.[1]

In the 20th century, many States enacted statutes meant to guarantee that outcome—that is, to prohibit so-called faithless voting. Rather than just assume that party-picked electors would vote for their party's winning nominee, those States insist that they do so. As of now, 32 States and the District of Columbia have such statutes on their books. They are typically called pledge laws because most demand that electors take a formal oath or pledge to cast their ballot for their party's presidential (and vice presidential) candidate. Others merely impose that duty by law. Either way, the statutes work to ensure that the electors vote for the candidate who got the most statewide votes in the presidential election.

Most relevant here, States began about 60 years ago to back up their pledge laws with some kind of sanction. By now, 15 States have such a system.[2] Almost all of them immediately remove

[1] Maine and Nebraska (which, for simplicity's sake, we will ignore after this footnote) developed a more complicated system in which two electors go to the winner of the statewide vote and one goes to the winner of each congressional district. See Me. Rev. Stat. Ann., Tit. 21–A, § 802; Neb. Rev. Stat. § 32–710. So, for example, if the Republican candidate wins the popular vote in Nebraska as a whole but loses to the Democratic candidate in one of the State's three congressional districts, the Republican will get four electors and the Democrat will get one. Here too, though, the States use party slates to pick the electors, in order to reflect the relevant popular preferences (whether in the State or in an individual district).

[2] Ariz. Rev. Stat. Ann. § 16–212; Cal. Elec. Code Ann. §§ 6906, 18002; Colo. Rev. Stat. § 1–4–304; Ind. Code § 3–10–4–9; Mich. Comp. Laws § 168.47; Minn. Stat. §§ 208.43, 208.46; Mont. Code Ann. §§ 13–25–304, 13–25–307; Neb. Rev. Stat. §§ 32–713, 32–714; Nev. Rev. Stat. §§ 298.045, 298.075; N.M. Stat. Ann. § 1–15–9; N.C. Gen. Stat.

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a faithless elector from his position, substituting an alternate whose vote the State reports instead. A few States impose a monetary fine on any elector who flouts his pledge.

Washington is one of the 15 States with a sanctions-backed pledge law designed to keep the State's electors in line with its voting citizens. As all States now do, Washington requires political parties fielding presidential candidates to nominate a slate of electors. On Election Day, the State gives voters a ballot listing only the candidates themselves. When the vote comes in, Washington moves toward appointing the electors chosen by the party whose candidate won the statewide count. But before the appointment can go into effect, each elector must "execute [a] pledge" agreeing to "mark [her] ballots" for the presidential (and vice presidential) candidate of the party nominating her. [Wash. Rev. Code] § 29A.56.084. And the elector must comply with that pledge, or else face a sanction. At the time relevant here, the punishment was a civil fine of up to $1,000. See § 29A.56.340.[3]

This case involves three Washington electors who violated their pledges in the 2016 presidential election. That year, Washington's voters chose Hillary Clinton over Donald Trump for President. The State thus appointed as its electors the nominees of the Washington State Democratic Party. Among those Democratic electors were petitioners Peter Chiafalo, Levi Guerra, and Esther John (the Electors). All three pledged to support Hillary Clinton in the Electoral College. But as that vote approached, they decided to cast their ballots for someone else. The three hoped they could encourage other electors—particularly those from States Donald Trump had carried—to follow their example. The idea was to deprive him of a majority of electoral votes and throw the election into the House of Representatives. So the three Electors voted for Colin Powell for President. But their effort failed. Only seven electors across the Nation cast faithless votes—the most in a century, but well short of the goal. Candidate Trump became President Trump. And, more to the point here, the State fined the Electors $1,000 apiece for breaking their pledges to support the same candidate its voters had.

The Electors challenged their fines in state court, arguing that the Constitution gives members of the Electoral College the right to vote however they please. The Washington Superior Court rejected the Electors' claim in an oral decision, and the State's Supreme Court affirmed that judgment. * * *

II

[T]his Court has considered elector pledge requirements before. Some seventy years ago Edmund Blair tried to become a presidential elector in Alabama. Like all States, Alabama lodged the authority to pick electors in the political parties fielding presidential candidates. And the Alabama Democratic Party required a pledge phrased much like Washington's today. No one could get on the party's slate of electors without agreeing to vote in the Electoral College for the

Ann. § 163–212; Okla. Stat., Tit. 26, §§ 10–102, 10–109; S.C. Code Ann. § 7–19–80; Utah Code § 20A–13–304; Wash. Rev. Code §§ 29A.56.084, 29A.56.090.

[3] Since the events in this case, Washington has repealed the fine. It now enforces pledges only by removing and replacing faithless electors. See Wash. Rev. Code § 29A.56.090(3).

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Democratic presidential candidate. Blair challenged the pledge mandate. He argued that the "intention of the Founders was that [presidential] electors should exercise their judgment in voting." *Ray*, 343 U.S., at 225. The pledge requirement, he claimed, "interfere[d] with the performance of this constitutional duty to select [a president] according to the best judgment of the elector." *Ibid.*

Our decision in *Ray* rejected that challenge. "Neither the language of Art. II, § 1, nor that of the Twelfth Amendment," we explained, prohibits a State from appointing only electors committed to vote for a party's presidential candidate. *Ibid*. Nor did the Nation's history suggest such a bar. To the contrary, "[h]istory teaches that the electors were expected to support the party nominees" as far back as the earliest contested presidential elections. *Id*., at 228. "[L]ongstanding practice" thus "weigh[ed] heavily" against Blair's claim. *Id*., at 228–230. And current voting procedures did too. The Court noted that by then many States did not even put electors' names on a presidential ballot. See *id*., at 229. The whole system presupposed that the electors, because of either an "implied" or an "oral pledge," would vote for the candidate who had won the State's popular election. *Ibid*.

Ray, however, reserved a question not implicated in the case: Could a State enforce those pledges through legal sanctions? See *id*., at 230. Or would doing so violate an elector's "constitutional freedom" to "vote as he may choose" in the Electoral College? *Ibid*. Today, we take up that question. We uphold Washington's penalty-backed pledge law for reasons much like those given in *Ray*. The Constitution's text and the Nation's history both support allowing a State to enforce an elector's pledge to support his party's nominee—and the state voters' choice—for President.

Article II, § 1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. As noted earlier, each State may appoint electors "in such Manner as the Legislature thereof may direct." Art. II, § 1, cl. 2. This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. *McPherson* v. *Blacker*, 146 U.S. 1, 27 (1892) [p. XXX]. And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. A State can require, for example, that an elector live in the State or qualify as a regular voter during the relevant time period. Or more substantively, a State can insist (as *Ray* allowed) that the elector pledge to cast his Electoral College ballot for his party's presidential nominee, thus tracking the State's popular vote. See *Ray*, 343 U.S., at 227 (A pledge requirement "is an exercise of the state's right to appoint electors in such manner" as it chooses). Or—so long as nothing else in the Constitution poses an obstacle—a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty. Which is to say that the State's appointment power, barring some outside constraint, enables the enforcement of a pledge like Washington's.[6]

[6] The concurring opinion would have us make fine distinctions among state laws punishing faithless voting—treating some as conditions of appointment and others not, depending on small semantic differences. The Electors themselves raised no such argument, and they were right not to do so. No matter the precise phrasing, a law penalizing faithless voting (like a law merely barring that practice) is an exercise of the State's power to impose conditions on the appointment of electors. See *Ray* v. *Blair*, 343 U.S. [at] 227.

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And nothing in the Constitution expressly prohibits States from taking away presidential electors' voting discretion as Washington does. * * * The Framers could have done it differently; other constitutional drafters of their time did. In the founding era, two States—Maryland and Kentucky—used electoral bodies selected by voters to choose state senators (and in Kentucky's case, the Governor too). The Constitutions of both States, Maryland's drafted just before and Kentucky's just after the U.S. Constitution, incorporated language that would have made this case look quite different. Both state Constitutions required all electors to take an oath "to elect without favour, affection, partiality, or prejudice, such persons for Senators, as they, in their judgment and conscience, believe best qualified for the office." The emphasis on independent "judgment and conscience" called for the exercise of elector discretion. But although the Framers knew of Maryland's Constitution, no language of that kind made it into the document they drafted.

The Electors argue that three simple words stand in for more explicit language about discretion. Article II, § 1 first names the members of the Electoral College: "electors." The Twelfth Amendment then says that electors shall "vote" and that they shall do so by "ballot." The "plain meaning" of those terms, the Electors say, requires electors to have "freedom of choice." If the States could control their votes, "the electors would not be 'Electors,' and their 'vote by Ballot' would not be a 'vote.'"

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he "votes" or fills in a "ballot." In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act. Or similarly, suppose in a system allowing proxy voting (a common practice in the founding era), the proxy acts on clear instructions from the principal, with no freedom of choice. Still, we might well say that he cast a "ballot" or "voted," though the preference registered was not his own. For that matter, some elections give the voter no real choice because there is only one name on a ballot (consider an old Soviet election, or even a down-ballot race in this country). Yet if the person in the voting booth goes through the motions, we consider him to have voted. The point of all these examples is to show that although voting and discretion are usually combined, voting is still voting when discretion departs. Maybe most telling, switch from hypotheticals to the members of the Electoral College. For centuries now, as we'll later show, almost all have considered themselves bound to vote for their party's (and the state voters') preference. Yet there is no better description for what they do in the Electoral College than "vote" by "ballot." And all these years later, everyone still calls them "electors"—and not wrongly, because even though they vote without discretion, they do indeed elect a President.

The Electors and their *amici* object that the Framers using those words expected the Electors' votes to reflect their own judgments. Hamilton praised the Constitution for entrusting the Presidency to "men most capable of analyzing the qualities" needed for the office, who would make their choices "under circumstances favorable to deliberation." The Federalist No. 68, p. 410 (C. Rossiter ed. 1961). So too, John Jay predicted that the Electoral College would "be composed of the most enlightened and respectable citizens," whose choices would reflect "discretion and discernment." *Id.*, No. 64, at 389.

But even assuming other Framers shared that outlook, it would not be enough. Whether by

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choice or accident, the Framers did not reduce their thoughts about electors' discretion to the printed page. All that they put down about the electors was what we have said: that the States would appoint them, and that they would meet and cast ballots to send to the Capitol. Those sparse instructions took no position on how independent from—or how faithful to—party and popular preferences the electors' votes should be. On that score, the Constitution left much to the future. And the future did not take long in coming. Almost immediately, presidential electors became trusty transmitters of other people's decisions. * * *

Begin at the beginning—with the Nation's first contested election in 1796. Would-be electors declared themselves for one or the other party's presidential candidate. * * * In some States, legislatures chose the electors; in others, ordinary voters did. But in either case, the elector's declaration of support for a candidate—essentially a pledge—was what mattered. Or said differently, the selectors of an elector knew just what they were getting—not someone who would deliberate in good Hamiltonian fashion, but someone who would vote for their party's candidate. * * * And when the time came to vote in the Electoral College, all but one elector did what everyone expected, faithfully representing their selectors' choice of presidential candidate.[7]

The Twelfth Amendment embraced this new reality—both acknowledging and facilitating the Electoral College's emergence as a mechanism not for deliberation but for party-line voting. [T]he Amendment grew out of a pair of fiascos—the election of [John Adams and Thomas Jefferson,] two then-bitter rivals as President and Vice President [in 1796], and the tie vote [in 1800 between Jefferson and Aaron Burr] that threw the next election into the House. Both had occurred because the Constitution's original voting procedures gave electors two votes for President, rather than one apiece for President and Vice President. Without the capacity to vote a party ticket for the two offices, the electors had foundered, and could do so again. If the predominant party's electors used both their votes on their party's two candidates, they would create a tie (see 1800). If they intentionally cast fewer votes for the intended vice president, they risked the opposite party's presidential candidate sneaking into the second position (see 1796). By allowing the electors to vote separately for the two offices, the Twelfth Amendment made party-line voting safe. The Amendment thus advanced, rather than resisted, the practice that had arisen in the Nation's first elections. An elector would promise to legislators or citizens to vote for their party's presidential and vice presidential candidates—and then follow through on that commitment. Or as the Court wrote in *Ray*, the new procedure allowed an elector to "vote the regular party ticket" and thereby "carry out the desires of the people" who had sent him to the Electoral College. *Ray*, 343 U.S., at 224, n.11. No independent electors need apply. * * *

State election laws evolved to reinforce that development, ensuring that a State's electors would vote the same way as its citizens. As noted earlier, state legislatures early dropped out of

[7] The reaction to even that single elector goes to prove the point that the system was non-discretionary. In the 1796 election, Pennsylvania held a statewide vote for electors under a winner-take-all rule (as all but two States have today). The people voted narrowly for the slate of electors supporting Jefferson. But Federalist chicanery led to the Governor's inclusion of two Federalist electors in the State's delegation to the Electoral College. One of them, Samuel Miles, agreed to cast his vote for Jefferson, in line with the winner-take-all expectation on which the race had been run. If he thought other Federalists would forgive him for acting with honor, he was wrong. An irate voter reacted: "[W]hen I voted for the [Federalist] ticket, I voted for John Adams. . . . What! do I chuse Samuel Miles to determine for me whether John Adams or Thomas Jefferson is the fittest man for President of the United States? No—I chuse him to *act*, not to *think*." See Gazette of the United States, Dec. 15, 1796, p. 3, col. 1 (emphasis in original).

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the picture; by the mid-1800s, ordinary voters chose electors. Except that increasingly, they did not do so directly. States listed only presidential candidates on the ballot, on the understanding that electors would do no more than vote for the winner. Usually, the State could ensure that result by appointing electors chosen by the winner's party. But to remove any doubt, States began in the early 1900s to enact statutes requiring electors to pledge that they would squelch any urge to break ranks with voters. Washington's law, penalizing a pledge's breach, is only another in the same vein. It reflects a tradition more than two centuries old. In that practice, electors are not free agents; they are to vote for the candidate whom the State's voters have chosen.

The history going the opposite way is one of anomalies only. The Electors stress that since the founding, electors have cast some 180 faithless votes for either President or Vice President. But that is 180 out of over 23,000. And more than a third of the faithless votes come from 1872, when the Democratic Party's nominee (Horace Greeley) died just after Election Day.[8] Putting those aside, faithless votes represent just one-half of one percent of the total. Still, the Electors counter, Congress has counted all those votes. But because faithless votes have never come close to affecting an outcome, only one has ever been challenged. True enough, that one was counted. But the Electors cannot rest a claim of historical tradition on one counted vote in over 200 years. And anyway, the State appointing that elector had no law requiring a pledge or otherwise barring his use of discretion. Congress's deference to a state decision to tolerate a faithless vote is no ground for rejecting a state decision to penalize one. * * *

The judgment of the Supreme Court of Washington is

Affirmed.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins as to Part II, concurring in the judgment.

The Court correctly determines that States have the power to require Presidential electors to vote for the candidate chosen by the people of the State. I disagree, however, with its attempt to base that power on Article II. In my view, the Constitution is silent on States' authority to bind electors in voting. I would resolve this case by simply recognizing that "[a]ll powers that the Constitution neither delegates to the Federal Government nor prohibits to the States are controlled by the people of each State." *U.S. Term Limits*, *Inc.* v. *Thornton*, 514 U.S. 779, 848 (1995) [p. XXX] (THOMAS, J., dissenting).

I * * *

[8] The Electors contend that elector discretion is needed to deal with the possibility that a future presidential candidate will die between Election Day and the Electoral College vote. We do not dismiss how much turmoil such an event could cause. In recognition of that fact, some States have drafted their pledge laws to give electors voting discretion when their candidate has died. See, *e.g.*, Cal. Elec. Code Ann. § 6906; Ind. Code § 3–10–4–1.7. And we suspect that in such a case, States without a specific provision would also release electors from their pledge. Still, we note that because the situation is not before us, nothing in this opinion should be taken to permit the States to bind electors to a deceased candidate.

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In a somewhat cursory analysis, the Court concludes that the States' duty to appoint electors "in such Manner as the Legislature thereof may direct," Art. II, § 1, cl. 2, provides an express grant of "power to appoint an elector." [T]his interpretation erroneously conflates the imposition of a duty with the granting of a power. But even setting that issue aside, I cannot agree with the Court's analysis. The Court appears to misinterpret Article II, § 1, by overreading its language as authorizing the broad power to impose and enforce substantive conditions on appointment. The Court then misconstrues the State of Washington's law as enforcing a condition of appointment.

The Court's conclusion that the text of Article II, § 1, expressly grants States the power to impose substantive conditions or qualifications on electors is highly questionable. Its interpretation appears to strain the plain meaning of the text, ignore historical evidence, and give the term "Manner" different meanings in parallel provisions of Article I and Article II.

First, the Court's attempt to root its analysis in Article II, § 1, seems to stretch the plain meaning of the Constitution's text. Article II, § 1, provides that States shall appoint electors "in such Manner as the Legislature thereof may direct." * * * [This language] suggest[s] that Article II requires state legislatures merely to set the approach for selecting Presidential electors, not to impose substantive limitations on whom [*sic*] may become an elector. And determining the "Manner" of appointment certainly does not include the power to impose requirements as to how the electors vote *after they are appointed*, which is what the Washington law addresses. * * *

Historical evidence from the founding also suggests that the "Manner" of appointment refers to the method for selecting electors, rather than the substantive limitations placed on the position. * * *

Finally, the Court's interpretation gives the same term—"Manner"—different meanings in two parallel provisions of the Constitution. Article I, § 4, states that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." In *U.S. Term Limits*, the Court concluded that the term "Manner" in Article I includes only "a grant of authority to issue procedural regulations," not "the broad power to set qualifications." 514 U.S., at 832–833. Yet, today, the Court appears to take the exact opposite view. The Court interprets the term "Manner" in Article II, § 1, to include the power to impose conditions or qualifications on the appointment of electors.

With respect, I demur. "When seeking to discern the meaning of a word in the Constitution, there is no better dictionary than the rest of the Constitution itself." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 829 (2015) [p. XXX] (ROBERTS, C.J., dissenting). While terms may not always have the exact same meaning throughout the Constitution, here we are interpreting the same word ("Manner") in two provisions that the Court has already stated impose "paralle[l]" duties—setting the "Manner of holding Elections" and setting the "Manner" of "appoint[ing] a Number of Electors." *U.S. Term Limits*, 514 U.S., at 804–805. Nothing in the Constitution's text or history indicates that the Court should take the strongly disfavored step of concluding that the term "Manner" has two different meanings in these closely aligned provisions.

All the Court can point to in support of its position is a single sentence in *Ray* v. *Blair*, 343

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U.S. 214 (1952), which suggested that a State's power to impose a requirement that electors pledge to vote for their party's nominee comes from Article II, § 1, *id.*, at 227. But this statement is simply made in passing in response to one of the parties' arguments. It is curiously bereft of reasoning or analysis of Article II. We generally look to the text to govern our analysis rather than insouciantly follow stray, "incomplete" statements in our prior opinions. In my view, we should be guided by the text here.

Even accepting the Court's broad interpretation of Clause 2 of Article II, § 1, I cannot agree with its determination that this Clause expressly authorizes the Washington law at issue here. In an attempt to tie Washington's law to the State's "power to appoint an elector," the Court construes Wash. Rev. Code § 29A.56.340 as "enforc[ing] a pledge." But § 29A.56.340 did not involve the enforcement of a pledge or relate to the appointment process at all. It simply regulated electors' votes, unconnected to the appointment process.

To understand the Court's error, a brief summary of its theory is necessary. According to the Court, Article II, § 1, grants States "the power to appoint" Presidential electors "in such Manner as the Legislature thereof may direct." That "power to appoint an elector," the Court states, "includes power to condition his appointment." The power to condition appointment in turn allows the State to insist that an "elector pledge to cast his Electoral College ballot for his party's presidential nominee." And finally, "the State's appointment power . . . enables the enforcement of a pledge." The Court's theory is entirely premised on the State exercising a power to *appoint*.

Assuming the Court has correctly interpreted Article II, § 1, there are certain circumstances in which this theory could stand. Some States expressly require electors to pledge to vote for a party nominee as a condition of appointment and then impose a penalty if electors violate that pledge. * * * But not all States attempt to bind electors' votes through the appointment process. Some States simply impose a legal duty that has no connection to elector appointment. For example, New Mexico imposes a legal duty on its electors: "All presidential electors shall cast their ballots in the electoral college for the candidates of the political party which nominated them as presidential electors." N.M. Stat. Ann. § 1–15–9(A). And "[a]ny presidential elector who casts his ballot in violation of [this duty] is guilty of a fourth degree felony." § 1–15–9(B). California has a similar system. It first imposes a legal duty on electors to vote for the nominated candidates of the political party they represent if those candidates are alive. Cal. Elec. Code Ann. § 6906. It then imposes a punishment on "[e]very person charged with the performance of any duty under any law of this state relating to elections, who willfully neglects or refuses to perform it." § 18002. These laws penalize electors for their faithless votes. But they do not attempt to regulate the votes of electors through the appointment process. In fact, these laws have nothing to do with elector appointment.

The Court recognizes the distinction between these two types of laws, *i.e.*, laws enforcing appointment conditions and laws that regulate electors outside of the appointment process. But it claims this is merely a "small semantic differenc[e]." Far from being semantic, the difference between the power to impose a "condition of appointment" and the power to impose restrictions on electors *that have nothing to do with appointment* is fundamental to the Court's textual argument. The Court's entire analysis is premised on States' purported Article II "power to appoint an elector" and "to condition his appointment." The Court does not, and cannot, claim that the text

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of Article II provides States power over anything other than the *appointment* of electors.

Here, the challenged Washington law did not enforce any appointment condition. It provided that "[a]ny elector who votes for a person or persons not nominated by the party of which he or she is an elector is subject to a civil penalty of up to one thousand dollars." [A] violation of § 29A.56.340 was not predicated on violating a pledge or any other condition of appointment. In fact, it did not even mention a pledge, which was set forth in a separate, unreferenced provision. See § 29A.56.320. Thus, § 29A.56.340 had no connection to the appointment process and could be enforced independent of the existence of any pledge requirement. While the Court's description of § 29A.56.340 as a law enforcing a condition of appointment may be helpful for the Court's claim that Washington's law was rooted in Article II, § 1's "power to appoint," it is simply not accurate. Thus, even accepting the Court's strained reading of Article II, § 1's text, I cannot agree with the Court's effort to reconcile Washington's law with its desired theory.

In short, the Constitution does not speak to States' power to require Presidential electors to vote for the candidates chosen by the people. The Court's attempt to ground such a power in Article II's text falls short. Rather than contort the language of both Article II and the state statute, I would acknowledge that the Constitution simply says nothing about the States' power in this regard.

II

When the Constitution is silent, authority resides with the States or the people. This allocation of power is both embodied in the structure of our Constitution and expressly required by the Tenth Amendment. The application of this fundamental principle should guide our decision here. * * *

As the Court recognizes, nothing in the Constitution prevents States from requiring Presidential electors to vote for the candidate chosen by the people. Petitioners ask us to infer a constitutional right to elector independence by interpreting the terms "appoint," "Electors," "vote," and "by Ballot" to align with the Framers' *expectations* of discretion in elector voting. But the Framers' expectations aid our interpretive inquiry only to the extent that they provide evidence of the original public meaning of the Constitution. They cannot be used to change that meaning. As the Court explains, the plain meaning of the terms relied on by petitioners do not appear to "connote independent choice." Thus, "the original expectation[s]" of the Framers as to elector discretion provide "no reason for holding that the power confided to the States by the Constitution has ceased to exist." *McPherson*, 146 U.S., at 36. * * *

Notes and Questions

1. Was the Court faithful to the original understanding of the constitutional provisions establishing the electoral college? The Court noted that the Constitution did not "expressly" or "explicit[ly]" prohibit states from binding electors to their respective popular votes, and the language that the Constitution did contain "took no position on how independent from—or how

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faithful to—party and popular preferences the electors' votes should be." Justice Thomas similarly argued that "the plain meaning of the [Constitution's] terms" did not impose limits on the states' ability to restrict electors' voting choice, and without such a textual indication, the contrary "*expectations*" of the Framers should be disregarded.

But is it proper to view the Constitution as silent on the question whether electors are entitled to vote independently? Is it plausible that the Framers would have forced state legislatures to choose electors (rather than allowing the state legislatures to cast votes for President directly) if the states could require the electors to vote a certain way? Why couldn't "original public meaning" be discerned from the constitutional structure, rather than from explicit language? *Cf., e.g.*, *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 806 (1995) [p. XXX] ("[T]he text and structure of the Constitution, the relevant historical materials, and, most importantly, the 'basic principles of our democratic system' all demonstrate that the Qualifications Clauses were intended to preclude the States from exercising any such power and to fix as exclusive the qualifications in the Constitution.") (quoting *Powell v. McCormack*, 395 U.S. 486, 548 (1969)); *Morrison v. Olson*, 487 U.S. 654, 703-04 (1988) (Scalia, J., dissenting) ("The Court devotes most of its attention to such relatively technical details as the Appointments Clause and the removal power, addressing briefly and only at the end of its opinion the separation of powers. * * * I think that has it backwards."); *United States v. Nixon*, 418 U.S. 683, 711 (1974) ("Nowhere in the Constitution * * * is there any explicit reference to a privilege of confidentiality [for presidential communications], yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based."); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 406 (1819) ("Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the [Constitution] which, like the Articles of Confederation, excludes incidental or implied powers and which requires that everything granted shall be expressly and minutely described.").

2. If a state joined the National Popular Vote Interstate Compact, which is discussed in the notes before *McPherson*, could it require its electors to vote in accordance with the national popular vote, even if a different candidate received more votes in the state?

3. The Court said that "the power to appoint an elector (in any manner) includes power to condition his appointment. * * * [S]o long as nothing else in the Constitution poses an obstacle[,] a State can add, as Washington did, an associated condition of appointment: It can demand that the elector actually live up to his pledge, on pain of penalty." The Court cited no authority for its conclusion that Washington could not only impose a condition on appointment but could also control the elector's conduct after the appointment. Does it follow from states' appointing authority that they also have the power to direct the performance of the elector while in office? Does such an authority extend to other appointed officials in the government? *Cf. Morrison v. Olson*, *supra* (upholding the independence of the independent counsel); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (protecting the independence of members of the Federal Trade Commission from the control of the President). Surely the Court did not mean to suggest that the President's power to appoint federal judges gave him the authority to control judges' behavior in office. In the days before the Seventeenth Amendment, could a state legislature recall its U.S. Senator in the middle of his six-year term if it were unhappy with his performance in office? No

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senator was ever recalled, and recall authority would appear quite inconsistent with the rationale of *U.S. Term Limits*. Can *Chiafalo* be squared with *Term Limits*?

4. Should the number of faithless electors in the country's history have been relevant to the question of whether the Constitution protects electors' independence? If so, does the fact that there have been 180 faithless electors out of 23,000 indicate that there is historical support for electors' independence, or can those 180 electors be dismissed as "anomalies"?

5. Is there a difference between, on the one hand, a law that requires electors to pledge to vote for a candidate and then punishes electors who break that pledge, and, on the other, a law that does not require a pledge but directly requires electors to vote for the winner of the state's popular vote and punishes electors who fail to do so? Is that a merely "semantic difference[]", as the Court charged, or is it "fundamental to the Court's textual argument," as Justice Thomas argued?

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. 2265 (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).

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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).