Election Law

Cases and Materials

SIXTH EDITION

2018 Supplement

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Table of Contents

Chapter 4. Partisan Gerrymandering and Political Competition

ADD THE FOLLOWING AT THE END OF NOTE 1 ON PAGE 144:

Since it was introduced, the efficiency gap has been the subject of significant academic commentary. For criticisms, see Benjamin Plener Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 STANFORD LAW REVIEW 1131 (2018) (arguing that the efficiency gap is in tension with democratic values like competition, participation, and proportional representation); and Jonathan S. Krasno et al., *Can Gerrymanders Be Detected? An Examination of Wisconsin's State Assembly*, 46 AMERICAN POLITICS RESEARCH (forthcoming 2018) (alleging that the efficiency gap is overly volatile). For responses to these and other points, see Nicholas O. Stephanopoulos and Eric M. McGhee, *The Measure of a Metric: The Debate over Quantifying Partisan Gerrymandering*, 70 STANFORD LAW REVIEW 1503 (2018).

ADD THE FOLLOWING ON PAGE 192 PRIOR TO NOTES AND QUESTIONS:

Wisconsin appealed the district court's decision to the Supreme Court. In *Gill v. Whitford*, 138 S. Ct. 1916 (2018), the Court unanimously vacated the decision below on the ground that the plaintiffs had not yet proven (but might still show) their standing to sue. Standing in a partisan gerrymandering suit brought on a vote dilution theory, according to the Court, does *not* extend to all supporters of the victimized party. Rather, only voters who *themselves* were placed in cracked or packed districts—and who could have been placed in uncracked or unpacked districts by some other, fairer map—have standing:

> To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific. An individual voter in Wisconsin is placed in a single district. He votes for a single representative. The boundaries of the district, and the composition of its voters, determine whether and to what extent a particular voter is packed or cracked. This "disadvantage to [the voter] as [an] individual[]" therefore results from the boundaries of the particular district in which he resides. And a plaintiff's remedy must be "limited to the inadequacy that produced [his] injury in fact." In this case the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district. . . .
>
> Here, the plaintiffs' partisan gerrymandering claims turn on allegations that their votes have been diluted. That harm arises from the particular composition of the voter's own district, which causes his vote—having been packed or cracked—to carry less weight than it would carry in another, hypothetical district. Remedying the individual voter's harm, therefore, does not necessarily require restructuring all of the State's legislative districts. It requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be.
>
> The plaintiffs argue that their legal injury is not limited to the injury that they have suffered as individual voters, but extends also to the statewide harm to their interest "in their collective representation in the legislature," and in influencing the legislature's overall "composition and policymaking." But our cases to date have not found that this presents an individual and personal injury of the kind required for Article III standing. On the facts

> of this case, the plaintiffs may not rely on "the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable "general interest common to all members of the public."

Whitford, 138 S. Ct. at 1130–31 (internal citations omitted).

Writing for herself and three other Justices, Justice Kagan filed a concurring opinion. She observed that the Court's standing rule will often be easy to satisfy when severe vote dilution has occurred. She also noted that if plaintiffs in numerous districts establish their standing, the necessary remedy to correct their cracking and packing may be statewide:

> In many partisan gerrymandering cases, that threshold showing will not be hard to make. Among other ways of proving packing or cracking, a plaintiff could produce an alternative map (or set of alternative maps)—comparably consistent with traditional districting principles—under which her vote would carry more weight. For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district. Or conversely, a Democratic plaintiff residing in a 35%-Democratic district could prove she was cracked by offering an alternative, neutrally drawn map putting her in a 50–50 district. The precise numbers are of no import. The point is that the plaintiff can show, through drawing alternative district lines, that partisan-based packing or cracking diluted her vote. . . .
>
> That problem, however, may be readily fixable. The Court properly remands this case to the District Court "so that the plaintiffs may have an opportunity" to "demonstrate a burden on their individual votes." That means the plaintiffs—both the four who initially made those assertions and any others (current or newly joined)—now can introduce evidence that their individual districts were packed or cracked. And if the plaintiffs' more general charges have a basis in fact, that evidence may well be at hand. Recall that the plaintiffs here alleged—and the District Court found—that a unified Republican government set out to ensure that Republicans would control as many State Assembly seats as possible over a decade (five consecutive election cycles). To that end, the government allegedly packed and cracked Democrats throughout the State, not just in a particular district or region. Assuming that is true, the plaintiffs should have a mass of packing and cracking proof, which they can now also present in district-by-district form to support their standing. In other words, a plaintiff residing in each affected district can show, through an alternative map or other evidence, that packing or cracking indeed occurred there. And if (or to the extent) that test is met, the court can proceed to decide all distinctive merits issues and award appropriate remedies. . . .
>
> Similarly, cases like this one might warrant a statewide remedy. Suppose that mapmakers pack or crack a critical mass of State Assembly districts all across the State to elect as many Republican politicians as possible. And suppose plaintiffs residing in those

> districts prevail in a suit challenging that gerrymander on a vote dilution theory. The plaintiffs might then receive exactly the relief sought in this case. To be sure, remedying each plaintiff's vote dilution injury "requires revising only such districts as are necessary to reshape [that plaintiff's] district—so that the [plaintiff] may be unpacked or uncracked, as the case may be." But with enough plaintiffs joined together—attacking all the packed and cracked districts in a statewide gerrymander—those obligatory revisions could amount to a wholesale restructuring of the State's districting plan. The Court recognizes as much. It states that a proper remedy in a vote dilution case "does not *necessarily* require restructuring all of the State's legislative districts." Not necessarily—but possibly. It all depends on how much redistricting is needed to cure all the packing and cracking that the mapmakers have done.

Whitford, 138 S. Ct. at 1936–37 (internal citations omitted).

Justice Kagan further floated a different theory of partisan gerrymandering, based not on vote dilution through cracking and packing but rather on the burdens imposed on party members' and leaders' associational rights. This theory stems from the First Amendment, not the Equal Protection Clause, and in Justice Kagan's view, it would support statewide criteria for standing, liability, and relief:

> As so formulated, the associational harm of a partisan gerrymander is distinct from vote dilution. Consider an active member of the Democratic Party in Wisconsin who resides in a district that a partisan gerrymander has left untouched (neither packed nor cracked). His individual vote carries no less weight than it did before. But if the gerrymander ravaged the party he works to support, then he indeed suffers harm, as do all other involved members of that party. This is the kind of "burden" to "a group of voters' representational rights" Justice Kennedy spoke of [in *Vieth*]. Members of the "disfavored party" in the State, deprived of their natural political strength by a partisan gerrymander, may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office (not to mention eventually accomplishing their policy objectives). And what is true for party members may be doubly true for party officials and triply true for the party itself (or for related organizations). By placing a state party at an enduring electoral disadvantage, the gerrymander weakens its capacity to perform all its functions.
>
> . . . But when the harm alleged is not district specific, the proof needed for standing should not be district specific either. And the associational injury flowing from a statewide partisan gerrymander, whether alleged by a party member or the party itself, has nothing to do with the packing or cracking of any single district's lines. The complaint in such a case is instead that the gerrymander has burdened the ability of like-minded people across the State to affiliate in a political party and carry out that organization's activities and objects. Because a plaintiff can have that complaint without living in a packed or cracked district, she need not show what the Court demands today for a vote dilution claim. Or said otherwise: Because on this alternative theory, the valued association and the injury to it are statewide, so too is the relevant standing requirement.

Whitford, 138 S. Ct. at 1939 (internal citations omitted).

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 194:

6. The Supreme Court held in *Whitford* that standing in partisan gerrymandering cases based on vote dilution is district-specific: in other words, that plaintiffs must show that their *own* districts have been unnecessarily cracked or packed. Is this holding in tension with the theory of vote dilution? Vote dilution is typically understood as an aggregate concept: a particular group is underrepresented in the legislature because its members' votes have been diluted by district lines that crack and pack these voters. If this is what vote dilution means, does it make sense for vote dilution standing to be district-specific?

Whatever the merits of the Court's new standing requirement, is Justice Kagan right that it will be easy for plaintiffs to satisfy in future cases? Say that the litigants in *Whitford*, on remand, identify an alternative Wisconsin state house map that uncracks and unpacks Democratic voters in dozens of current districts. Say also that the litigants bring into the case at least one Democratic voter living in each of the districts that could be uncracked or unpacked. Would all of these new plaintiffs have standing, thus exposing to liability (and eventual revision) very large swathes of the map? If so, what is the point of *Whitford*? Does it just create a hoop through which future litigants will have little trouble jumping?

7. In her concurrence, Justice Kagan purports to flesh out the First Amendment theory of partisan gerrymandering hinted at by Justice Kennedy in his opinion in *Vieth*. Is this really the First Amendment theory that Justice Kennedy had in mind? Or does his opinion dovetail better with retaliation (the government taking adverse actions against individuals because of their political beliefs) or even vote dilution (the government reducing the representation of a disfavored political group)?

Whether or not Justice Kagan's and Justice Kennedy's ideas are aligned, how exactly would an associational rights claim work? Would it be enough for party members and leaders to testify that their party-related activities—"fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office"—have been impaired? If so, what district plan would be safe from challenge? Or would the burden on associational rights have to be sufficiently heavy in order to trigger liability? If so, how would courts distinguish between severe and lighter impositions? And would the jurisdiction have an opportunity to justify a map that burdened associational rights? If so, what scrutiny would the map face? For an attempt to answer some of these questions, see Daniel P. Tokaji, *Gerrymandering and Association*, 59 WILLIAM & MARY LAW REVIEW 2159 (2018)

8. In another case decided the same day as *Whitford*, the Supreme Court affirmed a lower court's refusal to enjoin preliminarily Maryland's congressional map from being used in the next election, sending it back for a full determination on the merits. See *Benisek v. Lamone*, 138 S. Ct. 1942 (2018). The Maryland plaintiffs dispute only the Sixth District, which they allege was deliberately flipped from the Republicans (under the 2000s map) to the Democrats (under the current map), thus punishing the district's Republican voters. See *Benisek v. Lamone*, 266 F. Supp. 3d 799 (D. Md. 2017). What are the merits of a single-district gerrymandering theory as opposed to one that attacks many or all of a plan's districts? Which theory better approximates how mapmakers themselves approach their work? Additionally, how sensible is it to focus on whether

a given district flips between the old map and the new one? What if the old map was highly asymmetric and the district was flipped in order to promote partisan fairness? What if both the old map and the new map are highly asymmetric and no district was flipped from the former to the latter?

9. One other federal court recently struck down a district plan on partisan gerrymandering grounds. In *Common Cause v. Rucho*, 279 F. Supp. 3d 587 (M.D.N.C. 2018), the court held that North Carolina's congressional map is unconstitutional. Unlike the trial court in *Whitford*, the *Common Cause* court invalidated the plan for three separate reasons: it diluted Democrats' votes in violation of the Equal Protection Clause, it impermissibly burdened Democrats' First Amendment rights, and it exceeded the North Carolina legislature's authority under the Elections Clause. *Common Cause* was vacated by the Supreme Court without opinion for reconsideration in light of *Whitford*. See *Rucho v. Common Cause*, __ S. Ct. __, 2018 WL 1335403 (June 25, 2018).

Common Cause differs from *Whitford* not just in the legal theories advanced but also in the evidence presented at trial. First, the authors of North Carolina's congressional map openly admitted their partisan intent, including as an official criterion that "[t]he partisan makeup of the congressional delegation" shall be "10 Republicans and 3 Democrats." Second, the map scores very poorly on measures of partisan asymmetry beyond the efficiency gap, like partisan bias and the mean-median difference. And third, thousands of computer-generated plans show that the map is far more skewed than would be expected given North Carolina's political geography and nonpartisan redistricting objectives. Should any of this evidence justify a different result, on remand, in *Common Cause* than in *Whitford*?

10. In another recent partisan gerrymandering decision, the Pennsylvania Supreme Court struck down the state's congressional map under the Free and Equal Elections Clause of the Pennsylvania Constitution. While the evidence presented was similar to that in *Whitford* and *Common Cause*, the court focused on the districts' noncompliance with traditional criteria such as compactness and respect for political subdivisions. See *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). How indicative of a partisan gerrymander are breaches of traditional criteria? Could a map abide by traditional criteria yet still be gerrymandered?

The Pennsylvania Supreme Court currently has a majority of Democratic judges; presumably, this helps explain why the litigants invoked the state constitution rather than any provision of federal law. From one perspective, judges elected statewide are unaffected by an alleged gerrymander and so are well-positioned to nullify it. From another perspective, such close involvement with legislative elections risks making judges seem equivalent to other elected officials. How would you weigh these pros and cons? Are state law challenges to gerrymanders the next frontier in redistricting litigation or an unwise politicization of the judiciary?

Chapter 5. Minority Vote Dilution

ADD THE FOLLOWING AFTER NOTE 8 ON PAGE 327:

9. In *Abbott v. Perez*, 138 S. Ct. 2305 (2018), the Supreme Court relied on *Gingles*'s first prong to reverse a lower court's ruling that one congressional district and two state house districts in Texas violated Section 2 of the Voting Rights Act. The lower court had held that Congressional District 27 was unlawful because it was not a Latino opportunity district, even though such a district could have been constructed in its vicinity. The Supreme Court disagreed, concluding that Texas had satisfied its Section 2 obligation by creating a Latino opportunity district (Congressional District 35) elsewhere in the state. Justice Alito's opinion for the five-justice majority observed that "the geography and demographics of south and west Texas do not permit the creation of any more than the seven Latino opportunity districts that exist under the current plan." *Abbott*, 138 S. Ct. at 2331. Contrary to the lower court, the Supreme Court concluded that voting was sufficiently racially polarized in CD 35 for it to count toward the tally of Latino opportunity districts in the state: "[T]here is ample evidence that this factor [of racial polarization] is met. Indeed, the [lower] court found that majority bloc voting exists throughout the State." *Abbott*, 138 S. Ct. at 2332. The Court thus held that the Texas legislature was justified in drawing CD 35 as a Latino opportunity district instead of CD 27.

Similarly, the Court held that the lower court erred in ruling that State House District 32 and House District 34 violated Section 2. These two state house districts make up all of Nueces County, where Latinos account for approximately 56 percent of the voting age population. House District 34 was undisputedly a Latino opportunity district, while House District 32 was not. According to the majority, the plaintiffs' "own expert determined that it was not possible to divide Nueces County into more than one *performing* Latino district." *Abbott*, 138 S. Ct. at 2332. "In order to create two performing districts in that area, it was necessary, he found, to break county lines in *multiple* places"—a districting choice the lower court found unwarranted. *Id*. The majority therefore concluded: "So if Texas could *not* create two performing districts in Nueces County and did *not* have to break county lines, the logical result is that Texas did not dilute the Latino vote." *Id*. Justice Sotomayor (joined by Justices Ginsburg, Breyer, and Kagan) dissented as to all three districts.

The fireworks in *Abbott* were not just about Section 2. They also pertained to whether Texas had intentionally discriminated against Latinos in enacting its congressional and state legislative plans. (Recall that a finding of intentional discrimination is necessary both to strike down maps under the Constitution and to trigger bail-in under Section 3 of the VRA.) According to the lower court, Texas engaged in intentional racial discrimination when it originally passed its maps in 2011. The lower court then "attributed this same intent to the 2013 Legislature" when it enacted new plans that corresponded to interim court-drawn maps "because it had 'failed to engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans.'" *Abbott*, 138 S. Ct. at 2318. This was legal error, in the view of the Supreme Court. As Justice Alito wrote for five Justices:

> The allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. "[P]ast discrimination cannot, in the

> manner of original sin, condemn governmental action that is not itself unlawful." The "ultimate question remains whether a discriminatory intent has been proved in a given case." The "historical background" of a legislative enactment is "one evidentiary source" relevant to the question of intent. But we have never suggested that past discrimination flips the evidentiary burden on its head. . . .
>
> . . . Nor is this a case in which a law originally enacted with discriminatory intent is later reenacted by a different legislature. The 2013 Texas Legislature did not reenact the plan previously passed by its 2011 predecessor. Nor did it use criteria that arguably carried forward the effects of any discriminatory intent on the part of the 2011 Legislature. Instead, it enacted, with only very small changes, plans that had been developed by the Texas court pursuant to instructions from this Court "not to incorporate . . . any legal defects."
>
> Under these circumstances, there can be no doubt about what matters: It is the intent of the 2013 Legislature. And it was the plaintiffs' burden to overcome the presumption of legislative good faith and show that the 2013 Legislature acted with invidious intent.
>
> The Texas court contravened these basic principles. Instead of holding the plaintiffs to their burden of overcoming the presumption of good faith and proving discriminatory intent, it reversed the burden of proof. It imposed on the State the obligation of proving that the 2013 Legislature had experienced a true "change of heart" and had "engage[d] in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans."

Id. at 2324–25 (internal citations omitted).

Justice Sotomayor dissented vigorously, joined by Justices Ginsburg, Breyer, and Kagan. She argued that the lower court had not, in fact, shifted the burden to Texas to show that it had cured the taint of past discrimination. She also contended that the evidence in the record amply supported the lower court's finding of intentional discrimination:

> The majority believes that, in analyzing the 2013 maps, the District Court erroneously "attributed [the] same [discriminatory] intent [harbored by the 2011 Legislature] to the 2013 Legislature" and required the 2013 Legislature to purge that taint. The District Court did no such thing. . . .
>
> . . . To start, there is no question as to the discriminatory impact of the 2013 plans, as the "specific portions of the 2011 plans that [the District Court] found to be discriminatory or unconstitutional racial gerrymanders continue unchanged in the 2013 plans, their harmful effects 'continu[ing] to this day.'" Texas, moreover, has a long "history of discrimination" against minority voters. "In the last four decades, Texas has found itself in court every redistricting cycle, and each time it has lost."
>
> There is also ample evidence that the 2013 Legislature knew of the discrimination that tainted its 2011 maps. "The 2013 plans were enacted by a substantially similar Legislature with the same leadership only two years after the original enactment." The Legislature was also well aware that "the D.C. court concluded that [its 2011] maps were

> tainted by evidence of discriminatory purpose," and despite the District Court having warned of the potential that the Voting Rights Act may require further changes to the maps, "the Legislature continued its steadfast refusal to consider [that] possibility."
>
> Turning to deliberative process—on which the majority is singularly focused, to the exclusion of the rest of the factors analyzed in the orders below—the District Court concluded that Texas was just "not truly interested in fixing any remaining discrimination in the [maps]." Despite knowing of the discrimination in its 2011 maps, "the Legislature did not engage in a deliberative process to ensure that the 2013 plans cured any taint from the 2011 plans." . . . The Legislature made no substantive changes to the challenged districts that were the subject of the 2011 complaints, and "there is no indication that the Legislature looked to see whether any discriminatory taint remained in the plans." . . .
>
> The absence of a true deliberative process was coupled with a troubling sequence of events leading to the enactment of the 2013 maps. Specifically, "the Legislature pushed the redistricting bills through quickly in a special session," despite months earlier having been urged by the Texas attorney general to take on redistricting during the regular session. By pushing the bills through a special session, the Legislature did not have to comply with "a two-thirds rule in the Senate or a calendar rule in the House," and it avoided the "full public notice and hearing" that would have allowed "'meaningful input' from all Texans, including the minority community."

Abbott, 138 S. Ct. at 2346–48.

Who has the better of this dispute? Is it fair to infer discriminatory intent when (1) a legislature is found guilty of intentional discrimination when it originally passes a map; (2) a court orders an interim remedial plan to be used; and (3) the legislature then enacts a new map that largely follows the contours of the interim remedial plan? Additionally, how common is this scenario? Especially now that Section 5 is a dead letter thanks to *Shelby County*, how often will legislatures find themselves in the position of deciding whether to ratify a court-drawn map?

ADD THE FOLLOWING AFTER NOTE 4 ON PAGE 372:

On remand from the Supreme Court, the lower court held that eleven Virginia state house districts were unconstitutional racial gerrymanders. The lower court based its conclusion that race predominated in the construction of these districts on the state's use of a 55 percent black voting age population target as well as extensive district-specific evidence. The court also ruled that the districts could not survive strict scrutiny because, above all, the 55 percent target was unnecessary for compliance with either Section 2 or Section 5 of the Voting Rights Act. See *Bethune-Hill v. Va. State Bd. of Elections*, __ F. Supp. 3d __, 2018 WL 3133819 (E.D. Va. 2018).

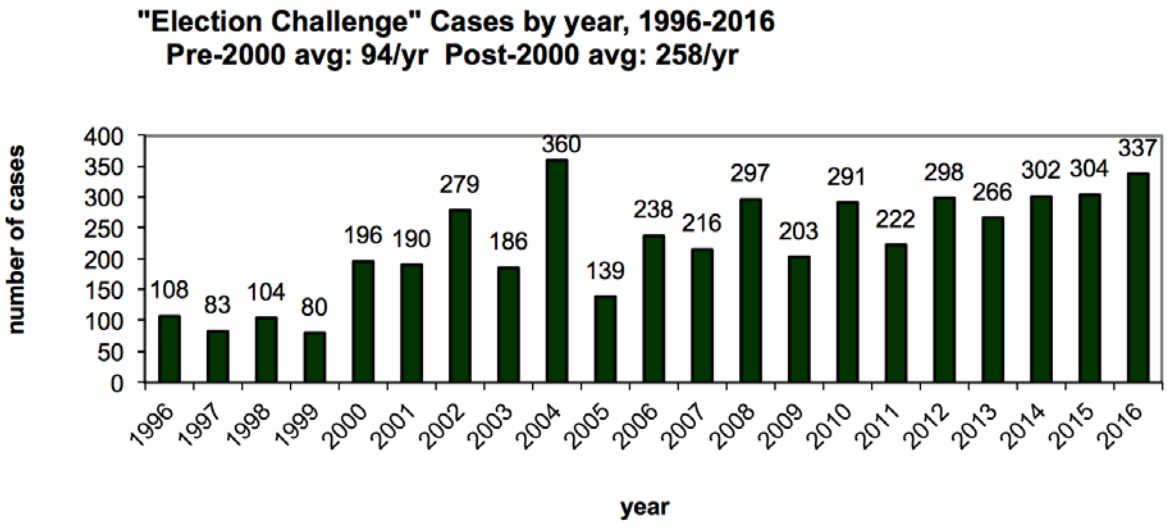
Chapter 6. Election Administration and Remedies

REPLACE NOTE 9 ON PAGE 397 WITH THE FOLLOWING:

9. *Increased Election Litigation.* Election litigation has increased substantially since 2000. Consider Figure 6.2, which shows that the number of election-related cases in the pre-2000 period was just 94 per year, compared to an average of 258 cases per year from 2000-2016.

We discuss two of the most active subjects of litigation – voting technology and voter identification – in Sections B and C.

Figure 6.2 "Election Challenge" Cases per Year: 1996-2016



Richard L. Hasen, *The 2016 Voting Wars: From Bad to Worse*, 26 WILLIAM & MARY BILL OF RIGHTS JOURNAL 629, 630 (2018).

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 443:

The federal court in New Jersey finally terminated the consent decree against Republican ballot security measures, which had been in effect for more than three and one-half decades. *Democratic National Committee v. Republican National Committee*, Order (Jan. 8, 2018), available at http://electionlawblog.org/wp-content/uploads/consent-order.pdf. For a discussion of the concerns arising from the lifting of this decree, see Richard L. Hasen, *Vote Suppressors Unleashed*, SLATE, Nov. 27, 2017, http://www.slate.com/articles/news_and_politics/jurisprudence/2017/11/donald_trump_will_supercharge_voter_suppression_if_the_rnc_consent_decree.html. The case is on appeal to the Third Circuit, No. 18-01215.

ADD THE FOLLOWING AT THE END OF NOTE 6 ON PAGE 444:

In *Veasey v. Abbott*, 888 F.3d 792 (5th Cir. 2018), a divided panel of the Fifth Circuit reversed an injunction against a revised version of Texas's voter ID law. After Texas's 2011 law was enjoined, the legislature adopted a modified version in 2017. The new law allows voters without the requisite identification to cast a ballot if they swear or affirm under penalty of perjury that they face a "reasonable impediment" to obtaining some form of compliant identification. *Id.* at 796–97. The law also prohibits election officials from questioning whether the claimed impediment is reasonable. *Id.*

Two of the three judges on the Fifth Circuit panel voted to reverse the order enjoining Texas's 2017 ID law. Writing only for herself, Judge Jones thought that the district court erred in finding the new law "tainted" by the discriminatory purpose behind the old law. *Id.* at 801-02. Judge Higginbotham concurred, reasoning that the district court had erred in enjoining the new law "without any suggestion of its independent invalidity." *Id.* at 805. Judge Graves dissented, agreeing with the district court that the new ID law was motivated by racially discriminatory intent. *Id.* at 807.

The new *Veasey* decision raises the question whether invidious intent may be presumed, when a court enjoins one voting statute on the basis of its discriminatory purpose and the legislature then enacts a different one in its place. In a recent redistricting case, the Supreme Court concluded that it was inappropriate to presume that a new law is tainted by racial discrimination merely because a similar prior law was motivated by discriminatory intent. *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (discussed *supra* Chapter 5 of this Supplement).

For more on voting rights litigators' shift toward discriminatory intent claims, see Danielle Lang and J. Gerald Hebert, *A Post-*Shelby *Strategy: Exposing Discriminatory Intent in Voting Rights Litigation*, 127 YALE LAW JOURNAL FORUM 779 (2018). For a discussion of the difficulties and limitations inherent in an approach focused on discriminatory intent, see Franita Tolson, *Election Law "Federalism" and the Limits of the Antidiscrimination Framework*, 59 WILLIAM & MARY LAW REVIEW 2211 (2018).

ADD THE FOLLOWING AFTER THE CARRYOVER PARAGRAPH ON PAGE 450, JUST BEFORE "***4. The Help America Vote Act***"

In a 5-4 decision, the U.S. Supreme Court upheld Ohio's practice of using the failure to vote as a basis for initiating the removal of voters from the rolls. *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833 (2018). Under Ohio's process, registered voters are sent a notice if they do not vote during a two-year period. Voters who fail to either respond to that notice or to vote in the next two federal election cycles are then removed from the rolls.

The relevant section of the NVRA provides that "[a]ny State program or activity to protect the integrity of the electoral process … shall not result in the removal of the name of any person from the official list of voters . . . by reason of the person's failure to vote . . . . " 52 U.S.C. § 20507(b). This provision, which the Court referred to as the "Failure–to–Vote Clause," includes

an exception for voter removal programs relying on change-of-address information from the U.S. Post Office and the failure to vote after a notice from election authorities.

Writing for the five-justice majority in *Husted*, Justice Alito explained:

> We reject [plaintiffs'] argument because the Failure–to–Vote Clause … simply forbids the use of nonvoting as the sole criterion for removing a registrant, and Ohio does not use it that way. Instead, . . . Ohio removes registrants only if they have failed to vote *and* have failed to respond to a notice . . . .
>
> [Ohio's system] does not strike any registrant solely by reason of the failure to vote. Instead, as expressly permitted by federal law, it removes registrants only when they have failed to vote *and* have failed to respond to a change-of-residence notice.

Husted, 138 S. Ct. at 1842–43.

Four justices dissented. Writing for the dissenters, Justice Breyer expressed the view that Ohio's process violated the NVRA because "under it, a registrant who fails to vote in a single federal election, fails to respond to a forwardable notice, and fails to vote for another four years may well be purged. If the registrant had voted at any point, the registrant would not have been removed." *Id.* at 1854 (Breyer, J., dissenting) (internal citation omitted).

Meanwhile, back in Kansas, the federal district court enjoined a state law requiring documentary proof of citizenship from those seeking to register. *Fish v. Kobach*, __ F. Supp. 3d __, 2018 WL 3017768 (D. Kan. June 18, 2018). After a bench trial, the district court concluded that the law violated both the NVRA and the constitutional right to vote. Rejecting Kansas's argument that the evidence of noncitizen voting was "the tip of the iceberg," the court found "that there is no iceberg; only an icicle, largely created by confusion and administrative error." *Id*. at *42. Kansas has appealed to the Tenth Circuit, No. 18-3134.

ADD THE FOLLOWING NOTE AFTER NOTE 5 ON PAGE 472:

6. A recurrent question in election administration is what should be done when a natural disaster, terrorist attack, or other emergency disrupts an election that has already begun. A recent article finds that, when such events occur, courts are often asked to intervene without clear standards to guide them. Michael T. Morley, *Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks*, 67 EMORY LAW JOURNAL 545 (2018). Professor Morley argues that courts should generally be reluctant to extend voting hours for run-of-the-mill problems like bad weather or power outages. The better approach, he suggests, is for states to adopt laws providing clear criteria for when election officials should take remedial action in response to emergencies.

Chapter 7. Ballot Propositions

ADD THE FOLLOWING AS THE LAST PARAGRAPH IN THE CHAPTER:

Note that *Arizona State Legislature* was a 5-4 decision and that one of the Justices in the majority, Justice Kennedy, recently retired from the Supreme Court. What is the likelihood that the case will remain good law going forward? There will be no shortage of opportunities to challenge it soon since we are rapidly approaching the next redistricting cycle, in which an array of commissions with responsibility for congressional plans will release new maps.

Chapter 8. Major Political Parties

ADD THE FOLLOWING NOTE ON PAGE 599, AFTER NOTE 2:

3. One of the arguments for a "top two" primary like that upheld in *Washington State Grange* is that it could mitigate political polarization. The theory is that moderate candidates are more likely to make it out of a top two primary than a traditional party primary. A recent study, however, finds mixed evidence on whether a top two primary system actually promotes moderation. Eric McGee & Boris Shor, *Has the Top Two Primary Elected More Moderates?*, 15 PERSPECTIVES ON POLITICS 1053 (2017). Looking at California and Washington, two states which use a top-two primary, the authors find an "inconsistent effect." There was greater evidence of moderation in California than in Washington, but that could be explained by a contemporaneous policy change: the use of an independent redistricting commission to draw district lines, which resulted in more competitive districts.

4. A recent Tenth Circuit case addresses the extent to which a state political party has a constitutional right to determine how its candidates are selected. The Utah Republican Party has traditionally begun its candidate selection process with a convention. If one candidate gained over 60 percent of the convention vote, then that candidate would appear on the general election ballot as the party's nominee. If no candidate reached that threshold, then the top two vote-getters at the party convention would appear on the primary ballot.

In 2014, Utah's overwhelmingly Republican legislature approved an alternative pathway to the primary ballot. Under this new law, candidates may now qualify by gathering a prescribed number of signatures. The Utah Republican Party challenged this law, alleging that it infringed on its First Amendment right of association. A majority of the Tenth Circuit rejected the Utah Republican Party's challenge, concluding that the state's interests in managing elections—increasing participation, and enhancing access to the ballot—outweighed the "minimal" burden on political parties' associational rights. *Utah Republican Party v. Cox*, 885 F.3d 1219 (10th Cir. 2018). Chief Judge Tymkovich dissented in part, finding evidence that the 2014 law was intended to "change the *substantive type* of candidates the Party nominates, all the while masquerading as mere *procedural* reform." *Id.* at 1246 (Tymkovich, C.J., concurring in part and dissenting in part). The Tenth Circuit subsequently denied rehearing en banc, with Chief Judge Tymkovich urging that the U.S. Supreme Court reconsider its approach to major parties' associational rights embodied in cases like *California Democratic Party v. Jones*:

> The behemoth, corrupt party machines we imagine to have caused the progressive era's turn to primaries are now, in many respects, out of commission. In important ways, the party system is the weakest it has ever been—a sobering reality given parties' importance to our republic's stability. And given new evidence of the substantial associational burdens, even distortions, caused by forcibly expanding a party's nomination process, a closer look seems in order. The time appears ripe for the Court to reconsider (or rather, as I see it, consider for the first time) the scope of government regulation of political party primaries and the attendant harms to associational rights and substantive ends.

892 F.3d 1066, 1072 (10th Cir. 2018) (Tymkovich, C.J., concurring in denial of rehearing en banc).

Do you agree that a reconsideration of major parties' associational rights is in order? If so, how should courts think about those rights?

ADD THE FOLLOWING ON PAGE 600, IMMEDIATELY BEFORE PART IV:

A recent essay criticizes the U.S. Supreme Court's approach to the associational rights of major parties:

> The Court has long determined that, with respect to political parties, First Amendment rights ought to be allocated in ways that promote democratic values and good governance. Unfortunately, in doing so, it has adopted a set of theoretical assumptions that do not hold true in the real world of contemporary politics. Known in the literature as "responsible party government," the theory, which, as it happens, also accounts for the specifics of the recent calls for party reform, presumes that electoral accountability emerges from the choice between ideologically distinct political parties during competitive elections.
>
> Responsible party government theory underpins the Court's jurisprudence on the First Amendment rights of political parties. It is responsible party government that explains not only why current constitutional doctrine entrenches the two-party system but also why it invariably sides with the leaders of the two major parties when internal disputes arise. …
>
> The commitment to responsible party government in the Court's jurisprudence, and also among party reformers, is a colossal mistake. Responsible party government has not panned out. The political parties are stronger and more ideologically distinct than in any prior era. Yet, responsible party government has not emerged. …

Tabatha Abu El-Haj, *Networking the Party: First Amendment Rights and the Pursuit of Responsive Party Government*, 118 COLUMBIA LAW REVIEW 1225 (2018).

Professor Abu El-Haj advocates a different kind of constitutional analysis, under which courts would focus on "a party's capacity to mobilize broad and representative political participation and facilitate a two-way street of information transmission through party activists." *Id.* at 1234. The idea is to enhance the political parties' ability to function as effective civic associations, allowing for interaction between party elites and the broader electorate. *Id.* at 1300. Is Professor Abu El-Haj's critique of the Court's jurisprudence persuasive? Is her alternative vision realistic?

Chapter 9. Third Parties and Independent Candidates

ADD THE FOLLOWING TO NOTE 1, AT THE BOTTOM OF PAGE 638:

For a recent decision taking a more deferential approach to state ballot access requirements for third party candidates, see *Tripp v. Scholz*, 872 F.3d 857 (7th Cir. 2017). The Seventh Circuit rejected Green Party members' constitutional challenge to Illinois's law requiring that new political parties' candidates obtain petition signatures equal to five percent of the total number of votes cast in the last state legislative district election to appear on the general election ballot. Even considered alongside additional requirements that petition sheets be notarized and that petitions be gathered in a 90-day period, the court found that Illinois's signature requirement did not impose a severe burden. The court went on to conclude that the state's interests in preventing ballot overcrowding, voter confusion, and circulator fraud justified these requirements.

Chapter 10. Campaigns

ADD THE FOLLOWING AFTER NOTE 13 ON PAGE 698:

14. We have focused thus far on the campaign speech of candidates, parties, committees, and others who are involved in promoting or opposing candidates or ballot measures. Campaigns end when voters cast their ballots and many state laws bar certain forms of electioneering in or near polling places in the moments before that ballot is cast. The idea is that voters should have a chance to cast their ballot free from undue pressure or intimidation.

In *Burson v. Freeman*, 504 U.S. 191 (1992), a case cited in a few of the principal cases in this chapter, the Supreme Court upheld against a First Amendment challenge to Tennessee's ban on certain forms of electioneering within 100 feet of polling place entrances. This was a rare case in which (a plurality of) the Court upheld the constitutionality of a law under strict scrutiny review.

The Court applied *Burson* and struck down a Minnesota ban on "political" apparel in polling places in *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018). Among other things, the state law provided that a "political badge, political button, or other political insignia may not be worn at or about the polling place on primary or election day." The case arose from a complaint of a Tea Party group, the Minnesota Voters Alliance, that in 2010 sent its members to vote wearing political paraphernalia, including T-shirts containing Tea Party messages such as "Don't tread on me" and a button saying "Please I.D. Me," even though Minnesota has no voter-ID law. Poll workers asked the voters to cover up their political messages because of a state law banning electioneering at and around polling places.

The Court recognized that the state "may reasonably take steps to ensure that partisan discord not follow the voter up to the voting booth, and distract from a sense of shared civic obligation at the moment it counts the most." *Id.* at 1888. But it held the Minnesota statute unconstitutionally overbroad, viewing the great discretion afforded election officials to determine improper apparel a violation of the First Amendment. The court asked, "Would a 'Support Our Troops' shirt be banned, if one of the candidates or parties had expressed a view on military funding or aid for veterans? What about a '#MeToo' shirt, referencing the movement to increase awareness of sexual harassment and assault?" *Id*. at 1890.

Mansky affirmed that a state "may prohibit messages intended to mislead voters about voting requirements and procedures," but noted that the state excluded the "Please I.D. Me" buttons because they were political, not because they were misleading. *Id*. at 1889 n.4.

The Court offered as permissible alternatives other, rather broad state laws that prohibit electioneering, including a Texas statute banning "a badge, insignia, emblem, or other similar communicative device relating to a candidate, measure, or political party appearing on the ballot, or to the conduct of the election" at polling places and within 100 feet of them. Texas Elections Code § 61.010. The Court added that such laws do not necessarily set the "outer limit" of what states may proscribe. *Mansky*, 138 S. Ct. at 1891.

As we will see in Chapters 12-14, the "relating to" language used in the Texas statute to separate campaign speech from non-campaign speech is much broader than the language the Court has demanded of campaign finance laws to comply with the First Amendment. Why the more permissive approach to laws regulating campaign speech as opposed to campaign spending?

If someone walks into a polling place in 2018 wearing a "Make America Great Again" hat (during an election in which President Donald Trump is not up for reelection), does that violate the Texas statute? Does the Texas statute solve the overbreadth problem the Court objected to in the Minnesota case?

ADD THE FOLLOWING TO THE END OF NOTE 1 ON PAGE 741:

Declaring that "*Williams-Yulee* marked a palpable change in the approach to state regulations of judicial-campaign speech—a change perhaps best exemplified by our unanimous en banc decision in *Wolfson*," a unanimous Ninth Circuit panel in *French v. Jones*, 876 F.3d 1228, 1235 (9th Cir. 2017) rejected a judicial candidate's challenge to a Montana rule barring such candidates from seeking, accepting, or using political endorsements in their campaigns. (Montana did not bar political parties from endorsing those candidates.) Applying post-*Williams-Yulee* strict scrutiny, the court held that two compelling interests justified Montana's rule:

> The first is an interest in both actual and perceived judicial impartiality . . . . [The rule] furthers a second interest that might be more compelling still: a related but distinct interest in a *structurally* independent judiciary. See *Wolfson*, 811 F.3d at 1186–88 (Berzon, J., concurring). If judicial candidates, including sitting judges running for reelection, regularly solicit and use endorsements from political parties, the public might view the judiciary as indebted to, dependent on, and in the end not different from the political branches.

French, 876 F.3d. at 1237–38.

The court rejected the candidate's under-inclusiveness and overbreadth arguments in light of *Williams-Yulee* and *Wolfson*, suggesting they would have fared better if analyzed solely under *White*. The Supreme Court declined to hear the case. 138 S. Ct. 1598 (2018).

A federal district court in Alabama tentatively barred enforcement of another judicial canon in *Parker v. Judicial Inquiry Commission of Alabama*, 295 F. Supp. 3d 1292 (M.D. Ala. 2018). A member of the Alabama Supreme Court and candidate for that court's chief justice challenged an Alabama rule which provided, among other things, that "a judge should abstain from public comment about a pending or impending proceeding in any court." Ala. Canon of Judicial Ethics 3A(6). A complaint had been filed against the state justice for making comments on a talk radio program about legal questions then pending before his court concerning the effects of the U.S. Supreme Court's decision on same-sex marriage in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

Citing the Ninth Circuit's claim in *French* that *Williams-Yulee* significantly changed the constitutional calculus, the Alabama Court said *Williams-Yulee* was not a "reversal" of *White* and that *White and Williams-Yulee*, while in tension, must be read together. *Parker*, 295 F. Supp. 3d at

1301–02. The court agreed the government had a compelling interest in preserving public confidence in the integrity and impartiality of the state's judiciary. *Id.* at 1302–03. But it found the Alabama rule impermissibly over-inclusive and overbroad because the rule barred discussion of pending and impending judicial proceedings in *any* court, and it was not clear that discussion of issues pending in other courts would affect public confidence in the Alabama judiciary. *Id.* at 1305–07.

The court issued a preliminary injunction enjoining Alabama from enforcing the rule "to the extent that it proscribes public comment by a judge that cannot reasonably be expected to affect the outcome or impair the fairness of a proceeding in Alabama." *Id*. at 1313. Doesn't the federal court order raise its own vagueness problems? Can a judicial candidate in Alabama speak about a pending U.S. Supreme Court case on LGBT rights and religious liberties, when cases involving that issue could well be before Alabama courts in the near future?

Chapter 11. Bribery

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 805:

In the wake of *McDonnell*, one high-profile bribery prosecution ended in charges being dropped. Senator Robert Menendez (D-NJ) was indicted for his interactions with a longtime friend, Dr. Salomon Melgen. The government alleged that Dr. Melgen made gifts and contributions to political committees in exchange for political favors from Senator Menendez. Their 2017 trial ended in a hung jury. Prosecutors announced their intention to retry the defendants, but changed their mind after a ruling from the district court that relied heavily on *McDonnell*. The court in *United States v. Menendez*, 291 F. Supp. 3d 606 (D.N.J. 2018), allowed some of the bribery counts to stand, but granted defendants' motion for acquittal on those involving political contributions, on the ground that there was insufficient evidence of a *quid pro quo*. In particular, the court concluded that a "close temporal relationship between political contributions and favorable official action, without more, is not sufficient" to prove a *quid pro quo*. *Id.* at 624. A few days later, the government announced it was dropping all charges against the defendants.

On the other hand, another high-profile bribery case led to a retrial and conviction. Former New York Assembly Speaker Sheldon Silver allegedly received referral fees through a law firm with which he was affiliated in exchange for taking official actions that benefitted a cancer researcher and real estate developers. The Second Circuit vacated his first conviction based on a jury instruction on "official acts" that resembled the one invalidated in *McDonnell*. *United States v. Silver*, 864 F.3d 102 (2nd Cir. 2017). Silver was retried and, after a more specific jury instruction on official action, was again convicted. Benjamin Weiser, *Sheldon Silver Is Convicted in 2nd Corruption Trial*, N.Y. TIMES, May 11, 2018.

Chapter 13. Spending Limits

ADD THE FOLLOWING AFTER NOTE 3 ON PAGE 947:

3.5. The question of foreign spending in U.S. elections took on new urgency after extensive reports of foreign (especially Russian government) interference in the 2016 elections. As explained in Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMENDMENT LAW REVIEW 200, 206–07 (2018):

> As part of a larger effort to influence the 2016 presidential election and U.S. politics, Russia undertook an extensive propaganda effort, which included publishing negative stories about [Democratic presidential candidate Hillary] Clinton and U.S. interests as well as inflaming passions and spreading false stories aimed at influencing the outcome of the election in Trump's favor. "For example, [Russian news website] Sputnik published an article that said the [John] Podesta email dump included certain incriminating comments about the Benghazi scandal, an allegation that turned out to be incorrect. Trump himself repeated this false story" at a campaign rally.
>
> Sources allied with the Russian government paid at least $100,000 to Facebook to spread election-related messages and false reports to specific populations (a process called "microtargeting"), including aiming certain false reports at journalists who might be expected to further spread the propaganda and misinformation. Russia and others also used automated "bots" to spread and amplify false news across social media platforms such as Facebook and Twitter.

But, according to Hasen, it was not clear how much of this activity violated the current federal ban on foreign spending in U.S. elections or, if federal law were amended to prohibit such activity, whether the Supreme Court would strike down some of the prohibitions as inconsistent with the First Amendment:

> After investigation, Facebook announced finding at least $100,000 in spending from sources connected to the Russian government on roughly 3,000 ads intended to influence the election. The ads reached at least 10 million people (44% before the 2016 election) and some focused on social controversies over immigration rights, gun rights, and racial justice.
>
> If Russia paid for these ads without coordinating with any campaign, then it almost certainly did not violate current federal campaign finance law as to most of the ads.[74] Further, laws that would bar Russia from placing these ads could well be found at least partially unconstitutional under the First Amendment as the Supreme Court currently construes it.
>
> Federal law bars foreign nationals, including foreign governments, from making expenditures, independent expenditures, and electioneering communications in connection

[74] See 52 U.S.C. § 30121(a)(1)(A) (2012). If the activity was done in consultation with a campaign, this would constitute an impermissible "contribution" of a "thing of value" in violation of the statute.

with a "Federal, State or local election."[75] However, it is at best uncertain whether independent online ads that do not expressly advocate the election or defeat of candidates are covered by the foreign expenditure ban.[76] For example, a Russian ad promoting a Black Lives Matter rally, but not mentioning or showing a candidate for office, likely would not be considered an election ad under current law, which does not cover pure issue advocacy even if intended to influence election outcomes.

These advertisements also would not be covered under proposed federal legislation, the "Honest Ads Act," which would extend rules barring foreign spending on television or radio "electioneering communications" to communications via digital outlets like Facebook.[78] Electioneering communications must feature the name or likeness of a candidate for office to be covered.

Even if Congress passed a statute purporting to make illegal all of the activity Russians engaged in during the 2016 election, such a statute would likely run into First Amendment resistance. After the Supreme Court decided *Citizens United* . . . the Court summarily affirmed a lower court decision in *Bluman v. Federal Election Commission*. *Bluman* upheld a federal law barring foreign nationals—in the case of Benjamin Bluman, a foreign national working in New York on a temporary work visa—from spending even fifty cents to print and distribute flyers expressly advocating the reelection of President Obama.

Bluman seems to indicate that, despite tensions with the holding in *Citizens United* that the identity of the speaker does not matter for First Amendment purposes, the government has a compelling interest in banning foreign spending in our elections…

But the *Bluman* court, in an opinion by conservative-libertarian D.C. Circuit judge Brett Kavanaugh, narrowly construed the foreign spending ban to cover only express advocacy and not issue advocacy. "This statute, as we interpret it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate." Indeed, three FEC Republican commissioners relied upon this dicta from *Bluman* in voting to hold that the foreign spending ban does not apply to ballot measure elections.

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[75] *Id.* § 30121 (establishing foreign contribution and spending ban); *Id.* § 30101(8)(a) (defining contribution).

[76] Spending to influence an election which appears on the Internet but which lacks words of express advocacy cannot count as an "electioneering communication" (which must be a broadcast, cable or satellite communication under 52 U.S.C. § 30104(f)(3) (2012)) or an independent expenditure (which must contain words of express advocacy pursuant to the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976)), 52 U.S.C. § 30101(17) (2012). The foreign spending ban, however, also prohibits a foreign national, including a foreign government, from making "an expenditure," *id.* § 30121(a)(1)(C), which includes "any purchase . . . made by any person for the purpose of influencing any election for Federal office," *id.* §30101(9)(A)(1). Money to pay bots or otherwise to spread fake news on Facebook with an intent to influence the U.S. election would appear to be an expenditure under this definition, but such an argument may run into constitutional problems that I discuss in the text.

[78] H.R. 4077, 115th Cong., 1st Sess., § 6 (as introduced by Rep. Kilmer & Rep. Coffman, Oct. 19, 2017) (expanding the definition of electioneering communications to cover digital advertising).

> While this interpretation is not free from doubt—the statute is written broadly to cover all expenditures and not just independent expenditures—it seems like the kind of interpretation likely to be favored by the current Supreme Court.
>
> Indeed, it is not clear that the courts would accept a more clearly written foreign spending ban going beyond express advocacy and electioneering communications to cover foreign-funded ads meant to stir social unrest without using candidates' names or likenesses. These ads should be covered, not because they necessarily contain false speech, but because they constitute a foreign government's interference with American self-government.

Hasen, *supra*, at 217–19.

Do you agree? Should a statute barring foreign interference be able to ban more than express advocacy and electioneering communications by foreign individuals, governments, and entities? Just governments? What about foreign media corporations? If *The Guardian* newspaper from Great Britain editorializes in favor of a candidate for U.S. President, should it be allowed to post a link to that endorsement via a paid Facebook ad targeted at U.S. readers?

Judge Kavanaugh, the author of the unanimous *Bluman* opinion, has been nominated to the Supreme Court by President Trump. Would his confirmation increase or decrease the chances of the Court construing the foreign spending ban to apply only to express advocacy?

Chapter 14. Contribution Limits

ADD THE FOLLOWING TO THE END OF NOTE 2 ON PAGE 984:

Courts continue to uphold low contribution limits despite *Randall*. The Fifth Circuit upheld Austin, Texas's individual campaign contribution limit of $300 indexed to inflation (and raised to $350 by the time of the lawsuit) against claims that it was unconstitutionally low under *Randall*. *Zimmerman v. City of Austin*, 881 F.3d 378, 387–88 (5th Cir. 2018). The court did not weigh in on another provision of Austin's law, passed by voter initiative, which prohibited candidates from accepting, in the aggregate, more than $36,000 (or $24,000 in a runoff) in contributions from sources other than natural persons living in the Austin city limits. It held the candidate did not have standing to raise the argument. *Id*. at 388.

The Fifth Circuit declined rehearing en banc on the constitutionality of Austin's $350 individual contribution limit. One of the Circuit's newest judges, James C. Ho, a former clerk to Justice Clarence Thomas, dissented from the denial of en banc rehearing. Joined by Judge Edith Jones, Judge Ho argued that the court should not have relied upon *Shrink Missouri* at all and that, under the *Randall* plurality test, the Austin limits were unconstitutional. *Zimmerman v. City of Austin*, 888 F.3d 163, 165–66 (5th Cir. 2018) (Ho, J., dissenting from denial of rehearing en banc).

Judge Ho then offered additional arguments that some new challengers could raise against Austin's limits in a future case. *Id*. at 166-68. After explaining why he believed, following Justice Thomas, that all campaign finance contribution limits violated the First Amendment, *id*. at 168-69, he suggested the problem was not money in politics but rather too much government:

> To be sure, many Americans of good faith bemoan the amount of money spent on campaign contributions and political speech. But if you don't like big money in politics, then you should oppose big government in our lives. Because the former is a necessary consequence of the latter. When government grows larger, when regulators pick more and more economic winners and losers, participation in the political process ceases to be merely a citizen's prerogative—it becomes a human necessity. This is the inevitable result of a government that would be unrecognizable to our Founders.
>
> So if there is too much money in politics, it's because there's too much government. The size and scope of government makes such spending essential.

Zimmerman, 888 F.3d at 170.

Should federal judges be opining on the size of government in their opinions? What do you think of Judge Ho's argument on the merits?

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 1031:

The Supreme Court may soon have the opportunity to explore the fourth question listed above regarding the evidence necessary to support the constitutionality of a campaign finance contribution limit. In *Lair v. Motl*, 873 F.3d 1170 (9th Cir. 2017), a divided Ninth Circuit panel

upheld Montana's campaign contribution limits against constitutional challenge. The court had upheld the limits in an earlier case, *Montana Right to Life Ass'n v. Eddleman*, 343 F.3d 1085 (9th Cir. 2003), and after the Supreme Court decided *Randall*, plaintiffs renewed their challenge in the *Lair* case. Among the arguments plaintiffs raised was that there was insufficient evidence of quid pro quo corruption or its appearance in Montana to justify the law. The *Lair* majority disagreed, relying on the test it set out in *Eddleman*:

> Montana's evidence shows the threat of actual or perceived quid pro quo corruption in Montana politics is not illusory. State Representative Hal Harper testified groups "funnel[] more money into campaigns when certain special interests know an issue is coming up, because it gets results." State Senator Mike Anderson sent a "destroy after reading" letter to his party colleagues, urging them to vote for a bill so a PAC would continue to funnel contributions to the party:
>
> > Dear Fellow Republicans. Please destroy this after reading. Why? Because the Life Underwriters Association in Montana is one of the larger Political Action Committees in the state, and I don't want the Demo's to know about it! In the last election they gave $8,000 to state candidates. … Of this $8,000—Republicans got $7,000—you probably got something from them. This bill is important to the underwriters and I have been able to keep the contributions coming our way. In 1983, the PAC will be $15,000. Let's keep it in our camp.
>
> State Senator Bruce Tutvedt stated in a declaration that during the 2009 legislative session the National Right to Work group promised to contribute at least $100,000 to elect Republican majorities in the next election if he and his colleagues introduced and voted for a right-to-work bill in the 2011 legislative session. Finally, a state court found two 2010 state legislature candidates violated state election laws by accepting large contributions from a corporation that "bragged . . . that those candidates that it supported 'rode into office in 100% support of [the corporation's] . . . agenda."

Lair, 873 F.3d at 1179.

Judge Bea dissented, arguing that the majority's standard was inconsistent with Supreme Court precedent, including *McCutcheon*, and suggesting that all campaign contribution limits are unconstitutional. "Absent a showing of the existence or appearance of quid pro quo corruption based on objective evidence, the presence of a subjective sense that there is a risk of such corruption or its appearance does not justify a limit on campaign contributions." *Id*. at 1191 (Bea, J., dissenting).

The Ninth Circuit denied en banc rehearing, with five judges dissenting. 880 F.3d 571 (9th Cir. 2018) (en banc). Judge Ikuta, writing for the dissenters, argued that the Ninth Circuit's *Eddleman* test had been "swept away" by the Supreme Court's decisions in *Citizens United* and *McCutcheon*. *Id*. at 572 (Ikuta, J., dissenting from denial of rehearing en banc). "In light of the Supreme Court's clarification, a state can justify imposing regulations limiting individuals' political speech (via limiting political contributions) only by producing evidence that it has a real

problem in combating actual or apparent quid pro quo corruption." *Id*. at 574. Judge Ikuta wrote that a "risk" of corruption is not enough. *Id*. at 575.

Plaintiffs are expected to file a petition seeking Supreme Court review.

ADD THE FOLLOWING TO THE END OF THE SECOND FULL PARAGRAPH ON PAGE 1035:

The Fifth Circuit held unconstitutional an Austin, Texas law barring city candidates from soliciting or accepting campaign contributions within 180 days of an election. *Zimmerman v. City of Austin*, 881 F.3d 378, 393 (5th Cir. 2018). The court distinguished *Thalheimer* and an earlier Fourth Circuit case upholding temporal limits by noting that they predated *McCutcheon* and "upheld temporal limits on campaign contributions without any specific evidence that the timing of a contribution creates a risk of actual corruption or its appearance that is distinct from that created by the size of a contribution." *Id*. Such evidence is now required after *McCutcheon*, the *Zimmerman* court ruled.

Chapter 16. Disclosure

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 1144:

Lower courts continue to deal with a wide swath of cases challenging the constitutionality of various disclosure laws. In *Citizens United v. Schneiderman*, 882 F.3d 374 (2d Cir. 2018), the Second Circuit rejected the ideological group Citizens United's First Amendment challenge to a New York law requiring charities that solicit for contributions to disclose their donor information (already submitted to the Internal Revenue Service) to New York officials. The information is not made public. The court rejected the argument that disclosure to government officials would impermissibly chill political speech in general, or Citizens United's speech in particular. A federal district court reached the same conclusion as to a similar California law. *Center for Competitive Politics v. Harris*, 296 F. Supp. 3d 1219 (E.D. Cal. 2017). That case is currently on appeal to the Ninth Circuit, No. 17-17403.

Relatedly, courts have grappled with state and federal definitions of political committee status, which usually triggers enhanced disclosure requirements. For a recent example, see *Citizens for Responsibility and Ethics in Washington v. FEC*, 299 F. Supp. 3d 83 (D.D.C. 2018) (rejecting the FEC's refusal to treat groups which fund extensive electioneering communications as political committees).