VOTING RIGHTS AND ELECTION LAW

Cases, Explanatory Notes, and Problems

Third Edition

2022 Supplement

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Chapter 1

VOTING QUALIFICATIONS

B. Defining the Community and Excluding Outsiders

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*, __ N.E.3d __, 2022 WL 1236822 (N.Y. 2022) (striking down a pro-Democratic gerrymander); *League of Women Voters v. Ohio Redistricting Commission*, __ N.E.3d __, 2022 WL 1665325 (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 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 to Note 4:

Apparently there is. The independent-state-legislature doctrine has remained controversial and the subject of litigation (and extensive academic commentary) in the years after *Arizona* and *Rucho*.[1] At the end of the 2021 Term, the Supreme Court granted *certiorari* in *Moore v. Harper*, a case in which the North Carolina Supreme Court held that the state's congressional map was a partisan gerrymander that violated the state constitution. The case was brought to the Supreme Court by state legislators who claimed that the Federal Constitution's Elections Clause prohibited state courts and state constitutions from interfering with state legislatures' choices of the times, places, and manner of federal elections. The case will be heard by the Supreme Court in the fall of 2022.

[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. __ (forthcoming 2022); Jason Marisam, *The Dangerous Independent State Legislature Theory*, 2022 MICH. ST. L. REV. __ (forthcoming); 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 Claim, Textualism, and State Law*, __ U. CHI. L. REV. __ (forthcoming 20__); Hayward H. Smith, *Revisiting the History of the Independent State Legislature Doctrine*, 53 ST. MARY'S L.J. __ (forthcoming 2022); Michael Weingartner, *Liquidating the Independent State Legislature Theory*, 46 HARV. J.L. & PUB. POL'Y __ (forthcoming 2023).

Chapter 4
RACE-CONSCIOUS DISTRICTING

C. Section 2's Post-1982 Results Test

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, __ L. Ed. 2d __ (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 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

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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.]

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 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 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

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[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.

[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?

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 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]

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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."

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.

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 "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. * * *

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[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.

* * *

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

[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.

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). * * *

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*

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[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.]

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 "[un]usual" [*sic*] 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.

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. * * *

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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.

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 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

[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.

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 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,

[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.

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. * * *

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 forego 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. * * *

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[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."

[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."

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 people who find it difficult to go to the polls on election day?

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 ä 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 voter's 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 Ka-

gan 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*?

11. A wholesale reexamination of *Gingles* may be on its way. In the October 2022 Term, the Supreme Court will hear argument in *Merrill v. Milligan*, a case involving a claim that § 2 of the Voting Rights Act required Alabama to create two majority-minority congressional districts out of the seven districts allotted to the state as a result of the 2020 census. The state responded that one majority-minority district was sufficient to satisfy the Voting Rights Act, and the race-consciousness that would be required to create a second district would itself violate the Equal Protection Clause. The district court struck down the state's plan and ordered the state to use different maps in the 2022 elections, but the Supreme Court, by a 5-4 vote, stayed that order. *Merrill v. Milligan*,

142 S. Ct. 1105 (2022). Although a decision to grant a stay "is not a decision on the merits," *id*. at 879 (Kavanaugh, J., joined by Alito, J., dissenting), stays are ordinarily not granted unless the lower-court order stands a "reasonable probability" of being overturned. *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (*per curiam*). Justice Kavanaugh wrote separately in *Milligan* to underscore that stays should issue more freely than usual "when a lower court has issued an injunction of a state's election law in the period close to an election," *id*. at 880, so it is not clear that the stay necessarily foreshadows a reversal of the district court. Nevertheless, it seems fair to assume that the Justices are at least open to the possibility of revising *Gingles*. That conclusion is strengthened by Chief Justice Roberts's opinion in *Milligan*. The Chief Justice opposed granting the stay because "the analysis below seems correct as *Gingles* is presently applied," *id*. at 883 (Roberts, C.J., dissenting), but he underscored the need to reexamine *Gingles* because that case "and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim." *Id*. at 882-83.

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?

Chapter 7

POLITICAL SPEECH

A. Introduction

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 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 the 2000 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 Note after Note 5:

6. 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 person-

ally 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

B. 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" have 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 confiden-

tiality may reduce the burden of disclosure to the State, they do not eliminate it.").

Chapter 10 ELECTION DAY

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.

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

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[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.

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. 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*, __ N.W.2d __, 2022 WL 2565599 (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. 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.

142 S. Ct. at 880-81. In Justice Kavanaugh's judgment, that standard was not met in *Milligan*

[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.

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, although he indicated that he would be open to overturning the lower court's judgment after full consideration. In the Chief Justice's view, the lower-court decision was correct under current law, and it should therefore continue in effect through the 2022 election. *See id*. at 883 (Roberts, C.J., dissenting). Justice Kagan, joined by Justices Breyer and Sotomayor, also dissented from the Court's decision to issue the stay. She 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?