Voting Rights and Election Law

Cases, Explanatory Notes, and Problems

Third Edition

2023 Supplement

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Chapter 1

VOTING QUALIFICATIONS

B. Defining the Community and Excluding Outsiders

Page 35. Add the following to the end of Note 3:

In 2021, President Biden signed an executive order requiring the Department of Justice to facilitate voting by eligible voters being held in federal custody, but the order did not (and could not) grant voting rights to anyone who would be barred from voting under state law. *See* David Schlussel, *President Biden Orders DOJ to Facilitate Voting for People in Federal Custody or Under Supervision*, COLLATERAL CONSEQUENCES RESOURCE CENTER (Mar. 12, 2021), *at* https://ccresourcecenter.org/2021/03/12/president-biden-orders-doj-to-facilitate-voting-for-people-in-federal-custody-or-under-supervision/.

Page 58. In the last paragraph of Note 13, add the following after "Does such a system violate the Equal Protection Clause, as interpreted in *Kramer*?":

For an argument that equal-protection challenges to judicial merit-selection plans should fail because they should be held to satisfy the special-purpose, appointment, or judicial exceptions to one-person, one-vote requirements, see Zachary Reger, Comment, *The Power of Attorneys: Addressing the Equal Protection Challenge to Merit-Based Judicial Selection*, 89 U. CHI. L. REV. 253 (2022).

Page 68. At the end of Note 8, note that *Minor v. Happersett* was overruled by U.S. CONST. amend. XIX. In addition, add the following after the *Skafte* citation:

In December 2021, the New York City Council passed an amendment to the City Charter. The amendment permitted non-citizens to vote in city elections, so long as they were city residents and either lawful permanent U.S. residents or authorized to work in the United States. In *Fossella v. Adams*, 2022 NYLJ LEXIS 670 (N.Y. Sup. Ct. Richmond Co. 2022), a state trial court struck down the law as inconsistent with the New York State Constitution, which extended voting rights to "citizens" and, in the view of the court, implied that *only* citizens should be allowed to exercise voting rights.

Chapter 2

REDISTRICTING AND ONE PERSON, ONE VOTE

B. The Political Thicket

Page 110. Add the following citation to the end of Note 6:

Kim I. Esler, A Defense of Activism, 40 N.Y.L. SCH. L. REV. 911, 920 n.25 (1996) ("Whittaker quit and Frankfurter suffered a stroke, presumably related to the stress of the defeat.").

E. Partisan Gerrymandering

Page 198. In Note 2, end the paragraph after the citations of Grove, Harrison, and Solimine. Replace the remainder of the Note with this new paragraph:

Regardless of whether state courts can provide remedies for partisan gerrymanders that violate the U.S. Constitution, several state courts have been active in providing remedies for partisan gerrymanders that violate their respective state constitutions. *Rucho* itself referenced some of the state-court litigation, and that litigation has continued after the *Rucho* decision. *See*, *e.g.*, *Harkenrider v. Hochul*, 197 N.E.3d 437 (N.Y. 2022) (striking down a pro-Democratic gerrymander); *League of Women Voters v. Ohio Redistricting Commission*, 200 N.E.3d 197 (Ohio 2022) (striking down a pro-Republican gerrymander, which was the Redistricting Commission's *fifth* attempt to adopt a districting plan). For further discussion of state-court remedies under state law post-*Rucho*, see Samuel S.-H. Wang et al., *Laboratories of Democracy Reform: State Constitutions and Partisan Gerrymanders*, 22 U. PA. J. CONST. L. 203 (2019).

Page 215. Add the following to the end of Note 1:

For recent examinations of how various types of redistricting commissions (should) work, see Robin E. Best et al., *Do Redistricting Commissions Avoid Partisan Gerrymanders?*, 50 AM. POL. RES. 379 (2022) (answering their own title question "sometimes," after studying the actions of independent commissions and other redistricting commissions from the 2010 round of redistricting); Jason Torchinsky & Dennis W. Polio, *How Independent Is Too Independent?: Redistricting Commissions and the Growth of the Unaccountable Administrative State*, 20 GEO. J.L. & PUB. POL'Y 533 (2022) (surveying various types of redistricting commissions in the states and arguing that several were insufficiently transparent and accountable).

Page 216. Add the following paragraph to the end of Note 3:

The issue was presented to the Supreme Court during the 2020 presidential election, when the Pennsylvania Supreme Court, citing the effects of the COVID-19 pandemic, permitted the counting of mail-in ballots that were received up to three days after the election, despite clear statutory language requiring mail-in ballots to be received by the board of elections by 8:00 p.m. on election day. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). The Republican Party of Pennsylvania asked the U.S. Supreme Court to hear the case, but the Court, by a 5-4 vote, refused to stay the state-court decision, *Republican Party of Pennsylvania v. Boockvar*, 592 U.S. __, 141 S. Ct. 643 (2020), and later denied *certiorari*, *Republican Party of Pennsylvania v. Degraffenreid*, 141 S. Ct. 732 (2021), over the dissents of Justice Thomas and Justice Alito, the latter joined by Justice Gorsuch.

Page 216. Add the following after Note 4:

It took another Supreme Court case, but it appears that *Arizona* is now firmly entrenched. The independent-state-legislature theory remained controversial and the subject of litigation (and extensive academic commentary) in the years after *Arizona* and *Rucho*.[1] Interestingly, however, the case that appears to have interred the independent-state-legislature theory breathed life into an issue that had lain dormant since *Bush v. Gore*, 531 U.S. 98 (2000): the degree to which the U.S. Constitution limits adventurous state courts from making law under the guise of interpreting it.

MOORE v. HARPER

Supreme Court of the United States
600 U.S. __, 143 S. Ct. 2065, __ L. Ed. 2d __ (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which JUSTICE SOTOMAYOR, JUSTICE KAGAN, JUSTICE KAVANAUGH, JUSTICE BARRETT, and JUSTICE JACKSON join].

Several groups of plaintiffs challenged North Carolina's congressional districting map as an impermissible partisan gerrymander. The plaintiffs brought claims under North Carolina's Constitution, which provides that "[a]ll elections shall be free." Art. I, § 10. Relying on that provision, as well as the State Constitution's equal protection, free speech, and free assembly clauses, the North Carolina Supreme Court found in favor of the plaintiffs and struck down the

[1] For additional analysis of the independent-state-legislature doctrine, see Vikram D. Amar & Akhil Amar, *Eradicating Bush-League Arguments Root and Branch: The Article II Independent-State-Legislature Notion and Related Rubbish*, 2021 SUP. CT. REV. 1 (2022); Leah Litman & Katherine Shaw, *Textualism, Judicial Supremacy, and the Independent State Legislature Doctrine*, 2022 WISC. L. REV. 1235 (2022); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. 571 (2022); Michael T. Morley, *The Independent State Legislature Doctrine*, 90 FORDHAM L. REV. 501 (2021); Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GA. L. REV. 1 (2021); Carolyn Shapiro, *The Independent State Legislature Theory, Federal Courts, and State Law*, 90 U. CHI. L. REV. 137 (2023); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. 445 (2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y 135 (2023); Rosemarie Zagarri, *The Historian's Case Against the Independent State Legislature Theory*, 64 B.C. L. REV. 637 (2023).

legislature's map. The Court concluded that North Carolina's Legislature deliberately drew the State's congressional map to favor Republican candidates.

[While this case was pending, Republicans won a majority of seats on the North Carolina Supreme Court and proceeded to "overrule" the prior decision by holding that partisan-gerrymandering claims are not justiciable under the state constitution. The state court did not, however, disturb the earlier judgment in the case, meaning that, despite the "overruling," the legislature's map could not be used in future elections. Because the legality of the legislature's map would continue to depend on the outcome of this case, the U.S. Supreme Court determined that the case was not moot.]

In drawing the State's congressional map, North Carolina's Legislature exercised authority under the Elections Clause of the Federal Constitution, which expressly requires "the Legislature" of each State to prescribe "[t]he Times, Places and Manner of" federal elections. Art. I, § 4, cl. 1. We decide today whether that Clause vests state legislatures with authority to set rules governing federal elections free from restrictions imposed under state law. * * * We hold that it does not. The Elections Clause does not insulate state legislatures from the ordinary exercise of state judicial review.

[The Court reviewed *Hildebrandt* and *Smiley*.]

[*Arizona State Legislature v. Arizona Independent Redistricting Comm'n*, 576 U.S. 787, 792 (2015) [p. 200]] recognized that whatever authority was responsible for redistricting, that entity remained subject to constraints set forth in the State Constitution. The Court embraced the core principle espoused in *Hildebrant* and *Smiley* "that redistricting is a legislative function, to be performed in accordance with the State's prescriptions for lawmaking, which may include the referendum and the Governor's veto." 576 U.S. at 808. The Court dismissed the argument that the Elections Clause divests state constitutions of the power to enforce checks against the exercise of legislative power: "Nothing in [the Elections] Clause instructs, nor has this Court ever held, that a state legislature may prescribe regulations on the time, place, and manner of holding federal elections in defiance of provisions of the State's constitution." 576 U.S. at 817–818. * * *

[W]hen legislatures make laws, they are bound by the provisions of the very documents that give them life. Legislatures, the Framers recognized, "are the mere creatures of the State Constitutions, and cannot be greater than their creators." 2 Farrand 88. "What are Legislatures? Creatures of the Constitution; they owe their existence to the Constitution: they derive their powers from the Constitution: It is their commission; and, therefore, all their acts must be conformable to it, or else they will be void." *Vanhorne's Lessee* v. *Dorrance*, 2 Dall. 304, 308 (Pa. 1795). *Marbury* [v. *Madison*] confirmed this understanding, 1 Cranch at 176–177, and nothing in the text of the Elections Clause undermines it. When a state legislature carries out its constitutional power to prescribe rules regulating federal elections, the "commission under which" it exercises authority is two-fold. The Federalist No. 78, at 467. The legislature acts both as a lawmaking body created and bound by its state constitution, and as the entity assigned particular authority by the Federal Constitution. Both constitutions restrain the legislature's exercise of power. * * *

The legislative defendants and JUSTICE THOMAS rely * * * on our decision in *Leser v. Garnett*, 258 U.S. 130 (1922), but it * * * offers little support. *Leser* addressed an argument that the Nineteenth Amendment—providing women the right to vote—was invalid because state

constitutional provisions "render[ed] inoperative the alleged ratifications by their legislatures." We rejected that position, holding that when state legislatures ratify amendments to the Constitution, they carry out "a federal function derived from the Federal Constitution," which "transcends any limitations sought to be imposed by the people of a State."

But the legislature in *Leser* performed a ratifying function rather than engaging in traditional lawmaking. The provisions at issue in today's case—like the provisions examined in *Hildebrant* and *Smiley*—concern a state legislature's exercise of lawmaking power. And as we held in *Smiley*, when state legislatures act pursuant to their Elections Clause authority, they engage in lawmaking subject to the typical constraints on the exercise of such power. 285 U.S. at 367. We have already distinguished *Leser* on those grounds. *Smiley*, 285 U.S. at 365–366. In addition, *Leser* cited for support our decision in *Hawke* v. *Smith*, which sharply separated ratification "from legislative action" under the Elections Clause. 253 U.S. at 228. Lawmaking under the Elections Clause, *Hawke* explained, "is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution." *Id.*, at 231.

Hawke and *Smiley* delineated the various roles that the Constitution assigns to state legislatures. Legislatures act as "Consent[ing]" bodies when the Nation purchases land, Art. I, § 8, cl. 17; as "Ratif[ying]" bodies when they agree to proposed Constitutional amendments, Art. V; and—prior to the passage of the Seventeenth Amendment—as "electoral" bodies when they choose United States Senators, *Smiley*, 285 U.S. at 365.

By fulfilling their constitutional duty to craft the rules governing federal elections, state legislatures do not consent, ratify, or elect—they make laws. Elections are complex affairs, demanding rules that dictate everything from the date on which voters will go to the polls to the dimensions and font of individual ballots. Legislatures must "provide a complete code for congressional elections," including regulations "relati[ng] to notices, registration, supervision of voting, protection of voters, prevention of fraud and corrupt practices, counting of votes, duties of inspectors and canvassers, and making and publication of election returns." *Smiley*, 285 U.S. at 366. In contrast, a simple up-or-down vote suffices to ratify an amendment to the Constitution. Providing consent to the purchase of land or electing Senators involves similarly straightforward exercises of authority. But fashioning regulations governing federal elections "unquestionably calls for the exercise of lawmaking authority." *Arizona State Legislature*, 576 U.S. at 808, n.17. And the exercise of such authority in the context of the Elections Clause is subject to the ordinary constraints on lawmaking in the state constitution.

In sum, our precedents have long rejected the view that legislative action under the Elections Clause is purely federal in character, governed only by restraints found in the Federal Constitution.

Addressing our decisions in *Smiley* and *Hildebrant*, both the legislative defendants and JUSTICE THOMAS concede that at least some state constitutional provisions can restrain a state legislature's exercise of authority under the Elections Clause. But they read those cases to differentiate between procedural and substantive constraints. * * * This argument adopts too cramped a view of our decision in *Smiley*. Chief Justice Hughes's opinion for the Court drew no distinction between "procedural" and "substantive" restraints on lawmaking. It turned on the view that state constitutional provisions apply to a legislature's exercise of lawmaking authority under the Elections Clause, with no concern about how those provisions might be categorized. 285 U.S.

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at 367–368; see also *Hildebrant*, 241 U.S. at 569–570.

The same goes for the Court's decision in *Arizona State Legislature*. The defendants attempt to cabin that case by arguing that the Court did not address substantive limits on the regulation of federal elections. But as in *Smiley*, the Court's decision in *Arizona State Legislature* discussed no difference between procedure and substance. * * *

The defendants and JUSTICE THOMAS do not in any event offer a defensible line between procedure and substance in this context. "The line between procedural and substantive law is hazy." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 92 (1938) (Reed, J., concurring in part). Many rules "are rationally capable of classification as either." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Procedure, after all, is often used as a vehicle to achieve substantive ends. When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a procedural or substantive restraint on lawmaking? *Smiley* did not endorse such murky inquiries into the nature of constitutional restraints, and we see no neat distinction today.

Were there any doubt, historical practice confirms that state legislatures remain bound by state constitutional restraints when exercising authority under the Elections Clause. * * * Two state constitutional provisions adopted shortly after the founding offer the strongest evidence. Delaware's 1792 Constitution provided that the State's congressional representatives "shall be voted for at the same places where representatives in the State legislature are voted for, and in the same manner." Art. VIII, § 2. Even though the Elections Clause stated that the "Places" and "Manner" of federal elections shall be "prescribed" by the state legislatures, the Delaware Constitution expressly enacted rules governing the "places" and "manner" of holding elections for federal office. An 1810 amendment to the Maryland Constitution likewise embodied regulations falling within the scope of the Elections and Electors Clauses. Article XIV provided that every qualified citizen "shall vote, by ballot, . . . for electors of the President and Vice-President of the United States, [and] for Representatives of this State in the Congress of the United States." If the Elections Clause had vested exclusive authority in state legislatures, unchecked by state courts enforcing provisions of state constitutions, these clauses would have been unenforceable from the start.

Besides the two specific provisions in Maryland and Delaware, multiple state constitutions at the time of the founding regulated federal elections by requiring that "[a]ll elections shall be by ballot." Ga. Const., Art. IV, § 2 (1789); see also, *e.g.*, Pa. Const., Art. III, § 2 (1790); Ky. Const., Art. III, cl. 2 (1792); Tenn. Const., Art. III, § 3 (1796); Ohio Const., Art. IV, § 2 (1803); La. Const., Art. VI, § 13 (1812). These provisions directed the "manner" of federal elections within the meaning of the Elections Clause, as Madison himself explained at the Constitutional Convention. See 2 Farrand 240 ("Whether the electors should vote by ballot or vivâ voce" falls within the "great latitude" of "regulating the times places & manner of holding elections").

The legislative defendants discount this evidence. They argue that those "by ballot" provisions spoke only "to the offices that were created by" state constitutions, and not to the federal offices to which the Elections Clause applies. We find no textual hook for that strained reading. "All" meant then what it means now.

In addition, the Framers did not write the Elections Clause on a blank slate—they instead borrowed from the Articles of Confederation, which provided that "delegates shall be annually appointed in such manner as the legislature of each state shall direct." Art. V. The two provisions

closely parallel. And around the time the Articles were adopted by the Second Continental Congress, multiple States regulated the "manner" of "appoint[ing] delegates," *ibid.*, suggesting that the Framers did not understand that language to insulate state legislative action from state constitutional provisions. See Del. Const., Art. XI (1776); Md. Const., Art. XXVII (1776); Va. Const., cls. 3–4 (1776); Pa. Const., § 11 (1776); N.C. Const., Art. XXXVII (1776); Ga. Const., Art. XVI (1777); N.Y. Const., Art. XXX (1777); S.C. Const., Art. XXII (1778); Mass. Const., pt. 2, ch. IV (1780); N.H. Const., pt. II (1784).

The defendants stress an 1820 convention held in Massachusetts to amend the Commonwealth's Constitution. After a Boston delegate proposed a provision regulating the manner of federal elections, Joseph Story—then a Justice of this Court—nixed the effort. In Story's view, such a provision would run afoul of the Elections Clause by "assum[ing] a control over the Legislature, which the constitution of the United States does not justify." Journal of the Debates and Proceedings in the Convention of Delegates 110 (1853). But Story's comment elicited little discussion, and reflects the views of a jurist who, although "a brilliant and accomplished man, . . . was not a member of the Founding generation." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856 (1995) [p. 538] (THOMAS, J., dissenting).

Although we conclude that the Elections Clause does not exempt state legislatures from the ordinary constraints imposed by state law, state courts do not have free rein. "State courts are the appropriate tribunals . . . for the decision of questions arising under their local law, whether statutory or otherwise." *Murdock v. Memphis*, 20 Wall. 590, 626 (1875). At the same time, the Elections Clause expressly vests power to carry out its provisions in "the Legislature" of each State, a deliberate choice that this Court must respect. As in other areas where the exercise of federal authority or the vindication of federal rights implicates questions of state law, we have an obligation to ensure that state court interpretations of that law do not evade federal law. * * * [A]lthough mindful of the general rule of accepting state court interpretations of state law, we have tempered such deference when required by our duty to safeguard limits imposed by the Federal Constitution.

Members of this Court last discussed the outer bounds of state court review in the present context in *Bush v. Gore*, 531 U.S. 98 (2000) (*per curiam*) . Our decision in that case turned on an application of the Equal Protection Clause of the Fourteenth Amendment. In separate writings, several Justices addressed whether Florida's Supreme Court, in construing provisions of Florida statutory law, exceeded the bounds of ordinary judicial review to an extent that its interpretation violated the Electors Clause.

Chief Justice Rehnquist, joined in a concurring opinion by JUSTICE THOMAS and Justice Scalia, acknowledged the usual deference we afford state court interpretations of state law, but noted "areas in which the Constitution requires this Court to undertake an independent, if still deferential, analysis of state law." *Id.*, at 114. He declined to give effect to interpretations of Florida election laws by the Florida Supreme Court that "impermissibly distorted them beyond what a fair reading required." *Id.*, at 115. Justice Souter, for his part, considered whether a state court interpretation "transcends the limits of reasonable statutory interpretation to the point of supplanting the statute enacted by the 'legislature' within the meaning of Article II." *Id.*, at 133 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting).

We do not adopt these or any other test by which we can measure state court interpretations of

state law in cases implicating the Elections Clause. The questions presented in this area are complex and context specific. We hold only that state courts may not transgress the ordinary bounds of judicial review such that they arrogate to themselves the power vested in state legislatures to regulate federal elections.

We decline to address whether the North Carolina Supreme Court strayed beyond the limits derived from the Elections Clause. The legislative defendants did not meaningfully present the issue in their petition for certiorari or in their briefing, nor did they press the matter at oral argument. * * *

State courts retain the authority to apply state constitutional restraints when legislatures act under the power conferred upon them by the Elections Clause. But federal courts must not abandon their own duty to exercise judicial review. In interpreting state law in this area, state courts may not so exceed the bounds of ordinary judicial review as to unconstitutionally intrude upon the role specifically reserved to state legislatures by Article I, Section 4, of the Federal Constitution. Because we need not decide whether that occurred in today's case, the judgment of the North Carolina Supreme Court is affirmed.

It is so ordered.

JUSTICE KAVANAUGH, concurring. * * *

* * * Federal court review of a state court's interpretation of state law in a federal election case should be deferential, but deference is not abdication.[1] I would adopt Chief Justice Rehnquist's straightforward standard [which asks whether the state court "impermissibly distorted" state law "beyond what a fair reading required"]. * * *

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, * * * dissenting.

[In a portion of the dissent joined by JUSTICE ALITO as well as JUSTICE GORSUCH, JUSTICE THOMAS argued that the case was moot.]

[The majority's] apparent rationale—that *Hildebrant*, *Smiley*, and *Arizona State Legislature* have already foreclosed petitioners' argument—is untenable, as it requires disregarding a principled distinction between the issues in those cases and the question presented here. In those cases, the relevant state-constitutional provisions addressed the allocation of lawmaking power within each State; they defined what acts, performed by which constitutional actors, constituted an "exercise of the lawmaking power." *Smiley*, 285 U.S. at 364. In other words, those cases addressed how to identify "the Legislature" of each State. But, nothing in their holdings speaks at all to whether the people of a State can impose substantive limits on the times, places, and manners that a procedurally complete exercise of the lawmaking power may validly prescribe. * * *

The majority indicates that it does not perceive this distinction between "substantive" and "procedural" rules, illustrating its doubts with a rhetorical question: "When a governor vetoes a bill because of a disagreement with its policy consequences, has the governor exercised a

[1] I doubt that there would be a material difference in application among the standards formulated by Chief Justice Rehnquist, Justice Souter, and the Solicitor General[.] * * * [The Solicitor General's proposed standard was whether the state court reached a "truly aberrant" interpretation of state law.]

procedural or substantive restraint on lawmaking?" The answer is straightforward: The power of approving or vetoing bills is "a part of the legislative process" because it is "a part in the making of state laws." *Smiley*, 285 U.S. at 368–369; see also *INS v. Chadha*, 462 U.S. 919, 933, 951, 954, 957, n.22, 958 (1983) (repeatedly referring to bicameralism and presentment as the "procedure" or "procedures" of lawmaking). A Governor's *motives* for vetoing a certain bill are irrelevant to the effect of the veto as part of the legislative process, just as the motives that may lead one house of the legislature to reject a bill passed by the other house are irrelevant to the effect of its doing so. * * *

[T]he majority focuses on the power of state courts to exercise "judicial review" of Elections Clause legislation. But that power sheds no light on the question presented. In every case properly before it, any court—state or federal—must ascertain and apply the substantive law that properly governs that case. * * * To say that "state judicial review" authorizes applying state constitutions over conflicting Elections Clause legislation, is simply to assume away petitioners' argument.

The majority opinion ends with some general advice to state and lower federal courts on how to exercise "judicial review" "in cases implicating the Elections Clause." As the majority offers no clear rationale for its interpretation of the Clause, it is impossible to be sure what the consequences of that interpretation will be. However, judging from the majority's brief sketch of the regime it envisions, I worry that today's opinion portends serious troubles ahead for the Judiciary. * * *

[T]he majority's framework appears to demand that federal courts develop some generalized concept of "the bounds of ordinary judicial review"; apply it to the task of constitutional interpretation within each State; and make that concept their rule of decision in some of the most politically acrimonious and fast-moving cases that come before them. * * * [T]he majority's advice invites questions of the most far-reaching scope. What *are* "the bounds of ordinary judicial review"? What methods of constitutional interpretation do they allow? Do those methods vary from State to State? And what about *stare decisis*—are federal courts to review state courts' treatment of their own precedents for some sort of abuse of discretion? The majority's framework would seem to require answers to all of these questions and more.

In the end, I fear that this framework will have the effect of investing potentially large swaths of state constitutional law with the character of a federal question not amenable to meaningful or principled adjudication by federal courts. In most cases, it seems likely that the "the bounds of ordinary judicial review" will be a forgiving standard in practice, and this federalization of state constitutions will serve mainly to swell federal-court dockets with state-constitutional questions to be quickly resolved with generic statements of deference to the state courts. On the other hand, there are bound to be exceptions. They will arise haphazardly, in the midst of quickly evolving, politically charged controversies, and the winners of federal elections may be decided by a federal court's expedited judgment that a state court exceeded "the bounds of ordinary judicial review" in construing the state constitution.

I would hesitate long before committing the Federal Judiciary to this uncertain path. And I certainly would not do so in an advisory opinion, in a moot case, where "the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 7 Wall. 506, 514 (1869).

I respectfully dissent.

Notes and Questions

1. Justice Thomas argued that while the Constitution permits state constitutions to restrict the legislative *process*, it does not permit state constitutions to place *substantive* limits on the Legislature's enactments? Is such a distinction "murky," as the Court claimed, or is it relatively simple to separate rules about legislative process from rules about the substance of legislation? Even if a distinction between procedure and substance can be maintained, does such a distinction follow from the Election Clause's vesting power in the "Legislature" of each state? In perhaps another way of phrasing the same question, was this case distinguishable from *Arizona State Legislature*?

2. Was it proper for the Court to address the permissible scope of state-court judicial review in elections cases? The Court held that the petitioners had not validly pressed a claim that the North Carolina Supreme Court had exceeded its power in that regard; wouldn't it have been better practice to leave that issue unaddressed?

3. Are you surprised that all six Justices in the majority—including the three Justices appointed by Democrats—agreed that federal courts have the authority to ensure that state courts do "not transgress the ordinary bounds of judicial review" in reviewing legislation concerning congressional elections? Is it reasonable to interpret the Constitution as prohibiting courts from usurping the power of "the Legislature" when *Arizona State Legislature* permitted an independent commission to usurp the power of "the Legislature"? If the people of Arizona could vest legislative districting power in an independent commission, why could the people of North Carolina not vest legislative districting power in their state courts?

4. How is a court supposed to determine whether the "ordinary bounds of judicial review" have been transgress[ed] in a particular case? Is there a difference between the standards proposed by Chief Justice Rehnquist and Justice Souter in *Bush v. Gore* and the one proposed by the Solicitor General in this case? Would *any* standard for resolving such claims be judicially manageable? *Cf. Rucho v. Common Cause*, 588 U.S. __, 139 S. Ct. 2484 (2019) [p. 180].

Chapter 3

CONGRESSIONAL POWER AND THE VOTING RIGHTS ACT

B. Preclearance and Prophylaxis

Page 241. Add the following before the start of the last paragraph of Note 9:

Without so much as noting the apparent conflict between *City of Rome* and *Flores*, the Supreme Court applied *City of Rome* in *Allen v. Milligan*, 599 U.S. __, __-__, 143 S. Ct. 1487, 1516-17 (2023), to uphold the effects test of § 2 of the VRA. The effects test, as the name implies, prohibits voting procedures (including districting) that have the *effect* of denying or abridging the right to vote on account of race. As the Court held in *City of Mobile v. Bolden*, however, the Fifteenth Amendment itself prohibits only intentional discrimination. Thus, at least with respect to § 2 of the VRA, it appears that the Court is willing to continue to apply *City of Rome*'s lenient rational-basis test. Because the Court ignored, rather than distinguished, *Flores*, however, it is hard to determine which other circumstances will trigger *City of Rome*'s more expansive conception of congressional power. (*Flores* itself distinguished *City of Rome*, 521 U.S. at 533, by noting that the provision approved in *City of Rome* was limited both temporally and geographically. Neither is true with respect to VRA § 2.)

In light of *Milligan*, it is especially interesting that in *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193, 204 (2009), Note 15, *infra*, the Court explicitly took note of the outstanding issue of which standard applied to challenges to Congress's authority to re-enact VRA § 5. The Court did not have to decide the issue in *Northwest Austin*, nor in *Shelby County v. Holder*, which is the next principal case, because the Court ruled for the challengers of congressional authority on other grounds.

Chapter 4
RACE-CONSCIOUS DISTRICTING

C. Section 2's Post-1982 Results Test

Page 323. Add the following footnote at the end of the last full paragraph:

. . . critical element of a vote dilution claim.[34] * * *

Page 342. Add the following case and Notes at the end of § C:

BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE

Supreme Court of the United States
594 U.S. __, 141 S. Ct. 2321, 210 L. Ed. 2d 753 (2021)

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

I * * *

The present dispute concerns two features of Arizona voting law, which generally makes it quite easy for residents to vote. All Arizonans may vote by mail for 27 days before an election using an "early ballot." No special excuse is needed, and any voter may ask to be sent an early ballot automatically in future elections. In addition, during the 27 days before an election, Arizonans may vote in person at an early voting location in each county. And they may also vote in person on election day.

Each county is free to conduct election-day voting either by using the traditional precinct model or by setting up "voting centers." Voting centers are equipped to provide all voters in a county with the appropriate ballot for the precinct in which they are registered, and this allows voters in the county to use whichever vote center they prefer.

The regulations at issue in this suit govern precinct-based election-day voting and early mail-in voting. Voters who choose to vote in person on election day in a county that uses the precinct system must vote in their assigned precincts. If a voter goes to the wrong polling place, poll workers are trained to direct the voter to the right location. If a voter finds that his or her name does not appear on the register at what the voter believes is the right precinct, the voter ordinarily

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[34] The Senate Report rejected the argument that the words "on account of race," contained in § 2(a), create any requirement of purposeful discrimination.

> "[I]t is patently [clear] that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination."

S. Rep. at 27-28, n.109.

may cast a provisional ballot. That ballot is later counted if the voter's address is determined to be within the precinct. But if it turns out that the voter cast a ballot at the wrong precinct, that vote is not counted.

For those who choose to vote early by mail, Arizona has long required that "[o]nly the elector may be in possession of that elector's unvoted early ballot." In 2016, the state legislature enacted House Bill 2023 (HB 2023), which makes it a crime for any person other than a postal worker, an elections official, or a voter's caregiver, family member, or household member to knowingly collect an early ballot—either before or after it has been completed.

In 2016, the Democratic National Committee and certain affiliates brought this suit * * * claim[ing] that both the State's refusal to count ballots cast in the wrong precinct and its ballot-collection restriction "adversely and disparately affect Arizona's American Indian, Hispanic, and African American citizens," in violation of § 2 of the [Voting Rights Act (VRA)]. In addition, they alleged that the ballot-collection restriction was "enacted with discriminatory intent" and thus violated both § 2 of the VRA and the Fifteenth Amendment.

[T]he District Court made extensive findings of fact and rejected all the plaintiffs' claims. * * * A divided panel of the Ninth Circuit affirmed, but an en banc court reversed. * * *

II * * *

[W]e think it prudent to make clear at the beginning that we decline in these cases to announce a test to govern all VRA §2 claims involving rules, like those at issue here, that specify the time, place, or manner for casting ballots. * * * [A]s this is our first foray into the area, we think it sufficient for present purposes to identify certain guideposts that lead us to our decision in these cases.

III

We start with the text of VRA § 2. It now provides:

> "(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).
>
> "(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301.

* * * Section 2(b) states that § 2 is violated only where "the political processes leading to nomination or election" are not "*equally open* to participation" by members of the relevant protected group "*in that its members have less opportunity* than other members of the electorate to participate in the political process and to elect representatives of their choice." (Emphasis added.)

The key requirement is that the political processes leading to nomination and election (here, the process of voting) must be "equally open" to minority and non-minority groups alike, and the most relevant definition of the term "open," as used in § 2(b), is "without restrictions as to who may participate," Random House Dictionary of the English Language 1008 (J. Stein ed. 1966), or "requiring no special status, identification, or permit for entry or participation," Webster's Third New International Dictionary 1579 (1976).

What §2(b) means by voting that is not "equally open" is further explained by this language: "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." The phrase "in that" is "used to specify the respect in which a statement is true." Thus, equal openness and equal opportunity are not separate requirements. Instead, equal opportunity helps to explain the meaning of equal openness. And the term "opportunity" means, among other things, "a combination of circumstances, time, and place suitable or favorable for a particular activity or action." *Id*., at 1583.

Putting these terms together, it appears that the core of § 2(b) is the requirement that voting be "equally open." The statute's reference to equal "opportunity" may stretch that concept to some degree to include consideration of a person's ability to *use* the means that are equally open. But equal openness remains the touchstone.

One other important feature of §2(b) stands out. The provision requires consideration of "the totality of circumstances." Thus, any circumstance that has a logical bearing on whether voting is "equally open" and affords equal "opportunity" may be considered. We will not attempt to compile an exhaustive list, but several important circumstances should be mentioned.

1. First, the size of the burden imposed by a challenged voting rule is highly relevant. The concepts of "open[ness]" and "opportunity" connote the absence of obstacles and burdens that block or seriously hinder voting, and therefore the size of the burden imposed by a voting rule is important. After all, every voting rule imposes a burden of some sort. Voting takes time and, for almost everyone, some travel, even if only to a nearby mailbox. Casting a vote, whether by following the directions for using a voting machine or completing a paper ballot, requires compliance with certain rules. But because voting necessarily requires some effort and compliance with some rules, the concept of a voting system that is "equally open" and that furnishes an equal "opportunity" to cast a ballot must tolerate the "usual burdens of voting."

Crawford v. *Marion County Election Bd.*, 553 U.S. 181, 198 (2008) [p. 999] (opinion of Stevens, J.). Mere inconvenience cannot be enough to demonstrate a violation of § 2.[11]

2. For similar reasons, the degree to which a voting rule departs from what was standard practice when § 2 was amended in 1982 is a relevant consideration. Because every voting rule imposes a burden of some sort, it is useful to have benchmarks with which the burdens imposed by a challenged rule can be compared.[15] The burdens associated with the rules in widespread use when § 2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally "open" or furnishing an equal "opportunity" to vote in the sense meant by § 2. Therefore, it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots. As of January 1980, only three States permitted no-excuse absentee voting. We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States. We have no need to decide whether adherence to, or a return to, a 1982 framework is necessarily lawful under § 2, but the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.

3. The size of any disparities in a rule's impact on members of different racial or ethnic groups is also an important factor to consider. Small disparities are less likely than large ones to indicate that a system is not equally open. To the extent that minority and non-minority groups differ with respect to employment, wealth, and education, even neutral regulations, no matter how crafted, may well result in some predictable disparities in rates of voting and noncompliance with voting rules. But the mere fact there is some disparity in impact does not necessarily mean that a system is not equally open or that it does not give everyone an equal opportunity to vote. The size of any disparity matters. And in assessing the size of any disparity, a meaningful comparison is essential. What are at bottom very small differences should not be artificially magnified.

4. Next, courts must consider the opportunities provided by a State's entire system of voting when assessing the burden imposed by a challenged provision. This follows from § 2(b)'s reference to the collective concept of a State's "political processes" and its "political process" as a

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[11] There is a difference between openness and opportunity, on the one hand, and the absence of inconvenience, on the other. For example, suppose that an exhibit at a museum in a particular city is open to everyone free of charge every day of the week for several months. Some residents of the city who have the opportunity to view the exhibit may find it inconvenient to do so for many reasons—the problem of finding parking, dislike of public transportation, anticipation that the exhibit will be crowded, a plethora of weekend chores and obligations, etc. Or, to take another example, a college course may be open to all students and all may have the opportunity to enroll, but some students may find it inconvenient to take the class for a variety of reasons. For example, classes may occur too early in the morning or on Friday afternoon; too much reading may be assigned; the professor may have a reputation as a hard grader; etc.

[15] * * * [G]iven that every voting rule imposes some amount of burden, rules that were and are commonplace are useful comparators when considering the totality of circumstances. Unlike the dissent, Congress did not set its sights on every facially neutral time, place, or manner voting rule in existence. See, *e.g.*, S. Rep. No. 97-417, at 10, n.22 (describing what the Senate Judiciary Committee viewed as "blatant direct impediments to voting"). [Relocated. -Eds.]

whole. Thus, where a State provides multiple ways to vote, any burden imposed on voters who choose one of the available options cannot be evaluated without also taking into account the other available means.

5. Finally, the strength of the state interests served by a challenged voting rule is also an important factor that must be taken into account. As noted, every voting rule imposes a burden of some sort, and therefore, in determining "based on the totality of circumstances" whether a rule goes too far, it is important to consider the reason for the rule. Rules that are supported by strong state interests are less likely to violate § 2.

One strong and entirely legitimate state interest is the prevention of fraud. Fraud can affect the outcome of a close election, and fraudulent votes dilute the right of citizens to cast ballots that carry appropriate weight. Fraud can also undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome. Ensuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest. * * *

While the factors set out above are important, others considered by some lower courts are less helpful in a case like the ones at hand. [I]t is important to keep in mind that the *Gingles* or "Senate" factors grew out of and were designed for use in vote-dilution cases. [See *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) [p. 316].] * * * We do not suggest that these factors should be disregarded [in cases involving neutral time, place, and manner rules]. After all, § 2(b) requires consideration of "the totality of circumstances." But their relevance is much less direct. * * *

The interpretation set out above follows directly from what § 2 commands: consideration of "the totality of circumstances" that have a bearing on whether a State makes voting "equally open" to all and gives everyone an equal "opportunity" to vote. The dissent, by contrast, would rewrite the text of § 2 and make it turn almost entirely on just one circumstance—disparate impact. * * *

[The dissent wishes] to undo as much as possible the compromise that was reached between the House and Senate when § 2 was amended in 1982. [T]he version originally passed by the House did not contain § 2(b) and was thought to prohibit any voting practice that had "discriminatory effects," loosely defined. That is the freewheeling disparate-impact regime the dissent wants to impose on the States. But the version enacted into law includes § 2(b), and that subsection directs us to consider "the totality of circumstances," not, as the dissent would have it, the totality of just one circumstance.[14] There is nothing to the dissent's charge that we are departing from the statutory text by identifying some of those considerations.

* * * According to the dissent, an interest served by a voting rule, no matter how compelling, cannot support the rule unless a State can prove to the satisfaction of the courts that this interest could not be served by any other means. Such a requirement has no footing in the text of § 2 or

[14] The dissent erroneously claims that the Senate-House compromise was only about proportional representation and not about "the equal-access right" at issue in the present cases. The text of the bill initially passed by the House had no equal-access right. Section 2(b) was the Senate's creation, and that provision is what directed courts to look beyond mere "results" to whether a State's "political processes" are "equally open," considering "the totality of circumstances." And while the proviso on proportional representation may not apply as directly in this suit, it is still a signal that § 2 imposes something other than a pure disparate-impact regime.

our precedent construing it.[16] That requirement also would have the potential to invalidate just about any voting rule a State adopts. Take the example of a State's interest in preventing voting fraud. Even if a State could point to a history of serious voting fraud within its own borders, the dissent would apparently strike down a rule designed to prevent fraud unless the State could demonstrate an inability to combat voting fraud in any other way, such as by hiring more investigators and prosecutors, prioritizing voting fraud investigations, and heightening criminal penalties. Nothing about equal openness and equal opportunity dictates such a high bar for States to pursue their legitimate interests.

With all other circumstances swept away, all that remains in the dissent's approach is the size of any disparity in a rule's impact on members of protected groups. As we have noted, differences in employment, wealth, and education may make it virtually impossible for a State to devise rules that do not have some disparate impact. But under the dissent's interpretation of § 2, any "statistically significant" disparity—wherever *that* is in the statute—may be enough to take down even facially neutral voting rules with long pedigrees that reasonably pursue important state interests. * * *

IV

A

In light of the principles set out above, neither Arizona's out-of-precinct rule nor its ballot-collection law violates § 2 of the VRA. Arizona's out-of-precinct rule enforces the requirement that voters who choose to vote in person on election day must do so in their assigned precincts. Having to identify one's own polling place and then travel there to vote does not exceed the "usual burdens of voting." *Crawford*, 553 U.S., at 198 (opinion of Stevens, J.) (noting the same about making a trip to the department of motor vehicles). On the contrary, these tasks are quintessential examples of the usual burdens of voting.

Not only are these unremarkable burdens, but the District Court's uncontested findings show that the State made extensive efforts to reduce their impact on the number of valid votes ultimately cast. The State makes accurate precinct information available to all voters. When precincts or polling places are altered between elections, each registered voter is sent a notice

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[16] For support, the dissent offers a baseless reading of one of our vote-dilution decisions. In *Houston Lawyers' Assn* [v. *Attorney General of Tex.*], 501 U.S. 419 [(1991)], we considered a § 2 challenge to an electoral scheme wherein all trial judges in a judicial district were elected on a district-wide basis. The State asserted that it had a strong interest in district-wide judicial elections on the theory that they make every individual judge at least partly accountable to minority voters in the jurisdiction. That unique interest, the State contended, should have "automatically" exempted the electoral scheme from § 2 scrutiny altogether. We disagreed, holding that the State's interest was instead "a legitimate factor to be considered by courts among the 'totality of circumstances' in determining whether a § 2 violation has occurred." * * * [*Houston Lawyers' Assn*] did not announce an "inquiry" at all—much less the least-burdensome-means requirement the dissent would have us smuggle in from materially different statutory regimes. Perhaps that is why *no one*—not the parties, not the United States, not the 36 other *amici*, not the courts below, and certainly not this Court in subsequent decisions—has advanced the dissent's surprising reading of a single phrase in *Houston Lawyers Assn*. The dissent apparently thinks that in 1991 we silently abrogated the principle that the nature of a State's interest is but one of many factors to consider, see *Thornburg* v. *Gingles*, 478 U.S. [at] 44-45, and that our subsequent cases have erred by failing simply to ask whether a less burdensome measure would suffice. Who knew?

showing the voter's new polling place. Arizona law also mandates that election officials send a sample ballot to each household that includes a registered voter who has not opted to be placed on the permanent early voter list, and this mailing also identifies the voter's proper polling location. In addition, the Arizona secretary of state's office sends voters pamphlets that include information (in both English and Spanish) about how to identify their assigned precinct. * * *

The burdens of identifying and traveling to one's assigned precinct are also modest when considering Arizona's "political processes" as a whole. The Court of Appeals noted that Arizona leads other States in the rate of votes rejected on the ground that they were cast in the wrong precinct, and the court attributed this to frequent changes in polling locations, confusing placement of polling places, and high levels of residential mobility. But even if it is marginally harder for Arizona voters to find their assigned polling places, the State offers other easy ways to vote. Any voter can request an early ballot without excuse. Any voter can ask to be placed on the permanent early voter list so that an early ballot will be mailed automatically. Voters may drop off their early ballots at any polling place, even one to which they are not assigned. And for nearly a month before election day, any voter can vote in person at an early voting location in his or her county. The availability of those options likely explains why out-of-precinct votes on election day make up such a small and apparently diminishing portion of overall ballots cast—0.47% of all ballots in the 2012 general election and just 0.15% in 2016.

Next, the racial disparity in burdens allegedly caused by the out-of-precinct policy is small in absolute terms. The District Court accepted the plaintiffs' evidence that, of the Arizona counties that reported out-of-precinct ballots in the 2016 general election, a little over 1% of Hispanic voters, 1% of African-American voters, and 1% of Native American voters who voted on election day cast an out-of-precinct ballot. For non-minority voters, the rate was around 0.5%. A policy that appears to work for 98% or more of voters to whom it applies—minority and non-minority alike—is unlikely to render a system unequally open.

The Court of Appeals attempted to paint a different picture, but its use of statistics was highly misleading[.] * * * [T]he en banc Ninth Circuit concluded that "minority voters in Arizona cast [out-of-precinct] ballots at twice the rate of white voters." * * * Properly understood, [however,] the statistics show only a small disparity that provides little support for concluding that Arizona's political processes are not equally open.

The Court of Appeals' decision also failed to give appropriate weight to the state interests that the out-of-precinct rule serves. Not counting out-of-precinct votes induces compliance with the requirement that Arizonans who choose to vote in-person on election day do so at their assigned polling places. And as the District Court recognized, precinct-based voting furthers important state interests. It helps to distribute voters more evenly among polling places and thus reduces wait times. It can put polling places closer to voter residences than would a more centralized voting-center model. In addition, precinct-based voting helps to ensure that each voter receives a ballot that lists only the candidates and public questions on which he or she can vote, and this orderly administration tends to decrease voter confusion and increase voter confidence in elections. It is also significant that precinct-based voting has a long pedigree in the United States. And the policy of not counting out-of-precinct ballots is widespread.

The Court of Appeals discounted the State's interests because, in its view, there was no evidence that a less restrictive alternative would threaten the integrity of precinct-based voting. The court thought the State had no good reason for not counting an out-of-precinct voter's choices with respect to the candidates and issues also on the ballot in the voter's proper precinct. We disagree with this reasoning.

Section 2 does not require a State to show that its chosen policy is absolutely necessary or that a less restrictive means would not adequately serve the State's objectives. And the Court of Appeals' preferred alternative would have obvious disadvantages. Partially counting out-of-precinct ballots would complicate the process of tabulation and could lead to disputes and delay. In addition, as one of the en banc dissenters noted, it would tend to encourage voters who are primarily interested in only national or state-wide elections to vote in whichever place is most convenient even if they know that it is not their assigned polling place.

In light of the modest burdens allegedly imposed by Arizona's out-of-precinct policy, the small size of its disparate impact, and the State's justifications, we conclude the rule does not violate § 2 of the VRA.[18]

B

HB 2023 likewise passes muster under the results test of § 2. Arizonans who receive early ballots can submit them by going to a mailbox, a post office, an early ballot drop box, or an authorized election official's office within the 27-day early voting period. They can also drop off their ballots at any polling place or voting center on election day, and in order to do so, they can skip the line of voters waiting to vote in person. Making any of these trips—much like traveling to an assigned polling place—falls squarely within the heartland of the "usual burdens of voting." *Crawford*, 553 U.S., at 198 (opinion of Stevens, J.). And voters can also ask a statutorily authorized proxy—a family member, a household member, or a caregiver—to mail a ballot or drop it off at any time within 27 days of an election. * * *

The plaintiffs were unable to provide statistical evidence showing that HB 2023 had a disparate impact on minority voters. Instead, they called witnesses who testified that third-party ballot collection tends to be used most heavily in disadvantaged communities and that minorities in Arizona—especially Native Americans—are disproportionately disadvantaged. But from that evidence the District Court could conclude only that prior to HB 2023's enactment, "minorities generically were more likely than non-minorities to return their early ballots with the assistance of third parties." How much more, the court could not say from the record. Neither can we. And without more concrete evidence, we cannot conclude that HB 2023 results in less opportunity to participate in the political process.

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[18] In arguing that Arizona's out-of-precinct policy violates § 2, the dissent focuses on the State's decisions about the siting of polling places and the frequency with which voting precincts are changed. But the plaintiffs did not challenge those practices. The dissent is thus left with the unenviable task of explaining how something like a 0.5% disparity in discarded ballots between minority and non-minority groups suffices to render Arizona's political processes not equally open to participation. A voting rule with that effect would not be—to use the dissent's florid example—one that a "minority vote suppressor in Arizona" would want in his or her "bag of tricks."

Even if the plaintiffs had shown a disparate burden caused by HB 2023, the State's justifications would suffice to avoid § 2 liability. * * * Limiting the classes of persons who may handle early ballots to those less likely to have ulterior motives deters potential fraud and improves voter confidence. That was the view of the bipartisan Commission on Federal Election Reform chaired by former President Jimmy Carter and former Secretary of State James Baker. The Carter-Baker Commission noted that "[a]bsentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation." Report of the Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005).

The Commission warned that "[v]ote buying schemes are far more difficult to detect when citizens vote by mail," and it recommended that "States therefore should reduce the risks of fraud and abuse in absentee voting by prohibiting 'third-party' organizations, candidates, and political party activists from handling absentee ballots." *Ibid.* The Commission ultimately recommended that States limit the classes of persons who may handle absentee ballots to "the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or election officials." *Id.*, at 47. HB 2023 is even more permissive in that it also authorizes ballot-handling by a voter's household member and caregiver. Restrictions on ballot collection are also common in other States. * * *[21]

As with the out-of-precinct policy, the modest evidence of racially disparate burdens caused by HB 2023, in light of the State's justifications, leads us to the conclusion that the law does not violate § 2 of the VRA.

V

We also granted certiorari to review whether the Court of Appeals erred in concluding that HB 2023 was enacted with a discriminatory purpose. The District Court found that it was not, and appellate review of that conclusion is for clear error. If the district court's view of the evidence is plausible in light of the entire record, an appellate court may not reverse even if it is convinced that it would have weighed the evidence differently in the first instance. * * *

* * * Aiming in part to frustrate the Democratic Party's get-out-the-vote strategy, [State Senator Dan] Shooter made what the [district] court termed "unfounded and often far-fetched allegations of ballot collection fraud." But what came after the airing of Shooter's claims and a

[21] * * * The burdens that fall on remote communities [caused by limited mail service] are mitigated by the long period of time prior to an election during which a vote may be cast either in person or by mail and by the legality of having a ballot picked up and mailed by family or household members. And in this suit, no individual voter testified that HB 2023 would make it significantly more difficult for him or her to vote. Moreover, the Postal Service is required by law to "provide a maximum degree of effective and regular postal services to rural areas, communities, and small towns where post offices are not self-sustaining." 39 U.S.C. § 101(b); see also § 403(b)(3). Small post offices may not be closed "solely for operating at a deficit," § 101(b), and any decision to close or consolidate a post office may be appealed to the Postal Regulatory Commission, see § 404(d)(5). An alleged failure by the Postal Service to comply with its statutory obligations in a particular location does not in itself provide a ground for overturning a voting rule that applies throughout an entire State.

"racially-tinged" video created by a private party was a serious legislative debate on the wisdom of early mail-in voting.

That debate, the District Court concluded, was sincere and led to the passage of HB 2023 in 2016. Proponents of the bill repeatedly argued that mail-in ballots are more susceptible to fraud than in-person voting. The bill found support from a few minority officials and organizations, one of which expressed concern that ballot collectors were taking advantage of elderly Latino voters. And while some opponents of the bill accused Republican legislators of harboring racially discriminatory motives, that view was not uniform. One Democratic state senator pithily described the "problem" HB 2023 aimed to "solv[e]" as the fact that "one party is better at collecting ballots than the other one."

We are more than satisfied that the District Court's interpretation of the evidence is permissible. The spark for the debate over mail-in voting may well have been provided by one Senator's enflamed partisanship, but partisan motives are not the same as racial motives. See *Cooper* v. *Harris*, 581 U.S. ___, ___-___, 137 S. Ct. 1455, 1466 (2017). The District Court noted that the voting preferences of members of a racial group may make the former look like the latter, but it carefully distinguished between the two. And while the District Court recognized that the "racially-tinged" video helped spur the debate about ballot collection, it found no evidence that the legislature as a whole was imbued with racial motives. * * *

* * *

Arizona's out-of-precinct policy and HB 2023 do not violate § 2 of the VRA, and HB 2023 was not enacted with a racially discriminatory purpose. The judgment of the Court of Appeals is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE GORSUCH, with whom JUSTICE THOMAS joins, concurring.

I join the Court's opinion in full, but flag one thing it does not decide. Our cases have assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2. See *Mobile* v. *Bolden*, 446 U.S. 55, 60 and n.8 (1980) [p. 302] (plurality opinion). Lower courts have treated this as an open question. *E.g.*, *Washington* v. *Finlay*, 664 F.2d 913, 926 (CA4 1981). Because no party argues that the plaintiffs lack a cause of action here, and because the existence (or not) of a cause of action does not go to a court's subject-matter jurisdiction, see *Reyes Mata* v. *Lynch*, 576 U.S. 143, 150 (2015), this Court need not and does not address that issue today.

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

II * * *

* * * [A] violation [of § 2] is established when, "based on the totality of circumstances," a State's electoral system is "not equally open" to members of a racial group. And * * * [a] system

is not equally open if members of one race have "less opportunity" than others to cast votes, to participate in politics, or to elect representatives. The key demand, then, is for equal political opportunity across races.

That equal "opportunity" is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. * * * If members of different races have the same opportunity to vote, but go to the ballot box at different rates, then so be it—that is their preference, and Section 2 has nothing to say. But if a law produces different voting opportunities across races—if it establishes rules and conditions of political participation that are less favorable (or advantageous) for one racial group than for others—then Section 2 kicks in. It applies, in short, whenever the law makes it harder for citizens of one race than of others to cast a vote.[4]

And that is so even if (as is usually true) the law does not single out any race, but instead is facially neutral. Suppose, as Justice Scalia once did, that a county has a law limiting "voter registration [to] only three hours one day a week." *Chisom* [v. *Roemer*], 501 U.S. [380,] 408 [(1991)] (dissenting opinion). And suppose that policy makes it "more difficult for blacks to register than whites"—say, because the jobs African Americans disproportionately hold make it harder to take time off in that window. *Ibid.* Those citizens, Justice Scalia concluded, would then "have less opportunity 'to participate in the political process' than whites, and § 2 would therefore be violated." *Ibid.* (emphasis deleted). In enacting Section 2, Congress documented many similar (if less extreme) facially neutral rules—"registration requirements," "voting and registration hours," voter "purging" policies, and so forth—that create disparities in voting opportunities. S. Rep. at 10, n.22; H.R. Rep. No. 97-227, pp. 11-17 (1981) (H.R. Rep.). Those laws, Congress thought, would violate Section 2, though they were not facially discriminatory, because they gave voters of different races unequal access to the political process.[6]

* * * Congress knew how those laws worked: It saw that "inferior education, poor employment opportunities, and low incomes"—all conditions often correlated with race—could turn even an ordinary-seeming election rule into an effective barrier to minority voting in certain circumstances. *Gingles*, 478 U.S. [at] 69 (plurality opinion). * * *

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[4] I agree with the majority that "very small differences" among racial groups do not matter. Some racial disparities are too small to support a finding of unequal access because they are not statistically significant—that is, because they might have arisen from chance alone. The statistical significance test is standard in all legal contexts addressing disparate impact. In addition, there may be some threshold of what is sometimes called "practical significance"—a level of inequality that, even if statistically meaningful, is just too trivial for the legal system to care about.

[6] Contra the majority, the House-Senate compromise reached in amending Section 2 has nothing to do with the law relevant here. The majority is hazy about the content of this compromise for a reason: It was about proportional representation. As then-Justice Rehnquist explained, members of the Senate expressed concern that the "results in" language of the House-passed bill would provide not "merely for equal 'access' to the political process" but also "for proportional representation" of minority voters. *Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002, 1010 (1984) (dissenting opinion). Senator Dole's solution was to add text making clear that minority voters had a right to equal voting opportunities, but no right to elect minority candidates "in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). * * * Nothing—literally nothing—suggests that the Senate wanted to water down the equal-access right that everyone agreed the House's language covered. So the majority is dead wrong to say that I want to "undo" the House-Senate compromise. It is the majority that wants to transform that compromise to support a view of Section 2 held in neither the House nor the Senate. [Relocated. -Eds.]

At the same time, the totality inquiry enables courts to take into account strong state interests supporting an election rule. * * * But in making that assessment of state interests, a court must keep in mind—just as Congress did—the ease of "offer[ing] a non-racial rationalization" for even blatantly discriminatory laws. S. Rep., at 37. State interests do not get accepted on faith. And even a genuine and strong interest will not suffice if a plaintiff can prove that it can be accomplished in a less discriminatory way. As we have put the point before: When a less racially biased law would not "significantly impair[] the State's interest," the discriminatory election rule must fall. *Houston Lawyers' Assn.* v. *Attorney General of Tex.*, 501 U.S. [419,] 427 [(1991)]. * * *

The majority * * * founds its decision on a list of mostly made-up factors, at odds with Section 2 itself. To excuse this unusual free-form exercise, the majority notes that Section 2 authorizes courts to conduct a "totality of circumstances" analysis. But * * * Congress mainly added that language so that Section 2 could protect against "the demonstrated ingenuity of state and local governments in hobbling minority voting power." [*Johnson* v.] *De Grandy*, 512 U.S. [997,] 1018 [(1994)] [p. 334]. The totality inquiry requires courts to explore how ordinary-seeming laws can interact with local conditions—economic, social, historical—to produce race-based voting inequalities. That inquiry hardly gives a court the license to devise whatever limitations on Section 2's reach it would have liked Congress to enact. But that is the license the majority takes. The "important circumstances" it invents all cut in one direction—toward limiting liability for race-based voting inequalities. (Indeed, the majority gratuitously dismisses several factors that point the opposite way.) Think of the majority's list as a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted to achieve the purposes *Congress* thought "important." The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens' voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority's non-test test makes it possible to save.

Start with the majority's first idea: a "[m]ere inconvenience[]" exception to Section 2. Voting, the majority says, imposes a set of "usual burdens": Some time, some travel, some rule compliance. And all of that is beneath the notice of Section 2—even if those burdens fall highly unequally on members of different races. But that categorical exclusion, for seemingly small (or "usual" or "[un]serious") burdens, is nowhere in the provision's text. To the contrary (and as this Court has recognized before), Section 2 allows no "safe harbor[s]" for election rules resulting in disparate voting opportunities. *De Grandy*, 512 U.S., at 1018. The section applies to *any* discriminatory "voting qualification," "prerequisite to voting," or "standard, practice, or procedure"—even the kind creating only (what the majority thinks of as) an ordinary burden. And the section cares about *any* race-based "abridgments" of voting, not just measures that come near to preventing that activity. Congress, recall, was intent on eradicating the "subtle, as well as the obvious," ways of suppressing minority voting. *Allen* [v. *State Bd. of Elections*], 393 U.S. [544,] 565 [(1969)] [p. 252]. One of those more subtle ways is to impose "inconveniences," especially a collection of them, differentially affecting members of one race. The certain result—because every inconvenience makes voting both somewhat more difficult and somewhat less likely—will be to deter minority votes. In countenancing such an election system, the majority departs from Congress's vision, set down in text, of ensuring equal voting opportunity. It chooses equality-lite.

And what is a "mere inconvenience" or "usual burden" anyway? The drafters of the Voting Rights Act understood that "social and historical conditions," including disparities in education, wealth, and employment, often affect opportunities to vote. *Gingles*, 478 U.S., at 47. What does not prevent one citizen from casting a vote might prevent another. How is a judge supposed to draw an "inconvenience" line in some reasonable place, taking those differences into account? Consider a law banning the handing out of water to voters. No more than—or not even—an inconvenience when lines are short; but what of when they are, as in some neighborhoods, hours-long? The point here is that judges lack an objective way to decide which voting obstacles are "mere" and which are not, for all voters at all times. And so Section 2 does not ask the question.

The majority's "multiple ways to vote" factor is similarly flawed. True enough, a State with three ways to vote (say, on Election Day; early in person; or by mail) may be more "open" than a State with only one (on Election Day). And some other statute might care about that. But Section 2 does not. What it cares about is that a State's "political processes" are "*equally* open" to voters of all races. And a State's electoral process is not equally open if, for example, the State "only" makes Election Day voting by members of one race peculiarly difficult. * * * Making one method of voting less available to minority citizens than to whites necessarily means giving the former "less opportunity than other members of the electorate to participate in the political process." § 10301(b).

The majority's history-and-commonality factor also pushes the inquiry away from what the statute demands. The oddest part of the majority's analysis is the idea that "what was standard practice when § 2 was amended in 1982 is a relevant consideration." The 1982 state of the world is no part of the Section 2 test. An election rule prevalent at that time may make voting harder for minority than for white citizens; Section 2 then covers such a rule, as it covers any other. And contrary to the majority's unsupported speculation, Congress "intended" exactly that. [S]ee H.R. Rep., at 14 (explaining that the Act aimed to eradicate the "numerous practices and procedures which act as continued barriers to registration and voting").[8] Section 2 was meant to disrupt the status quo, not to preserve it—to eradicate then-current discriminatory practices, not to set them in amber. See [*Reno* v.] *Bossier* [*Parish School Bd.*], 528 U.S. [320,] 334 [(2000)] (under Section 2, "[i]f the *status quo*" abridges the right to vote "relative to what the right to vote *ought to be*, the status quo itself must be changed"). And as to election rules common now, the majority oversimplifies. Even if those rules are unlikely to violate Section 2 everywhere, they may easily do so somewhere. That is because the demographics and political geography of States vary widely and Section 2's application depends on place-specific facts. As we have recognized, the statute calls for "an intensely local appraisal," not a count-up-the-States exercise. *Gingles*, 478 U.S., at 79. This case, as I'll later discuss, offers a perfect illustration of how the difference between those two approaches can matter.

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[8] The House Report listed some of those offensive, even though facially neutral and then-prevalent, practices: "inconvenient location and hours of registration, dual registration for county and city elections," "frequent and unnecessary purgings and burdensome registration requirements, and failure to provide . . . assistance to illiterates." H.R. Rep., at 14. So too the Senate Report complained of "inconvenient voting and registration hours" and "reregistration requirements and purging of voters." S. Rep., at 10, n.22.

That leaves only the majority's discussion of state interests, which is again skewed so as to limit Section 2 liability. No doubt that under our precedent, a state interest in an election rule "is a legitimate factor to be considered." *Houston Lawyers' Assn.*, 501 U.S., at 426. But the majority wrongly dismisses the need for the closest possible fit between means and end—that is, between the terms of the rule and the State's asserted interest. * * * The majority argues that * * * "[d]emanding such a tight fit would have the effect of invalidating a great many neutral voting regulations." But a state interest becomes relevant only when a voting rule, even if neutral on its face, is found *not* neutral in operation—only, that is, when the rule provides unequal access to the political process. Apparently, the majority does not want to "invalidate [too] many" of those actually discriminatory rules. But Congress had a different goal in enacting Section 2.

The majority's approach, which would ask only whether a discriminatory law "*reasonably* pursue[s] important state interests," gives election officials too easy an escape from Section 2. Of course preventing voter intimidation is an important state interest. And of course preventing election fraud is the same. But those interests are also easy to assert groundlessly or pretextually in voting discrimination cases. Congress knew that when it passed Section 2. Election officials can all too often, the Senate Report noted, "offer a non-racial rationalization" for even laws that "purposely discriminate[]." S. Rep., at 37. A necessity test filters out those offerings. It thereby prevents election officials from flouting, circumventing, or discounting Section 2's command not to discriminate. * * *

III

* * * Both [Arizona's out-of-precinct policy and its ballot-collection ban] violate Section 2, on a straightforward application of its text. Considering the "totality of circumstances," both "result in" members of some races having "less opportunity than other members of the electorate to participate in the political process and to elect a representative of their choice." § 10301(b). The majority reaches the opposite conclusion because it closes its eyes to the facts on the ground.[10]

A

Arizona's out-of-precinct policy requires discarding any Election Day ballot cast elsewhere than in a voter's assigned precinct. Under the policy, officials throw out every choice in every race—including national or statewide races (*e.g.*, for President or Governor) that appear identically on every precinct's ballot. The question is whether that policy unequally affects minority citizens' opportunity to cast a vote.

Although the majority portrays Arizona's use of the rule as "unremarkable," the State is in fact a national aberration when it comes to discarding out-of-precinct ballots. [A]cross the five elections at issue in this litigation (2008-2016), Arizona threw away far more out-of-precinct votes—almost 40,000—than did any other State in the country. * * * And the out-of-precinct

[10] Because I would affirm the Court of Appeals' holding that the effects of these policies violate Section 2, I need not pass on that court's alternative holding that the laws were enacted with discriminatory intent.

policy operates unequally: Ballots cast by minorities are more likely to be discarded. In 2016, Hispanics, African Americans, and Native Americans were about twice as likely—or said another way, 100% more likely—to have their ballots discarded than whites. * * *

The majority is wrong to assert that those statistics are "highly misleading." In the majority's view, they can be dismissed because the great mass of voters are unaffected by the out-of-precinct policy. But Section 2 is less interested in "absolute terms" (as the majority calls them) than in relative ones. Arizona's policy creates a statistically significant disparity between minority and white voters: Because of the policy, members of different racial groups do not in fact have an equal likelihood of having their ballots counted. Suppose a State decided to throw out 1% of the Hispanic vote each election. Presumably, the majority would not approve the action just because 99% of the Hispanic vote is unaffected. Nor would the majority say that Hispanics in that system have an equal shot of casting an effective ballot. Here, the policy is not so overt; but under Section 2, that difference does not matter. Because the policy "results in" statistically significant inequality, it implicates Section 2. And the kind of inequality that the policy produces is not the kind only a statistician could see. A rule that throws out, each and every election, thousands of votes cast by minority citizens is a rule that can affect election outcomes. If you were a minority vote suppressor in Arizona or elsewhere, you would want that rule in your bag of tricks. You would not think it remotely irrelevant.

* * * Arizona's out-of-precinct policy has such a racially disparate impact on voting opportunity [largely because of] the siting and shifting of polling places. Arizona moves polling places at a startling rate. Maricopa County (* * * Arizona's largest by far) changed 40% or more of polling places before both the 2008 and the 2012 elections. In 2012 (the election with the best data), voters affected by those changes had an out-of-precinct voting rate that was 40% higher than other voters did. And, critically, Maricopa's relocations hit minority voters harder than others. In 2012, the county moved polling stations in African American and Hispanic neighborhoods 30% more often than in white ones. The odds of those changes leading to mistakes increased yet further because the affected areas are home to citizens with relatively low education and income levels. And even putting relocations aside, the siting of polling stations in minority areas caused significant out-of-precinct voting. Hispanic and Native American voters had to travel further than white voters did to their assigned polling places. And all minority voters were disproportionately likely to be assigned to polling places other than the ones closest to where they lived. Small wonder, given such siting decisions, that minority voters found it harder to identify and get to their correct precincts. But the majority does not address these matters.[11]

* * * [T]he State contends that it needs the out-of-precinct policy to support a precinct-based voting system. But 20 other States combine precinct-based systems with mechanisms for partially counting out-of-precinct ballots (that is, counting the votes for offices like President or Governor). And the District Court found that it would be "administratively feasible" for Arizona to join that

[11] The majority's excuse for failing to consider the plaintiffs' evidence on Arizona's siting of polling places is that the plaintiffs did not bring a separate claim against those practices. If that sounds odd, it is. * * * To refuse to think about those practices because the plaintiffs might have brought a freestanding claim against them is to impose an out-of-thin-air pleading requirement that operates to exclude exactly the evidence that most strongly signals a Section 2 violation.

group. Arizona—echoed by the majority—objects that adopting a partial-counting approach would decrease compliance with the vote-in-your-precinct rule (by reducing the penalty for a voter's going elsewhere). But there is more than a little paradox in that response. We know from the extraordinary number of ballots Arizona discards that its current system fails utterly to "induce[] compliance." Presumably, that is because the system—most notably, its placement and shifting of polling places—sows an unparalleled level of voter confusion. A State that makes compliance with an election rule so unusually hard is in no position to claim that its interest in "induc[ing] compliance" outweighs the need to remedy the race-based discrimination that rule has caused.

B

Arizona's law mostly banning third-party ballot collection also results in a significant race-based disparity in voting opportunities. The problem with that law again lies in facts nearly unique to Arizona—here, the presence of rural Native American communities that lack ready access to mail service. Given that circumstance, the Arizona statute discriminates in just the way Section 2 proscribes. The majority once more comes to a different conclusion only by ignoring the local conditions with which Arizona's law interacts.

The critical facts for evaluating the ballot-collection rule have to do with mail service. Most Arizonans vote by mail. But many rural Native American voters lack access to mail service, to a degree hard for most of us to fathom. Only 18% of Native voters in rural counties receive home mail delivery, compared to 86% of white voters living in those counties. And for many or most, there is no nearby post office. Native Americans in rural Arizona "often must travel 45 minutes to 2 hours just to get to a mailbox." And between a quarter to a half of households in these Native communities do not have a car. So getting ballots by mail and sending them back poses a serious challenge for Arizona's rural Native Americans.[12]

For that reason, an unusually high rate of Native Americans used to "return their early ballots with the assistance of third parties." As the District Court found: "[F]or many Native Americans living in rural locations," voting "is an activity that requires the active assistance of friends and neighbors." So in some Native communities, third-party collection of ballots—mostly by fellow clan members—became "standard practice." And stopping it, as one tribal election official testified, "would be a huge devastation."

Arizona has always regulated these activities to prevent fraud. State law makes it a felony offense for a ballot collector to fail to deliver a ballot. It is also a felony for a ballot collector to tamper with a ballot in any manner. And as the District Court found, "tamper evident envelopes and a rigorous voter signature verification procedure" protect against any such attempts. For those reasons and others, no fraud involving ballot collection has ever come to light in the State. * * *

[12] Certain Hispanic communities in Arizona confront similar difficulties. For example, in the border town of San Luis, which is 98% Hispanic, "[a]lmost 13,000 residents rely on a post office located across a major highway" for their mail service. The median income in San Luis is $22,000, so "many people [do] not own[ ] cars"—making it "difficult" to "receiv[e] and send[] mail."

Put all of that together, and Arizona's ballot-collection ban violates Section 2. The ban interacts with conditions on the ground—most crucially, disparate access to mail service—to create unequal voting opportunities for Native Americans. Recall that only 18% of rural Native Americans in the State have home delivery; that travel times of an hour or more to the nearest post office are common; that many members of the community do not have cars. Given those facts, the law prevents many Native Americans from making effective use of one of the principal means of voting in Arizona.[14] What is an inconsequential burden for others is for these citizens a severe hardship. And the State has shown no need for the law to go so far. Arizona, as noted above, already has statutes in place to deter fraudulent collection practices. Those laws give every sign of working. Arizona has not offered any evidence of fraud in ballot collection, or even an account of a harm threatening to happen. And anyway, Arizona did not have to entirely forgo a ballot-collection restriction to comply with Section 2. It could, for example, have added an exception to the statute for Native clan or kinship ties, to accommodate the special, "intensely local" situation of the rural Native American community. *Gingles*, 478 U.S., at 79. That Arizona did not do so shows, at best, selective indifference to the voting opportunities of its Native American citizens. * * *

IV * * *

This Court has no right to remake Section 2. Maybe some think that vote suppression is a relic of history—and so the need for a potent Section 2 has come and gone. But Congress gets to make that call. Because it has not done so, this Court's duty is to apply the law as it is written. The law that confronted one of this country's most enduring wrongs; pledged to give every American, of every race, an equal chance to participate in our democracy; and now stands as the crucial tool to achieve that goal. That law, of all laws, deserves the sweep and power Congress gave it. That law, of all laws, should not be diminished by this Court.

Notes and Questions

1. Suppose that a state requires all voters, except those physically absent from the jurisdiction on election day, to vote in person. Suppose further that members of minority races disproportionately lack access to transportation, so that traveling to the polling place is more difficult, on average, for minority voters than for whites. In that factual context, do minority voters have an equal "opportunity * * * to participate in the political process and to elect representatives of their choice"? Are the political processes of the state "equally open" to them? If not, should it make a difference if the state provides other voting procedures—*e.g.*, mail-in voting and voting centers for early in-person voting—that make voting easier for

[14] To make matters worse, in-person voting does not provide a feasible alternative for many rural Native voters. Given the low population density on Arizona's reservations, the distance to an assigned polling place—like that to a post office—is usually long. Again, many Native citizens do not own cars. And the State's polling-place siting practices cause some voters to go to the wrong precincts. Respecting the last factor, the District Court found that because Navajo voters "lack standard addresses[,] their precinct assignments" are "based upon guesswork." As a result, there is frequent "confusion about the voter's correct polling place."

people who find it difficult to go to the polls on election day, assuming that racial disparities in voting persist despite those procedures?

2. Was the Court correct that § 2 "must tolerate the 'usual burdens of voting'" (quoting Justice Stevens's opinion in *Crawford v. Marion County Election Board*, 553 U.S. 181, 198 (2008) [p. 999])? In other words, does § 2 outlaw only *unusual* procedures that result in unequal voting opportunities? Was *Crawford*'s analysis relevant in *Brnovich*, or are there crucial differences between the scope of the constitutional right to vote, at issue in *Crawford*, and the scope of § 2 of the VRA, at issue in *Brnovich*?

3. Was it proper for the Court to use "standard" voting practice in 1982 as a "benchmark[] with which the burdens imposed by a challenged rule can be compared"? Note that unlike § 5, which requires the effect of a proposed change in voting rules to be compared to the effect of the existing rules, *see Beer v. United States*, 425 U.S. 130 (1976), § 2 does not judge the legality of a law by reference to the standards in place at any particular time. Rather, § 2's comparison is between the opportunity for political participation afforded to members of minority groups and the opportunity provided to "other members of the electorate." 52 U.S.C. § 10301(b). Nevertheless, the *Brnovich* Court suggested that disparate effects caused by "rules in widespread use when § 2 was adopted" do not render a state's political processes violative of § 2.

The Court "doubt[ed] that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States." Was that the right question? If the most natural reading of § 2's text did result in uprooting some voting procedures in widespread use, which should control: the ordinary meaning of the text or the Court's assessment of Congress's intent?

4. Suppose that, as in *Brnovich*, 99.5% of whites and 99% of minorities can comply with a given voting regulation. For VRA § 2 purposes, is the significant fact that nearly all voters of all races can comply with the regulation, or that the rate of minorities' inability to comply is twice as high as the rate of whites' inability to comply? In other worse, is it more important to focus on the absolute or comparative numbers of people unable to access the political process or to vote?

5. Does the *amount* of statistical disparity in the way a law affects different racial groups have any bearing on whether a law deprives a minority group of equal opportunity to access the political process? The Court argued that "a small disparity * * * provides little support for concluding that [a State's] political processes are not equally open." The dissent, by contrast, argued that § 2 was implicate[d]" by a "statistically significant inequality"—at least if the inequality was also "practical[ly] significan[t]." Should some disparities be considered *de minimis*, even though elections can be decided by very small margins?

6. Perhaps the most important difference between the majority and the dissent is this: In the majority's view, a political system can be equally open to all races, even if "predictable disparities in rates of voting" among racial groups result from differences in other areas of life, such as "employment, wealth, and education." For the dissent, it is precisely those

"economic, social, [and] historical factors" that must be analyzed along with the challenged law to determine if the political process is, in fact, equally open. Which interpretation is more faithful to § 2? Which interpretation is more faithful to precedent?

7. Do you agree with the Court that the dissent's interpretation of § 2 would jeopardize all manner of voting regulations, so long as racial and ethnic groups "differ with respect to employment, wealth, and education"? Or do you agree with Justice Kagan that "a State that tries both to serve its electoral interests and to give its minority citizens equal electoral access will rarely have anything to fear from a Section 2 suit"?

8. HB 2023 prohibited a practice known pejoratively as "ballot harvesting." As the Court noted, bans on ballot harvesting plausibly serve government interests in lessening opportunities for pressure or intimidation. As discussed in Chapter 10, § C, the Court has permitted states to ban otherwise-protected political speech near polling places, so that voters can approach the polling place free of pressure and intimidation, and so that they can cast their votes in a contemplative atmosphere. With absentee or mail-in votes, however, such restrictions are obviously impossible. Absentee and mail-in voting therefore runs a risk that voters will be pressured by other members of their household, as it is difficult to maintain the privacy of the secret ballot and to guard against intimidation when ballots are marked at home. One member of a household may even complete the ballots of other members of the household, with or without the lawful voters' knowledge or permission.

Ballot harvesting exacerbates these concerns—particularly in jurisdictions where voters receive mail-in ballots automatically without requesting them from the board of elections. The ballot harvester goes to voters' homes, collects ballots, and delivers them to the board of elections, drop boxes, or mailboxes. Opponents of ballot harvesting fear that ballot harvesters are (or might be) doing more—pressuring voters to vote for the ballot harvesters' preferred candidates or even collecting blank ballots and filling them out. Those practices are illegal, of course (as Justice Kagan pointed out in her dissent), but opponents of ballot harvesting argue that it is difficult to detect such misbehavior, and there would not be an opportunity for such chicanery if private parties were not allowed to collect ballots.

9. In 2020, many states loosened their election procedures in response to the COVID-19 pandemic. After the 2020 election, some states re-imposed some of the procedures that had been in place before 2020. Georgia's Election Integrity Act of 2021 was particularly controversial. It shortened the period of early voting, required ID for absentee voting, reduced the number of ballot drop boxes (although it made the availability of drop boxes—a temporary measure adopted during the pandemic—permanent), and prohibited volunteers from distributing food to voters in line. Critics of the law argued that it would impose a disproportionate burden on minority voters.

Defenders of the law argued that the law's provisions were modest, and they pointed out that several other states had voting laws in place that were more restrictive than Georgia's. For example, the law created a three-week period of early voting, in line with the national average of twenty-three days among the states that allow early voting. National Conference of State Legislatures, *Early In-Person Voting*, May 23, 2022, *at* https://www.ncsl.org/research/elections-

and-campaigns/early-voting-in-state-elections.aspx. Five states (Alabama, Connecticut, Mississippi, Missouri, and New Hampshire) do not permit early in-person voting at all. *See id*. The law required absentee voters to submit the last four digits of their Social Security numbers, their driver's licenses, or a photocopy of an ID; this requirement replaced a signature-matching requirement that typically resulted in invalidating more ballots than ID requirements do. Georgia's ban on food and water distribution was hardly unusual; most states prohibit non-voters from approaching people in line to vote—whether to give them food, drink, campaign literature, or anything else. And in the first election under the new law, voter turnout was greater than it had been in the previous election. Should VRA § 2 be interpreted to impose greater limitations on Georgia's voting laws than those of other states, owing to the continuing effects of racial discrimination in Georgia?

10. *Brnovich* discounted the relevance of *Thornburg v. Gingles*, 478 U.S. 30 (1986) [p. 316], because *Gingles* involved a vote-dilution claim, rather than, as in *Brnovich*, one based on the times, places, or manner of elections. But *Brnovich* did not merely distinguish the earlier case. In an omitted portion of the majority opinion, *Brnovich* noted that *Gingles* "jumped right to" a consideration of legislative history, whereas "[t]oday, our statutory interpretation cases almost always start with a careful consideration of the text." After *Brnovich*, should *Gingles* retain its place of prominence in vote-dilution cases, or should *Brnovich*'s interpretation of § 2 lead to a wholesale reexamination of *Gingles*? Somewhat surprisingly, two years after *Brnovich*, in *Allen v. Milligan*, the Supreme Court left *Gingles* in place and once again applied the effects test to resolve a vote-dilution claim under § 2. *Milligan* appears as a principal case in Chapter 4.

F. Resolving the *Shaw*/VRA Conflict

Page 395. Replace *League of United Latin American Citizens v. Perry* and its Notes with the following case and Notes:

ALLEN v. MILLIGAN

Supreme Court of the United States
599 U.S. __, 143 S. Ct. 1487, __ L. Ed. 2d __ (2023)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court, except as to Part III–B–1. [JUSTICE SOTOMAYOR, JUSTICE KAGAN, and JUSTICE JACKSON join this opinion in full. JUSTICE KAVANAUGH joins except as to Part III–B–1.] * * *

[Following the 2020 census, Alabama's legislature passed HB1, a law redrawing the state's seven congressional districts. Under HB1, as under previous plans, one of the seven districts was majority-minority. HB1 was challenged as violating § 2 of the Voting Rights Act, 52 U.S.C. § 10301, on the ground that it diluted black voting strength. Blacks constituted approximately two-sevenths of the state's population, and plaintiffs demonstrated that a second majority-

minority district could be created by combining black populations across various portions of the state. Creating such a district, however, would require splitting apart the existing district that covered the Gulf Coast region. Alabama argued that § 2 did not require the creation of the second majority-minority district because, as a practical matter, the only way to create such a district was to prioritize racial considerations over other traditional districting principles.]

II * * *

For the past forty years, we have evaluated claims brought under § 2 using the three-part framework developed in our decision *Thornburg* v. *Gingles*, 478 U.S. 30 (1986) [p. 316]. * * * To succeed in proving a § 2 violation under *Gingles*, plaintiffs must satisfy three "preconditions." *Id.*, at 50. First, the "minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured district." A district will be reasonably configured, our cases explain, if it comports with traditional districting criteria, such as being contiguous and reasonably compact. "Second, the minority group must be able to show that it is politically cohesive." And third, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." Finally, a plaintiff who demonstrates the three preconditions must also show, under the "totality of circumstances," that the political process is not "equally open" to minority voters. *Id.*, at 45–46. * * *

Gingles has governed our Voting Rights Act jurisprudence since it was decided 37 years ago. Congress has never disturbed our understanding of § 2 as *Gingles* construed it. And we have applied *Gingles* in one § 2 case after another, to different kinds of electoral systems and to different jurisdictions in States all over the country. * * *

With respect to the first *Gingles* precondition, the District Court correctly found that black voters could constitute a majority in a second district that was "reasonably configured." The plaintiffs adduced eleven illustrative maps—that is, example districting maps that Alabama could enact—each of which contained two majority-black districts that comported with traditional districting criteria. With respect to compactness, for example, the District Court explained that the maps submitted by one of plaintiffs' experts, Dr. Moon Duchin, "perform[ed] generally better on average than" did HB1. A map offered by another of plaintiffs' experts, Bill Cooper, produced districts roughly as compact as the existing plan. And none of plaintiffs' maps contained any "tentacles, appendages, bizarre shapes, or any other obvious irregularities that would make it difficult to find" them sufficiently compact. Plaintiffs' maps also satisfied other traditional districting criteria. They contained equal populations, were contiguous, and respected existing political subdivisions, such as counties, cities, and towns. Indeed, some of plaintiffs' proposed maps split the same number of county lines as (or even *fewer* county lines than) the State's map. We agree with the District Court, therefore, that plaintiffs' illustrative maps "strongly suggest[ed] that Black voters in Alabama" could constitute a majority in a second, reasonably configured, district.

The State nevertheless argues that plaintiffs' maps were not reasonably configured because they failed to keep together a traditional community of interest within Alabama. A "community of interest," according to Alabama's districting guidelines, is an "area with recognized similarities of interests, including but not limited to ethnic, racial, economic, tribal, social, geographic, or

historical identities." Alabama argues that the Gulf Coast region in the southwest of the State is such a community of interest, and that plaintiffs' maps erred by separating it into two different districts.

We do not find the State's argument persuasive. Only two witnesses testified that the Gulf Coast was a community of interest. The testimony provided by one of those witnesses was "partial, selectively informed, and poorly supported." The other witness, meanwhile, justified keeping the Gulf Coast together "simply" to preserve "political advantage[]": "You start splitting counties," he testified, "and that county loses its influence. That's why I don't want Mobile County to be split." The District Court understandably found this testimony insufficient to sustain Alabama's "overdrawn argument that there can be no legitimate reason to split" the Gulf Coast region.

Even if the Gulf Coast did constitute a community of interest, moreover, the District Court found that plaintiffs' maps would still be reasonably configured because they joined together a different community of interest called the Black Belt. Named for its fertile soil, the Black Belt contains a high proportion of black voters, who "share a rural geography, concentrated poverty, unequal access to government services, . . . lack of adequate healthcare," and a lineal connection to "the many enslaved people brought there to work in the antebellum period." The District Court concluded—correctly, under our precedent—that it did not have to conduct a "beauty contest[]" between plaintiffs' maps and the State's. There would be a split community of interest in both.

The State also makes a related argument based on "core retention"—a term that refers to the proportion of districts that remain when a State transitions from one districting plan to another. Here, by largely mirroring Alabama's 2011 districting plan, HB1 performs well on the core retention metric. Plaintiffs' illustrative plans, by contrast, naturally fare worse because they change where the 2011 district lines were drawn. But this Court has never held that a State's adherence to a previously used districting plan can defeat a § 2 claim. If that were the rule, a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan. That is not the law: § 2 does not permit a State to provide some voters "less opportunity . . . to participate in the political process" just because the State has done it before. 52 U.S.C. § 10301(b).

As to the second and third *Gingles* preconditions, the District Court determined that there was "no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate." The Court noted that, "on average, Black voters supported their candidates of choice with 92.3% of the vote" while "white voters supported Black-preferred candidates with 15.4% of the vote." Plaintiffs' experts described the evidence of racially polarized voting in Alabama as "intens[e]," "very strong," and "very clear." Even Alabama's expert conceded "that the candidates preferred by white voters in the areas that he looked at regularly defeat the candidates preferred by Black voters."

Finally, the District Court concluded that plaintiffs had carried their burden at the totality of circumstances stage. The Court observed that elections in Alabama were racially polarized; that "Black Alabamians enjoy virtually zero success in statewide elections"; that political campaigns in Alabama had been "characterized by overt or subtle racial appeals"; and that "Alabama's extensive history of repugnant racial and voting-related discrimination is undeniable and well

documented."

We see no reason to disturb the District Court's careful factual findings, which are subject to clear error review and have gone unchallenged by Alabama in any event. Nor is there a basis to upset the District Court's legal conclusions. The Court faithfully applied our precedents and correctly determined that, under existing law, HB1 violated § 2.

III

The heart of these cases is not about the law as it exists. It is about Alabama's attempt to remake our § 2 jurisprudence anew.

The centerpiece of the State's effort is what it calls the "race-neutral benchmark." The theory behind it is this: Using modern computer technology, mapmakers can now generate millions of possible districting maps for a given State. The maps can be designed to comply with traditional districting criteria but to not consider race. The mapmaker can determine how many majority-minority districts exist in each map, and can then calculate the median or average number of majority-minority districts in the entire multimillion-map set. That number is called the race-neutral benchmark.

The State contends that this benchmark should serve as the point of comparison in § 2 cases. The benchmark, the State says, was derived from maps that were "race-blind"—maps that cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race" because they never took race into "account" in the first place. 52 U.S.C. § 10301(a). Courts in § 2 cases should therefore compare the number of majority-minority districts in the State's plan to the benchmark. If those numbers are similar—if the State's map "resembles" the benchmark in this way—then, Alabama argues, the State's map also cannot have "deni[ed] or abridge[d]" anyone's right to vote "on account of race." *Ibid.* * * *

As we explain below, we find Alabama's new approach to § 2 compelling neither in theory nor in practice. We accordingly decline to recast our § 2 case law as Alabama requests.

A

Section 2 prohibits States from imposing any "standard, practice, or procedure . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color." 52 U.S.C. § 10301(a). What that means, § 2 goes on to explain, is that the political processes in the State must be "equally open," such that minority voters do not "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." § 10301(b).

We have understood the language of § 2 against the background of the hard-fought compromise that Congress struck. To that end, we have reiterated that § 2 turns on the presence of discriminatory effects, not discriminatory intent. See, *e.g.*, *Chisom* v. *Roemer*, 501 U.S. 380, 403–404 (1991). And we have explained that "[i]t is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination." *Gingles*, 478 U.S. at 71, n.34 (plurality opinion). Individuals thus lack an equal opportunity to participate in the political process when a State's electoral structure operates in a manner that "minimize[s] or cancel[s] out the[ir] voting strength." *Id.*, at 47. That occurs where an individual is disabled from "enter[ing] into the political process in

a reliable and meaningful manner" "in the light of past and present reality, political and otherwise." *White* [v. *Regester*], 412 U.S. [755,] 767, 770 [(1973)] [p. 288]. A district is not equally open, in other words, when minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter.

The State's reading of § 2, by contrast, runs headlong into our precedent. Alabama asserts that a State's map does not "abridge[]" a person's right to vote "on account of race" if the map resembles a sufficient number of race-neutral alternatives. But our cases have consistently focused, for purposes of litigation, on the specific illustrative maps that a plaintiff adduces. Deviation from that map shows it is *possible* that the State's map has a disparate effect on account of race. The remainder of the *Gingles* test helps determine whether that possibility is reality by looking to polarized voting preferences and the frequency of racially discriminatory actions taken by the State, past and present.

A State's liability under § 2, moreover, must be determined "based on the totality of circumstances." 52 U.S.C. § 10301(b). Yet Alabama suggests there is only one "circumstance[]" that matters—how the State's map stacks up relative to the benchmark. That single-minded view of § 2 cannot be squared with the VRA's demand that courts employ a more refined approach. And we decline to adopt an interpretation of § 2 that would "revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence" for nearly forty years.

Alabama also argues that the race-neutral benchmark is required because our existing § 2 jurisprudence inevitably demands racial proportionality in districting, contrary to the last sentence of § 2(b). But properly applied, the *Gingles* framework itself imposes meaningful constraints on proportionality [because] traditional districting criteria limit[] any tendency of the VRA to compel proportionality. * * *

* * * Forcing proportional representation is unlawful and inconsistent with this Court's approach to implementing § 2. The numbers bear the point out well. At the congressional level, the fraction of districts in which black-preferred candidates are likely to win "is currently below the Black share of the eligible voter population in every state but three." Only one State in the country, meanwhile, "has attained a proportional share" of districts in which Hispanic-preferred candidates are likely to prevail. That is because as residential segregation decreases—as it has "sharply" done since the 1970s—satisfying traditional districting criteria such as the compactness requirement "becomes more difficult."

Indeed, as *amici* supporting the appellees emphasize, § 2 litigation in recent years has rarely been successful for just that reason. Since 2010, plaintiffs nationwide have apparently succeeded in fewer than ten § 2 suits. * * * By contrast, "[n]umerous lower courts" have upheld districting maps "where, due to minority populations' geographic diffusion, plaintiffs couldn't design an additional majority-minority district" or satisfy the compactness requirement. The same has been true of recent litigation in this Court. See *Abbott* [v. *Perez*], 585 U.S. [__], —— – ——, 138 S. Ct., at 2331 [(2018)] (finding a Texas district did not violate § 2 because "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino . . . districts that exist under the current plan").

Reapportionment, we have repeatedly observed, "is primarily the duty and responsibility of the State[s]," not the federal courts. *Id.*, at ——, 138 S. Ct., at 2324. Properly applied, the *Gingles*

factors help ensure that remains the case. As respondents themselves emphasize, § 2 "never require[s] adoption of districts that violate traditional redistricting principles." Its exacting requirements, instead, limit judicial intervention to "those instances of intensive racial politics" where the "excessive role [of race] in the electoral process . . . den[ies] minority voters equal opportunity to participate." [S. Rep. No. 97-147, pp. 33–34 (1982).]

B

Although we are content to reject Alabama's invitation to change existing law on the ground that the State misunderstands § 2 and our decisions implementing it, we also address how the race-neutral benchmark would operate in practice. Alabama's approach fares poorly on that score, which further counsels against our adopting it.

1

The first change to existing law that Alabama would require is prohibiting the illustrative maps that plaintiffs submit to satisfy the first *Gingles* precondition from being "based" on race. Although Alabama is not entirely clear whether, under its view, plaintiffs' illustrative plans must not take race into account at all or whether they must just not "prioritize" race, we see no reason to impose such a new rule.

When it comes to considering race in the context of districting, we have made clear that there is a difference "between being aware of racial considerations and being motivated by them." *Miller* [v. *Johnson*], 515 U.S. [900,] 916 [(1995)] [p. 376]. The former is permissible; the latter is usually not. That is because "[r]edistricting legislatures will . . . almost always be aware of racial demographics," *Miller*, 515 U.S. at 916, but such "race consciousness does not lead inevitably to impermissible race discrimination," *Shaw* [v. *Reno*], 509 U.S. [630,] 646 [(1993) (*Shaw I*)] [p. 362]. Section 2 itself "demands consideration of race." *Abbott*, 581 U.S., at ——, 138 S. Ct., at 2315. The question whether additional majority-*minority* districts can be drawn, after all, involves a "quintessentially race-conscious calculus." [*Johnson* v.] *De Grandy*, 512 U.S. [997,] 1020 [(1994)] [p. 334].

At the same time, however, race may not be "the predominant factor in drawing district lines unless [there is] a compelling reason." *Cooper*, 581 U.S., at 291. Race predominates in the drawing of district lines, our cases explain, when "race-neutral considerations [come] into play only after the race-based decision had been made." *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U.S. 178, 189 (2017). That may occur where "race for its own sake is the overriding reason for choosing one map over others." *Id.*, at 190.

While the line between racial predominance and racial consciousness can be difficult to discern, see *Miller*, 515 U.S., at 916, it was not breached here. The * * * plaintiffs relied on illustrative maps produced by expert Bill Cooper. Cooper testified that while it was necessary for him to *consider* race, he also took several other factors into account, such as compactness, contiguity, and population equality. Cooper testified that he gave all these factors "equal weighting." And when asked squarely whether race predominated in his development of the illustrative plans, Cooper responded: "No. It was a consideration. This is a Section 2 lawsuit, after all. But it did not predominate or dominate."

The District Court agreed. It found "Cooper's testimony highly credible" and commended

Cooper for "work[ing] hard to give 'equal weight[]' to all traditional redistricting criteria." * * * The District Court did not err in finding that race did not predominate in Cooper's maps in light of the evidence before it.

The dissent contends that race nevertheless predominated in both Cooper's and Duchin's maps because they were designed to hit "express racial target[s]"—namely, two "50%-plus majority-black districts." This argument fails in multiple ways. First, the dissent's reliance on *Bethune-Hill* is mistaken. In that case, this Court was unwilling to conclude that a State's maps were produced in a racially predominant manner. Instead, we remanded for the lower court to conduct the predominance analysis itself, explaining that "the use of an express racial target" was just one factor among others that the court would have to consider as part of "[a] holistic analysis." *Id.*, at 192. JUSTICE THOMAS dissented in relevant part, contending that because "the legislature sought to achieve a [black voting-age population] of at least 55%," race necessarily predominated in its decisionmaking. *Id.*, at 198 (opinion concurring in part and dissenting in part). But the Court did not join in that view, and JUSTICE THOMAS again dissents along the same lines today.

The second flaw in the dissent's proposed approach is its inescapable consequence: *Gingles* must be overruled. According to the dissent, racial predominance plagues *every single illustrative map ever adduced* at the first step of *Gingles*. For all those maps were created with an express target in mind—they were created to show, as our cases require, that an additional majority-minority district could be drawn. That is the whole point of the enterprise. The upshot of the approach the dissent urges is not to change how *Gingles* is applied, but to reject its framework outright.

The contention that mapmakers must be entirely "blind" to race has no footing in our § 2 case law. The line that we have long drawn is between consciousness and predominance. Plaintiffs adduced at least one illustrative map that comported with our precedents. They were required to do no more to satisfy the first step of *Gingles*.

2

The next condition Alabama would graft onto § 2 is a requirement that plaintiffs demonstrate, at the totality of circumstances stage, that the State's enacted plan contains fewer majority-minority districts than the race-neutral benchmark. If it does not, then § 2 should drop out of the picture.

Alabama argues that is what should have happened here. It notes that one of plaintiffs' experts, Dr. Duchin, used an algorithm to create "2 million districting plans for Alabama . . . without taking race into account in any way in the generation process." Of these two million "race-blind" plans, none contained two majority-black districts while many plans did not contain any. Alabama also points to a "race-neutral" computer simulation conducted by another one of plaintiffs' experts, Dr. Kosuke Imai, which produced 30,000 potential maps. As with Dr. Duchin's maps, none of the maps that Dr. Imai created contained two majority-black districts. Alabama thus contends that because HB1 sufficiently "resembles" the "race-neutral" maps created by Dr. Duchin and Dr. Imai—all of the maps lack two majority-black districts—HB1 does not violate § 2.

Alabama's reliance on the maps created by Dr. Duchin and Dr. Imai is misplaced. For one,

neither Duchin's nor Imai's maps accurately represented the districting process in Alabama. Dr. Duchin's maps were based on old census data—from 2010 instead of 2020—and ignored certain traditional districting criteria, such as keeping together communities of interest, political subdivisions, or municipalities. And Dr. Imai's 30,000 maps failed to incorporate Alabama's own districting guidelines, including keeping together communities of interest and preserving municipal boundaries.

But even if the maps created by Dr. Duchin and Dr. Imai were adequate comparators, we could not adopt the map-comparison test that Alabama proposes. The test is flawed in its fundamentals. Districting involves myriad considerations—compactness, contiguity, political subdivisions, natural geographic boundaries, county lines, pairing of incumbents, communities of interest, and population equality. See *Miller*, 515 U.S., at 916. Yet "[q]uantifying, measuring, prioritizing, and reconciling these criteria" requires map drawers to "make difficult, contestable choices." And "[i]t is easy to imagine how different criteria could move the median map toward different . . . distributions," meaning that "the same map could be [lawful] or not depending solely on what the mapmakers said they set out to do." For example, "the scientific literature contains dozens of competing metrics" on the issue of compactness. Which one of these metrics should be used? What happens when the maps they produce yield different benchmark results? How are courts to decide? * * *

One final point bears mentioning. Throughout these cases, Alabama has repeatedly emphasized that HB1 cannot have violated § 2 because none of plaintiffs' two million odd maps contained more than one majority-minority district. The point is that two million is a very big number and that sheer volume matters. But as elsewhere, Alabama misconceives the math project that it expects courts to oversee. A brief submitted by three computational redistricting experts explains that the number of possible districting maps in Alabama is at least in the "trillion trillions." Another publication reports that the number of potential maps may be orders of magnitude higher: "the universe of all possible connected, population-balanced districting plans that satisfy the state's requirements," it explains, "is likely in the range of googols." Two million maps, in other words, is not many maps at all. And Alabama's insistent reliance on that number, however powerful it may sound in the abstract, is thus close to irrelevant in practice. What would the next million maps show? The next billion? The first trillion of the trillion trillions? Answerless questions all.

Section 2 cannot require courts to judge a contest of computers when there is no reliable way to determine who wins, or even where the finish line is.

3

Alabama's final contention with respect to the race-neutral benchmark is that it requires plaintiffs to demonstrate that any deviations between the State's enacted plan and race-neutral alternatives "can be explained *only* by racial discrimination."

We again find little merit in Alabama's proposal. As we have already explained, our precedents and the legislative compromise struck in the 1982 amendments clearly rejected treating discriminatory intent as a requirement for liability under § 2. Yet Alabama's proposal is even *more* demanding than the intent test Congress jettisoned. Demonstrating discriminatory intent, we have long held, "does not require a plaintiff to prove that the challenged action rested

solely on racially discriminatory purpose[].” *Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) (emphasis added). Alabama’s proposed approach stands in sharp contrast to all this, injecting into the effects test of § 2 an evidentiary standard that even our purposeful discrimination cases eschew.

C

Alabama finally asserts that the Court should outright stop applying § 2 in cases like these because the text of § 2 does not apply to single-member redistricting and because § 2 is unconstitutional as the District Court applied it here. We disagree on both counts.

Alabama first argues that § 2 does not apply to single-member redistricting. Echoing JUSTICE THOMAS’s concurrence in *Holder* v. *Hall*, Alabama reads § 2’s reference to “standard, practice, or procedure” to mean only the “methods for conducting a part of the voting process that might . . . be used to interfere with a citizen’s ability to cast his vote.” 512 U.S. [874,] 917–918 [(1994)] [p. 343] (opinion concurring in judgment). * * *

This understanding of § 2 cannot be reconciled with our precedent. As recounted above, we have applied § 2 to States’ districting maps in an unbroken line of decisions stretching four decades. In doing so, we have unanimously held that § 2 and *Gingles* “[c]ertainly . . . apply” to claims challenging single-member districts. *Growe* [v. *Emison*], 507 U.S. [25,] 40 [(1993)]. And we have even invalidated portions of a State’s single-district map under § 2. See [*League of United Latin American Citizens* v. *Perry*], 548 U.S. [399,] 427–429 [(2006) (*LULAC*)]. Alabama’s approach would require “abandoning” this precedent, “overruling the interpretation of § 2” as set out in nearly a dozen of our cases. *Holder*, 512 U.S. at 944 (opinion of THOMAS, J.).

We decline to take that step. Congress is undoubtedly aware of our construing § 2 to apply to districting challenges. It can change that if it likes. But until and unless it does, statutory *stare decisis* counsels our staying the course.

The statutory text in any event supports the conclusion that § 2 applies to single-member districts. Alabama’s own proffered definition of a “procedure is the manner or method of proceeding in a process or course of action.” But the manner of proceeding in the act of voting entails determining in which districts voters will vote. The fact that the term “procedure” is preceded by the phrase “qualification or prerequisite to voting,” 52 U.S.C. § 10301(a), does not change its meaning. It is hard to imagine many more fundamental “prerequisites” to voting than determining where to cast your ballot or who you are eligible to vote for. * * *

We also reject Alabama’s argument that § 2 as applied to redistricting is unconstitutional under the Fifteenth Amendment. According to Alabama, that Amendment permits Congress to legislate against only purposeful discrimination by States. But we held over 40 years ago “that, even if § 1 of the [Fifteenth] Amendment prohibits only purposeful discrimination, the prior decisions of this Court foreclose any argument that Congress may not, pursuant to § 2 [of the Fifteenth Amendment] outlaw voting practices that are discriminatory in effect.” *City of Rome* v. *United States*, 446 U.S. 156, 173 (1980). The VRA’s “ban on electoral changes that are discriminatory in effect,” we emphasized, “is an appropriate method of promoting the purposes of the Fifteenth Amendment.” *Id.*, at 177. As *City of Rome* recognized, we had reached the very same conclusion in *South Carolina* v. *Katzenbach*, a decision issued right after the VRA was first enacted. 383 U.S. [301,] 308–309, 329–337 [(1966)] [p. 220].

Alabama further argues that, even if the Fifteenth Amendment authorizes the effects test of § 2, that Amendment does not authorize race-based redistricting as a remedy for § 2 violations. But for the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2. In light of that precedent, including *City of Rome*, we are not persuaded by Alabama's arguments that § 2 as interpreted in *Gingles* exceeds the remedial authority of Congress.

The concern that § 2 may impermissibly elevate race in the allocation of political power within the States is, of course, not new. See, *e.g.*, *Shaw*, 509 U.S. at 657 ("Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters."). Our opinion today does not diminish or disregard these concerns. It simply holds that a faithful application of our precedents and a fair reading of the record before us do not bear them out here.

[*Affirmed.*]

JUSTICE KAVANAUGH, concurring in all but Part III–B–1.

I agree with the Court that Alabama's redistricting plan violates § 2 of the Voting Rights Act as interpreted in *Thornburg v. Gingles*. I write separately to emphasize four points.

First, the upshot of Alabama's argument is that the Court should overrule *Gingles*. But the *stare decisis* standard for this Court to overrule a statutory precedent, as distinct from a constitutional precedent, is comparatively strict. Unlike with constitutional precedents, Congress and the President may enact new legislation to alter statutory precedents such as *Gingles*. In the past 37 years, however, Congress and the President have not disturbed *Gingles*, even as they have made other changes to the Voting Rights Act. * * *

Second, Alabama contends that *Gingles* inevitably requires a proportional number of majority-minority districts, which in turn contravenes the proportionality disclaimer in § 2(b) of the Voting Rights Act. 52 U.S.C. § 10301(b). But Alabama's premise is wrong. As the Court's precedents make clear, *Gingles* does not mandate a proportional number of majority-minority districts. *Gingles* requires the creation of a majority-minority district only when, among other things, (i) a State's redistricting map cracks or packs a large and "geographically compact" minority population and (ii) a plaintiff's proposed alternative map and proposed majority-minority district are "reasonably configured"—namely, by respecting compactness principles and other traditional districting criteria such as county, city, and town lines. See, *e.g.*, *Cooper* v. *Harris*, 581 U.S. 285, 301–302 (2017); *Voinovich* v. *Quilter*, 507 U.S. 146, 153–154 (1993).

If *Gingles* demanded a proportional number of majority-minority districts, States would be forced to group together geographically dispersed minority voters into unusually shaped districts, without concern for traditional districting criteria such as county, city, and town lines. But *Gingles* and this Court's later decisions have flatly rejected that approach.[2]

Third, Alabama argues that courts should rely on race-blind computer simulations of

[2] To ensure that *Gingles* does not improperly morph into a proportionality mandate, courts must rigorously apply the "geographically compact" and "reasonably configured" requirements. See *ante* (§ 2 requirements under *Gingles* are "exacting"). In this case, for example, it is important that at least some of the plaintiffs' proposed alternative maps respect county lines at least as well as Alabama's redistricting plan.

redistricting maps to assess whether a State's plan abridges the right to vote on account of race. It is true that computer simulations might help detect the presence or absence of *intentional* discrimination. * * * But as this Court has long recognized—and as all Members of this Court today agree—the text of § 2 establishes an effects test, not an intent test. And the effects test, as applied by *Gingles* to redistricting, requires in certain circumstances that courts account for the race of voters so as to prevent the cracking or packing—whether intentional or not—of large and geographically compact minority populations.

Fourth, Alabama asserts that § 2, as construed by *Gingles* to require race-based redistricting in certain circumstances, exceeds Congress's remedial or preventive authority under the Fourteenth and Fifteenth Amendments. As the Court explains, the constitutional argument presented by Alabama is not persuasive in light of the Court's precedents. JUSTICE THOMAS notes, however, that even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future. But Alabama did not raise that temporal argument in this Court, and I therefore would not consider it at this time.

For those reasons, I vote to affirm, and I concur in all but Part III–B–1 of the Court's opinion.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, with whom JUSTICE BARRETT joins as to Parts II and III, and with whom JUSTICE ALITO joins as to Parts II–A and II–B, dissenting.

These cases "are yet another installment in the 'disastrous misadventure' of this Court's voting rights jurisprudence." *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254, 294 (2015) (THOMAS, J., dissenting) (quoting *Holder* v. *Hall*, 512 U.S. [at] 893 (THOMAS, J., concurring in judgment)). * * * The question presented is whether § 2 of the Act, as amended, requires the State of Alabama to intentionally redraw its longstanding congressional districts so that black voters can control a number of seats roughly proportional to the black share of the State's population. Section 2 demands no such thing, and, if it did, the Constitution would not permit it.

I

* * * Under the statutory text, a § 2 challenge must target a "voting qualification or prerequisite to voting or standard, practice, or procedure." 52 U.S.C. § 10301(a). I have long been convinced that those words reach only "enactments that regulate citizens' access to the ballot or the processes for counting a ballot"; they "do not include a State's . . . choice of one districting scheme over another." *Holder*, 512 U.S., at 945 (opinion of THOMAS, J.). "Thus, § 2 cannot provide a basis for invalidating any district." *Abbott* v. *Perez*, 585 U.S. [at] __, 138 S. Ct. [at] 2335 (THOMAS, J., concurring). * * *

II

Even if § 2 applies here, however, Alabama should prevail. * * *

A

As we have long recognized, "the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured." *Reno* v. *Bossier Parish School Bd.*, 520 U.S. 471, 480 (1997). * * *

To be sure, it is no easy task to identify an objective, "undiluted" benchmark against which to judge a districting plan. * * * One overriding principle, however, should be obvious. A proper districting benchmark must be *race neutral*: It must not assume, *a priori*, that an acceptable plan should include any particular number or proportion of minority-controlled districts. * * *

* * * Indeed, any benchmark other than a race-neutral one would render the vote-dilution inquiry fundamentally circular, allowing courts to conclude that a districting plan "dilutes" a minority's voting strength "on account of race" merely because it does not measure up to an ideal already defined in racial terms. * * * Nor could any nonneutral benchmark be reconciled with * * * the text's disclaimer of a right to proportional representation. 594 U.S., at ——, and n.14, 141 S. Ct., at 2341, and n.14).

There is yet another compelling reason to insist on a race-neutral benchmark. * * * [O]ur precedents apply strict scrutiny whenever race was "the predominant factor motivating [the placement of] a significant number of voters within or without a particular district," *Miller*, 515 U.S., at 916, or, put another way, whenever "[r]ace was the criterion that . . . could not be compromised" in a district's formation. *Shaw* v. *Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*).

Because "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions" and undermine "the goal of a political system in which race no longer matters," *Shaw I*, 509 U.S., at 657, our cases have long recognized the need to interpret § 2 to avoid "unnecessarily infus[ing] race into virtually every redistricting" plan. *LULAC*, 548 U.S., at 446 (opinion of Kennedy, J.); accord, *Bartlett* v. *Strickland*, 556 U.S. 1, 21 (2009) (plurality opinion). Plainly, however, that "infusion" is the inevitable result of any race-based benchmark. * * * To avoid setting § 2 on a collision course with the Constitution, courts must apply a race-neutral benchmark in assessing any claim that a districting plan unlawfully dilutes a racial minority's voting strength.

B

The plaintiffs in these cases seek a "proportional allocation of political power according to race." *Holder*, 512 U.S., at 936 (opinion of THOMAS, J.). According to the 2020 census, black Alabamians account for 27.16% of the State's total population and 25.9% of its voting-age population, both figures slightly less than two-sevenths. * * * [C]reating two majority-black districts would require Alabama to aggressively "sort voters on the basis of race." *Wisconsin Legislature I* [v. *Wisconsin Elections Comm'n*], 595 U.S. [__], __, 142 S. Ct. [1245], 1248 [(2022) (*per curiam*)]. The plaintiffs' 11 illustrative maps make that clear. All 11 maps refashion existing District 2 into a majority-black district while preserving the current black majority in District 7. They all follow the same approach: Starting with majority-black areas of populous Montgomery County, they expand District 2 east and west to encompass predominantly majority-black areas throughout the rural "Black Belt." In the process, the plans are careful to leave enough of the Black Belt for District 7 to maintain its black majority. Then—and critically—the plans have District 2 extend a southwestern tendril into Mobile County to capture a dense, high-population majority-black cluster in urban Mobile.

Those black Mobilians currently reside in the urban heart of District 1. For 50 years, District 1 has occupied the southwestern pocket of Alabama, consisting of the State's two populous Gulf Coast counties (Mobile and Baldwin) as well as some less populous areas to the immediate north

and east. It is indisputable that the Gulf Coast region is the sort of community of interest that the Alabama Legislature might reasonably think a congressional district should be built around. It contains Alabama's only coastline, its fourth largest city, and the Port of Mobile. Its physical geography runs north along the Alabama and Mobile Rivers, whose paths District 1 follows. Its economy is tied to the Gulf—to shipping, shipbuilding, tourism, and commercial fishing.

But, for the plaintiffs to secure their majority-black District 2, this longstanding, compact, and eminently sensible district must be radically transformed. In the Gulf Coast region, the newly drawn District 1 would retain only the majority-white areas that District 2 did not absorb on its path to Mobile's large majority-black population. To make up the lost population, District 1 would have to extend eastward through largely majority-white rural counties along the length of Alabama's border with the Florida panhandle. The plaintiffs do not assert that white residents on the Gulf Coast have anything special in common with white residents in those communities, and the District Court made no such finding. The plaintiffs' maps would thus reduce District 1 to the leftover white communities of the southern fringe of the State, its shape and constituents defined almost entirely by the need to make District 2 majority-black while also retaining a majority-black District 7.

The plaintiffs' mapmaking experts left little doubt that their plans prioritized race over neutral districting criteria. Dr. Moon Duchin, who devised four of the plans, testified that achieving "two majority-black districts" was a "nonnegotiable principl[e]" in her eyes, a status shared only by our precedents' "population balance" requirement. Only "after" those two "nonnegotiable[s]" were satisfied did Dr. Duchin then give lower priority to "contiguity" and "compactness." The architect of the other seven maps, William Cooper, considered "minority voting strengt[h]" a "traditional redistricting principl[e]" in its own right, and treated "the minority population in and of itself" as the paramount community of interest in his plans.

Statistical evidence also underscored the illustrative maps' extreme racial sorting. Another of the plaintiffs' experts, Dr. Kosuke Imai, computer generated 10,000 districting plans using a race-blind algorithm programmed to observe several objective districting criteria. None of those plans contained even one majority-black district. Dr. Imai generated another 20,000 plans using the same algorithm, but with the additional constraint that they must contain at least one majority-black district; none of those plans contained a second majority-black district, or even a second district with a black voting-age population above 40%. In a similar vein, Dr. Duchin testified about an academic study in which she had randomly "generated 2 million districting plans for Alabama" using a race-neutral algorithm that gave priority to compactness and contiguity. She "found some [plans] with one majority-black district, but never found a second . . . majority-black district in 2 million attempts." "[T]hat it is hard to draw two majority-black districts by accident," Dr. Duchin explained, "show[ed] the importance of doing so on purpose."

The plurality of Justices who join Part III–B–I of THE CHIEF JUSTICE's opinion appear to agree that the plaintiffs could not prove the first precondition of their statewide vote-dilution claim—that black Alabamians could constitute a majority in two "reasonably configured" districts—by drawing an illustrative map in which race was predominant. That should be the end of these cases, as the illustrative maps here are palpable racial gerrymanders. The plaintiffs' experts clearly applied "express racial target[s]" by setting out to create 50%-plus majority-black districts in both Districts 2 and 7. *Bethune-Hill*, 580 U.S. [at] 192. And it is impossible to conceive of *the State*

adopting the illustrative maps without pursuing the same racially motivated goals. Again, the maps' key design features are: (1) making District 2 majority-black by connecting black residents in one metropolitan area (Montgomery) with parts of the rural Black Belt and black residents in another metropolitan area (Mobile); (2) leaving enough of the Black Belt's majority-black rural areas for District 7 to maintain its majority-black status; and (3) reducing District 1 to the white remainder of the southern third of the State.

If the State did this, we would call it a racial gerrymander, and rightly so. We would have no difficulty recognizing race as "the predominant factor motivating [the placement of] significant number[s] of voters within or without" Districts 1, 2, and 7. *Miller*, 515 U.S., at 916. The "stark splits in the racial composition of populations moved into and out of" Districts 1 and 2 would make that obvious. *Bethune-Hill*, 580 U.S., at 192. So would the manifest absence of any nonracial justification for the new District 1. And so would the State's clear intent to ensure that *both* Districts 2 and 7 hit their preordained racial targets. See *ibid.* (noting that "pursu[it of] a common redistricting policy toward multiple districts" may show predominance). That the plan delivered proportional control for a particular minority—a statistical anomaly that over 2 million race-blind simulations did not yield and 20,000 *race-conscious* simulations did not even approximate—would be still further confirmation.

The State could not justify such a plan simply by arguing that it was less bizarre to the naked eye than other, more elaborate racial gerrymanders we have encountered. As we held in *Miller*, visual "bizarreness" is not "a necessary element of the constitutional wrong," only "persuasive circumstantial evidence." 515 U.S., at 912–913.

Nor could such a plan be explained by supposed respect for the Black Belt. For present purposes, I accept the District Court's finding that the Black Belt is a significant community of interest. But the entire black population of the Black Belt—some 300,000 black residents—is too small to provide a majority in a *single* congressional district, let alone two.[11] The black residents needed to populate majority-black versions of Districts 2 and 7 are overwhelmingly concentrated in the urban counties of Jefferson (*i.e.*, the Birmingham metropolitan area, with about 290,000 black residents), Mobile (about 152,000 black residents), and Montgomery (about 134,000 black residents). Of the three, only Montgomery County is in the Black Belt. The plaintiffs' maps, therefore, cannot and do not achieve their goal of two majority-black districts by "join[ing] together" the Black Belt, as the majority seems wrongly to believe. Rather, their majority-black districts are anchored by three separate high-density clusters of black residents in three separate metropolitan areas, two of them outside the Black Belt. The Black Belt's largely rural remainder is then *divided* between the two districts to the extent needed to fill out their population numbers with black majorities in both. Respect for the Black Belt as a community of interest cannot explain this approach. The only explanation is the plaintiffs' express racial target: two majority-black districts and statewide proportionality. * * *

[The plurality] entirely ignores Dr. Duchin's plans—presumably because her own explanation

[11] The equal-population baseline for Alabama's seven districts is 717,154 persons per district.

of her method sounds too much like textbook racial predominance.[12] Compare 2 App. 634 ("[A]fter . . . what I took to be *nonnegotiable* principles of population balance *and seeking two majority-black districts*, *after that*, I took contiguity as a requirement and compactness as paramount" (emphasis added)) and *id.*, at 635 ("I took . . . county integrity to take precedence over the level of [black voting-age population] *once that level was past 50 percent*" (emphasis added)), with *Bethune-Hill*, 580 U.S., at 189 (explaining that race predominates when it " 'was the criterion that . . . could not be compromised,' and race-neutral considerations 'came into play only after the race-based decision had been made' " (quoting *Shaw II*, 517 U.S., at 907)), and *Miller*, 515 U.S., at 916 (explaining that race predominates when "the [mapmaker] subordinated traditional race-neutral districting principles . . . to racial considerations"). The plurality thus affirms the District Court's finding only in part and with regard to Mr. Cooper's plans alone.

In doing so, the plurality acts as if the only relevant evidence were Mr. Cooper's testimony about his own mental state and the State's expert's analysis of Mr. Cooper's maps. Such a blinkered view of the issue is unjustifiable. All 11 illustrative maps follow the same approach to creating two majority-black districts. The essential design features of Mr. Cooper's maps are indistinguishable from Dr. Duchin's, and it is those very design features that would require race to predominate. None of the plaintiffs' maps could possibly be drawn by a mapmaker who was merely "aware of," rather than motivated by, "racial demographics." *Miller*, 515 U.S., at 916. They could only ever be drawn by a mapmaker whose predominant motive was hitting the "express racial target" of two majority-black districts. *Bethune-Hill*, 580 U.S., at 192.[13]

The plurality endeavors in vain to blunt the force of this obvious fact. Contrary to the plurality's apparent understanding, nothing in *Bethune-Hill* suggests that "an express racial target" is not highly probative evidence of racial predominance. 580 U.S., at 192 (placing "express racial target[s]" alongside "stark splits in the racial composition of [redistricted] populations" as "relevant districtwide evidence"). That the *Bethune-Hill* majority "decline[d]" to act as a "court of . . . first view," instead leaving the ultimate issue of predominance for remand, cannot be transmuted into such an implausible holding or, in truth, any holding at all. *Id.*, at 193.

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[12] * * * To the extent the plurality supposes that, under our precedents, a State may purposefully sort voters based on race to some indefinite extent without crossing the line into predominance, it is wrong, and its predominance analysis would water down decades of racial-gerrymandering jurisprudence. Our constitutional precedents' line between racial awareness and racial predominance simply tracks the distinction between awareness of consequences, on the one hand, and discriminatory *purpose*, on the other. See *Miller*, 515 U.S. at 916 ("Discriminatory purpose implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects"); accord, *Shaw I*, 509 U.S. [at] 646. And our statements that § 2 "demands consideration of race," *Abbott* v. *Perez*, 585 U. S. ——, ——, 138 S. Ct. 2305, 2315 (2018), and uses a "race-conscious calculus," *De Grandy*, 512 U.S. at 1020, did not imply that a State can ever purposefully sort voters on a race-predominant basis without triggering strict scrutiny.

[13] The plurality's reasoning does not withstand scrutiny even on its own terms. Like Dr. Duchin, Mr. Cooper found it "necessary to consider race" to construct two majority-black districts, and he frankly acknowledged "reconfigur[ing]" the southern part of the State "to create the second African-American majority district." Further, his conclusory statement that race did not "predominate" in his plans must be interpreted in light of the rest of his testimony and the record as a whole. Mr. Cooper recognized communities of interest as a traditional districting principle, but he applied that principle in a nakedly race-focused manner, explaining that "the minority population in and of itself" was the community of interest that was "top of mind as [he] was drawing the plan[s]." As noted, he also testified that he considered "minority voting strengt[h]" to be a "traditional redistricting principl[e]" in its own right. His testimony therefore buttresses, rather than undermines, the conclusion already obvious from the maps themselves: Only a mapmaker pursuing a fixed racial target would produce them.

The plurality is also mistaken that my predominance analysis would doom every illustrative map a § 2 plaintiff "ever adduced." Rather, it would mean only that—because § 2 requires a race-neutral benchmark—plaintiffs cannot satisfy their threshold burden of showing a reasonably configured alternative plan with a proposal that could only be viewed as a racial gerrymander if enacted by the State. This rule would not bar a showing, in an appropriate case, that a State could create an additional majority-minority district through a reasonable redistricting process in which race did not predominate. It would, on the other hand, screen out efforts to use § 2 to push racially proportional districting to the limits of what a State's geography and demography make possible —the approach taken by the illustrative maps here.

C * * *

* * * Suppose, for argument's sake, that Alabama *reasonably* could decide to create two majority-black districts by (1) connecting Montgomery's black residents with Mobile's black residents, (2) dividing up the rural parts of the Black Belt between that district and another district with its population core in the majority-black parts of the Birmingham area, and (3) accepting the extreme disruption to District 1 and the Gulf Coast that this approach would require. The plaintiffs prefer that approach because it allows the creation of two majority-black districts, which they think Alabama should have. But even if that approach were reasonable, there is hardly any compelling race-neutral reason to elevate such a plan to a *benchmark* against which all other plans must be measured. Nothing in Alabama's geography or demography makes it clearly the best way, or even a particularly attractive way, to draw three of seven equally populous districts. The State has obvious legitimate, race-neutral reasons to prefer its own map—most notably, its interest in "preserving the cores of prior districts" and the Gulf Coast community of interest in District 1. *Karcher v. Daggett*, 462 U.S. 725, 740 (1983). And even *discounting* those interests would not yield a race-neutral case for treating the plaintiffs' approach as a suitable benchmark: Absent core retention, there is no apparent race-neutral reason to insist that District 7 remain a majority-black district uniting Birmingham's majority-black neighborhoods with majority-black rural areas in the Black Belt. * * *

D

Given all this, by what benchmark did the District Court find that Alabama's enacted plan was dilutive? The answer is as simple as it is unlawful: The District Court applied a benchmark of proportional control based on race. To be sure, that benchmark was camouflaged by the elaborate vote-dilution framework we have inherited from *Gingles*. But nothing else in that framework or in the District Court's reasoning supplies an alternative benchmark capable of explaining the District Court's bottom line: that Alabama's one-majority-black-district map dilutes black voters' fair share of political power. * * *

* * * Quite simply, we have never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark. The second and third preconditions are all but irrelevant to the task. They essentially collapse into one question: Is voting racially polarized such that minority-preferred candidates consistently lose to majority-preferred ones? See *Gingles*, 478 U.S., at 51. Even if the answer is yes, that tells a court nothing about "how hard it 'should' be for minority voters to elect their preferred candidates under an

acceptable system." *Id.*, at 88 (O'Connor, J., concurring in judgment). Perhaps an acceptable system is one in which the minority simply cannot elect its preferred candidates; it is, after all, a minority. Rejecting that outcome as "dilutive" requires a value judgment relative to a benchmark that polarization alone cannot provide.

The first *Gingles* precondition is only marginally more useful. True, * * * the first precondition at least requires plaintiffs to identify *some* hypothetical alternative plan. Yet that alternative plan need only be "reasonably configured," and—as explained above—to say that a plan is *reasonable* is a far cry from establishing an objective standard of fairness.

That leaves only the *Gingles* framework's final stage: the totality-of-circumstances determination whether a State's "political process is equally open to minority voters." 478 U.S., at 79. But this formulation is mere verbiage unless one knows what an "equally open" system should look like—in other words, what the benchmark is. And, our cases offer no substantive guidance on how to identify the undiluted benchmark at the totality stage. The best they have to offer is a grab bag of amorphous "factors"—widely known as the Senate factors, after the Senate Judiciary Committee Report accompanying the 1982 amendments to § 2—that *Gingles* said "typically may be relevant to a § 2 claim." See *id.*, at 44–45. Those factors, however, amount to no more than "a list of possible considerations that might be consulted by a court attempting to develop a *gestalt* view of the political and racial climate in a jurisdiction." *Holder*, 512 U.S., at 938 (opinion of THOMAS, J.). Such a *gestalt* view is far removed from the necessary benchmark of a hypothetical, undiluted districting plan. * * *

In reality, the limits of the *Gingles* preconditions and the aimlessness of the totality-of-circumstances inquiry left the District Court only one obvious and readily administrable option: a benchmark of "allocation of seats in direct proportion to the minority group's percentage in the population." *Holder*, 512 U.S., at 937 (opinion of THOMAS, J.). True, as discussed above, that benchmark is impossible to square with what the majority calls § 2(b)'s "robust disclaimer against proportionality," and it runs headlong into grave constitutional problems. Nonetheless, the intuitive pull of proportionality is undeniable. "Once one accepts the proposition that the effectiveness of votes is measured in terms of the control of seats, the core of any vote dilution claim" "is inherently based on ratios between the numbers of the minority in the population and the numbers of seats controlled," and there is no more logical ratio than direct proportionality. *Holder*, 512 U.S., at 902 (opinion of THOMAS, J.). Combine that intuitive appeal with the "lack of any better alternative" identified in our case law to date, *id.*, at 937, and we should not be surprised to learn that proportionality generally explains the results of § 2 cases after the *Gingles* preconditions are satisfied. See E. Katz, M. Aisenbrey, A. Baldwin, E. Cheuse, & A. Weisbrodt, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. L. Reform 643, 730–732 (2006) (surveying lower court cases and finding a near-perfect correlation between proportionality findings and liability results).

Thus, in the absence of an alternative benchmark, the vote-dilution inquiry has a strong and demonstrated tendency to collapse into a rough two-part test: (1) Does the challenged districting plan give the relevant minority group control of a proportional share of seats? (2) If not, has the plaintiff shown that some reasonably configured districting plan could better approximate proportional control? In this approach, proportionality is the ultimate benchmark, and the first *Gingles* precondition becomes a proxy for whether that benchmark is reasonably attainable in

practice. * * *

E * * *

Ultimately, the majority has very little to say about the appropriate benchmark. What little it does say suggests that the majority sees no real alternative to the District Court's proportional-control benchmark, though it appears unwilling to say so outright. * * * [T]he majority asserts that "the *Gingles* framework itself imposes meaningful constraints on proportionality." But the only constraint on proportionality the majority articulates is that it is often *difficult to achieve*—which, quite obviously, is no principled limitation at all.

Thus, the end result of the majority's reasoning is no different from the District Court's: The ultimate benchmark is a racially proportional allocation of seats, and the main question on which liability turns is whether a closer approximation to proportionality is possible under any reasonable application of traditional districting criteria. This approach, moreover, is consistent with how the majority describes the role of plaintiffs' illustrative maps, as well as an unjustified practical asymmetry to which its rejection of computer evidence gives rise. Courts are to "focu[s] . . . on the specific illustrative maps that a plaintiff adduces," by which the majority means that courts should *not* "focu[s]" on statistical evidence showing those maps to be outliers. Thus, plaintiffs may use an algorithm to generate any number of maps that meet specified districting criteria and a preferred racial target; then, they need only produce one of those maps to "sho[w] it is *possible* that the State's map" is dilutive. But the State may not use algorithmic evidence to suggest that the plaintiffs' map is an unsuitable benchmark for comparison—not even, apparently, if it can prove that the illustrative map is an outlier among "billion[s]" or "trillion[s]" of concededly "adequate comparators." This arbitrary restriction amounts to a thumb on the scale for § 2 plaintiffs—an unearned presumption that any "reasonable" map they put forward constitutes a benchmark against which the State's map can be deemed dilutive. And, once the comparison is framed in that way, the only workable rule of decision is proportionality. See *Holder*, 512 U.S., at 941–943 (opinion of THOMAS, J.). * * *

III * * *

If Congress has any power at all to require States to sort voters into congressional districts based on race, that power must flow from its authority to "enforce" the Fourteenth and Fifteenth Amendments "by appropriate legislation." Amdt. 14, § 5; Amdt. 15, § 2. Since Congress in 1982 replaced intent with effects as the criterion of liability, however, "a violation of § 2 is no longer *a fortiori* a violation of" either Amendment. Thus, § 2 can be justified only under Congress' power to "enact reasonably prophylactic legislation to deter constitutional harm." *Allen* v. *Cooper*, 589 U.S. ——, ——, 140 S. Ct. 994 (2020); see *City of Boerne* v. *Flores*, 521 U.S. 507, 517–529 (1997). Because Congress' prophylactic-enforcement authority is "remedial, rather than substantive," "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. Congress' chosen means, moreover, must "consist with the letter and spirit of the constitution." *Shelby County* v. *Holder*, 570 U.S. 529, 555 (2013) [p. 244] (quoting *McCulloch* v. *Maryland*, 4 Wheat. 316, 421 (1819)); accord, *Miller*, 515 U.S., at 927.

Here, as with everything else in our vote-dilution jurisprudence, the task of sound analysis is

encumbered by the lack of clear principles defining § 2 liability in districting. It is awkward to examine the "congruence" and "proportionality" of a statutory rule whose very meaning exists in a perpetual state of uncertainty. The majority makes clear, however, that the primary factual predicate of a vote-dilution claim is "bloc voting along racial lines" that results in majority-preferred candidates defeating minority-preferred ones. * * * Thus, the relevant statutory rule may be approximately stated as follows: If voting is racially polarized in a jurisdiction, and if there exists any more or less reasonably configured districting plan that would enable the minority group to constitute a majority in a number of districts roughly proportional to its share of the population, then the jurisdiction must ensure that its districting plan includes that number of majority-minority districts "or something quite close." Thus construed and applied, § 2 is not congruent and proportional to any provisions of the Reconstruction Amendments.

To determine the congruence and proportionality of a measure, we must begin by "identify[ing] with some precision the scope of the constitutional right at issue." *Board of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356, 365 (2001). The Reconstruction Amendments "forbi[d], so far as civil and political rights are concerned, discrimination . . . against any citizen because of his race," ensuring that "[a]ll citizens are equal before the law." *Gibson* v. *Mississippi*, 162 U.S. 565, 591 (1896) (Harlan, J.). They dictate "that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." *Miller*, 515 U.S., at 911. These principles are why the Constitution presumptively forbids race-predominant districting, "even for remedial purposes." *Shaw I*, 509 U.S., at 657.

These same principles foreclose a construction of the Amendments that would entitle members of racial minorities, *qua* racial minorities, to have their preferred candidates win elections. Nor do the Amendments limit the rights of members of a racial majority to support *their* preferred candidates—regardless of whether minorities prefer different candidates and of whether "the majority, by virtue of its numerical superiority," regularly prevails. *Gingles*, 478 U.S., at 48. Nor, finally, do the Amendments establish a norm of proportional control of elected offices on the basis of race. And these notions are not merely *foreign to* the Amendments. Rather, they are *radically inconsistent* with the Amendments' command that government treat citizens as individuals and their "goal of a political system in which race no longer matters." [*Shaw I*, 509 U.S., at 657.]

Those notions are, however, the values at the heart of § 2 as construed by the District Court and the majority. As applied here, the statute effectively considers it a legal wrong by the State if white Alabamians vote for candidates from one political party at high enough rates, provided that black Alabamians vote for candidates from the other party at a still higher rate. And the statute remedies that wrong by requiring the State to engage in race-based redistricting in the direction of proportional control.

I am not certain that Congress' enforcement power could *ever* justify a statute so at odds "with the letter and spirit of the constitution." *Shelby County*, 570 U.S., at 555. If it could, it must be because Congress "identified a history and pattern" of actual constitutional violations that, for some reason, required extraordinary prophylactic remedies. *Garrett*, 531 U.S., at 368. But the legislative record of the 1982 amendments is devoid of any showing that might justify § 2's blunt approximation of a "racial register for allocating representation on the basis of race." *Holder*, 512 U.S., at 908 (opinion of THOMAS, J.). To be sure, the Senate Judiciary Committee Report that

accompanied the 1982 amendment to the Voting Rights Act "listed many examples of what the Committee *took to be* unconstitutional vote dilution." But the * * * Committee's "principal reason" for rejecting discriminatory purpose was simply that it preferred an alternative legal standard; it thought *Mobile*'s intent test was "the wrong question," and that courts should instead ask whether a State's election laws offered minorities "a fair opportunity to participate" in the political process. S. Rep. No. 97–417, p. 36.

As applied here, the amended § 2 thus falls on the wrong side of "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law." *City of Boerne*, 521 U.S., at 519. It replaces the constitutional right against intentionally discriminatory districting with an amorphous race-based right to a "fair" distribution of political power, a "right" that cannot be implemented without requiring the very evils the Constitution forbids. * * *

By applying § 2 in this way to claims [like the one at issue here], we encourage a conception of politics as a struggle for power between "competing racial factions." *Shaw I*, 509 U.S., at 657. We indulge the pernicious tendency of assigning Americans to "creditor" and "debtor race[s]," even to the point of redistributing political power on that basis. *Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in judgment). We ensure that the race-based redistricting we impose on Alabama now will bear divisive consequences long into the future * * *. We place States in the impossible position of having to weigh just how much racial sorting is necessary to avoid the "competing hazards" of violating § 2 and violating the Constitution. *Abbott*, 585 U.S., at ——, 138 S. Ct., at 2315. * * * Worst of all, by making it clear that there are political dividends to be gained in the discovery of new ways to sort voters along racial lines, we prolong immeasurably the day when the "sordid business" of "divvying us up by race" is no more. *LULAC*, 548 U.S., at 511 (ROBERTS, C.J., concurring in part, concurring in judgment in part, and dissenting in part). To the extent § 2 requires any of this, it is unconstitutional.

The majority deflects this conclusion by appealing to two of our older Voting Rights Act cases, *City of Rome* v. *United States*, 446 U.S. 156 (1980), and *South Carolina* v. *Katzenbach*, 383 U.S. 301 [(1966)] [p. 220], that did not address § 2 at all and, indeed, predate Congress' adoption of the results test. That maneuver is untenable. *Katzenbach* upheld § 5's preclearance requirements, § 4(b)'s original coverage formula, and other related provisions aimed at "a small number of States and political subdivisions" where "systematic resistance to the Fifteenth Amendment" had long been flagrant. Fourteen years later, *City of Rome* upheld the 1975 Act extending § 5's preclearance provisions for another seven years. The majority's reliance on these cases to validate a statutory rule not there at issue could make sense only if we assessed the congruence and proportionality of the Voting Rights Act's rules wholesale, without considering their individual features, or if *Katzenbach* and *City of Rome* meant that Congress has plenary power to enact whatever rules it chooses to characterize as combating "discriminatory . . . effect[s]." Neither proposition makes any conceptual sense or is consistent with our cases. See, *e.g.*, *Shelby County*, 570 U.S., at 550–557 (holding the 2006 preclearance coverage formula unconstitutional); *Northwest Austin Municipal Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) (emphasizing the distinctness of §§ 2 and 5); *City of Boerne*, 521 U.S., at 533 (discussing *City of Rome* as a paradigm case of congruence-and-proportionality review of remedial

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legislation); *Miller*, 515 U.S., at 927 (stressing that construing § 5 to require "that States engage in presumptively unconstitutional race-based districting" would raise "troubling and difficult constitutional questions," notwithstanding *City of Rome*).

In fact, the majority's cases confirm the very limits on Congress' enforcement powers that are fatal to the District Court's construction of § 2. *City of Rome*, for example, immediately after one of the sentences quoted by the majority, explained the remedial rationale for its approval of the 1975 preclearance extension: "Congress could rationally have concluded that, because electoral changes *by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination*, it was proper to prohibit changes that have a discriminatory impact." 446 U.S., at 177. The next section of *City of Rome* then separately examined and upheld the reasonableness of the extension's 7-year time period. See *id.*, at 181–182. *City of Rome* thus stands for precisely the propositions for which *City of Boerne* cited it: Congress may adopt "[p]reventive measures . . . when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional," 521 U.S., at 532, particularly when it employs "termination dates, geographic restrictions, or egregious predicates" that "tend to ensure Congress' means are proportionate to ends legitimate," *id.*, at 533; see also *id.*, at 532–533 (analyzing *Katzenbach* in similar terms); *Shelby County*, 570 U.S., at 535, 545–546 (same). Again, however, the amended § 2 lacks any such salutary limiting principles; it is unbounded in time, place, and subject matter, and its districting-related commands have no nexus to any likely constitutional wrongs.

In short, as construed by the District Court, § 2 does not remedy or deter unconstitutional discrimination in districting in any way, shape, or form. On the contrary, it *requires* it, hijacking the districting process to pursue a goal that has no legitimate claim under our constitutional system: the proportional allocation of political power on the basis of race. Such a statute "cannot be considered remedial, preventive legislation," and the race-based redistricting it would command cannot be upheld under the Constitution. *City of Boerne*, 521 U.S., at 532.

IV

These cases are not close. * * * [The outcome of this case has rendered § 2] nothing more than a racial entitlement to roughly proportional control of elective offices—limited only by feasibility—wherever different racial groups consistently prefer different candidates.

If that is what § 2 means, the Court should hold that it is unconstitutional. If that is not what it means, but § 2 applies to districting, then the Court should hold that vote-dilution challenges require a race-neutral benchmark that bears no resemblance to unconstitutional racial registers. On the other hand, if the Court believes that finding a race-neutral benchmark is as impossible as much of its rhetoric suggests, it should hold that § 2 cannot be applied to single-member districting plans for want of an "objective and workable standard for choosing a reasonable benchmark." *Holder*, 512 U.S., at 881 (plurality opinion). Better yet, it could adopt the correct interpretation of § 2 and hold that a single-member districting plan is not a "voting qualification," a "prerequisite to voting," or a "standard, practice, or procedure," as the Act uses those terms. One way or another, the District Court should be reversed. * * *

I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE GORSUCH joins, dissenting. * * *

My fundamental disagreement with the Court concerns the first *Gingles* precondition. In cases like these, where the claim is that § 2 requires the creation of an additional majority-minority district, the first precondition means that the plaintiff must produce an additional illustrative majority-minority district that is "reasonably configured." *Cooper*, 581 U.S. at 301; *Wisconsin Legislature*, 595 U.S., at ——, 142 S. Ct., at 1248; see also *Gingles*, 478 U.S. at 50.

The Court's basic error is that it misunderstands what it means for a district to be "reasonably configured." Our cases make it clear that "reasonably configured" is not a synonym for "compact." We have explained that the first precondition also takes into account other traditional districting criteria like attempting to avoid the splitting of political subdivisions and "communities of interest." [*LULAC*], 548 U.S. [at] 433–434.

To its credit, the Court recognizes that compactness is not enough and that a district is not reasonably configured if it flouts other "traditional districting criteria." At various points in its opinion it names quite a few: minimizing the splitting of counties and other political subdivisions, keeping "communities of interest" together where possible, and avoiding the creation of new districts that require two incumbents to run against each other. In addition, the Court acknowledges that a district is not "reasonably configured" if it does not comport with the Equal Protection Clause's one-person, one-vote requirement. But the Court fails to explain why compliance with "traditional districting criteria" matters under § 2 or why the only relevant equal protection principle is the one-person, one-vote requirement. If the Court had attempted to answer these questions, the defect in its understanding of the first *Gingles* precondition would be unmistakable.

To explain this, I begin with what is probably the most frequently mentioned traditional districting criterion and ask why it should matter under § 2 whether a proposed majority-minority district is "compact." Neither the Voting Rights Act (VRA) nor the Constitution imposes a compactness requirement. The Court notes that we have struck down bizarrely shaped districts, but we did not do that for esthetic reasons. Compactness in and of itself is not a legal requirement —or even necessarily an esthetic one. (Some may find fancifully shaped districts more pleasing to the eye than boring squares.)

The same is true of departures from other traditional districting criteria. Again, nothing in the Constitution or the VRA demands compliance with these criteria. If a whimsical state legislature cavalierly disregards county and municipal lines and communities of interest, draws weirdly shaped districts, departs radically from a prior map solely for the purpose of change, and forces many incumbents to run against each other, neither the Constitution nor the VRA would make any of that illegal *per se*. Bizarrely shaped districts and other marked departures from traditional districting criteria matter because mapmakers usually heed these criteria, and when it is evident that they have not done so, there is reason to suspect that something untoward—specifically, unconstitutional racial gerrymandering—is afoot.

Conspicuous violations of traditional districting criteria constitute strong *circumstantial evidence* of unconstitutionality. And when it is shown that the configuration of a district is attributable predominantly to race, that is more than circumstantial evidence that the district is unlawful. That is *direct evidence* of illegality because, as we have often held, race may not "predominate" in the drawing of district lines. See, *e.g.*, *Cooper*, 581 U.S., at 292; *Bethune-Hill* v.

Virginia State Bd. of Elections, 580 U.S. [at] 191–192; *Shaw II*, 517 U.S. [at] 906–907; *Miller v. Johnson*, 515 U.S. [at] 920.

Because non-predominance is a longstanding and vital feature of districting law, it must be honored in a *Gingles* plaintiff's illustrative district. If race predominated in the creation of such a district, the plaintiff has failed to satisfy both our precedent, which requires "reasonably configured" districts, and the terms of § 2, which demand equal openness. Two Terms ago, we engaged in a close analysis of the text of § 2 and explained that its "key requirement" is that the political processes leading to nomination or election must be " 'equally open to participation' by members of a protected class." *Brnovich* v. *Democratic National Committee*, 594 U.S. ——, ——, 141 S. Ct. 2321, 2332, 2337 (2021) (quoting 52 U.S.C. § 10301(b)). "[E]qual openness," we stressed, must be our "touchstone" in interpreting and applying that provision. 594 U.S., at ——, 141 S.Ct., at 2338.

When the race of one group is the predominant factor in the creation of a district, that district goes beyond making the electoral process equally open to the members of the group in question. It gives the members of that group an advantage that § 2 does not require and that the Constitution may forbid. And because the creation of majority-minority districts is something of a zero-sum endeavor, giving an advantage to one minority group may disadvantage others.

What all this means is that a § 2 plaintiff who claims that a districting map violates § 2 because it fails to include an additional majority-minority district must show at the outset that such a district can be created without making race the predominant factor in its creation. The plaintiff bears both the burden of production and the burden of persuasion on this issue, see *Voinovich v. Quilter*, 507 U.S. [at] 155–156; *White v. Regester*, 412 U.S. [at] 766, but a plaintiff can satisfy the former burden simply by adducing evidence—in any acceptable form—that race did not predominate. * * *

This is an entirely workable scheme. It does not obligate either party to offer computer evidence, and it minimizes the likelihood of a clash between what § 2 requires and what the Constitution forbids. We have long assumed that § 2 is consistent with the Constitution. But that cannot mean that every conceivable interpretation of § 2 is constitutional, and I do not understand the majority's analysis of Alabama's constitutional claim to suggest otherwise.

Our cases make it perfectly clear that using race as a "predominant factor" in drawing legislative districts is unconstitutional unless the stringent requirements of strict scrutiny can be satisfied, and therefore if § 2 can be found to require the adoption of an additional majority-minority district that was created under a process that assigned race a "predominant" role, § 2 and the Constitution would be headed for a collision. * * *

It is true that the District Court addressed the question of race-predominance when it discussed and rejected the State's argument that the plaintiffs' maps violated the Equal Protection Clause, but the court's understanding of predominance was deeply flawed. The court began this part of its opinion with this revealing statement:

> "Dr. Duchin and Mr. Cooper [plaintiffs' experts] testified that they *prioritized race* only for the purpose of determining and to the extent necessary to determine whether it was possible for the *Milligan* plaintiffs and the *Caster* plaintiffs to state a Section Two claim. As soon as they determined the answer to that question, they assigned greater weight to other traditional redistricting criteria."

This statement overlooks the obvious point that by "prioritiz[ing] race" at the outset, Dr. Duchin and Mr. Cooper gave race a predominant role.

The next step in the District Court's analysis was even more troubling. The court wrote, "Dr. Duchin's testimony that she considered two majority-Black districts as 'nonnegotiable' does not" show that race played a predominant role in her districting process. But if achieving a certain objective is "non-negotiable," then achieving that objective will necessarily play a predominant role. Suppose that a couple are relocating to the Washington, D.C., metropolitan area, and suppose that one says to the other, "I'm flexible about where we live, but it has to be in Maryland. That's non-negotiable." Could anyone say that finding a home in Maryland was not a "predominant" factor in the couple's search? Or suppose that a person looking for a flight tells a travel agent, "It has to be non-stop. That's non-negotiable." Could it be said that the number of stops between the city of origin and the destination was not a "predominant" factor in the search for a good flight? The obvious answer to both these questions is no, and the same is true about the role of race in the creation of a new district. If it is "non-negotiable" that the district be majority black, then race is given a predominant role.

The District Court wrapped up this portion of its opinion with a passage that highlighted its misunderstanding of the first *Gingles* precondition. The court thought that a § 2 plaintiff cannot proffer a reasonably configured majority-minority district without first attempting to see if it is possible to create such a district—that is, by first making the identification of such a district "non-negotiable." But that is simply not so. A plaintiff's expert can first create maps using only criteria that do not give race a predominant role and then determine how many contain the desired number of majority-minority districts. * * *

The plurality's position seems to be that race does not predominate in the creation of a districting map so long as the map does not violate other traditional districting criteria such as compactness, contiguity, equally populated districts, minimizing county splits, etc. But this conclusion is irreconcilable with our cases. In *Miller*, for instance, we acknowledged that the particular district at issue was not "shape[d] . . . bizarre[ly] on its face," but we nonetheless held that race predominated because of the legislature's "overriding desire to assign black populations" in a way that would create an additional "majority-black district." 515 U.S. at 917.

Later cases drove home the point that conformity with traditional districting principles does not necessarily mean that a district was created without giving race a predominant role. In *Cooper*, we held that once it was shown that race was "the overriding reason" for the selection of a particular map, "a further showing of 'inconsistency between the enacted plan and traditional redistricting criteria' is unnecessary to a finding of racial predominance." 581 U.S. at 301, n.3 (quoting *Bethune-Hill*, 580 U.S. at 190); see also *Vera*, 517 U.S. at 966 (plurality opinion) (race may still predominate even if "traditional districting principle[s] do correlate to some extent with the district's layout"). * * *

The plurality's analysis of predominance contravenes our precedents in another way. We have been sensitive to the gravity of "trapp[ing]" States "between the competing hazards of liability" imposed by the Constitution and the VRA. *Id.*, at 196 (quoting *Vera*, 517 U.S. at 977). The VRA's demand that States not unintentionally "dilute" the votes of particular groups must be reconciled with the Constitution's demand that States generally avoid intentional augmentation of the political power of any one racial group (and thus the diminution of the power of other groups).

The plurality's predominance analysis shreds that prudential concern. If a private plaintiff can demonstrate § 2 liability based on the production of a map that the State has every reason to believe it could not constitutionally draw, we have left "state legislatures too little breathing room" and virtually guaranteed that they will be on the losing end of a federal court's judgment.

The Court's treatment of *Gingles* is inconsistent with the text of § 2, our precedents on racial predominance, and the fundamental principle that States are almost always prohibited from basing decisions on race. Today's decision unnecessarily sets the VRA on a perilous and unfortunate path. I respectfully dissent.

Notes and Questions

1. In Part III.A, the Court quoted *White v. Regester*, 412 U.S. 755, 767, 770 (1973) [p. 288], and said that "the *Gingles* test" looks to "the frequency of racially discriminatory actions taken by the State, past and present." Should Alabama's history of racial discrimination continue to prevent it from adopting election practices that would be legal if adopted by other states? Is such a continuing effect consistent with the Court's invocation of the "equal sovereignty" principle in *Shelby County, Alabama v. Holder*, 570 U.S. 529 (2013) and *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009)? Would *Milligan* have been decided differently if the exact same facts occurred in, say, Indiana? *Compare White v. Regester*, *supra*, *with Whitcomb v. Chavis*, 403 U.S. 124 (1971) [p. 282].

2. The Court concluded that race did not "predominate" in drawing the plaintiffs' map, even though "[t]he very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of* its racial composition—that is, because it creates an additional majority-minority district that does not then exist" (footnote 7) (emphasis in original). Does that make sense? The Court, quoting *Bethune-Hill*, said that "[r]ace predominates in the drawing of district lines, our cases explain, when 'race-neutral considerations [come] into play only after the race-based decision had been made.'" Doesn't that precisely describe the process the plaintiffs' experts used to create their illustrative maps? If race does not predominate when it is the "non-negotiable" requirement of producing a majority-minority district, how can one determine when race *does* predominate?

3. The Court placed extraordinary weight on compactness and other traditional districting criteria in concluding that the intentional creation of a second majority-minority district in Alabama would not violate the Fourteenth Amendment, as interpreted in the Court's racial-gerrymandering precedents. Is it fair to say that the Court has retreated from *Miller v. Johnson* in that instead of using districts' shape as *evidence of* a predominant racial purpose, the Court treated misshapen districts as *equivalent to* a predominant racial purpose?

4. The plurality rejected the dissent's reading of predominance in part because such a reading would require the invalidation of "every single illustrative map ever adduced at the first step of *Gingles*" (emphasis deleted). Justice Thomas countered that plaintiffs would still be permitted to demonstrate "that a State could create an additional majority-minority district

through a reasonable redistricting process in which race did not predominate." Similarly, Justice Alito argued that plaintiffs "can first create maps using only criteria that do not give race a predominant role and then determine how many contain the desired number of majority-minority districts." Who is right? If the whole point of the first *Gingles* precondition is to ascertain whether a(nother) majority-minority-district can be drawn, wouldn't race necessarily "predominate" under the dissents' analysis? Does that suggest that the dissenters were arguing more for a re-shaping, rather than an application, of *Gingles*?

5. Are the dissenters correct that the Court in effect created a right to proportional representation where it is possible to create a proportionate number of compact districts? If so, does that interpretation correctly reflect the meaning of § 2, or does it fail to give appropriate effect to the proviso at the end of § 2(b)?

6. The Court rejected, rather dismissively, the argument that § 2 exceeded Congress's power to "enforce" the Fourteenth and Fifteenth Amendments. The Court relied on *City of Rome v. United States*, 446 U.S. 156 (1980), which held that Congress may "prohibit state action that, though in itself not violative of [the Fifteenth Amendment], perpetuates the *effects* of past discrimination." *Id*. at 176 (emphasis added). Justice Thomas pointed out that *City of Rome* and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) [p. 220], both predated the § 2 effects test, but they held that Congress had the power to ban practices that produce discriminatory effects even though the Fifteenth Amendment itself prohibits only purposeful discrimination. For a discussion of *City of Rome*, see pages 240-42 of the Casebook.

While *City of Rome* thus appears to decide the question of Congress's power to enact the § 2 effects test, the Court applied a more restrictive interpretation of Congress's enforcement power in *City of Boerne v. Flores*, 521 U.S. 507 (1997) (discussed at pages 235-42 of the Casebook). Under *Flores*, Congress's enforcement power is limited to the enactment of "congruent" and "proportional" remedies for constitutional violations. The *Milligan* Court did not mention *Flores*; does the Fifteenth Amendment give Congress wider berth when passing voting-rights legislation than when protecting other constitutional rights? Is § 2's effects test congruent and proportional to the Fifteenth Amendment's ban on purposeful racial discrimination in voting?

7. Only three weeks after deciding *Milligan*, the Supreme Court held in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, 600 U.S. __, 143 S. Ct. 2141 (2023) (*SFFA*), that the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964 prohibit colleges and universities from using race as a factor in admissions decisions. Chief Justice Roberts wrote for the majority in *Students for Fair Admissions*, as he did in *Milligan*, and Justice Kavanaugh was in the majority in both cases. Why would it be unconstitutional to use race in college admissions, and yet constitutional for Congress to *require* states to use race in drawing electoral districts?

Justice Sotomayor's dissent in *SFFA*, invoking the Court's seminal racial-gerrymandering decision, argued that race-consciousness should be permitted in college admissions as it is permitted in drawing district lines:

> "The law sometimes requires consideration of race to achieve racial equality. Just like drawing district lines that comply with the Voting Rights Act may require consideration of race along with other demographic factors, achieving racial diversity in higher education requires consideration of race along with "age, economic status, religious and political persuasion, and a variety of other demographic factors." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) ("[R]ace consciousness does not lead inevitably to impermissible race discrimination").

600 U.S. at __ n.34, 143 S. Ct. at __ n.34 (Sotomayor, J., dissenting). The Court responded that race-conscious districting is allowed because it is "remediating specific, identified instances of past discrimination that violated the Constitution or a statute." *Id*. at __, 143 S. Ct. at 2162 (opinion of the Court). Is that distinction convincing? Should the government be able to use race as a way of remedying a *statutory* violation?

Chapter 5

THE ROLES AND RIGHTS OF POLITICAL PARTIES

C. Associational Rights of Parties

Page 433. Add the following paragraph to the end of Note 10:

Suppose instead that the Equity Party of East Carolina wishes its state committee to contain equal numbers of men and women. Members of the state committee are chosen by the voters at the state-run primary elections. Accordingly, the Party passes a resolution stating that voters in each county will choose two committee members—one male and one female. East Carolina then constructs a ballot instructing voters to choose a maximum of one male and one female, and telling voters that if they vote for two males or two females, neither of those votes will be counted. The election is held, and the top two vote-getters are males. The second-place male candidate, who loses to a female who received fewer votes than he did, challenges the ballot, the election outcome, and the Party rule. Assuming that the gender quota violates the Equal Protection Clause on the merits, is there state action? *Cf. Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) ("Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (finding state action in judicial enforcement of a racially restrictive real-estate covenant). If state action is satisfied because of the state's involvement in constructing the ballot and running the election, what should it do to avoid violating the Constitution?

Page 443. Add the following to the end of Note 5, at the top of the page:

What about the reverse situation? Suppose state law requires a party to have a state committee comprised of one man and one woman from each county. If a party objects to this gender-balance provision, does it have a First Amendment right to choose the members of its committee without regard to gender? *See Marchioro v. Chaney*, 582 P.2d 487 (Wash. 1978) (rejecting such an argument), *aff'd on other grounds*, 442 U.S. 191 (1979). Does the answer depend on whether the state committee's power is limited to internal party matters or whether, in addition, the committee can choose officials to fill vacancies in the state legislature or in other governmental bodies?

Page 458. Add the following to the end of Note 2:

After experiencing Democratic crossover votes in the Republican primary election, Wyoming has recently amended its law to prohibit changes to party registration within three months of the primary. Democrats in the heavily Republican state had changed their party registration to support Liz Cheney, who, as a Republican member of the House of Representatives, was critical of President Trump. Cheney lost her primary election in a landslide, but Republicans were still

concerned that the participation of Democrats in the Republican primary would cause the party's nominees to be less conservative than they otherwise would be. *See* Matt Gruver, *GOP-Sought Primary Voter Restrictions Become Law in Wyoming*, A.P. NEWS, Mar. 3, 2023, *at* https://apnews.com/article/wyoming-voting-registration-party-primaries-republican-democrat-406d10bf34991144c2c3c0e45b7a1118.

Chapter 7

POLITICAL SPEECH

A. Introduction

Page 559. Add the following after the first sentence of the second paragraph:

Perhaps for that reason, although the Supreme Court routinely claims that political speech occupies the "core" of the First Amendment, it is by no means clear that the Court actually provides any more protection to political speech than to speech on any other topic. *See* Francesca L. Procaccini, *Equal Speech Protection*, 108 VA. L. REV. 353, 356 (2022). *See generally* Michael R. Dimino, *Political Speech*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW __ (Eugene D. Mazo ed., forthcoming 2024).

Page 560. Add the following footnote after the second sentence of the second full paragraph (the sentence ending ". . . unrelated to the message of a given speaker."):

[footnote] In most cases, one can determine whether a speech restriction is content-based by asking whether the effect of the regulation differs depending on the content of the speech. In other words, if one needs to know the content of the speech to determine how the regulation should apply, the law is content-based. The Supreme Court has recently clarified, however, that the key question is whether the *reason* for the speech restriction is related to the content of the speech. *See City of Austin v. Reagan National Advertising, LLC*, 596 U.S. __, __, 142 S. Ct. 1464, 1471 (2022) ("[A]bsent a content-based purpose or justification, the City's distinction is content neutral and does not warrant the application of strict scrutiny."). In *Reagan National Advertising*, for example, the Court held that an outdoor-sign regulation was content-neutral even though it distinguished between on-premises signs, which advertised businesses and activities located where the sign was installed, and off-premises signs, which advertised businesses and activities located elsewhere. The Court held that the law was "content-agnostic," *id*. at 1475, because the subject-matter of the speech was irrelevant to determining the effect of the regulation. Instead, "the City's off-premises distinction require[d] an examination of [the content of] speech only in service of drawing neutral, location-based lines. *Id*. at 1471.

B. False Statements

Page 584. Add the following to Note 5, Problem C:

May a state criminalize lies about candidates, rather than about electoral mechanics? *See* Michael R. Dimino, *Political Speech*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW __ (Eugene D. Mazo ed., forthcoming 2024) (arguing that "the First Amendment should not be

held to protect political speech that makes a deliberately or recklessly false statement of fact that is likely to mislead voters"); Rebecca Green, *Counterfeit Campaign Speech*, 70 HASTINGS L.J. 1445 (2019) (analogizing intentionally false campaign speech to fraud); Martin H. Redish & Julio Pereyra, *Resolving the First Amendment's Civil War: Political Fraud and the Democratic Goals of Free Expression*, 62 ARIZ. L. REV. 451 (2020) (similar); James Weinstein, *Free Speech and Domain Allocation: A Suggested Framework for Analyzing the Constitutionality of Prohibitions of Lies in Political Campaigns*, 71 OKLA. L. REV. 167, 222 (2018) (arguing that government should have more power to regulate speech in those contexts where the government has a special interest in promoting the effective functioning of election processes than in contexts where speech restrictions would not protect the voting process).

Page 588. Add the following Note after Note 2:

2A. North Carolina makes it a crime to publish "derogatory reports with reference to any candidate in any primary or election, knowing such report to be false or in reckless disregard of its truth or falsity, when such report is calculated or intended to affect the chances of such candidate for nomination or election." N.C. Gen. Stat. § 163-274(a)(9). Thus, the law makes it a crime to make certain false statements (those with reference to a candidate and intended to affect an election), but not others. Does the law violate the First Amendment by making content-based distinctions between false speech that is prohibited and false speech that is allowed? *See Grimmett v. Freeman*, 59 F.4th 689, 694-96 (4th Cir. 2023).

Page 589. Add the following citation to the end of Note 4:

RICHARD L. HASEN, CHEAP SPEECH: HOW DISINFORMATION POISONS OUR POLITICS—AND HOW TO CURE IT (2022).

Page 590. Add the following paragraphs to the end of Note 5:

Government's power to limit or to punish false speech assumed prominence after the 2020 presidential election. President Trump claimed to have won the election in a "landslide," and a group of his supporters, hoping to "stop the steal," stormed the Capitol on January 6, 2021, as Congress was counting the electoral votes. President Trump was later impeached (and subsequently acquitted) for allegedly inciting an insurrection. Some suggested that the January 6 episode demonstrated that more should be done to address election-related speech that (in the government's view) lacked sufficient support. The governor of Washington proposed a bill that would criminalize lying about election results, provided the speaker knew that there was the potential for the speech to lead to violence. Would such a prohibition be constitutional?

President Trump is not the only person who has disputed the official election results. Stacey Abrams, who lost the 2018 Georgia governor's race, has claimed that she "won," and has blamed "voter suppression" for her opponent's victory, despite having questionable support for such claims. *See, e.g.*, Adam Shaw, *Stacey Abrams Again Claims She Won Georgia Governor's Race: 'I'm Not' a Good Sport*, FOX NEWS, May 4, 2019, *at* https://www.foxnews.com/politics/stacey-abrams-again-claims-she-won-georgia-governors-race-im-not-a-good-sport. Similarly, Hillary Clinton has suggested that Donald Trump stole the 2016 election, and several Democrats have made the same claim about George W. Bush's victory in the 2000 presidential election. *See, e.g.*, Timothy P. Carney, *Being a Democrat Means Never Having to Accept an Election Loss*, WASH. EXAMINER, Oct. 5, 2021, *at* https://www.washingtonexaminer.com/opinion/being-a-democrat-means-never-having-to-accept-an-election-loss; Dana Hughes & Kirit Radia, *Hillary Clinton Compares 2000 Florida Recount to Nigeria's Rigged Elections*, ABC NEWS, Aug. 12, 2009, *at* https://abcnews.go.com/Blotter/story?id=8314204&page=1. Are Abrams's claims of "voter suppression" sufficiently different from Trump's claims of "fraudulent" votes and a "rigged" election to yield different results under proposals such as the ones discussed above?

In another controversial attempt to counter false speech, in April 2022, the Department of Homeland Security created a Disinformation Governance Board to provide guidance on how to combat false information that might threaten national security (for example, by interfering in U.S. elections). The Board was "paused" less than a month after it was announced, owing to criticism on free-speech grounds, mostly from conservatives and civil libertarians who suspected that the Board would display a political bias in the kind of "disinformation" that it chose to combat.

Page 590. Add the following Notes after Note 5:

6. Advancements in artificial intelligence (AI) have greatly lowered the costs of creating "sophisticated videos and images that can deceive viewers and spread misinformation." Sabrina Siddiqui & Ryan Tracy, *AI's Rapid Growth Threatens to Flood 2024 Campaigns with Fake Videos: Millions of People Have the Tools to Create Deceptive Political Content*, WALL ST. J., June 5, 2023, *available at* wsj.com/articles/ais-rapid-growth-threatens-to-flood-2024-campaigns-with-fake-videos-dbd8144f. That possibility, in turn, has led to calls to restrict the use of AI in political advertising. Would a ban on the use of such technology be constitutional? Would it be constitutional to require AI-generated photos to include a statement disclosing the use of that technology?

Federal law already prohibits candidates from "fraudulently misrepresent [themselves] or any committee or organization under [their] control as speaking or writing or otherwise acting for or on behalf of any other candidate or political party or employee or agent thereof on a matter which is damaging to such other candidate or political party or employee or agent thereof." 5 U.S.C. § 30124. Is *that* ban constitutional? If so, would it apply where a candidate uses AI to portray an opponent? For an argument that it should so apply, see Public Citizen, *Petition for Rulemaking to Clarify that the Law Against "Fraudulent Misrepresentation" (5 U.S.C. 30124) Applies to Deceptive AI Campaign Ads*, May 16, 2023, *available at* https://www.citizen.org/wp-content/uploads/Deepfakes-FEC-Petition.pdf. Would it apply to an advertisement that features the voice of a human actor doing an impression of an opposing candidate?

7. Shortly before the 2016 presidential election between Donald Trump and Hillary Clinton, a man named Douglass Mackey distributed fake advertisements purporting to urge readers to vote for Clinton "from home" by posting "Hillary" to Facebook or Twitter, or by texting "Hillary" to a particular phone number. Mackey was charged with violating 18 U.S.C. § 241, which makes it a crime to conspire "to injure, oppress, threaten, or intimidate any person * * * in the free exercise or enjoyment of any right or privilege secured to him by the Constitution." The theory of the complaint was that Mackey's speech abridged others' constitutional right to vote by tricking them into staying home and casting a "vote" that would not count. *See* U.S. Department of Justice, *Social Media Influencer Charged with Election Interference Stemming from Voter Disinformation Campaign*, at *https://www.justice.gov/opa/pr/social-media-influencer-charged-election-interference-stemming-voter-disinformation-campaign* (press release). Was Mackey's speech constitutionally protected?

Aside from the constitutional question, did Mackey's speech violate the statute, *i.e.,* did it "injure" or "oppress" someone's right to vote? What if Mackey lied about a candidate's qualifications or policy positions, rather than about the mechanics of voting? *See* Eugene Volokh, *Are Douglas Mackey's Memes Illegal?,* TABLET (Feb. 9, 2021), *at* https://www.tabletmag.com/sections/news/articles/douglass-mackev-rickv-vaughn-memes-first-amendment.

H. Patronage

Page 712. At the bottom of the page, replace the *Adams* citation with the following:

Adams v. Governor of Delaware, 922 F.3d 166 (3d Cir. 2019), vacated for want of standing sub nom. Carney v. Adams, *592 U.S. __, 141 S. Ct. 493 (2020).*

Chapter 8

CAMPAIGN FINANCE

C. Limits on Contributions

Page 799. Add the following to Note 6:

On remand, the Court of Appeals held that the state had failed to demonstrate that Alaska's $500 individual-to-candidate contribution limit and $500 individual-to-group (PAC) limit were closely drawn to meet their objectives, and that the nonresident aggregate-campaign-contribution limit (which barred a candidate from accepting more than $3,000 per year from individuals who were not residents of Alaska) was not justified by the state's claimed anti-corruption interest. *Thompson v. Hebdon*, 7 F.4th 811 (9th Cir. 2021).

Page 809. Add the following Notes after Note 8:

8a. Does the timing of a contribution matter? Twenty-eight states place some limits or bans on campaign contributions while the legislature is in session. *See* National Conference of State Legislatures, *States that Prohibit Campaign Contributions During Legislative Sessions* (https://ilga.gov/joint/Documents/Articles%20from%20the%20National%20Conference%20of%20State%20Legislatures%20-%20States%20that%20Prohibit%20Campaign%20Contributions%20During%20Legislative%20Sessions.pdf (viewed June 20, 2022). Are political contributions made while the legislature is in session more corrupting than identical contributions made at other times? If so, should limits or bans on such contributions apply only to incumbents, or to all candidates?

The ability of such statutes to withstand constitutional challenges has depended greatly on the details of the statute. For example, in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir. 1999), the Fourth Circuit upheld a ban on contributions during the legislative session that applied only to lobbyists or organizations employing lobbyists. The court reasoned that because "lobbyists are paid to effectuate particular political outcomes" and "[t]he pressure on them to perform mounts as legislation winds its way through the system," if "lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange 'dollars for political favors' can be powerful." *Id*. at 715-16. *See also Kimbell v. Hooper*, 665 A.2d 44 (Vt. 1995). Other courts, however, have found that reasoning unpersuasive, arguing that "corruption can occur at any time." *Arkansas Right to Life State PAC v. Butler*, 29 F. Supp. 2d 540, 552 (W.D. Ark. 1998). The length of the limits or bans has also mattered. For example, the *Bartlett* court stressed the brevity of North Carolina's legislative sessions, 168 F.3d at 716, but the Florida Supreme Court, in holding a ban unconstitutional, emphasized that special sessions of the Florida legislature could be called at any time and last up to six months or more. *State v. Dodd*, 561 So. 2d 263, 265 (Fla. 1990).

The *Bartlett* Court also rejected the argument that the statute was over-inclusive because it prohibited contributions to challengers who were not in a position to influence legislation, arguing

that "sticks can work as well as carrots, and the threat of contributing to a legislator's challenger can supply as powerful an incentive as contributing to that legislator himself." 168 F.3d at 715-16. Other courts, however, have held that laws that apply to non-incumbents are overly broad and hence unconstitutional. *See Emison v. Catalano*, 951 F. Supp. 714 (E.D. Tenn. 1996); *Shrink Missouri Government PAC v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996); *State v. Dodd*, 561 So. 2d 263 (Fla. 1990). Which arguments do you find most persuasive? Assuming such limits on contributions to legislators are constitutional, are limits on contributions during legislative session to non-legislative officials, such as the State Comptroller or Attorney General, also constitutional? *See, e.g.*, Ala. Code § 17-5-7(b)(2) (2013).

8b. Recall that, in *Buckley v. Valeo,* the Supreme Court struck down a limit on how much candidates could contribute to their own campaigns. *See supra* at pp. 742-43. Wealthy candidates often choose to fund their own campaigns, in whole or in part. There are many advantages to doing so, including a dramatic reduction in fundraising overhead; the elimination of time spent fundraising; and, perhaps most importantly, the ability to raise campaign cash quickly to deal with unexpected opportunities or challenges. Candidate self-funding is a significant source of campaign cash—in fact, between 1983 and 2018, total candidate self-funding was greater than funding by either labor or business PACs. Alexei V. Ovtchinnikov & Philip Valta, *Self-Funding of Political Campaigns*, MGMT. SCI. 1 (April 7, 2022). In 2020 races for the U.S. House, candidates contributed in the aggregate over $256 million to their own campaigns for office. *Id.* Like most of us, however, candidates often would prefer to get their money back. Thus, many candidates loan funds to their campaigns, to be repaid as the candidate raises campaign donations in the future. This allows the candidate to raise cash when needed and when it is most valuable, without completely risking the money. It should be noted that political campaigns routinely go into debt over the course of a campaign, and pay off those debts with money raised later, including with contributions raised after the election for the specific purpose of paying off debt. Further, note that campaign contributions raised after the election are still subject to the individual limit—that is, if a donor has already contributed the legal maximum to the campaign, that donor cannot contribute more to help retire the campaign's debt.

A provision of the Bipartisan Campaign Reform Act of 2002 prohibited a campaign from repaying more than $250,000 in candidate loans from contributions raised after the election. In his 2018 race for U.S. Senate, in which he was outspent by his opponent by over $33 million, Texas Senator Ted Cruz loaned his campaign $260,000 just days before the election. After narrowly winning with 50.9% of the vote, Cruz sought to have his campaign repay his personal loan with funds raised after the election, but was barred from doing so by the provision in BCRA limiting repayment of candidate loans. Cruz challenged the provision in court. In *Federal Election Commission v. Cruz for Senate*, 596 U.S. __, 142 S. Ct. 1638 (2022), the Supreme Court ruled, 6-3, that the limit on repayment was unconstitutional. The government's position, largely adopted by the dissenters on the Supreme Court, was that retiring a loan to the candidate with funds raised after the election posed a unique possibility of corruption. A primary distinction between campaign contributions and bribes is that the former go toward the persuasion of the electorate, whereas the latter directly benefit a candidate's personal financial situation. The government argued that donors giving to retire a campaign debt that they know is owed to the candidate

personally are essentially giving a direct financial benefit to the candidate. The majority, however, looked at the baseline differently—even after the loan was repaid, the candidate was no better off financially than before loaning money to the campaign. If repayment of a loan were deemed uniquely corrupting, could a candidate ever be repaid for any loan made for any purpose, or be paid other money owed the candidate? The majority also attacked the provision as both over-inclusive and under-inclusive. It was over-inclusive because it also covered loan repayment to losing candidates who would not be in a position to vote on or influence legislation, and it was under-inclusive because it permitted repayment of up to $250,000 which, under the government's theory, should have been deemed equally corrupting. Is the problem with the loan-repayment bar merely that it can be said to be both over- and under-inclusive? Would a more complete ban on any repayment from post-election-day contributions be constitutional? Would it matter if the ban applied only to electoral victors?

Leaving aside how you feel generally about contribution limits, do you agree, one way or the other, that contributions made to retire a candidate loan after the election pose a greater chance for corruption? Was the Court just substituting its risk assessment for that of Congress?

One of the interesting facets of the case was that Senator Cruz was running as an incumbent. Historically, due to various advantages of incumbency, incumbents are less likely than challengers to self-fund, and likely to raise more money than challengers. Both norms were flipped in Cruz's case. But there is ample evidence that the limit on loan repayment was intended as a measure that would benefit incumbents by harming self-funded challengers. *See, e.g.*, 147 Cong. Rec. S2541-2544 (statement of Senator Daschle, in support, that the provision "benefits incumbents"). Does this aspect of congressional intent make a difference to your analysis?

After *Cruz*, are temporal fundraising bans of the type discussed in Note 8a in jeopardy? Plainly unconstitutional? Or can you come up with distinctions that leave them constitutionally viable under the Court's jurisprudence?

Chapter 9

ANONYMOUS SPEECH
C. Reporting and Disclosure of Campaign Contributions

Page 950. Add the following at the end of the first paragraph of Note 5(B):

By initiative in 2022, Arizona enacted a requirement that Super PACs spending more than $50,000 on a statewide race or $25,000 on a local race disclose the names of people who have given them more than $5000. In addition, Super PACs must notify their donors that their donations will be used for political advertising and give the donors an opportunity to opt-out or block the use of their money for that purpose.

Page 962. Add the following Note after Note 3:

4. Critics of "dark money" in politics have argued that disclosures of contributors may accomplish little if the contributions come from organizations that can conceal their own contributors. *See ACLU v. Heller*, 378 F.3d 979, 994 (9th Cir. 2004) (noting that a requirement to disclose merely a contributing organization's name "does not provide useful information" to voters because "individuals and entities interested in funding election-related speech often join together in ad hoc organizations with creative but misleading names"). In response to such a concern, San Francisco enacted a requirement that political committees disclose (in both print and broadcast advertisements) their largest contributors as well as the contributors' largest contributors. According to the law's challengers, the disclosures would have taken more than thirty seconds of an audio advertisement; would have filled 35%-51% of the screen for ten seconds of a video advertisement, and would have occupied 70% of a five-inch by five-inch print advertisement. Print and video advertisements would have had to include a disclosure like this one:

> Ad paid for by San Franciscans Supporting Prop. B 2022. Committee major funding from:
> 1. Concerned Parents Supporting the Recall of Collins, Lopez and Moliga ($5000)—contributors include Neighbors for a Better San Francisco Advocacy Committee ($468,800), Arthur Rock ($350,000).
> 2. BOMA SF Ballot Issues PAC ($5000).
> 3. Edwin M. Lee Asian Pacific Democratic Club PAC sponsored by Neighbors for a Better San Francisco Advocacy Committee ($100,000), David Chiu for Assembly 2022 ($10,600).
> Financial disclosures are available at sfethics.org.

Is this disclosure requirement for secondary contributors sufficiently related to the interest in informing voters for the law to satisfy exacting scrutiny? Is the disclosure simply too onerous to satisfy the First Amendment? *See No on E v. Chiu*, 62 F.4th 529 (9th Cir. 2023) (upholding the law in light of the government's commitment not to enforce the requirement against print advertisements no larger than five inches by five inches, or against audio advertisements no longer than 60 seconds).

D. Exemptions from Disclosure

Page 985. Add the following Notes after Note 5:

5a. In 2021, the Supreme Court revisited the constitutional status of anonymous speech in a challenge to a California law that required charities to disclose their donors to the state. *Americans for Prosperity Foundation v. Bonta*, 594 U.S. __, 141 S. Ct. 2373 (2021), held that the standard of "exacting scrutiny" requires not merely a "substantial" relationship, but narrow tailoring. It does not, however, require that disclosure be the least-restrictive means of achieving the government's interest:

> A substantial relation is necessary but not sufficient to ensure that the government adequately considers the potential for First Amendment harms before requiring that organizations reveal sensitive information about their members and supporters. Where exacting scrutiny applies, the challenged requirement must be narrowly tailored to the interest it promotes, even if it is not the least restrictive means of achieving that end.

See id. at __, 141 S. Ct. at 2384. The Court held that the California law failed narrow tailoring because there were other means of achieving the government's interest in preventing fraud, even if the disclosure requirement did make enforcement easier. *See id.* at __, 141 S. Ct. at 2385-87.

Because the Court held that the challenged law failed exacting scrutiny, it was unnecessary to decide whether the proper test should be more demanding, or whether the test should vary depending on the circumstances. Three Justices (Chief Justice Roberts and Justices Kavanaugh and Barrett) nonetheless concluded that exacting scrutiny applied to laws compelling disclosure —"[r]egardless of the type of association." *Id.* at __, 141 S. Ct. at 2383 (plurality opinion). Justice Alito and Justice Gorsuch declined to decide whether "a single standard applies to all disclosure requirements," *Id.* at __, 141 S. Ct. at 2391 (Alito, J., concurring in part and concurring in the judgment), although they noted their belief that the Court's "seminal compelled disclosure cases" are "fully in accord with contemporary strict scrutiny doctrine." *Id*. Justice Thomas would have applied strict scrutiny. *See id.* at __, 141 S. Ct. at 2390 (Thomas, J., concurring in part and concurring in the judgment). The remaining Justices dissented, believing that the correct standard was exacting scrutiny, which they read not to require narrow tailoring. *See id.* at __, 141 S. Ct. at 2396 (Sotomayor, J., dissenting).

5b. In *Americans for Prosperity*, *supra*, the mandated disclosures were supposed to be confidential, although "careless mistakes" had resulted in thousands of confidential documents being made accessible through the state's website. 594 U.S. at __, 141 S. Ct. at 2381. If speakers reasonably fear reprisals only from the public, and not from the government, should the right of anonymous speech extend only to *public* disclosures, so that disclosures to the government can be mandated? *See id.* at __, 141 S. Ct. at 2388 ("Our cases have said that disclosure requirements can chill association '[e]ven if there [is] no disclosure to the general public.'") (quoting *Shelton v. Tucker*, 364 U.S. 479, 486 (1960)). What if, as in *Americans for Prosperity*, the government has a history of breaching confidentiality, but adopts new security measures to ensure confidentiality? *See Americans for Prosperity*, 594 U.S. at __, 141 S. Ct. at 2388 ("While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it.").

Chapter 10

ELECTION DAY

B. Fraud Prevention and Burdens on Casting Ballots

Page 1012. Add the following to the end of Note 6:

For an argument that both claims of fraud and claims of voter suppression are overblown and that most reform proposals to restore legitimacy to elections are disconnected from the facts, see Bradley A. Smith, *Crisis and Disconnect: Electoral Legitimacy and Proposals for Election Reform*, 24 U. PA. J. CONST. L. 1053 (2022).

Page 1018. Add the following Note after Note 13:

13A. *Problem*. Under New Jersey law, each candidate in primary elections may designate a slogan of not more than six words that will appear on the ballot opposite the candidate's name. The slogan may not, however, include the name of any person or the name of any New Jersey corporation without the permission of the named person or corporation. N.J. Stat. § 19:23-17. Thus, the law creates a content-based distinction between slogans that are permitted to appear on the ballot and those that must go through the extra step of obtaining permission of the named person or entity. Ordinarily, such content-based distinctions on candidates' speech would trigger strict scrutiny. But does *Anderson-Burdick*'s balancing test, rather than strict scrutiny, apply because the slogan appears on the ballot and is therefore part of the election machinery? Does it matter that, in practice, it may be especially difficult to obtain permission for slogans (*e.g.*, "Never Trumper" or No More Bailouts for Acme Co.") that are critical of the named persons or entities? *See Mazo v. N.J. Secretary of State*, 54 F.4th 124 (3d Cir. 2022), *cert. pending*.

Page 1019. Add the following to the end of Note 17:

One study of the effect of voter-ID laws on state-legislative, gubernatorial, congressional, and presidential elections from 2003 to 2020 concluded that such laws motivate and mobilize supporters of both parties, resulting in negligible effects overall on election results. *See* Jeffrey J. Harden & Alejandra Campos, *Who Benefits from Voter Identification Laws?*, 120 PNAS no. 7, e2217323120 (2023), *available at* https://www.pnas.org/doi/epdf/10.1073/pnas.2217323120.

C. Speech Restrictions in or near Polling Places

Page 1031. Add the following Note after Note 4:

4A. If, under *Burson*, the government may protect voters by limiting speech that occurs in *geographic* proximity to the place where voting occurs, does the same reasoning justify a greater

government power to limit speech that occurs in *temporal* proximity to elections, *i.e.*, in the weeks leading up to election day? *Compare* Kiel Brennan-Marquez & Douglas M. Spencer, *Temporal Buffer Zones: The Constitutional Case for Regulating Political Speech Immediately Prior to Elections*, 40 Yale L. & Pol'y Rev. 465, 476 (2022) (advocating such a rule), *with* Michael R. Dimino, *Political Speech*, *in* THE OXFORD HANDBOOK OF AMERICAN ELECTION LAW __ (Eugene D. Mazo ed., forthcoming 2024) ("[S]uch an argument as [Brennan-Marquez and Spencer's] represents a radical departure from the free-speech principles animating decisions such as *Mills v. Alabama* [384 U.S. 214 (1966)] [p. 591], which have been more vigilant in protecting the right to 'uninhibited, robust, and wide-open' political debate.").

D. Federal Regulation of State-Run Elections

Page 1062. Add the following paragraph to the end of Note 5:

As noted, the NVRA imposes requirements on the states concerning voter registration only in federal elections. Thus, after *Inter-Tribal Council*, states could not require proof of citizenship when registering voters for federal elections, but they could for state elections. The Tenth Circuit, however, struck down a Kansas law requiring documentary proof of citizenship as both unconstitutional and preempted by the NVRA, meaning that the citizenship requirement could not be enforced even as to state elections. *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020). In 2022, Arizona re-enacted a proof-of-citizenship requirement for both state and federal elections, and the U.S. Department of Justice has filed suit to invalidate the new law. *See* Dareh Gregorian & Julia Jester, *Justice Department Sues to Block Arizona's Proof of Citizenship Voting Law*, NBC NEWS, July 5, 2022, *at* https://www.nbcnews.com/politics/elections/justice-department-files-suit-block-arizonas-proof-citizenship-voting-rcna36808.

Page 1071. Add the following new Note after Note 3:

3A.On January 6, 2021, supporters of the incumbent President, Donald Trump, stormed the U.S. Capitol. The rioters believed President Trump's false claims that he was the rightful victor of the 2020 presidential election, and they went to the Capitol to "stop the steal." The riot resulted in the death of one of the rioters, several injuries, damage to the Capitol, and the temporary disruption of Congress's counting of electoral votes. President Trump had urged Vice President Mike Pence, who was presiding over the electoral count pursuant to the Twelfth Amendment, to reject the votes in states where Trump was contesting the validity of the results. *See* U.S. CONST. amend. XII ("The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates [of the electors' votes] and the votes shall then be counted."). Pence refused, believing that he had no such authority.

The following year, in an attempt to avoid repeating the calamity of January 6, 2021, Congress passed the Electoral Count Reform Act (ECRA). Division P, Title I of the Consolidated Appropriations Act, Pub. L. 117-328, 136 Stat. 4459 (2022). The ECRA clarified that the Vice

President's role in counting the votes is purely ceremonial, and it increased the number of members of Congress necessary to challenge any state's electoral votes. The previous law provided that a challenge to a state's votes would be considered by the Houses of Congress if only one member of each House supported the challenge. Under the new law, no such challenge would be considered unless it had the support of one-fifth of each chamber.

Other provisions of the ECRA specify the governor as the official responsible for certifying each state's electors; provide for expedited judicial review of electoral challenges by presidential and vice-presidential candidates with a direct appeal to the Supreme Court; and require Congress to defer to slates of electors chosen pursuant to court orders. Together, these reforms were aimed at allowing Congress to identify conclusively a single slate of electors from each state, and to have challenges resolved expeditiously. Finally, the ECRA amended prior law that had allowed each state to declare a "failed election" after the fact; the law now provides that the presidential election day may be moved from the Tuesday after the first Monday in November only in the event of an "extraordinary and catastrophic" event.

E. Counting the Votes

Page 1102. Add the following Note after Note 4:

4a. A 2019 Pennsylvania law expanded the availability of mail-in voting, but specified that mail-in votes "must be received in the office of the county board of elections no later than eight o'clock P.M. on the day of the primary or election." 25 Pa. Stat. Ann. § 3150.16(c); *see also* 25 Pa. Stat. Ann. § 3146.6(c) (specifying the same deadline for absentee ballots). Although the Pennsylvania legislature amended some election procedures for the 2020 election in response to the COVID-19 pandemic, it made no changes to the deadline for returning mail-in or absentee ballots. While acknowledging that "there is no ambiguity regarding the deadline set by the General Assembly," the Pennsylvania Supreme Court permitted ballots to be counted as long as they were mailed by election day[2] and received within three days of election day. *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020). The state court did not declare the statutory deadline unconstitutional; rather, it looked to a different statutory provision that required courts to be in session on election day to "to secure a free, fair and correct computation and canvass of the votes cast," and gave courts the authority to "decide such * * * matters pertaining to the election as may be necessary to carry out the intent of this act." 25 Pa. Stat. Ann. § 3046. In the court's view, the pandemic, along with anticipated postal delays, presented a "natural disaster" justifying the court's three-day extension.

The Republican Party of Pennsylvania sought review in the Supreme Court, arguing that the state supreme court had usurped the state legislature's constitutional authority to "direct" the "Manner" of appointing presidential electors. U.S. CONST. art. II, § 1. The Supreme Court denied a stay and refused to expedite its consideration of the case, ensuring that it would not issue any decision before the election. *Republican Party of Pennsylvania v. Boockvar*, 592 U.S. __, 141 S. Ct. 643 (2020). Ultimately the Court denied *certiorari*, *Republican Party of Pennsylvania v.*

[2] More precisely, the court held that ballots would be presumed to have been mailed by election day if they were received within three days of the election, even if they lacked a legible postmark. 238 A.3d at 371 n.26.

Degraffenreid, 141 S. Ct. 732 (2021).

Was the state court's interpretation of the statute so contrary to the statutory language as to violate Article II? Should the Supreme Court have heard the case before the election, or was it better for the Court to stay out of a controversy with such obvious partisan overtones?

Chapter 11

ELECTION REMEDIES

B. Correcting Faulty Elections

2. Adjusting the Vote Totals

Page 1142. Add the following Note after Note 3:

3a. President Trump claimed that his loss in the 2020 election was due to fraud, and several lawsuits were filed alleging that fraud had tainted the election. The lawsuits, by and large, were unsuccessful. *See, e.g.*, *Donald J. Trump for President, Inc. v. Boockvar*, 502 F. Supp. 3d 899 (M.D. Pa. 2020) (rejecting a challenge to Pennsylvania's certification).[3] Even if they were completely meritless (and perhaps especially if they were completely meritless), President Trump's claims of fraud have raised the question whether American elections are adequately secure from the risk of subversion. How should we protect elections against manipulation or theft? For one observer's ideas, see Richard L. Hasen, *Identifying and Minimizing the Risk of Election Subversion and Stolen Elections in the Contemporary United States*, 135 HARV. L. REV. F. 265 (2022) (suggesting increasing transparency in vote-counting; limiting the discretion of those who certify votes; limiting politicization of election administration; increasing penalties for election-tampering and voter-intimidation; and countering election-related disinformation).

[3] That is not to say, however, that the election's administration was ideal. There was considerable controversy in Pennsylvania in particular, as the state supreme court decided that mail-in ballots should be counted even if they were received after the statutory deadline, *Pennsylvania Democratic Party v. Boockvar*, 238 A.3d 345 (Pa. 2020), and that ballots could not be rejected based on a signature comparison, *In re: November 3, 2020 General Election (Petition of Boockvar)*, 240 A.3d 591 (Pa. 2020). The court then held that mail-in votes should be counted even if the voters failed to comply with the requirement that they write their names, addresses, and dates on the ballots' outer envelopes. *In re: Canvass of Absentee and Mail-In Ballots of November 3, 2020 General Election*, 241 A.3d 1058 (Pa. 2020). The same court also upheld Philadelphia's vote-counting process, after a lower court had held that election workers violated state law by providing an inadequate opportunity for the vote-counting process to be observed. *In re: Canvassing Observation*, 241 A.3d 339 (Pa. 2020), *vacating* 2020 WL 6551316 (Pa. Commw. Ct.). Similarly, Wisconsin's election administration in the 2020 election was controversial, as officials authorized the use of ballot drop boxes that the state supreme court later held to be illegal. *See Teigen v. Wisconsin Elections Commission*, 976 N.W.2d 519 (Wisc. 2022).

D. Remedying Individual Electoral Injuries

2. Remedies for the Wrongful Denial of the Right to Vote

a. The Timing of Injunctive Relief

Page 1163. Add the following Note after Note 3:

4. What criteria should guide the Court in applying the *Purcell* principle? In *Merrill v. Milligan*, 142 S. Ct. 879 (2022), the Court stayed a lower-court judgment invalidating Alabama's congressional districts approximately two months before voting was to begin in the primary elections. Alabama had created one majority-minority district out of the seven that it had been allotted after the 2020 census. The plan was challenged, however, on the ground that § 2 of the Voting Rights Act required Alabama to create two majority-minority districts, not merely one. The district court therefore ordered Alabama—in January 2022—to redraw its districts before the primary elections, which were to be held four months later in May, with absentee voting beginning on March 30. The Supreme Court stayed the district-court order, permitting the 2022 elections to take place with the districting plan that created one majority-minority district. (The Court ultimately affirmed the district court's conclusion. *Allen v. Milligan*, 599 U.S. __, 143 S. Ct. 1487 (2023).) Justice Kavanaugh wrote a concurrence, in which he expanded on the *Purcell* principle:

> [T]he *Purcell* principle [] reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.[1]
>
> Some of this Court's opinions, including *Purcell* itself, could be read to imply that the principle is absolute and that a district court may *never* enjoin a State's election laws in the period close to an election. As I see it, however, the *Purcell* principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the *Purcell* principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

[1] How close to an election is too close may depend in part on the nature of the election law at issue, and how easily the State could make the change without undue collateral effects. Changes that require complex or disruptive implementation must be ordered earlier than changes that are easy to implement.

142 S. Ct. at 880-81. In Justice Kavanaugh's judgment, that standard was not met in *Milligan* because the challengers could not establish that the merits were clearly in their favor, and because the changes ordered by the lower court could not be implemented absent cost, confusion, or hardship. *See id*. at 881 (Kavanaugh, J., concurring).

Chief Justice Roberts disagreed with the Court's grant of the stay. In his view, the lower court correctly applied the law, and its decision should have been left in place unless and until the Supreme Court altered the governing precedents. *See id*. at 883 (Roberts, C.J., dissenting). In a separate dissent from the grant of the stay, Justice Kagan, joined by Justices Breyer and Sotomayor, argued that there was plenty of time for the state to conform its districts to the requirements of federal law; that both the challengers and the lower courts had acted expeditiously; and that applying the *Purcell* principle would undermine voting rights: "Alabama is not entitled to keep violating Black Alabamians' voting rights just because the [lower] court's order came down in the first month of an election year." *Id*. at 888-89 (Kagan, J., dissenting).

How far in advance of an election should the *Purcell* principle apply? How does one weigh a state's interest in having its election rules in place well ahead of the election against voters' interest in enforcing their rights under the Constitution or the Voting Rights Act? Is the interest in easily administering an election sufficiently strong that a federal court cannot issue an injunction nine months before a general election? On the other hand, does Justice Kagan take sufficient account of the burdens placed on candidates and voters, as well as election officials? Candidates considering running in an election need to assess their chances, to raise money, to meet voters, and to create and run advertisements, yet the district-court decision would have changed district lines—altering the electorate, and perhaps the candidates, in affected districts—with only two months before voting in primary elections was to begin.

Should it matter that without early voting the district court's decision would have been issued *four* months before the primary election? Could the district court have avoided the *Purcell* problem by issuing an injunction lessening the early-voting period (or delaying the primary) to allow more time for candidates, voters, and election officials to adapt to the new districts, or would that have created even more disruption than the injunction that it did order?