

Election Law

Cases and Materials

SIXTH EDITION

2021 Supplement

Daniel Hays Lowenstein

PROFESSOR OF LAW EMERITUS
UNIVERSITY OF CALIFORNIA, LOS ANGELES
SCHOOL OF LAW

Richard L. Hasen

CHANCELLOR'S PROFESSOR OF LAW AND POLITICAL SCIENCE
UNIVERSITY OF CALIFORNIA, IRVINE
SCHOOL OF LAW

Daniel P. Tokaji

FRED W. & VI MILLER DEAN AND PROFESSOR OF LAW
UNIVERSITY OF WISCONSIN LAW SCHOOL

Nicholas Stephanopoulos

KIRKLAND & ELLIS PROFESSOR OF LAW
HARVARD LAW SCHOOL



CAROLINA ACADEMIC PRESS
Durham, North Carolina

Copyright © 2021
Carolina Academic Press, LLC.
All Rights Reserved.

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

This Supplement was written by Professors Hasen, Tokaji, and Stephanopoulos. The authors thank Katy Shanahan for her research and editorial assistance in connection with the 2018 Supplement, Hannah Bartlett in connection with the 2019 Supplement, Timothy Duong and Xuechun Wang in connection with the 2020 Supplement, and Anna Setyaeva and Alyx Bogus in connection with the 2021 Supplement.

Table of Contents

Chapter 3. Representation and Districting	5
Chapter 4. Partisan Gerrymandering and Political Competition	11
Chapter 5. Minority Vote Dilution	47
Chapter 6. Election Administration and Remedies	55
Chapter 7. Ballot Propositions	91
Chapter 8. Major Political Parties	93
Chapter 9. Third Parties and Independent Candidates	101
Chapter 10. Campaigns	103
Chapter 11. Bribery	107
Chapter 13. Spending Limits	109
Chapter 14. Contribution Limits	113
Chapter 15. Public Financing	117
Chapter 16. Disclosure	119

Chapter 3. Representation and Districting

ADD THE FOLLOWING TO THE END OF NOTE 20 ON PAGE 107:

The Supreme Court recently decided a different question concerning the 2020 Census, one that has major implications for the apportionment of U.S. Representatives among the states as well as for the drawing of districts within states. In 2018, Secretary of Commerce Wilbur Ross announced that question regarding citizenship would be added to the census questionnaire. The Census Bureau has asked some people questions about citizenship in the past, but in recent decades the question was asked as part of the American Community Survey (formerly known as the long-form questionnaire) that only a sampling of households receive, rather than the census questionnaire that all households receive. For background on the history of citizenship questions on the census, see Thomas P. Wolf and Brianna Cea, *A Critical History of the United States Census and Citizenship Questions*, 108 GEORGETOWN LAW JOURNAL ONLINE 1 (2019).

The Department of Commerce argued that addition of the citizenship question was needed to facilitate enforcement of the Voting Rights Act (VRA). Claims of minority vote dilution under Section 2 of the VRA often rely on evidence of how many voting-age *citizens* of different races and ethnicities live in different regions (see Chapter 5 of the Casebook). Opponents of the citizenship question argued that its addition would depress participation, especially among Latino households and those which include noncitizens, ultimately resulting in a less accurate count. They sued on multiple grounds, alleging that addition of the citizenship question would violate the Enumeration Clause of the U.S. Constitution, the Census Act, and the Administrative Procedures Act (APA). Three different district courts agreed with at least one of these claims, issuing injunctions against the question.

A federal district court in New York ruled that the Department of Commerce’s decision to add the citizenship question was “arbitrary and capricious.” In an opinion by Chief Justice Roberts, the Supreme Court reversed in part and affirmed in part, remanding the case to the district court for further proceedings. *Department of Commerce v. New York*, 139 S. Ct. 2551 (2019). Different groups of justices joined different portions of the Chief Justice’s majority opinion. In an opinion joined by the other conservative justices (Justices Thomas, Alito, Gorsuch, and Kavanaugh), the Court upheld the Department of Commerce’s authority to ask about citizenship under the Enumeration Clause. That Clause, according to the majority, gives Congress—and by implication, the Department of Commerce—broad authority to decide what questions to add as part of the Census. The same group of justices found that the stated reason for adding the question, that is was needed to enforce the VRA, was “reasonable and reasonably explained.” They also rejected the argument that the addition of the citizenship question violated the Census Act.

The Court nevertheless concluded that the Department of Commerce’s decisionmaking process violated the APA. A different group of justices formed the majority for this part of the opinion, with Justices Ginsburg, Breyer, Sotomayor, and Kagan joining the Chief Justice. The Court concluded that the Secretary’s decision “rested on a pretextual basis,” therefore justifying remand to the Department of Commerce. The Court relied on evidence showing that improved enforcement of the VRA was not the real reason for adding the citizenship question to the 2020 census:

CHAPTER 3. REPRESENTATION AND DISTRICTING

That evidence showed that the Secretary was determined to reinstate a citizenship question from the time he entered office; instructed his staff to make it happen; waited while Commerce officials explored whether another agency would request census-based citizenship data; subsequently contacted the Attorney General himself to ask if DOJ would make the request; and adopted the Voting Rights Act rationale late in the process. In the District Court’s view, this evidence established that the Secretary had made up his mind to reinstate a citizenship question “well before” receiving DOJ’s request, and did so for reasons unknown but unrelated to the VRA. . . .

The record shows that the Secretary began taking steps to reinstate a citizenship question about a week into his tenure, but it contains no hint that he was considering VRA enforcement in connection with that project. The Secretary’s Director of Policy did not know why the Secretary wished to reinstate the question, but saw it as his task to “find the best rationale.” The Director initially attempted to elicit requests for citizenship data from the Department of Homeland Security and DOJ’s Executive Office for Immigration Review, neither of which is responsible for enforcing the VRA. After those attempts failed, he asked Commerce staff to look into whether the Secretary could reinstate the question without receiving a request from another agency. The possibility that DOJ’s Civil Rights Division might be willing to request citizenship data for VRA enforcement purposes was proposed by Commerce staff along the way and eventually pursued.

Even so, it was not until the Secretary contacted the Attorney General directly that DOJ’s Civil Rights Division expressed interest in acquiring census-based citizenship data to better enforce the VRA. And even then, the record suggests that DOJ’s interest was directed more to helping the Commerce Department than to securing the data. The December 2017 letter from DOJ drew heavily on contributions from Commerce staff and advisors. Their influence may explain why the letter went beyond a simple entreaty for better citizenship data—what one might expect of a typical request from another agency—to a specific request that Commerce collect the data by means of reinstating a citizenship question on the census. Finally, after sending the letter, DOJ declined the Census Bureau’s offer to discuss alternative ways to meet DOJ’s stated need for improved citizenship data, further suggesting a lack of interest on DOJ’s part.

Altogether, the evidence tells a story that does not match the explanation the Secretary gave for his decision. In the Secretary’s telling, Commerce was simply acting on a routine data request from another agency. Yet the materials before us indicate that Commerce went to great lengths to elicit the request from DOJ (or any other willing agency). And unlike a typical case in which an agency may have both stated and unstated reasons for a decision, here the VRA enforcement rationale—the sole stated reason—seems to have been contrived.

We are presented, in other words, with an explanation for agency action that is incongruent with what the record reveals about the agency’s priorities and decisionmaking process. It is rare to review a record as extensive as the one before us when evaluating informal agency action—and it should be. But having done so for the sufficient reasons we

CHAPTER 3. REPRESENTATION AND DISTRICTING

have explained, we cannot ignore the disconnect between the decision made and the explanation given. Our review is deferential, but we are “not required to exhibit a naiveté from which ordinary citizens are free.” *United States v. Stanchich*, 550 F.2d 1294, 1300 (2nd Cir. 1977) (Friendly, J.). The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. Accepting contrived reasons would defeat the purpose of the enterprise. If judicial review is to be more than an empty ritual, it must demand something better than the explanation offered for the action taken in this case.

In these unusual circumstances, the District Court was warranted in remanding to the agency, and we affirm that disposition. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). We do not hold that the agency decision here was substantively invalid. But agencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action. What was provided here was more of a distraction.

Justices Thomas, Alito, Gorsuch, and Kavanaugh dissented from this portion of the Chief Justice’s majority opinion.

The majority concludes that enforcement of the VRA was not the Department of Commerce’s real reason for adding the citizenship question. What then was the real reason? The Court professes agnosticism on this question, saying that the reasons are “unknown.” But documents that came to light shortly before the Court’s decision shed some light on the answer. The documents came from the electronic files of the late Thomas B. Hofeller, a Republican political operative who has been referred to as the “Michelangelo of gerrymandering” for his role in designing redistricting plans favorable to the party. After his death in 2018, his estranged daughter turned over information from Hofeller’s hard drives to Common Cause, an advocacy group involved in cases challenging partisan gerrymandering. Michael Wines, *Deceased G.O.P. Strategist’s Hard Drives Reveal New Details on the Census Citizenship Question*, N.Y. TIMES, May 30, 2019.

The information from Hofeller’s hard drives included a 2015 analysis of how political representation would be affected if only citizens—rather than the entire population—were counted in drawing legislative districts. At the time, the plaintiffs in *Evenwel v. Abbott* (see *supra* note 12, pages 100-01 of the Casebook) were challenging Texas’s use of total population to divide the state into legislative districts. Hofeller’s analysis of Texas found that using only voting-age citizens (rather than total population) to draw districts “would be advantageous to Republicans and non-Hispanic whites.” The problem was that the detailed citizenship data needed to draw districts in this way was lacking. As Hofeller put it, “the use of citizen voting age population is functionally unworkable” without a citizenship question on the 2020 Census. *Id.*

This evidence suggests that the real reason—at least the main one—for adding the citizenship question to the 2020 Census was to allow Republican-dominated legislatures to equalize the voting-age citizen population instead of the total population when drawing districts. Drawing districts in this way would presumably advantage Republicans, while disadvantaging

CHAPTER 3. REPRESENTATION AND DISTRICTING

Democrats and Latino voters. Even before the Hofeller documents became public, some speculated that this was the real reason for the Department of Commerce wanting to add the citizenship question. See Justin Levitt, *Citizenship and the Census*, 119 COLUMBIA LAW REVIEW 1355 (2019); see also Jowei Chen & Nicholas O. Stephanopoulos, *Democracy's Denominator*, 109 CALIFORNIA LAW REVIEW 1011 (2021) (analyzing the redistricting implications of equalizing adult citizens rather than all persons and concluding that doing so would significantly reduce minority representation while diminishing Democratic representation only slightly).

While the Supreme Court remanded the case to the district court, its decision did not prohibit the Department of Commerce from trying again. Before the Supreme Court's decision, the government had informed the Court that the question whether to add the citizenship question to the 2020 census had to be resolved by June 2019. Immediately after the decision, President Trump announced that he had "asked the lawyers if they can delay the Census, no matter how long, until the United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter." It seemed quite possible that this approach might work. See Richard L. Hasen, *Donald Trump Is Promising to Fight the Census Case. That Might Actually Work*, SLATE, June 27, 2019, available at <https://slate.com/news-and-politics/2019/06/john-roberts-trump-census-question-supreme-court-october.html>. But the government ultimately decided to abandon its effort to add the citizenship question to the 2020 census. Ted Hesson, *Census to Leave Citizenship Question off 2020 Questionnaire*, POLITICO, July 2, 2019.

If the Department of Commerce had tried again, would that have been legally permissible? In addition to the APA issue, there is a question whether adding the citizenship question would be intentionally racially discriminatory, in violation of equal protection. Two days before the Supreme Court's decision in *Department of Commerce v. New York*, the Fourth Circuit remanded the Maryland case to the district court, for further proceedings on this question. *La Union del Pueblo Entero v. Ross*, 771 Fed. Appx 323 (4th Cir. 2019).

Suppose the Department of Commerce had tried again to add the citizenship question, asserting (as it did before) that the question is needed for enforcement of the VRA. Suppose further that the Department came forward with new evidence from reputable social scientists, asserting that the citizenship question will enhance enforcement of claims of minority vote dilution. Should the addition of this question be enjoined, on the ground that this rationale is pretextual, just as it was the first time? What if the Department of Commerce had admitted that enhancing Republican partisan advantage in the next round of redistricting is the real reason for adding the question? Given that partisan gerrymandering has now been deemed a nonjusticiable "political question" (see *Rucho v. Common Cause*, Chapter 4 of this Supplement), is it now permissible for the government to provide partisan justifications for its actions?

Notwithstanding his administration's defeat in *Department of Commerce v. New York*, President Trump issued a memorandum in July 2020 announcing a policy of excluding unlawful aliens from the apportionment count that is used to allocate U.S. House members among states. Under this policy, the Secretary of Commerce would use administrative records and other information to identify unlawful aliens and omit them from the apportionment count. In *Trump v. New York*, 141 S. Ct. 530 (2020), the Supreme Court ruled that a challenge to the policy was

CHAPTER 3. REPRESENTATION AND DISTRICTING

premature. “[T]he policy may not prove feasible to implement in any manner whatsoever,” the Court observed, rendering overly speculative any evaluation of how the policy might affect apportionment or funding flows. *Id.* at 535. In the event, the Trump administration was unable to complete the project of excluding unlawful aliens from the apportionment count before its term expired, and the incoming Biden administration quickly reversed the policy. *See* Exec. Order No. 13,986, 86 Fed. Reg. 7015, 7016 (Jan. 20, 2021).

In reporting data for redistricting to the states, the Census Bureau has announced that, for the first time, it will employ a procedure known as “differential privacy.” This is a statistical algorithm that randomly varies the population counts of small geographic units in order to prevent Census respondents’ identities from being identifiable. Alabama has filed a suit objecting to the use of differential privacy on the grounds that it violates the Census Act, the Administrative Procedure Act, and various constitutional provisions. *See Alabama v. Department of Commerce*, No. 3:21-cv-211-RAH-KFP, 2021 WL 1171873 (M.D. Ala. Mar. 26, 2021). Scholars have published reports on differential privacy reaching divergent conclusions on whether it would materially affect district plans’ partisan and racial characteristics. Compare Aloni Cohen et al., *Census TopDown: The Impacts of Differential Privacy on Redistricting* (Apr. 14, 2021) (no significant impact), with Christopher T. Kenney et al., *The Impact of the U.S. Census Disclosure Avoidance System on Redistricting and Voting Rights Analysis* (May 28, 2021) (significant impact).

CHAPTER 3. REPRESENTATION AND DISTRICTING

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).

DELETE THE MATERIAL FROM *VIETH V. JUBELIRER* ON PAGE 160 UP TO PART III ON PAGE 194, AND REPLACE WITH THE FOLLOWING:

The Long Partisan Gerrymandering Interregnum

After holding in *Bandemer* that partisan gerrymandering may violate the Constitution and is justiciable, too, the Court did not consider another case of this kind until *Vieth v. Jubelirer*, 541 U.S. 267 (2004). The plaintiffs in *Vieth* were Democratic voters in Pennsylvania who objected to the state's congressional plan, under which Republicans won a supermajority of the seats even though the state's voters were nearly evenly split between the parties. The plaintiffs also proposed a new test to replace the one adopted by the *Bandemer* plurality, which, as noted above, had proved impossible for litigants to satisfy. Under this test's intent prong, the predominant purpose for a district map had to be the pursuit of partisan advantage. See *id.* at 284 (plurality opinion). Under the test's effect prong, the cracking and packing of the targeted party's voters had to thwart their ability to translate a majority of votes into a majority of seats. See *id.* at 286-87.

A majority of the *Vieth* Court rejected as unworkable both the plaintiffs' proposal and several other suggested legal standards: (1) that adopted by the *Bandemer* plurality; (2) a district-specific predominant-partisan-intent requirement, offered by Justice Stevens; (3) a five-part approach modeled on the Court's racial vote dilution precedents and focusing on compliance with traditional districting criteria, offered by Justice Souter; and (4) a statewide test asking if a partisan minority has unjustifiably entrenched itself in power, offered by Justice Breyer. See *id.* at 277-301. A plurality of four Justices would also have reversed *Bandemer* and held that all partisan gerrymandering claims are nonjusticiable. We bracket the arguments for and against justiciability until our discussion of *Rucho v. Common Cause*, which largely echoed the debate in *Vieth*. The reason the *Vieth* plurality's nonjusticiability conclusion commanded the support of only four Justices was that Justice Kennedy declined to embrace that position.

In his concurrence in the judgment, Justice Kennedy floated a First Amendment theory of partisan gerrymandering. As we shall see, this theory enjoyed some traction until it was ultimately rejected in *Rucho*:

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

I note that the complaint in this case also alleged a violation of First Amendment rights. The First Amendment may be the more relevant constitutional provision in future cases that allege unconstitutional partisan gerrymandering. After all, these allegations involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views. Under general First Amendment principles those burdens in other contexts are unconstitutional absent a compelling government interest. . . . As these precedents show, First Amendment concerns arise where a State enacts a law that has the purpose and effect of subjecting a group of voters or their party to disfavored treatment by reason of their views. In the context of partisan gerrymandering, that means that First Amendment concerns arise where an apportionment has the purpose and effect of burdening a group of voters' representational rights.

The plurality suggests there is no place for the First Amendment in this area. The implication is that under the First Amendment any and all consideration of political interests in an apportionment would be invalid. That misrepresents the First Amendment analysis. The inquiry is not whether political classifications were used. The inquiry instead is whether political classifications were used to burden a group's representational rights. If a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest. . . .

Where it is alleged that a gerrymander had the purpose and effect of imposing burdens on a disfavored party and its voters, the First Amendment may offer a sounder and more prudential basis for intervention than does the Equal Protection Clause. The equal protection analysis puts its emphasis on the permissibility of an enactment's classifications. This works where race is involved since classifying by race is almost never permissible. It presents a more complicated question when the inquiry is whether a generally permissible classification has been used for an impermissible purpose. That question can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens. The First Amendment analysis concentrates on whether the legislation burdens the representational rights of the complaining party's voters for reasons of ideology, beliefs, or political association. The analysis allows a pragmatic or functional assessment that accords some latitude to the States.

Id. at 314-15 (Kennedy, J., concurring in the judgment) (internal citations omitted). If the crux of a First Amendment challenge is the mapmaker's partisan intent—"burdening or penalizing citizens because of . . . their association with a political party"—then would such a suit succeed whenever a single party has full control of the redistricting process and so is able to disadvantage its opponent? Alternatively, if a First Amendment claim requires both partisan intent and a "burden [on] a group's representational rights," then how is it different from an equal protection claim, which also includes intent and effect prongs?

Around the time of *Vieth*, the issue of *re*-redistricting—enacting a second district map in a decade, even though the initial map was lawful—arose in several states. In Colorado, the legislature changed a court-drawn congressional plan following a Republican victory in the 2002

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

election. The Colorado Supreme Court struck down the plan on state law grounds, ruling that the Colorado Constitution prohibited a second redistricting plan during the decade. *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (en banc), cert. denied *Colorado General Assembly v. Salazar*, 541 U.S. 1093 (2004). In New Hampshire, the legislature was unable to update its own districts after the 2000 election, so a court-drawn plan was used in 2002. The New Hampshire Supreme Court upheld under state law a plan that the new legislature adopted in 2004. *In re Below*, 855 A.2d 459 (N.H. 2004). The court held that the legislature had authority under the state constitution to adopt only a single plan each decade, but that its authority was not obviated by the occurrence of an election under a court-drawn plan.

The fiercest controversy was in Texas. As in Colorado and New Hampshire, a divided legislature and governor had failed to produce a congressional plan after the 2000 census. Republicans claimed that a court-drawn plan simply carried forward a Democratic gerrymander enacted in 1991. Republicans won control of the state government in the 2002 elections and decided to turn the tables. The nation was entertained by the spectacle of Democratic legislators fleeing to Oklahoma and New Mexico to prevent Republicans from obtaining a quorum. Eventually Republicans succeeded in passing their plan and Democrats challenged it on a number of grounds. We shall discuss one of these claims, under Section 2 of the Voting Rights Act, in Chapter 5, Part IV. More relevant here, Democrats argued that whatever the difficulty of finding constitutional standards in the case of ordinary redistricting addressed by *Vieth*, a mid-decade re-districting should be treated differently. Once a plan has been adopted that satisfies one-person, one-vote, no new plan is necessary. Therefore, a new plan adopted by a legislature controlled by one party should be treated as presumptively void.

The Supreme Court rejected this argument in *League of Unified Latin American Citizens v. Perry*, 548 U.S. 399 (2006) (*LULAC*). As in *Vieth*, Justice Kennedy wrote the pivotal opinion. In one paragraph joined by the four *Vieth* dissenters and therefore speaking for the Court, he stated that he would not revisit the holding of *Bandemer* that partisan gerrymandering claims are justiciable. Proceeding for himself only, Justice Kennedy disagreed with the plaintiffs that partisan gain is necessarily the “sole” motivation for re-redistricting. “Evaluating the legality of acts arising out of mixed motives can be complex, and affixing a single label to those acts can be hazardous.” *Id.* at 418 (opinion of Kennedy, J.). More fundamentally, Justice Kennedy objected to striking down maps because of their subjective purposes alone. “[A] successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants’ sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants’ representational rights.” *Id.*

Justice Kennedy further commented on a “symmetry standard,” proposed by a group of distinguished political scientist amici, “that would measure partisan bias by ‘compar[ing] how both parties would fare hypothetically if they each (in turn) had received a given percentage of the vote.’” *Id.* at 419. “Under that standard the measure of a map’s bias is the extent to which a majority party would fare better than the minority party, should their respective shares of the vote reverse.” *Id.* at 420. Justice Kennedy observed that “[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers will reside.” *Id.* He added that he was “wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.” *Id.* Moreover, “the counterfactual plaintiff would

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

face the same problem as the present, actual appellants: providing a standard for deciding how much partisan dominance is too much.” *Id.* Accordingly, “[w]ithout altogether discounting its utility in redistricting planning and litigation,” Justice Kennedy “conclude[d] asymmetry alone is not a reliable measure of unconstitutional partisanship.” *Id.*

Noticing that this passage did not definitively dismiss the relevance of partisan asymmetry, a group of plaintiffs challenged Wisconsin’s state house plan in the 2010 cycle based in part on its extreme asymmetry. In particular, the plaintiffs showed that the plan exhibited some of the most pro-Republican efficiency gaps and partisan biases in modern history in the 2012 and 2014 elections. [See page 144, Note 1 of the Casebook, defining the efficiency gap and partisan bias.] For the first time since *Bandemer*, the three-judge district court invalidated the plan on partisan gerrymandering grounds. Specifically, the court adopted a three-part test, under which a plan (1) must be “intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation”; (2) must “achieve[] the intended effect” by “burden[ing] the representational rights of [voters] by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of [the plan]”; and (3) must be incapable of being “justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.” *Whitford v. Gill*, 218 F. Supp. 3d 837 (W.D. Wis. 2016), *vacated*, 138 S. Ct. 1916 (2018).

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. . . .

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

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 1930–31 (internal citations omitted). Is the Court’s holding that standing in partisan gerrymandering cases is district-specific 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 partisan vote dilution standing to be district-specific?

On remand from the Court, the *Whitford* litigants added numerous new plaintiffs in state house districts across Wisconsin. They also compiled expert evidence that the plaintiffs lived in districts that (1) were cracked or packed; and (2) could be uncracked or unpacked by a different map. Does this prove that the plaintiffs had standing to allege partisan vote dilution? More importantly, after *Whitford*, three-judge district courts ruled in favor of partisan gerrymandering plaintiffs in cases from Maryland, Michigan, North Carolina, and Ohio. See *Ohio A. Philip Randolph Inst. v. Householder*, 373 F. Supp. 3d 978 (S.D. Ohio 2019); *League of Women Voters of Mich. v. Benson*, 373 F. Supp. 3d 867 (E.D. Mich. 2019); *Benisek v. Lamone*, 348 F. Supp. 3d 493 (D. Md. 2018), *vacated*, 139 S. Ct. 2484 (2019); *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated*, 139 S. Ct. 2484 (2019).

Three of these cases (all but the Maryland litigation) involved partisan vote dilution claims like the one in *Whitford*. The plaintiffs showed that particular districts were intentionally cracked or packed, and could have been uncracked or unpacked by other maps. The plaintiffs also showed that each plan was extremely asymmetric by historical standards, based on metrics like the efficiency gap and partisan bias. The plaintiffs further showed that each plan was more asymmetric than thousands of maps generated randomly by a computer algorithm using nonpartisan districting criteria. In addition, all four cases included First Amendment claims along the lines described by Justice Kennedy in *Vieth* (as well as by Justice Kagan in *Whitford*). These claims were plan-wide in Michigan, North Carolina, and Ohio, and limited to a single district in Maryland. Regardless of their scope, the claims succeeded in the district courts because of evidence that the mapmakers intended to disadvantage certain voters due to their political beliefs and, in fact, imposed burdens on these voters’ rights of free speech and association.

Two of the major post-*Whitford* cases, *Common Cause* involving North Carolina’s congressional plan and *Benisek* involving a single Maryland congressional district, were appealed to the Supreme Court and decided in June 2019. In these cases, there were five votes for the

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

position that commanded only plurality support in *Vieth*: namely, that all partisan gerrymandering claims are nonjusticiable political questions.

Rucho v. Common Cause

139 S. 333 Ct. 2484 (2019)

Chief Justice ROBERTS delivered the opinion of the Court.

Voters and other plaintiffs in North Carolina and Maryland challenged their States’ congressional districting maps as unconstitutional partisan gerrymanders. The North Carolina plaintiffs complained that the State’s districting plan discriminated against Democrats; the Maryland plaintiffs complained that their State’s plan discriminated against Republicans. The plaintiffs alleged that the gerrymandering violated the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, the Elections Clause, and Article I, § 2, of the Constitution. The District Courts in both cases ruled in favor of the plaintiffs, and the defendants appealed directly to this Court.

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

I A

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

In November 2016, North Carolina conducted congressional elections using the 2016 Plan, and Republican candidates won 10 of the 13 congressional districts. In the 2018 elections, Republican candidates won nine congressional districts, while Democratic candidates won three.

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

The Republican candidate narrowly prevailed in the remaining district, but the State Board of Elections called a new election after allegations of fraud.

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

. . . On remand [after *Whitford*], the District Court again struck down the 2016 Plan. It found standing and concluded that the case was appropriate for judicial resolution. On the merits, the court found that “the General Assembly’s predominant intent was to discriminate against voters who supported or were likely to support non-Republican candidates,” and to “entrench Republican candidates” through widespread cracking and packing of Democratic voters. The court rejected the defendants’ arguments that the distribution of Republican and Democratic voters throughout North Carolina and the interest in protecting incumbents neutrally explained the 2016 Plan’s discriminatory effects. In the end, the District Court held that 12 of the 13 districts constituted partisan gerrymanders that violated the Equal Protection Clause.

The court also agreed with the plaintiffs that the 2016 Plan discriminated against them because of their political speech and association, in violation of the First Amendment. . . . Finally, the District Court concluded that the 2016 Plan violated the Elections Clause and Article I, § 2. The District Court enjoined the State from using the 2016 Plan in any election after the November 2018 general election.

B

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

It was used in the 2012 election and succeeded in flipping the Sixth District. A Democrat has held the seat ever since.

In November 2013, three Maryland voters filed this lawsuit. They alleged that the 2011 Plan violated the First Amendment, the Elections Clause, and Article I, § 2, of the Constitution. After considerable procedural skirmishing and litigation over preliminary relief, the District Court entered summary judgment for the plaintiffs. It concluded that the plaintiffs' claims were justiciable, and that the Plan violated the First Amendment by diminishing their "ability to elect their candidate of choice" because of their party affiliation and voting history, and by burdening their associational rights. On the latter point, the court relied upon findings that Republicans in the Sixth District "were burdened in fundraising, attracting volunteers, campaigning, and generating interest in voting in an atmosphere of general confusion and apathy."

II A

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." We have understood that limitation to mean that federal courts can address only questions "historically viewed as capable of resolution through the judicial process." In these cases we are asked to decide an important question of constitutional law. "But before we do so, we must find that the question is presented in a 'case' or 'controversy' that is, in James Madison's words, 'of a Judiciary Nature.'"

Chief Justice Marshall famously wrote that it is "the province and duty of the judicial department to say what the law is." Sometimes, however, "the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights." *Vieth*. In such a case the claim is said to present a "political question" and to be nonjusticiable—outside the courts' competence and therefore beyond the courts' jurisdiction. *Baker*. Among the political question cases the Court has identified are those that lack "judicially discoverable and manageable standards for resolving [them]." *Id.*

Last Term in *Gill v. Whitford*, we reviewed our partisan gerrymandering cases and concluded that those cases "leave unresolved whether such claims may be brought." This Court's authority to act, as we said in *Gill*, is "grounded in and limited by the necessity of resolving, according to legal principles, a plaintiff's particular claim of legal right." The question here is whether there is an "appropriate role for the Federal Judiciary" in remedying the problem of partisan gerrymandering—whether such claims are claims of legal right, resolvable according to legal principles, or political questions that must find their resolution elsewhere.

B

Partisan gerrymandering is nothing new. Nor is frustration with it. The practice was known in the Colonies prior to Independence, and the Framers were familiar with it at the time of the drafting and ratification of the Constitution. During the very first congressional elections, George Washington and his Federalist allies accused Patrick Henry of trying to gerrymander Virginia's

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

districts against their candidates—in particular James Madison, who ultimately prevailed over fellow future President James Monroe.

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

The Framers addressed the election of Representatives to Congress in the Elections Clause. That provision assigns to state legislatures the power to prescribe the “Times, Places and Manner of holding Elections” for Members of Congress, while giving Congress the power to “make or alter” any such regulations. Whether to give that supervisory authority to the National Government was debated at the Constitutional Convention. When those opposed to such congressional oversight moved to strike the relevant language, Madison came to its defense:

“[T]he State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local coveniency or prejudices. . . . Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed.”

During the subsequent fight for ratification, the provision remained a subject of debate. Antifederalists predicted that Congress’s power under the Elections Clause would allow Congress to make itself “omnipotent,” setting the “time” of elections as never or the “place” in difficult to reach corners of the State. Federalists responded that, among other justifications, the revisionary power was necessary to counter state legislatures set on undermining fair representation, including through malapportionment. The Federalists were, for example, concerned that newly developing population centers would be deprived of their proper electoral weight, as some cities had been in Great Britain.

Congress has regularly exercised its Elections Clause power, including to address partisan gerrymandering. The Apportionment Act of 1842, which required single-member districts for the first time, specified that those districts be “composed of contiguous territory” in “an attempt to forbid the practice of the gerrymander.” Later statutes added requirements of compactness and equality of population. (Only the single member district requirement remains in place today.) Congress also used its Elections Clause power in 1870, enacting the first comprehensive federal statute dealing with elections as a way to enforce the Fifteenth Amendment. Force Act of 1870. Starting in the 1950s, Congress enacted a series of laws to protect the right to vote through measures such as the suspension of literacy tests and the prohibition of English-only elections.

Appellants suggest that, through the Elections Clause, the Framers set aside electoral issues such as the one before us as questions that only Congress can resolve. We do not agree. In two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts.

But the history is not irrelevant. The Framers were aware of electoral districting problems and considered what to do about them. They settled on a characteristic approach, assigning the issue to the state legislatures, expressly checked and balanced by the Federal Congress. As Alexander Hamilton explained, "it will . . . not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded that there were only three ways in which this power could have been reasonably modified and disposed: that it must either have been lodged wholly in the national legislature, or wholly in the State legislatures, or primarily in the latter, and ultimately in the former." At no point was there a suggestion that the federal courts had a role to play. Nor was there any indication that the Framers had ever heard of courts doing such a thing.

C

Courts have nevertheless been called upon to resolve a variety of questions surrounding districting. [The Court then summarizes its one-person, one-vote and racial gerrymandering precedents. See Chapter 3, Part I and Chapter 5, Part III of the Casebook.] . . .

Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, "a jurisdiction may engage in constitutional political gerrymandering."

To hold that legislators cannot take partisan interests into account when drawing district lines would essentially countermand the Framers' decision to entrust districting to political entities. The "central problem" is not determining whether a jurisdiction has engaged in partisan gerrymandering. It is "determining when political gerrymandering has gone too far." *Vieth*. See *LULAC* (opinion of Kennedy, J.) (difficulty is "providing a standard for deciding how much partisan dominance is too much"). . . .

III A

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

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

B

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

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

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

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

“‘Fairness’ does not seem to us a judicially manageable standard. . . . Some criterion more solid and more demonstrably met than that seems to us necessary to enable the state

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

legislatures to discern the limits of their districting discretion, to meaningfully constrain the discretion of the courts, and to win public acceptance for the courts' intrusion into a process that is the very foundation of democratic decisionmaking.”

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

On the other hand, perhaps the ultimate objective of a “fairer” share of seats in the congressional delegation is most readily achieved by yielding to the gravitational pull of proportionality and engaging in cracking and packing, to ensure each party its “appropriate” share of “safe” seats. Such an approach, however, comes at the expense of competitive districts and of individuals in districts allocated to the opposing party.

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

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

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

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

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

More fundamentally, “vote dilution” in the one-person, one-vote cases refers to the idea that each vote must carry equal weight. In other words, each representative must be accountable to (approximately) the same number of constituents. That requirement does not extend to political parties. It does not mean that each party must be influential in proportion to its number of supporters. As we stated unanimously in *Gill*, “this Court is not responsible for vindicating generalized partisan preferences. The Court’s constitutionally prescribed role is to vindicate the individual rights of the people appearing before it.”

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

IV

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

A

The *Common Cause* District Court concluded that all but one of the districts in North Carolina’s 2016 Plan violated the Equal Protection Clause by intentionally diluting the voting strength of Democrats. In reaching that result the court first required the plaintiffs to prove “that a legislative mapdrawer’s predominant purpose in drawing the lines of a particular district was to ‘subordinate adherents of one political party and entrench a rival party in power.’” The District Court next required a showing “that the dilution of the votes of supporters of a disfavored party in a particular district—by virtue of cracking or packing—is likely to persist in subsequent elections such that an elected representative from the favored party in the district will not feel a need to be responsive to constituents who support the disfavored party.” Finally, after a *prima facie* showing of partisan vote dilution, the District Court shifted the burden to the defendants to prove that the discriminatory effects are “attributable to a legitimate state interest or other neutral explanation.”

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

The District Court tried to limit the reach of its test by requiring plaintiffs to show, in addition to predominant partisan intent, that vote dilution “is likely to persist” to such a degree that the elected representative will feel free to ignore the concerns of the supporters of the minority party. But “[t]o allow district courts to strike down apportionment plans on the basis of their prognostications as to the outcome of future elections . . . invites ‘findings’ on matters as to which neither judges nor anyone else can have any confidence.” *Bandemer* (opinion of O’Connor, J.). And the test adopted by the Common Cause court requires a far more nuanced prediction than simply who would prevail in future political contests. Judges must forecast with unspecified certainty whether a prospective winner will have a margin of victory sufficient to permit him to ignore the supporters of his defeated opponent (whoever that may turn out to be). Judges not only have to pick the winner—they have to beat the point spread.

The appellees assure us that “the persistence of a party’s advantage may be shown through sensitivity testing: probing how a plan would perform under other plausible electoral conditions.” Experience proves that accurately predicting electoral outcomes is not so simple, either because the plans are based on flawed assumptions about voter preferences and behavior or because demographics and priorities change over time. In our two leading partisan gerrymandering cases themselves, the predictions of durability proved to be dramatically wrong. In 1981, Republicans controlled both houses of the Indiana Legislature as well as the governorship. Democrats challenged the state legislature districting map enacted by the Republicans. This Court in *Bandemer* rejected that challenge, and just months later the Democrats increased their share of

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

House seats in the 1986 elections. Two years later the House was split 50–50 between Democrats and Republicans, and the Democrats took control of the chamber in 1990. Democrats also challenged the Pennsylvania congressional districting plan at issue in *Vieth*. Two years after that challenge failed, they gained four seats in the delegation, going from a 12–7 minority to an 11–8 majority. At the next election, they flipped another Republican seat.

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

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

B

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

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

The plaintiffs’ argument is that partisanship in districting should be regarded as simple discrimination against supporters of the opposing party on the basis of political viewpoint. Under that theory, any level of partisanship in districting would constitute an infringement of their First Amendment rights. But as the Court has explained, “[i]t would be idle . . . to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

invalidate it.” The First Amendment test simply describes the act of districting for partisan advantage. It provides no standard for determining when partisan activity goes too far.

As for actual burden, the slight anecdotal evidence found sufficient by the District Courts in these cases shows that this too is not a serious standard for separating constitutional from unconstitutional partisan gerrymandering. The District Courts relied on testimony about difficulty drumming up volunteers and enthusiasm. How much of a decline in voter engagement is enough to constitute a First Amendment burden? How many door knocks must go unanswered? How many petitions unsigned? How many calls for volunteers unheeded? The Common Cause District Court held that a partisan gerrymander places an unconstitutional burden on speech if it has more than a “*de minimis*” “chilling effect or adverse impact” on any First Amendment activity. The court went on to rule that there would be an adverse effect “even if the speech of [the plaintiffs] was not *in fact* chilled”; it was enough that the districting plan “makes it easier for supporters of Republican candidates to translate their votes into seats,” thereby “enhanc[ing] the[ir] relative voice.”

These cases involve blatant examples of partisanship driving districting decisions. But the First Amendment analysis below offers no “clear” and “manageable” way of distinguishing permissible from impermissible partisan motivation. The *Common Cause* court embraced that conclusion, observing that “a judicially manageable framework for evaluating partisan gerrymandering claims need not distinguish an ‘acceptable’ level of partisan gerrymandering from ‘excessive’ partisan gerrymandering” because “the Constitution does not authorize state redistricting bodies to engage in such partisan gerrymandering.” The decisions below prove the prediction of the *Vieth* plurality that “a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in districting,” contrary to our established precedent.

C

The dissent proposes using a State’s own districting criteria as a neutral baseline from which to measure how extreme a partisan gerrymander is. The dissent would have us line up all the possible maps drawn using those criteria according to the partisan distribution they would produce. Distance from the “median” map would indicate whether a particular districting plan harms supporters of one party to an unconstitutional extent.

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

Even if we were to accept the dissent’s proposed baseline, it would return us to “the original unanswerable question (How much political motivation and effect is too much?).” *Vieth* (plurality opinion). Would twenty percent away from the median map be okay? Forty percent? Sixty percent?

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

Why or why not? (We appreciate that the dissent finds all the unanswerable questions annoying, but it seems a useful way to make the point.) The dissent’s answer says it all: “This much is too much.” That is not even trying to articulate a standard or rule.

The dissent argues that there are other instances in law where matters of degree are left to the courts. True enough. But those instances typically involve constitutional or statutory provisions or common law confining and guiding the exercise of judicial discretion. For example, the dissent cites the need to determine “substantial anticompetitive effect[s]” in antitrust law. That language, however, grew out of the Sherman Act, understood from the beginning to have its “origin in the common law” and to be “familiar in the law of this country prior to and at the time of the adoption of the [A]ct.” Judges began with a significant body of law about what constituted a legal violation. In other cases, the pertinent statutory terms draw meaning from related provisions or statutory context. Here, on the other hand, the Constitution provides no basis whatever to guide the exercise of judicial discretion. Common experience gives content to terms such as “substantial risk” or “substantial harm,” but the same cannot be said of substantial deviation from a median map. There is no way to tell whether the prohibited deviation from that map should kick in at 25 percent or 75 percent or some other point. The only provision in the Constitution that specifically addresses the matter assigns it to the political branches. See [the Elections Clause]. . . .

V

Excessive partisanship in districting leads to results that reasonably seem unjust. But the fact that such gerrymandering is “incompatible with democratic principles” does not mean that the solution lies with the federal judiciary. We conclude that partisan gerrymandering claims present political questions beyond the reach of the federal courts. Federal judges have no license to reallocate political power between the two major political parties, with no plausible grant of authority in the Constitution, and no legal standards to limit and direct their decisions. “[J]udicial action must be governed by *standard*, by *rule*,” and must be “principled, rational, and based upon reasoned distinctions” found in the Constitution or laws. *Vieth* (plurality opinion). Judicial review of partisan gerrymandering does not meet those basic requirements.

Today the dissent essentially embraces the argument that the Court unanimously rejected in *Gill*: “this Court *can* address the problem of partisan gerrymandering because it *must*.” That is not the test of our authority under the Constitution; that document instead “confines the federal courts to a properly judicial role.”

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

Our conclusion does not condone excessive partisan gerrymandering. Nor does our conclusion condemn complaints about districting to echo into a void. The States, for example, are actively addressing the issue on a number of fronts. In 2015, the Supreme Court of Florida struck down that State’s congressional districting plan as a violation of the Fair Districts Amendment to the Florida Constitution. The dissent wonders why we can’t do the same. The answer is that there is no “Fair Districts Amendment” to the Federal Constitution. Provisions in state statutes and state constitutions can provide standards and guidance for state courts to apply. (We do not understand how the dissent can maintain that a provision saying that no districting plan “shall be drawn with the intent to favor or disfavor a political party” provides little guidance on the question.) Indeed, numerous other States are restricting partisan considerations in districting through legislation. One way they are doing so is by placing power to draw electoral districts in the hands of independent commissions. For example, in November 2018, voters in Colorado and Michigan approved constitutional amendments creating multimember commissions that will be responsible in whole or in part for creating and approving district maps for congressional and state legislative districts. Missouri is trying a different tack. Voters there overwhelmingly approved the creation of a new position—state demographer—to draw state legislative district lines.

Other States have mandated at least some of the traditional districting criteria for their mapmakers. Some have outright prohibited partisan favoritism in redistricting. See Fla. Const., Art. III, § 20(a) (“No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.”); Mo. Const., Art. III, § 3 (“Districts shall be designed in a manner that achieves both partisan fairness and, secondarily, competitiveness. ‘Partisan fairness’ means that parties shall be able to translate their popular support into legislative representation with approximately equal efficiency.”). . . .

As noted, the Framers gave Congress the power to do something about partisan gerrymandering in the Elections Clause. The first bill introduced in the 116th Congress would require States to create 15-member independent commissions to draw congressional districts and would establish certain redistricting criteria, including protection for communities of interest, and ban partisan gerrymandering.

Dozens of other bills have been introduced to limit reliance on political considerations in redistricting. In 2010, H.R. 6250 would have required States to follow standards of compactness, contiguity, and respect for political subdivisions in redistricting. It also would have prohibited the establishment of congressional districts “with the major purpose of diluting the voting strength of any person, or group, including any political party,” except when necessary to comply with the Voting Rights Act of 1965.

Another example is the Fairness and Independence in Redistricting Act, which was introduced in 2005 and has been reintroduced in every Congress since. That bill would require every State to establish an independent commission to adopt redistricting plans. The bill also set forth criteria for the independent commissions to use, such as compactness, contiguity, and population equality. It would prohibit consideration of voting history, political party affiliation, or incumbent Representative’s residence.

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

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

* * *

No one can accuse this Court of having a crabbed view of the reach of its competence. But we have no commission to allocate political power and influence in the absence of a constitutional directive or legal standards to guide us in the exercise of such authority. “It is emphatically the province and duty of the judicial department to say what the law is.” In this rare circumstance, that means our duty is to say “this is not law.”

The judgments of the United States District Court for the Middle District of North Carolina and the United States District Court for the District of Maryland are vacated, and the cases are remanded with instructions to dismiss for lack of jurisdiction.

It is so ordered.

Justice KAGAN, with whom Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR join, dissenting.

For the first time ever, this Court refuses to remedy a constitutional violation because it thinks the task beyond judicial capabilities.

And not just any constitutional violation. The partisan gerrymanders in these cases deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives. In so doing, the partisan gerrymanders here debased and dishonored our democracy, turning upside-down the core American idea that all governmental power derives from the people. These gerrymanders enabled politicians to entrench themselves in office as against voters’ preferences. They promoted partisanship above respect for the popular will. They encouraged a politics of polarization and dysfunction. If left unchecked, gerrymanders like the ones here may irreparably damage our system of government.

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

I

Maybe the majority errs in these cases because it pays so little attention to the constitutional harms at their core. After dutifully reciting each case's facts, the majority leaves them forever behind, instead immersing itself in everything that could conceivably go amiss if courts became involved. So it is necessary to fill in the gaps. To recount exactly what politicians in North Carolina and Maryland did to entrench their parties in political office, whatever the electorate might think. And to elaborate on the constitutional injury those politicians wreaked, to our democratic system and to individuals' rights. All that will help in considering whether courts confronting partisan gerrymandering claims are really so hamstrung—so unable to carry out their constitutional duties—as the majority thinks.

A

[Justice Kagan extensively discusses the facts in *Rucho* and *Lamone*, focusing on the raw partisan motives underlying the North Carolina and Maryland maps as well as the drafters' success, in subsequent elections, in accomplishing their objectives.]

B

Now back to the question I asked before: Is that how American democracy is supposed to work? I have yet to meet the person who thinks so.

"Governments," the Declaration of Independence states, "deriv[e] their just Powers from the Consent of the Governed." The Constitution begins: "We the People of the United States." The Gettysburg Address (almost) ends: "[G]overnment of the people, by the people, for the people." If there is a single idea that made our Nation (and that our Nation commended to the world), it is this one: The people are sovereign. The "power," James Madison wrote, "is in the people over the Government, and not in the Government over the people."

Free and fair and periodic elections are the key to that vision. The people get to choose their representatives. And then they get to decide, at regular intervals, whether to keep them. Madison again: "[R]epublican liberty" demands "not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people." Members of the House of Representatives, in particular, are supposed to "recollect[] [that] dependence" every day. To retain an "intimate sympathy with the people," they must be "compelled to anticipate the moment" when their "exercise of [power] is to be reviewed." Election day—next year, and two years later, and two years after that—is what links the people to their representatives, and gives the people their sovereign power. That day is the foundation of democratic governance.

And partisan gerrymandering can make it meaningless. At its most extreme—as in North Carolina and Maryland—the practice amounts to "rigging elections." By drawing districts to maximize the power of some voters and minimize the power of others, a party in office at the right time can entrench itself there for a decade or more, no matter what the voters would prefer. Just ask the people of North Carolina and Maryland. The "core principle of republican government," this Court has recognized, is "that the voters should choose their representatives, not the other way

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

around.” Partisan gerrymandering turns it the other way around. By that mechanism, politicians can cherry-pick voters to ensure their reelection. And the power becomes, as Madison put it, “in the Government over the people.”

The majority disputes none of this. I think it important to underscore that fact: The majority disputes none of what I have said (or will say) about how gerrymanders undermine democracy. Indeed, the majority concedes (really, how could it not?) that gerrymandering is “incompatible with democratic principles.” And therefore what? That recognition would seem to demand a response. The majority offers two ideas that might qualify as such. One is that the political process can deal with the problem—a proposition so dubious on its face that I feel secure in delaying my answer for some time. The other is that political gerrymanders have always been with us. To its credit, the majority does not frame that point as an originalist constitutional argument. After all (as the majority rightly notes), racial and residential gerrymanders were also once with us, but the Court has done something about that fact. The majority’s idea instead seems to be that if we have lived with partisan gerrymanders so long, we will survive.

That complacency has no cause. Yes, partisan gerrymandering goes back to the Republic’s earliest days. (As does vociferous opposition to it.) But big data and modern technology—of just the kind that the mapmakers in North Carolina and Maryland used—make today’s gerrymandering altogether different from the crude linedrawing of the past. Old-time efforts, based on little more than guesses, sometimes led to so-called dummymanders—gerrymanders that went spectacularly wrong. Not likely in today’s world. Mapmakers now have access to more granular data about party preference and voting behavior than ever before. County-level voting data has given way to precinct-level or city-block-level data; and increasingly, mapmakers avail themselves of data sets providing wide-ranging information about even individual voters. Just as important, advancements in computing technology have enabled mapmakers to put that information to use with unprecedented efficiency and precision. While bygone mapmakers may have drafted three or four alternative districting plans, today’s mapmakers can generate thousands of possibilities at the touch of a key—and then choose the one giving their party maximum advantage (usually while still meeting traditional districting requirements). The effect is to make gerrymanders far more effective and durable than before, insulating politicians against all but the most titanic shifts in the political tides. These are not your grandfather’s—let alone the Framers’—gerrymanders.

The proof is in the 2010 pudding. That redistricting cycle produced some of the most extreme partisan gerrymanders in this country’s history. I’ve already recounted the results from North Carolina and Maryland, and you’ll hear even more about those. But the voters in those States were not the only ones to fall prey to such districting perversions. Take Pennsylvania. In the three congressional elections occurring under the State’s original districting plan (before the State Supreme Court struck it down), Democrats received between 45% and 51% of the statewide vote, but won only 5 of 18 House seats. Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats. (Nor is there any reason to think that the results in those States stemmed from political geography or non-partisan districting criteria, rather than from partisan manipulation.) And gerrymanders will only get worse (or depending on your perspective, better) as time goes on—as data becomes ever more fine-grained and data analysis techniques continue to improve. What was possible with paper and pen—or even with Windows 95—doesn’t hold a candle (or an LED bulb?)

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

to what will become possible with developments like machine learning. And someplace along this road, “we the people” become sovereign no longer.

C

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

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

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

And partisan gerrymandering implicates the First Amendment too. That Amendment gives its greatest protection to political beliefs, speech, and association. Yet partisan gerrymanders subject certain voters to “disfavored treatment”—again, counting their votes for less—precisely because of “their voting history [and] their expression of political views.” *Vieth* (opinion of Kennedy, J.). And added to that strictly personal harm is an associational one. Representative democracy is “unimaginable without the ability of citizens to band together in [support of] candidates who espouse their political views.” By diluting the votes of certain citizens, the State frustrates their efforts to translate those affiliations into political effectiveness. In both those ways, partisan gerrymanders of the kind we confront here undermine the protections of “democracy embodied in the First Amendment.”

Though different Justices have described the constitutional harm in diverse ways, nearly all have agreed on this much: Extreme partisan gerrymandering (as happened in North Carolina and Maryland) violates the Constitution. See, e.g., *Vieth* (plurality opinion) (“[A]n excessive injection of politics [in districting] is unlawful” (emphasis deleted)). . . . Once again, the majority

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

never disagrees; it appears to accept the “principle that each person must have an equal say in the election of representatives.” And indeed, without this settled and shared understanding that cases like these inflict constitutional injury, the question of whether there are judicially manageable standards for resolving them would never come up.

II

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

The majority gives two reasons for thinking that the adjudication of partisan gerrymandering claims is beyond judicial capabilities. First and foremost, the majority says, it cannot find a neutral baseline—one not based on contestable notions of political fairness—from which to measure injury. . . . And second, the majority argues that even after establishing a baseline, a court would have no way to answer “the determinative question: ‘How much is too much?’” . . .

I’ll give the majority this one—and important—thing: It identifies some dangers everyone should want to avoid. Judges should not be apportioning political power based on their own vision of electoral fairness, whether proportional representation or any other. And judges should not be striking down maps left, right, and center, on the view that every smidgen of politics is a smidgen too much. Respect for state legislative processes—and restraint in the exercise of judicial authority—counsels intervention in only egregious cases.

But in throwing up its hands, the majority misses something under its nose: What it says can’t be done has been done. Over the past several years, federal courts across the country—including, but not exclusively, in the decisions below—have largely converged on a standard for adjudicating partisan gerrymandering claims (striking down both Democratic and Republican districting plans in the process). And that standard does what the majority says is impossible. The standard does not use any judge-made conception of electoral fairness—either proportional representation or any other; instead, it takes as its baseline a State’s own criteria of fairness, apart from partisan gain. And by requiring plaintiffs to make difficult showings relating to both purpose and effects, the standard invalidates the most extreme, but only the most extreme, partisan gerrymanders.

Below, I first explain the framework courts have developed, and describe its application in these two cases. Doing so reveals in even starker detail than before how much these partisan gerrymanders deviated from democratic norms. As I lay out the lower courts’ analyses, I consider two specific criticisms the majority levels—each of which reveals a saddening nonchalance about the threat such districting poses to self-governance. All of that lays the groundwork for then assessing the majority’s more general view, described above, that judicial policing in this area

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

cannot be either neutral or restrained. The lower courts' reasoning, as I'll show, proves the opposite.

A

Start with the standard the lower courts used. The majority disaggregates the opinions below, distinguishing the one from the other and then chopping up each into "a number of 'tests.'" But in doing so, it fails to convey the decisions' most significant—and common—features. Both courts focused on the harm of vote dilution, though the North Carolina court mostly grounded its analysis in the Fourteenth Amendment and the Maryland court in the First. And both courts (like others around the country) used basically the same three-part test to decide whether the plaintiffs had made out a vote dilution claim. As many legal standards do, that test has three parts: (1) intent; (2) effects; and (3) causation. First, the plaintiffs challenging a districting plan must prove that state officials' "predominant purpose" in drawing a district's lines was to "entrench [their party] in power" by diluting the votes of citizens favoring its rival. Second, the plaintiffs must establish that the lines drawn in fact have the intended effect by "substantially" diluting their votes. And third, if the plaintiffs make those showings, the State must come up with a legitimate, non-partisan justification to save its map. If you are a lawyer, you know that this test looks utterly ordinary. It is the sort of thing courts work with every day.

Turn now to the test's application. First, did the North Carolina and Maryland districters have the predominant purpose of entrenching their own party in power? Here, the two District Courts catalogued the overwhelming direct evidence that they did. To remind you of some highlights: North Carolina's redistricting committee used "Partisan Advantage" as an official criterion for drawing district lines. And from the first to the last, that committee's chair (along with his mapmaker) acted to ensure a 10–3 partisan split, whatever the statewide vote, because he thought that "electing Republicans is better than electing Democrats." For their part, Maryland's Democrats—the Governor, senior Congressman, and State Senate President alike—openly admitted to a single driving purpose: flip the Sixth District from Republican to Democratic. They did not blanch from moving some 700,000 voters into new districts (when one-person-one-vote rules required relocating just 10,000) for that reason and that reason alone.

The majority's response to the District Courts' purpose analysis is discomfiting. The majority does not contest the lower courts' findings; how could it? Instead, the majority says that state officials' intent to entrench their party in power is perfectly "permissible," even when it is the predominant factor in drawing district lines. But that is wrong. True enough, that the intent to inject "political considerations" into districting may not raise any constitutional concerns. In *Gaffney*, for example, we thought it non-problematic when state officials used political data to ensure rough proportional representation between the two parties. And true enough that even the naked purpose to gain partisan advantage may not rise to the level of constitutional notice when it is not the driving force in mapmaking or when the intended gain is slight. But when political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far. Consider again Justice Kennedy's hypothetical of mapmakers who set out to maximally burden (i.e., make count for as little as possible) the votes going to a rival party. Does the majority really think that goal is permissible? But why even bother with hypotheticals? Just consider the purposes here. It cannot be permissible and thus irrelevant, as the majority claims,

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

that state officials have as their purpose the kind of grotesquely gerrymandered map that, according to all this Court has ever said, violates the Constitution.

On to the second step of the analysis, where the plaintiffs must prove that the districting plan substantially dilutes their votes. The majority fails to discuss most of the evidence the District Courts relied on to find that the plaintiffs had done so. But that evidence—particularly from North Carolina—is the key to understanding both the problem these cases present and the solution to it they offer. The evidence reveals just how bad the two gerrymanders were (in case you had any doubts). And it shows how the same technologies and data that today facilitate extreme partisan gerrymanders also enable courts to discover them, by exposing just how much they dilute votes.

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

Using that approach, the North Carolina plaintiffs offered a boatload of alternative districting plans—all showing that the State's map was an out-out-out-outlier. One expert produced 3,000 maps, adhering in the way described above to the districting criteria that the North Carolina redistricting committee had used, other than partisan advantage. To calculate the partisan outcome of those maps, the expert also used the same election data (a composite of seven elections) that Hofeller had employed when devising the North Carolina plan in the first instance. The results were, shall we say, striking. Every single one of the 3,000 maps would have produced at least one more Democratic House Member than the State's actual map, and 77% would have elected three or four more. A second expert obtained essentially the same results with maps conforming to more generic districting criteria (e.g., compactness and contiguity of districts). Over 99% of that expert's 24,518 simulations would have led to the election of at least one more Democrat, and over 70% would have led to two or three more. Based on those and other findings, the District Court determined that the North Carolina plan substantially dilutes the plaintiffs' votes.⁴

⁴ The District Court also relied on actual election results (under both the new plan and the similar one preceding it) and on mathematical measurements of the new plan's "partisan asymmetry." Those calculations assess whether supporters of the two parties can translate their votes into representation with equal ease. See Stephanopoulos & McGhee, *The Measure of a Metric*, 70 STAN. L. REV. 1503, 1505–07 (2018). The court found that the new North Carolina plan led to extreme asymmetry, compared both to plans used in the rest of the country and to plans previously used in the State.

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

. . . The majority claims all these findings are mere “prognostications” about the future, in which no one “can have any confidence.” But the courts below did not gaze into crystal balls, as the majority tries to suggest. Their findings about these gerrymanders’ effects on voters—both in the past and predictably in the future—were evidence-based, data-based, statistics-based. Knowledge-based, one might say. The courts did what anyone would want a decisionmaker to do when so much hangs in the balance. They looked hard at the facts, and they went where the facts led them. They availed themselves of all the information that mapmakers (like Hofeller and Hawkins) and politicians (like Lewis and O’Malley) work so hard to amass and then use to make every districting decision. They refused to content themselves with unsupported and out-of-date musings about the unpredictability of the American voter. They did not bet America’s future—as today the majority does—on the idea that maps constructed with so much expertise and care to make electoral outcomes impervious to voting would somehow or other come apart. They looked at the evidence—at the facts about how these districts operated—and they could reach only one conclusion. By substantially diluting the votes of citizens favoring their rivals, the politicians of one party had succeeded in entrenching themselves in office. They had beat democracy.

B

The majority’s broadest claim, as I’ve noted, is that this is a price we must pay because judicial oversight of partisan gerrymandering cannot be “politically neutral” or “manageable.” . . . But [the majority] never tries to analyze the serious question presented here—whether the kind of standard developed below falls prey to those objections, or instead allows for neutral and manageable oversight. The answer, as you’ve already heard enough to know, is the latter. That kind of oversight is not only possible; it’s been done.

Consider neutrality first. Contrary to the majority’s suggestion, the District Courts did not have to—and in fact did not—choose among competing visions of electoral fairness. That is because they did not try to compare the State’s actual map to an “ideally fair” one (whether based on proportional representation or some other criterion). Instead, they looked at the difference between what the State did and what the State would have done if politicians hadn’t been intent on partisan gain. Or put differently, the comparator (or baseline or touchstone) is the result not of a judge’s philosophizing but of the State’s own characteristics and judgments. The effects evidence in these cases accepted as a given the State’s physical geography (e.g., where does the Chesapeake run?) and political geography (e.g., where do the Democrats live on top of each other?). So the courts did not, in the majority’s words, try to “counteract ‘natural’ gerrymandering caused, for example, by the urban concentration of one party.” Still more, the courts’ analyses used the State’s own criteria for electoral fairness—except for naked partisan gain. Under their approach, in other words, the State selected its own fairness baseline in the form of its other districting criteria. All the courts did was determine how far the State had gone off that track because of its politicians’ effort to entrench themselves in office.

The North Carolina litigation well illustrates the point. The thousands of randomly generated maps I’ve mentioned formed the core of the plaintiffs’ case that the North Carolina plan was an “extreme[] outlier.” Those maps took the State’s political landscape as a given. In North Carolina, for example, Democratic voters are highly concentrated in cities. That fact was built into all the maps; it became part of the baseline. On top of that, the maps took the State’s legal landscape

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

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

The Maryland court lacked North Carolina’s fancy evidence, but analyzed the gerrymander’s effects in much the same way—not as against an ideal goal, but as against an *ex ante* baseline. To see the difference, shift gears for a moment and compare Maryland and Massachusetts—both of which (aside from Maryland’s partisan gerrymander) use traditional districting criteria. In those two States alike, Republicans receive about 35% of the vote in statewide elections. But the political geography of the States differs. In Massachusetts, the Republican vote is spread evenly across the State; because that is so, districting plans (using traditional criteria of contiguity and compactness) consistently lead to an all-Democratic congressional delegation. By contrast, in Maryland, Republicans are clumped—into the Eastern Shore (the First District) and the Northwest Corner (the old Sixth). Claims of partisan gerrymandering in those two States could come out the same way if judges, *à la* the majority, used their own visions of fairness to police districting plans; a judge in each State could then insist, in line with proportional representation, that 35% of the vote share entitles citizens to around that much of the delegation. But those suits would not come out the same if courts instead asked: What would have happened, given the State’s natural political geography and chosen districting criteria, had officials not indulged in partisan manipulation? And that is what the District Court in Maryland inquired into. The court did not strike down the new Sixth District because a judicial ideal of proportional representation commanded another Republican seat. It invalidated that district because the quest for partisan gain made the State override its own political geography and districting criteria. So much, then, for the impossibility of neutrality.

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

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

single partisan distribution—the one reflecting proportional representation. But those two demands are different, and only the former is at issue here.

The majority’s “how much is too much” critique fares no better than its neutrality argument. How about the following for a first-cut answer: This much is too much. By any measure, a map that produces a greater partisan skew than any of 3,000 randomly generated maps (all with the State’s political geography and districting criteria built in) reflects “too much” partisanship. Think about what I just said: The absolute worst of 3,001 possible maps. The only one that could produce a 10–3 partisan split even as Republicans got a bare majority of the statewide vote. And again: How much is too much? This much is too much: A map that without any evident non-partisan districting reason (to the contrary) shifted the composition of a district from 47% Republicans and 36% Democrats to 33% Republicans and 42% Democrats. A map that in 2011 was responsible for the largest partisan swing of a congressional district in the country. Even the majority acknowledges that “[t]hese cases involve blatant examples of partisanship driving districting decisions.” If the majority had done nothing else, it could have set the line here. How much is too much? At the least, any gerrymanders as bad as these.

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

Nor is there any reason to doubt, as the majority does, the competence of courts to determine whether a district map “substantially” dilutes the votes of a rival party’s supporters from the everything-but-partisanship baseline described above. (Most of the majority’s difficulties here really come from its idea that ideal visions set the baseline. But that is double-counting—and, as already shown, wrong to boot.) As this Court recently noted, “the law is full of instances” where a judge’s decision rests on “estimating rightly . . . some matter of degree”—including the “substantial[ity]” of risk or harm. The majority is wrong to think that these laws typically (let alone uniformly) further “confine[] and guide[]” judicial decisionmaking. They do not, either in themselves or through “statutory context.” To the extent additional guidance has developed over the years (as under the Sherman Act), courts themselves have been its author—as they could be in this context too. And contrary to the majority’s suggestion, courts all the time make judgments about the substantiality of harm without reducing them to particular percentages. If courts are no longer competent to do so, they will have to relinquish, well, substantial portions of their docket.

And the combined inquiry used in these cases set the bar high, so that courts could intervene in the worst partisan gerrymanders, but no others. Or to say the same thing, so that courts could intervene in the kind of extreme gerrymanders that nearly every Justice for decades has thought to violate the Constitution. Illicit purpose was simple to show here only because politicians and mapmakers thought their actions could not be attacked in court. They therefore felt free to openly proclaim their intent to entrench their party in office. But if the Court today had declared that behavior justiciable, such smoking guns would all but disappear. Even assuming some officials

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

continued to try implementing extreme partisan gerrymanders, they would not brag about their efforts. So plaintiffs would have to prove the intent to entrench through circumstantial evidence—essentially showing that no other explanation (no geographic feature or non-partisan districting objective) could explain the districting plan’s vote dilutive effects. And that would be impossible unless those effects were even more than substantial—unless mapmakers had packed and cracked with abandon in unprecedented ways. As again, they did here. That the two courts below found constitutional violations does not mean their tests were unrigorous; it means that the conduct they confronted was constitutionally appalling—by even the strictest measure, inordinately partisan.

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

III

This Court has long understood that it has a special responsibility to remedy violations of constitutional rights resulting from politicians’ districting decisions. Over 50 years ago, we committed to providing judicial review in that sphere, recognizing as we established the one-person-one-vote rule that “our oath and our office require no less.” *Reynolds*. Of course, our oath and our office require us to vindicate all constitutional rights. But the need for judicial review is at its most urgent in cases like these. “For here, politicians’ incentives conflict with voters’ interests, leaving citizens without any political remedy for their constitutional harms.” Those harms arise because politicians want to stay in office. No one can look to them for effective relief.

The majority disagrees, concluding its opinion with a paean to congressional bills limiting partisan gerrymanders. “Dozens of [those] bills have been introduced,” the majority says. One was “introduced in 2005 and has been reintroduced in every Congress since.” And might be reintroduced until the end of time. Because what all these bills have in common is that they are not laws. The politicians who benefit from partisan gerrymandering are unlikely to change partisan gerrymandering. And because those politicians maintain themselves in office through partisan gerrymandering, the chances for legislative reform are slight.

No worries, the majority says; it has another idea. The majority notes that voters themselves have recently approved ballot initiatives to put power over districting in the hands of independent commissions or other non-partisan actors. Some Members of the majority, of course, once thought such initiatives unconstitutional. But put that aside. Fewer than half the States offer voters an opportunity to put initiatives to direct vote; in all the rest (including North Carolina and Maryland),

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

voters are dependent on legislators to make electoral changes (which for all the reasons already given, they are unlikely to do). And even when voters have a mechanism they can work themselves, legislators often fight their efforts tooth and nail. Look at Missouri. There, the majority touts a voter-approved proposal to turn districting over to a state demographer. But before the demographer had drawn a single line, Members of the state legislature had introduced a bill to start undoing the change. I'd put better odds on that bill's passage than on all the congressional proposals the majority cites.

The majority's most perplexing "solution" is to look to state courts. "[O]ur conclusion," the majority states, does not "condemn complaints about districting to echo into a void": Just a few years back, "the Supreme Court of Florida struck down that State's congressional districting plan as a violation" of the State Constitution. And indeed, the majority might have added, the Supreme Court of Pennsylvania last year did the same thing. But what do those courts know that this Court does not? If they can develop and apply neutral and manageable standards to identify unconstitutional gerrymanders, why couldn't we?

We could have, and we should have. The gerrymanders here—and they are typical of many—violated the constitutional rights of many hundreds of thousands of American citizens. Those voters (Republicans in the one case, Democrats in the other) did not have an equal opportunity to participate in the political process. Their votes counted for far less than they should have because of their partisan affiliation. When faced with such constitutional wrongs, courts must intervene: "It is emphatically the province and duty of the judicial department to say what the law is." That is what the courts below did. Their decisions are worth a read. They (and others that have recently remedied similar violations) are detailed, thorough, painstaking. They evaluated with immense care the factual evidence and legal arguments the parties presented. They used neutral and manageable and strict standards. They had not a shred of politics about them. Contra the majority, this was law.

That is not to deny, of course, that these cases have great political consequence. They do. Among the amicus briefs here is one from a bipartisan group of current and former Members of the House of Representatives. They describe all the ways partisan gerrymandering harms our political system—what they call "a cascade of negative results." These artificially drawn districts shift influence from swing voters to party-base voters who participate in primaries; make bipartisanship and pragmatic compromise politically difficult or impossible; and drive voters away from an ever more dysfunctional political process. Last year, we heard much the same from current and former state legislators. In their view, partisan gerrymandering has "sounded the death-knell of bipartisanship," creating a legislative environment that is "toxic" and "tribal." Gerrymandering, in short, helps create the polarized political system so many Americans loathe.

And gerrymandering is, as so many Justices have emphasized before, anti-democratic in the most profound sense. In our government, "all political power flows from the people." And that means, as Alexander Hamilton once said, "that the people should choose whom they please to govern them." But in Maryland and North Carolina they cannot do so. In Maryland, election in and election out, there are 7 Democrats and 1 Republican in the congressional delegation. In North Carolina, however the political winds blow, there are 10 Republicans and 3 Democrats. Is it conceivable that someday voters will be able to break out of that prefabricated box? Sure. But

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

everything possible has been done to make that hard. To create a world in which power does not flow from the people because they do not choose their governors.

Of all times to abandon the Court's duty to declare the law, this was not the one. The practices challenged in these cases imperil our system of government. Part of the Court's role in that system is to defend its foundations. None is more important than free and fair elections. With respect but deep sadness, I dissent.

Notes and Questions

1. At first glance, *Rucho* is a puzzling decision. It holds that partisan gerrymandering claims are nonjusticiable even though majorities of the Justices had repeatedly concluded to the contrary—including as recently as the year before, in *Gill v. Whitford*. *Rucho* also ignores various passages in *Whitford* that seemed to be giving clues to future partisan gerrymandering litigants: for example, the Court's statement that evidence of partisan intent "may well be pertinent with respect to any ultimate determination whether the plaintiffs may prevail in their claims." *Whitford*, 138 S. Ct. at 1932. What explains these oddities? Could it be the Court's changed composition? Note that Justice Kennedy was on the Court (and its median voter on this issue) in *Vieth*, *LULAC*, and *Whitford*, but that, by the time *Rucho* was decided, he had been replaced by Justice Kavanaugh. Is there any reason to think that Justice Kennedy would have joined the *Rucho* majority? See Nicholas Stephanopoulos, *The Denouement of Kennedy's Retirement*, ELECTION LAW BLOG (July 1, 2019), <https://electionlawblog.org/?p=105881>.

2. Most of *Rucho* discusses one reason why a legal theory may be a nonjusticiable political question: that there exists "a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186, 217 (1962). However, the appellants argued that partisan gerrymandering claims are political questions for a second reason: because the Elections Clause assigns responsibility for regulating federal elections to state legislatures and to Congress—but not to courts. See *id.* (observing that nonjusticiability also follows when there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department"). In what may have been the plaintiffs' only victory in *Rucho*, the majority rejected this argument. The majority did "not agree" that "through the Elections Clause, the Framers set aside electoral issues . . . as questions that only Congress can resolve" because "[i]n two areas—one-person, one-vote and racial gerrymandering—our cases have held that there is a role for the courts with respect to at least some issues that could arise from a State's drawing of congressional districts." *Rucho*, 139 S. Ct. at 2495-96.

Why did the majority dismiss the appellants' Elections Clause theory, even though it would have given the majority a second reason to hold partisan gerrymandering claims nonjusticiable? As the majority notes, the appellants' Elections Clause theory would seemingly have extended to one-person, one-vote and racial gerrymandering claims, since they too involve judicial intervention in the area of congressional redistricting. Would the theory have extended even further, to *all* judicial intervention with respect to congressional elections? Under the text or history of the Elections Clause, is there any way to distinguish redistricting from other aspects of electoral regulation? Note as well that, on its face, the Elections Clause is simply a power-conferring provision, bestowing certain authorities to state legislatures and to Congress. What implications

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

would follow from the position that all power-conferring provisions are nonjusticiable unless they explicitly mention a role for the courts?

3. The *Rucho* majority mentions two other kinds of redistricting claims—one-person, one-vote and racial gerrymandering challenges—but pointedly makes no reference to a third category: racial *vote dilution* claims. As we shall see in Chapter 5, Part II, such claims have been recognized under the Fourteenth Amendment since the early 1970s. They typically attack an electoral arrangement, such as an at-large electoral system or a single-member-district map, on the ground that it intentionally dilutes the electoral influence of a racial minority group. Why might the *Rucho* majority have declined to discuss racial vote dilution claims? (It's not because the plaintiffs didn't bring them up; they featured heavily in the plaintiffs' briefs.) How similar are racial and partisan vote dilution? Racial vote dilution requires discriminatory intent as well as the effect of a minority group's reduced electoral influence, often achieved through district lines that crack or pack the group's members. And what would be the fate of Section 2 of the Voting Rights Act, which bans racial vote dilution as a statutory matter, if constitutional racial vote dilution is no longer a cognizable claim? See Nicholas Stephanopoulos, *The Erasure of Racial Vote Dilution Doctrine*, ELECTION LAW BLOG (June 28, 2019), <https://electionlawblog.org/?p=105855>.

4. One of the *Rucho* majority's key analytical moves takes the following form: (1) *Some* partisan motivation in redistricting is permissible. (2) The Constitution only prohibits *excessive* partisanship. (3) There is no way to distinguish reliably between some and too much partisanship. (4) Therefore, no judicially manageable partisan gerrymandering standard exists. One response to this reasoning is to attack its premise: that some partisan motivation in redistricting is constitutionally unobjectionable. True, the *Vieth* plurality said the same thing, but that view only gained the support of four Justices. As Justice Stevens remarked in dissent in *Vieth*, until the plurality's opinion in that case, "there ha[d] not been the slightest intimation in any opinion written by any Member of this Court that a naked purpose to disadvantage a political minority would provide a rational basis for drawing a district line." *Vieth*, 541 U.S. at 337 (Stevens, J., dissenting). See also Michael S. Kang, *Gerrymandering and the Constitutional Norm Against Government Partisanship*, 116 MICHIGAN LAW REVIEW 351 (2017) (arguing that any partisan motivation in redistricting is impermissible); Justin Levitt, *Intent Is Enough: Invidious Partisanship in Redistricting*, 59 WILLIAM & MARY LAW REVIEW 1993 (2018) (same).

A different response is to argue that a *predominant*-partisan-intent requirement successfully navigates between acceptable and unacceptable levels of partisanship in redistricting. This is the tack taken by Justice Kagan in her dissent in *Rucho*. "[W]hen political actors have a specific and predominant intent to entrench themselves in power by manipulating district lines, that goes too far." *Rucho*, 139 S. Ct. at 2517 (Kagan, J., dissenting). But note that both the *Vieth* appellants and Justice Stevens in dissent in *Vieth* proposed predominant-partisan-intent criteria (plan-wide in the appellants' case, district-specific in Justice Stevens's), and that five Justices in *Vieth* rejected both formulations. How, then, can Justice Kagan maintain that this approach is still doctrinally available?

5. The *Rucho* majority insists that "[p]artisan gerrymandering claims invariably sound in a desire for proportional representation." *Rucho*, 139 S. Ct. at 2499. What does the majority mean here by proportional representation? In political science, proportional representation has a clear

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

definition: a share of legislative seats for a party that is *equal* to its share of the vote. Under this definition, neither the plaintiffs nor the lower courts sought to impose proportional representation. In particular, the quantitative metrics on which the plaintiffs and the lower courts relied, such as the efficiency gap and partisan bias, capture a plan's deviation from *partisan symmetry*, not proportionality. [See the discussion at pages 142-44, Note 1 in the Casebook.] But perhaps the *Rucho* majority means something broader by proportional representation, more like any argument that even looks to how a party's legislative representation compares to its popular support. In that case, it might be fair to label the efficiency gap and partisan bias as measures of disproportionality. But how tenable is this view? In a democracy, is it really possible, normatively, to divorce a party's legislative representation from its popular support?

6. The *Rucho* majority observes that there are multiple desiderata in redistricting. Some want “a greater number of competitive districts.” Others prefer “to ensure each party its ‘appropriate’ share of ‘safe’ seats.” Still others advocate “adherence to ‘traditional’ districting criteria, such as maintaining political subdivisions, keeping communities of interest together, and protecting incumbents.” *Rucho*, 139 S. Ct. at 2500. What do these redistricting objectives have to do with claims of *partisan* gerrymandering? Would anyone call it a partisan gerrymandering challenge if a plaintiff wanted lines to be drawn to yield greater electoral competitiveness? Or if a plaintiff sought districts that better corresponded to political subdivisions or communities of interest? To put the point another way, would courts actually have to “decid[e] among . . . these different visions of fairness” to adjudicate partisan gerrymandering claims, *id.*, or could courts simply stay agnostic between them?

7. Prior to *Rucho*, the last time the Supreme Court held that a redistricting cause of action was nonjusticiable was in *Colegrove v. Green*, 328 U.S. 549 (1946). In that case, as we discuss in Chapter 3, Part I, a plurality of the Court deemed one-person, one-vote claims to be political questions. The *Colegrove* plurality, and the dissenters in the 1960s reapportionment cases (which reversed *Colegrove*), made a number of arguments reminiscent of the *Rucho* majority's reasoning. Among other things, they contended that (1) conventional modes of constitutional interpretation do not support the justiciability of one-person, one-vote claims; (2) no normative consensus exists as to what a fairly apportioned map is; (3) judges lack the empirical skills to tackle the quantitative issues associated with malapportionment; (4) it would be unseemly for the federal courts to involve themselves in redistricting; and (5) other actors, like legislatures and state courts, could solve the problem of malapportionment instead. See Nicholas O. Stephanopoulos, *The Anti-Carolene Court*, 2019 SUPREME COURT REVIEW 111, 128-35 (tracing the parallels between the *Rucho* majority and the opponents of one-person, one-vote in the mid-twentieth century).

8. Perhaps the most powerful evidence relied on by the plaintiffs, the lower courts, and Justice Kagan are computer simulations of alternative district maps. The logic of these simulations is as follows: First, identify all redistricting criteria used by a jurisdiction *other* than partisan advantage. (These may include compactness, respect for political subdivisions, compliance with the Voting Rights Act, and any other nonpartisan goal.) Second, deploy a computer algorithm to generate randomly thousands of district maps based on these criteria. Third, use election results to estimate the likely partisan consequences of both the enacted plan and all of the computer-generated maps. And fourth, compare the enacted plan's partisan performance to that of the computer-generated maps. If the enacted plan is similar to the computer-generated maps, then it is

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

unproblematic. But if the enacted plan is more biased than the computer-generated maps—yielding more seats for the line-drawing party—then one may infer partisan intent, partisan effect, and a lack of any legitimate justification for this impact.

The *Rucho* majority objects that “it does not make sense to use criteria that will vary from State to State and year to year as the baseline.” *Id.* at 2505. But why isn’t this fluctuating benchmark “a virtue, not a vice—a feature, not a bug,” as Justice Kagan argues in her dissent? *Id.* at 2521 (Kagan, J., dissenting). After all, the Court has always given mapmakers a great deal of discretion in selecting parameters for redistricting. The fluctuating benchmark is simply a product of this discretion. The *Rucho* majority also complains that it is unclear *how* different from the computer-generated maps the enacted plan must be to be condemned. “Would twenty percent away from the median map be okay? Forty percent? Sixty percent?” *Id.* at 2505. The dissent does not propose a quantitative standard, like more than two standard deviations away from the median, or more biased than 95 percent of computer-generated maps. Should it have?

A different critique of the computer simulations is that they may not be a representative sample of the universe of district maps that satisfy the specified criteria. In that case, it is arguably irrelevant how near to, or far from, the median of the distribution of computer-generated maps the enacted plan happens to be. If this median is unrepresentative of the appropriate universe, then it may carry little or no normative weight. For scholars making this point, see Micah Altman et al., *Revealing Preferences: Why Gerrymanders Are Hard to Prove, and What to Do About It* (Mar. 23, 2015), and Benjamin Fifield et al., *A New Automated Redistricting Simulator Using Markov Chain Monte Carlo* (May 24, 2018).

9. The *Rucho* majority asserts that voters’ partisan preferences may change from race to race and year to year. As a result, district plans alleged to be gerrymanders for one party (like the Indiana state house map at issue in *Bandemer* and the Pennsylvania congressional map at issue in *Vieth*) may produce majorities for the opposing party in subsequent elections. In her dissent, Justice Kagan calls these claims “unsupported and out-of-date musings about the unpredictability of the American voter.” *Rucho*, 139 S. Ct. at 2519 (Kagan, J., dissenting). The political science literature backs her up. Modern American voters rarely split their tickets or switch their partisan preferences from one election to the next. See, for example, Donald P. Green et al., *PARTISAN HEARTS AND MINDS: POLITICAL PARTIES AND THE SOCIAL IDENTITIES OF VOTERS* (2002) and Corwin D. Smidt, *Polarization and the Decline of the American Floating Voter*, 61 *AMERICAN JOURNAL OF POLITICAL SCIENCE* 365 (2017). But even if the *Rucho* majority is wrong empirically, could there be sound jurisprudential reasons to assume that voters do not necessarily follow the party line but, rather, make choices based on issues, candidates, and campaigns? For an exploration of this possibility, see Michael Morley, *Rucho, Legal Fictions, and the Judicial Models of Voters*, *ELECTION LAW BLOG* (July 4, 2019), <https://electionlawblog.org/?p=106008>.

10. The *Rucho* majority makes short work of the argument that partisan gerrymandering is justiciable under the First Amendment. First, the *Rucho* majority claims that district plans impose “no restrictions on speech, association, or any other First Amendment activities” because “plaintiffs are free to engage in those activities no matter what the effect of a plan may be on their district.” *Rucho*, 139 S. Ct. at 2504. But even if gerrymanders do not *directly* burden First Amendment rights, why don’t they do so *indirectly*, through their chilling effects on targeted voters

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

who realize that their speech and association have been rendered meaningless in gerrymandered districts? The Court has often recognized First Amendment claims of this kind. See, for example, *Buckley v. Valeo*, 424 U.S. 1, 65 (1976) (applying “exacting scrutiny” to disclosure requirements even though their associational burden “arises, not through direct government action, but indirectly as an unintended but inevitable result of the government’s conduct”) and *NAACP v. Alabama*, 357 U.S. 449, 463 (1958) (striking down an order that the NAACP reveal its membership list because the order “may induce [NAACP] members to withdraw from the Association and dissuade others from joining it”). See also Christopher Warshaw and Nicholas Stephanopoulos, *The Impact of Partisan Gerrymandering on Political Parties* (Feb. 21, 2019) (finding empirically that when parties are disadvantaged by gerrymandering, associational functions such as running for office and donating money are impeded).

Second, the *Rucho* majority asserts that, under the First Amendment, “any level of partisanship in districting would constitute an infringement.” *Rucho*, 139 S. Ct. at 2504. The First Amendment thus “provides no standard for determining when partisan activity goes too far.” *Id.* Perhaps it is true that a theory of viewpoint discrimination would find a violation whenever district lines are drawn to benefit certain voters, and disadvantage other voters, because of their political beliefs. But is this also the case for an associational theory that focuses on the ways in which gerrymanders prevent likeminded voters from collaborating politically? As we discuss in Chapter 6, Part C and Chapter 9, associational claims typically trigger sliding-scale scrutiny, under which the stringency of judicial review varies based on the severity of the burden imposed on associational rights. Why wouldn’t this approach prevent the outcome feared by the Court, namely, the invalidation of all districts drawn for partisan reasons? See Daniel P. Tokaji, *Gerrymandering and Association*, 59 WILLIAM & MARY LAW REVIEW 2159 (2018).

11. In the final section of its opinion, the *Rucho* majority observes that state courts, unlike federal courts, may fight gerrymandering on the basis of state constitutional provisions that are more specific than any clause in the federal Constitution. “[T]here is no ‘Fair Districts Amendment’ to the Federal Constitution,” as there is to the Florida constitution. *Rucho*, 139 S. Ct. at 2507. But notice that the Pennsylvania Supreme Court recently struck down the state’s congressional plan based on a provision stating only that “elections shall be free and equal.” *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. 2018). Is this language any more determinate than the First Amendment or the Equal Protection Clause? Also note that, shortly after *Rucho*, a North Carolina trial court invalidated the state’s legislative maps based on (among other theories) North Carolina’s analogues to the First and Fourteenth Amendments. This court explicitly disagreed with the Supreme Court that these provisions are nonjusticiable in this context. See *Common Cause v. Lewis*, 2019 WL 4569584 (N.C. Super. Sept. 3, 2019). And observe (as Justice Kagan does in her dissent) that, prior to *Rucho*, district courts in Michigan, North Carolina, Ohio, and Wisconsin arrived at essentially the same three-part test for adjudicating claims of partisan vote dilution. Does this lower court consensus suggest that, even if the federal Constitution is highly abstract, its dictates can be made more concrete through conventional judicial interpretation? See Nicholas Stephanopoulos, *The Emerging Consensus of the Lower Courts*, ELECTION LAW BLOG (Apr. 27, 2019), <https://electionlawblog.org/?p=104888>.

The *Rucho* majority further points out that gerrymandering may be combatted by voter initiatives that “mandate[] at least some of the traditional districting criteria” or “plac[e] power to

CHAPTER 4. PARTISAN GERRYMANDERING AND POLITICAL COMPETITION

draw electoral districts in the hands of independent commissions.” *Rucho*, 139 S. Ct. at 2507. But how helpful is direct democracy in this context? Most attempts to reform redistricting through voter initiatives fail due to the ferocious opposition of sitting legislators. See Nicholas O. Stephanopoulos, *Reforming Redistricting: Why Popular Initiatives to Establish Redistricting Commissions Succeed or Fail*, 23 JOURNAL OF LAW AND POLITICS 331 (2007). Voter initiatives are also available in only about half the states; they are *not* available, for example, in Maryland, North Carolina, and Wisconsin—the states that gave rise to *Lamone*, *Rucho*, and *Whitford*, respectively. And the constitutionality of independent redistricting commissions remains hazy. Their validity was affirmed in *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015), which we discuss in Chapter 7, Part D. But Chief Justice Roberts, joined by three other Justices, dissented on the ground that when a commission is responsible for redistricting, the Elections Clause is violated because the “Legislature” does not get to draw the lines. Now that Justice Kennedy is no longer on the Court, this position may well command five votes.

Much the same points apply to the *Rucho* majority’s final option for thwarting gerrymandering: congressional legislation. How likely is it that, for the first time in American history, members of Congress, many of whom are elected from gerrymandered districts, will pass laws seriously restricting the practice? One might think, not very likely, except that the House of Representatives recently approved a bill that would mandate the use of redistricting commissions for congressional district plans. See H.R. 1, 116th Cong. §§ 2401, 2411 (2019). However, there is no sign that the Senate will take any action on this bill. In addition, is it clear that congressional action in this area would be constitutionally permissible? Congress has near-plenary authority over congressional elections under the Elections Clause. But what if, in exercising this power, Congress orders states to take certain steps (like creating redistricting commissions)? Would such directives violate the anti-commandeering doctrine? And even if Congress can fight congressional gerrymandering, can it curb state and local gerrymandering? To do so, Congress would presumably have to invoke its Fourteenth Amendment enforcement authority. Any such invocation would require the Court to determine how “congruent and proportional” the legislation is to underlying constitutional offenses.

12. What will mapmakers do now that there is no possibility of federal courts checking partisan gerrymandering? More aggressive gerrymandering of the kind seen in the 2010 cycle, relying on the cracking and packing of the opposing party’s voters, is a near-certainty. But consider the following additional steps that mapmakers could take: (1) using computer algorithms to maximize the size and durability of a party’s redistricting advantage; (2) redrawing districts more frequently (as often as every two years) to keep fine-tuning a party’s electoral position; and (3) creating noncontiguous districts that combine clusters of voters in different parts of a state. How plausible are these options? How much value do they add to traditional gerrymandering? And is it definitely the case that federal courts would stay on the sidelines if these tactics were tried? See Aaron Goldzimer and Nicholas Stephanopoulos, *Democrats Can’t Be Afraid to Gerrymander Now*, SLATE (July 3, 2019).

Chapter 5. Minority Vote Dilution

ADD THE FOLLOWING NOTE ON PAGE 295, AFTER NOTE 9:

9.5. Can white voters bring racial vote dilution claims under Section 2 of the Voting Rights Act? The statutory text, which refers to “a denial or abridgement of the right of *any citizen* . . . to vote *on account of race or color*,” suggests so. And that is indeed what most lower courts have held. However, even if they could satisfy the *Gingles* preconditions, white voters would presumably have a very difficult time establishing liability under the Senate factors, most of which involve the presence of historical and ongoing racial discrimination. For a recent case recognizing white voters’ right to bring a racial vote dilution challenge, but ruling against them on the merits, see *Harding v. County of Dallas*, 948 F.3d 302 (5th Cir. 2020) (holding that plaintiffs failed to prove that a second Anglo opportunity county commissioner district could be drawn in Dallas County, Texas).

ADD THE FOLLOWING AFTER NOTE 5 ON PAGE 316:

And what if a state has already drawn a majority-minority district, but minority voters are still unable to elect their preferred candidate (due to low turnout or less-than-perfect cohesion)? Can the state still be found liable under Section 2? The Fifth Circuit recently said yes, striking down a majority-minority Mississippi state senate district as dilutive. See *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019). In so ruling, the court rejected the idea that *Bartlett* barred Section 2 claims against majority-minority districts, explaining that “the Court did not hold . . . that if the district being challenged already contains a majority-minority population, then a § 2 claim is precluded.” *Id.* at 157. However, Judge Willett dissented on this ground, arguing that the majority’s “blinkered focus on outcomes rather than opportunity clashes with the VRA’s express text and relevant caselaw, both of which underscore electoral participation and opportunity—not electoral success.” *Id.* at 183 (Willett, J., dissenting). Sitting en banc, the Fifth Circuit also vacated the decision below on the ground that the case became moot after the 2019 election was held. See *Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc).

ADD THE FOLLOWING NOTE ON PAGE 317, AFTER NOTE 7:

What if no *two* minority communities are numerous enough to comprise a majority of a hypothetical district but *three* minority groups would be sufficiently numerous? In *Holloway v. City of Virginia Beach*, ___ F. Supp. 3d ___, 2021 WL 1226554 (E.D. Va. 2020), the district court ruled in favor of a claim brought by African American, Hispanic, and Asian American voters. Notably, the court found that these groups were politically cohesive because of not only their voting patterns but also their shared political advocacy. According to the court, “qualitative evidence can be used as a strong metric for determining the political cohesion of a minority group.” *Id.* at *30. Do you agree that political cohesion can be ascertained based on qualitative as well as quantitative evidence?

ADD THE FOLLOWING NOTE ON PAGE 317, AFTER NOTE 8:

8.5. 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

CHAPTER 5. MINORITY VOTE DILUTION

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. . . .

CHAPTER 5. MINORITY VOTE DILUTION

. . . 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

CHAPTER 5. MINORITY VOTE DILUTION

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 TO THE END OF THE PARAGRAPH THAT BEGINS “WHILE EVEN THIS LEVEL OF METHODOLOGICAL DETAIL” ON PAGE 318:

Lastly, should precincts’ racial composition be determined using Census data (which covers all eligible voters) or voter files (which can be used to zero in on actual voters only)? The vast majority of courts have relied on Census data but the Second Circuit recently approved a technique known as Bayesian Improved Surname Geocoding that begins with voter files and then employs an algorithm to predict the race of each voter. *See Clerveaux v. East Ramapo Cent. Sch. Dist.*, 984 F.2d 213 (2d Cir. 2021).

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*, 326 F. Supp. 3d 128 (E.D. Va. 2018).

CHAPTER 5. MINORITY VOTE DILUTION

Virginia’s Attorney General decided not to appeal the district court’s decision. However, the Virginia House of Delegates, which had intervened as a defendant at the trial stage, chose to continue the litigation. In *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945 (2019), the Supreme Court held that the House lacked standing and thus avoided commenting (for a second time) on the merits of the racial gerrymandering claims:

To begin with, the House has not identified any legal basis for its claimed authority to litigate on the State’s behalf. Authority and responsibility for representing the State’s interests in civil litigation, Virginia law prescribes, rest exclusively with the State’s Attorney General. . . . Virginia has thus chosen to speak as a sovereign entity with a single voice. In this regard, the State has adopted an approach resembling that of the Federal Government, which “centraliz[es]” the decision whether to seek certiorari by “reserving litigation in this Court to the Attorney General and the Solicitor General.” Virginia, had it so chosen, could have authorized the House to litigate on the State’s behalf, either generally or in a defined class of cases. . . . But the choice belongs to Virginia, and the House’s argument that it has authority to represent the State’s interests is foreclosed by the State’s contrary decision.

. . . . The House [also] has standing, it contends, because it is “the legislative body that actually drew the redistricting plan,” and because, the House asserts, any remedial order will transfer redistricting authority from it to the District Court. But the Virginia constitutional provision the House cites allocates redistricting authority to the “General Assembly,” of which the House constitutes only a part.

That fact distinguishes this case from *Arizona State Legislature v. Arizona Independent Redistricting Comm’n*, in which the Court recognized the standing of the Arizona House and Senate—*acting together*—to challenge a referendum that gave redistricting authority exclusively to an independent commission, thereby allegedly usurping the legislature’s authority under the Federal Constitution over congressional redistricting. In contrast to this case, in *Arizona State Legislature* there was no mismatch between the body seeking to litigate and the body to which the relevant constitutional provision allegedly assigned exclusive redistricting authority. Just as individual members lack standing to assert the institutional interests of a legislature, a single House of a bicameral legislature lacks capacity to assert interests belonging to the legislature as a whole.

. . . . Aside from its role in enacting the invalidated redistricting plan, the House, echoed by the dissent, asserts that the House has standing because altered district boundaries may affect its composition. . . .

. . . . [A]lthough redrawing district lines indeed may affect the membership of the chamber, the House as an institution has no cognizable interest in the identity of its members. Although the House urges that changes to district lines will “profoundly disrupt its day-to-day operations,” it is scarcely obvious how or why that is so. As the party invoking this Court’s jurisdiction, the House bears the burden of doing more than “simply alleg[ing] a nonobvious harm.”

CHAPTER 5. MINORITY VOTE DILUTION

Analogizing to “group[s] other than a legislative body,” the dissent insists that the House has suffered an “obvious” injury. But groups like the string quartet and basketball team posited by the dissent select their own members. Similarly, the political parties involved in the cases the dissent cites select their own leadership and candidates. In stark contrast, the House does not select its own members. Instead, it is a representative body composed of members chosen by the people. Changes to its membership brought about by the voting public thus inflict no cognizable injury on the House.

Virginia House of Delegates, 139 S. Ct. at 1951-55. Justice Alito, joined by Chief Justice Roberts, Justice Breyer, and Justice Kavanaugh, dissented. In an interesting passage, he argued that how district lines are drawn has significant implications for the behavior of both individual legislators and the legislature as a whole. As to individual legislators, “[w]hen the boundaries of a district are changed, the constituents and communities of interest present within the district are altered, and this is likely to change the way in which the district's representative does his or her work.” *Id.* at 1956. And as to the legislature as a whole, “it matters a lot how voters with shared interests and views are concentrated or split up.” “The cumulative effects of all the decisions that go into a districting plan have an important impact on the overall work of the body.” *Id.*

Does *Virginia House of Delegates* create opportunities for gamesmanship? Suppose that a district plan is enacted under conditions of unified government, that the minority party captures the attorney general position later in the decade, and that plaintiffs then successfully challenge the plan in federal district court. If the attorney general (who may be aligned politically with the plaintiffs) declines to appeal, is the plan then doomed, even if the Supreme Court would likely reverse the district court? Assuming the answer is yes, is this a sensible rule? It would seem to allow the invalidation of district maps, without possibility of appeal, when an initially unified government is replaced by a divided government. But maybe this is actually desirable if one posits that unified governments typically pass gerrymandered maps. Then making it easier for these maps to be struck down could be a net positive.

Virginia House of Delegates rests, in part, on the fact that Virginia had authorized the Attorney General to make decisions for the state in litigation. Could states circumvent the case's holding by simply authorizing *multiple* parties, or *other* parties, to represent the state? Wisconsin Republicans may have done just that when, after losing the races for governor and attorney general in 2018, they passed a lame duck law that enabled the legislature (still under Republican control) to instruct the attorney general how to proceed. “If requested by the governor or either house of the legislature,” the attorney general must “appear for and represent the state” and “prosecute or defend in any court . . . any cause or matter, civil or criminal.” Wis. Stat. § 165.25(1m).

Perhaps the most interesting portions of *Virginia House of Delegates* address the very nature of a legislature (and thus whether it is harmed by the invalidation of a district map). The majority has a thin conception of a legislature, under which its only function is formally to represent the people of a state. On this view, it doesn't matter who composes the legislature or what the legislature does; only the official provision of representation is relevant. The dissent, on the other hand, has a much thicker understanding of a legislature, under which its membership and output are every bit as significant as its nominal representation of the people. On this account, a

CHAPTER 5. MINORITY VOTE DILUTION

legislature necessarily has an interest in the preservation of its current district map, because any change to the map would affect its makeup and policies. Which theory do you find more persuasive? If a legislature only has an interest in its formal representation of the people, as the majority opinion maintains, then why should it matter whether one chamber or both are appellants? Even if both chambers appeal, isn't their grievance still not judicially cognizable?

CHAPTER 5. MINORITY VOTE DILUTION

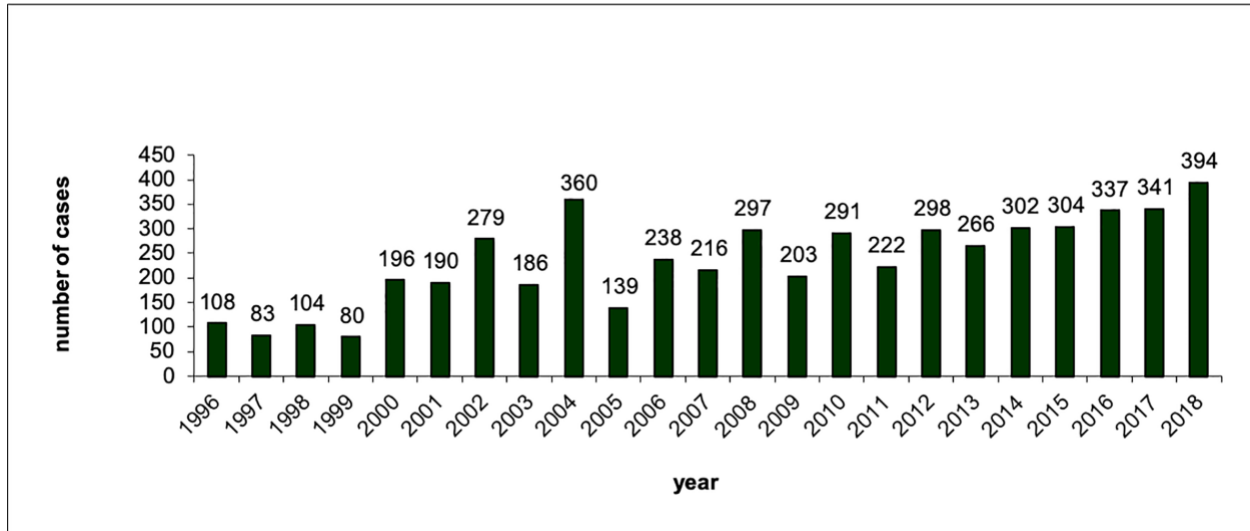
Chapter 6. Election Administration and Remedies

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 270 cases per year from 2000-2018. “The nonpresidential year of 2018 saw the most cases, 394, since at least since 1996 (and likely ever).” RICHARD L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 56 (2020). And though the dust has not yet settled, it appears the 2020 election set a new record.

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: 1996-2018:



Source: Richard L. HASEN, *ELECTION MELTDOWN: DIRTY TRICKS, DISTRUST, AND THE THREAT TO AMERICAN DEMOCRACY* 56 (2020).

In some ways, the 2020 election was remarkably successful. In the midst of an unprecedented global pandemic that caused a massive shift in how people vote, state and local election officials managed to conduct a secure presidential election that was free from any reasonable doubt over the outcome. See Nathaniel Persily & Charles Stewart III, *The Miracle and Tragedy of the 2020 Election*, 32 *JOURNAL OF DEMOCRACY* 159 (2021). Yet President Trump’s baseless claim that he was denied victory due to the electoral fraud – sometimes known as Trump’s “Big Lie” – cast a dark cloud over the election and pose a continuing challenge to our democracy.

2020 was an especially active year for election litigation. The Stanford-MIT Healthy Elections Project found over 500 cases and appeals arising from 46 states plus the District of Columbia and Puerto Rico. Stanford-MIT Healthy Elections Project, *COVID-Related Election*

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

Litigation Tracker, <https://healthyelections-case-tracker.stanford.edu/search> (accessed July 13, 2021). In general, these cases can be broken down into two broad categories. The first encompasses cases seeking to compel states to liberalize their voting rules in response to the pandemic, mostly brought by Democrats and their allies. The second are cases challenging the liberalization of voting rules or alleging electoral fraud, mostly brought by Republicans or their allies. For a sampling of some of the most prominent cases, see *2020 Election Litigation Tracker*, SCOTUSBLOG, <https://www.scotusblog.com/election-litigation/>.

A prominent subject of litigation in the first category was absentee voting. Given the risks of contracting COVID through in-person contact, the country saw a massive shift in how people with vote, with millions choosing to vote by mail rather than in person. One survey found that the fraction of people voting by mail more than doubled (going from 21% to 46%), while the percentage of people voting in person on election day fell by more than half (going from 60% to 28%). Charles Stewart III, *How We Voted in 2020: A Topical Look at the Survey of the Performance of American Elections* 6 (March 2021), <http://electionlab.mit.edu/sites/default/files/2021-03/HowWeVotedIn2020-March2021.pdf>. There was a dramatic difference by party affiliation, with many more Democrats (60%) than Republicans (32%) opting to vote by mail. *Id.* at 9. In 2020, 34 states and D.C. had no-excuse absentee voting, which allows people to cast their votes through the mail without providing a reason. National Conference of State Legislators, *Voting Outside the Polling Place Report*, Table 1: States with No-Excuse Absentee Voting (May 1, 2020), <https://www.ncsl.org/research/elections-and-campaigns/vopp-table-1-states-with-no-excuse-absentee-voting.aspx>.

As the pandemic worsened in March 2020, in-person voting in the Ohio and Wisconsin primary elections was called off shortly before the polls were to open. While litigation over Ohio's decision was unsuccessful and ultimately declared moot, *State ex re. Ohio Democratic Party v. LaRose*, 159 Ohio St. 3d 277 (2020), the Wisconsin Supreme Court overturned Governor Tony Evers' decision to suspend in-person voting on the ground that it violated the state constitution, *Wisconsin Legislature v. Evers*, No. 2020AP608-OA (slip op. April 6, 2020), https://www.wicourts.gov/news/docs/2020AP608_2.pdf. In a related federal lawsuit, the Democratic Party obtained a preliminary injunction requiring the state to accept absentee ballots postmarked after the scheduled election day, but the Supreme Court stayed that injunction by a 5-4 vote. *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020); see also *Merrill v. People First of Alabama*, 141 S. Ct. 190 (2020) (staying preliminary injunction issued by a federal court in Alabama, which would have relaxed the requirements for absentee voting and made curbside voting available). Before the general election, the Court upheld a stay of yet another injunction, which would have extended the deadline for the receipt of mail-in ballots in Wisconsin. *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020). These decisions, which are driven by the Court's skepticism of federal court last-minute election injunctions close to an election, are discussed further below (Supplement to page 463 of the Casebook).

Other cases seeking to make voting easier were brought in state court. Prominent among the was a case in Pennsylvania, a pivotal swing state, seeking to require the state to count absentee and mail-in ballots received up to three days after Election Day. The Pennsylvania Supreme Court issued a pre-election injunction requiring that these ballots be counted, so long as they were not

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

clearly postmarked after that date. *Pennsylvania Democratic Party v. Boockvar*, 238 A. 3d 345, 371-72, 386 (Penn. 2020). Its ruling was partly predicated on the “Free and Equal Elections Clause” of the Pennsylvania State Constitution, which it understood to require that the electoral process be kept open to the extent possible. *Id.* at 369-70. But the state court denied an order requiring that so-called “naked ballots” – that is, ballots that were returned without a secrecy envelope to ensure the voter’s anonymity – be counted. *Id.* at 380, 386.

Republicans sought U.S. Supreme Court review of the Pennsylvania Supreme Court’s ruling. The main issue before the U.S. Supreme Court was whether a state court, relying on its state constitution, may alter the rules for conducting a presidential election. Republicans’ argument relied on the “independent state legislature” doctrine, which holds that state *legislatures* have the authority to set rules governing presidential election, which state courts may not alter. Article II, Section 1 of the U.S. Constitution gives “the Legislature” of each state has authority to determine how presidential electors are appointed. Supporters of the independent state legislature theory contend that the term “the Legislature” means what it says. On their reading, state courts are powerless to alter or strike down state election statutes in presidential elections on the ground that they violate a state constitution (which was not written by the state legislature). On the other hand, the Supreme Court has interpreted the term “the Legislature,” which also appears in the Elections Clause of Article I, Section 4, to include the state’s entire lawmaking power. *Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652 (2015). That would include constitution-makers and state courts interpreting state constitutions.

The Supreme Court denied relief in the Pennsylvania case and subsequently declined to rule on the merits, over the dissents of Justice Thomas and Justice Alito (joined by Justice Gorsuch). *Republican Party of Pennsylvania v. DeGraffenreid*, 141 S. Ct. 732 (2021). Four of the Court’s nine justices (Thomas, Alito, Gorsuch, and Kavanaugh), however, have signaled their agreement with the independent state legislature doctrine. Richard L. Hasen, *Trump’s Legal Farce Is Having Tragic Results*, N.Y. TIMES, Nov. 23, 2020. For a scholarly defense of this doctrine, see Michael T. Morley, *The Independent State Legislature Doctrine, Federal Elections, and State Constitutions*, 55 GEORGIA LAW REVIEW 1 (2020). For a rebuttal, see Vikram D. Amar, *Federal Court Review of State Court Interpretations of State Laws that Regulate Federal Elections: Debunking the ‘Independent State Legislature’ Notion Once and for all, and Keeping Federal Judges to Their Important but Limited Lanes* (November 16, 2020), <https://ssrn.com/abstract=3731755>. Is the independent state legislature a “ticking time bomb,” waiting to go off in some future election. See Rick Hasen, *Breaking and Analysis: Supreme Court Refuses to Hear Cases Over Conduct of Election in Pennsylvania, With Justices Alito, Gorsuch and Thomas Dissenting: A Ticking Time Bomb To Go Off in a Later Case*, ELECTION LAW BLOG, Feb. 22, 2021, <https://electionlawblog.org/?p=120941>.

The second category of cases involve challenges to the liberalization of voting rules or allegations of electoral fraud, mostly brought by Republicans and their supporters. Some of these cases were brought before the election. In New Jersey, for example, the Trump campaign and RNC challenged a state executive order and subsequent legislation facilitating mail-in voting. A federal district court denied preliminary injunctive relief. *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354 (D.N.J. 2020). In Texas, Republicans brought suit shortly before Election Day to challenge approximately 127,000 ballots cast at drive-through voting sites in the Houston area.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

The federal courts denied a preliminary injunction and dismissed the lawsuit. *Hotze v. Hollins*, 2020 WL 6437668 (S.D. Tex. Nov. 2, 2020); *Hotze v. Hollins*, 2020 WL 6440440 (5th Cir. Nov. 2, 2020).

After Election Day, President Trump's most ardent supporters went to court in several states seeking to have him declared the winner. Their main argument rested on claims of electoral fraud, most of them lacking in substantial evidence. Courts in Michigan, Wisconsin, Pennsylvania, and other states rejected lawsuits by Trump and his allies. In the most prominent of these cases, the Supreme Court rejected for lack of standing a lawsuit by the State of Texas against certification of election results in four states the Joe Biden won. *Texas v. Pennsylvania*, 141 S. Ct. 1230 (2020)

The Trump camp's scorched-earth litigation strategy was unsuccessful in reversing the result of the 2020 presidential election, given the scant evidence of significant fraud, and the willingness of most election officials – many of them Republicans – to defend the results and the integrity of our election system. Still, the Big Lie achieved some of its intended effects. Many of Trump supporters continue to believe his claim that the election was stolen from him, despite the lack of credible evidence. Does this pose an ongoing threat to the stability of American democracy? See Hasen, *Trump's Legal Farce Is Having Tragic Results*, N.Y. TIMES, Nov. 23, 2020. Consider the growing partisan pressure on state and local election officials, discussed in the next note.

ADD THE FOLLOWING TO NOTE 10 ON PAGE 398:

State and local election officials are facing greater threats to their impartiality than ever, in the wake of the false claims of widespread election fraud in 2020. After Election Day, President Trump exerted intense public and private pressure on Republican-aligned election officials in key swing states, even after it was clear he had lost. The most egregious example was phone call to Georgia's Republican Secretary of State Brad Raffensperger, which was recorded. Amy Gardner, *'I Just Want to Find 11,780 Votes': In Extraordinary Hour-Long Call, Trump Pressures Georgia Secretary of State to Recalculate the Vote in His Favor*, WASH. POST, Jan. 3, 2021. In that call, the President embraced various disproven conspiracy theories, based on which he claimed to have won the state. At one point, the President said:

So look. All I want to do is this. I just want to find 11,780 votes, which is one more than we have. Because we won the state.

And later:

So what are we going to do here, folks? I only need 11,000 votes. Fellas, I need 11,000 votes. Give me a break."

Secretary of State Raffensperger resisted President Trump's entreaties. In response, Trump and his allies have attacked Raffensperger mercilessly. The state Republican party even censured Raffensperger. He is running for reelection as Georgia's Secretary of State in 2022, but faces a challenge from a Trump loyalist and is given a slim chance of winning the Republican primary. Russell Berman, *Trump's Revenge Begins in Georgia*, THE ATLANTIC, July 12, 2021. What

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

implications does all this have for future attempts at election subversion? Will election officials perform their jobs conscientiously if they risk losing those jobs for doing so?

The risk of election subversion does not end with the possibility that election officials will be voted out of office for resisting political pressure. Since the 2020 election, supporters of former President Trump have taken aggressive steps to assert control over the administration of elections. For example, a new Georgia election law allows the state legislature to suspend county election officials and gives it greater control over the state election board. Some county election board members have already been stripped of their positions, most of them Democrats and several people of color. According to one report, there have been 216 bills in 41 states to give state legislatures more power over election officials, 24 of which have been enacted into law in 14 states. Nick Corasaniti & Reid J. Epstein, *How Republican States Are Expanding Their Power Over Elections*, N.Y. TIMES, June 19, 2021. Many state and local election officials have received threats of violence. Some have left their jobs, while those who remain face increasing pressure to put partisan interests above their responsibility to administer elections evenhandedly. Brennan Center for Justice, *Election Officials Under Attack*, June 16, 2021, <https://www.brennancenter.org/our-work/policy-solutions/election-officials-under-attack>; Michael Wines, *After a Nightmare Year, Election Officials Are Quitting*, N.Y. TIMES, July 2, 2021.

What can be done to safeguard the impartiality of those charged with running our elections? For one suggestion, see Larry Diamond, Kevin Johnson, and Miles Rapaport, *The Time Has Come for Nonpartisan State Election Leadership*, THE HILL, April 4, 2021, <https://thehill.com/opinion/campaign/546307-the-time-has-come-for-nonpartisan-state-election-leadership?rl=1>.

ADD THE FOLLOWING AT THE BOTTOM OF PAGE 401:

The American electoral infrastructure, including our voting technology, received renewed attention in the wake of the Russian government's interference with the 2016 election. One aspect of that interference was the targeting of election websites in at least 21 states, according to the Department of Homeland Security. See Michael McFaul & Bronte Kass, *Understanding Putin's Intentions and Actions in the 2016 U.S. Presidential Election*, in SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND (2019), available at <https://cyber.fsi.stanford.edu/securing-our-cyber-future>. The Mueller Report documented Russian attempts to interfere with state and local election systems, as well as the private firms servicing them. Those efforts included the placement of malware within the software of a voter registration vendor. While there is no evidence to date that such hacking affected any actual votes in the 2016 election, the incidents have prompted increased concern about the security of voting technology. Recent reports by Stanford's Cyber Policy Center and the National Academies of Sciences, Engineering, and Medicine recommend another overhaul of the United States' electoral infrastructure. Herbert Lin et al., *Increasing the Security of the U.S. Election Infrastructure*, in SECURING AMERICAN ELECTIONS: PRESCRIPTIONS FOR ENHANCING THE INTEGRITY AND INDEPENDENCE OF THE 2020 U.S. PRESIDENTIAL ELECTION AND BEYOND (2019); National Academies of Sciences, Engineering, and Medicine, *SECURING THE VOTE: PROTECTING AMERICAN DEMOCRACY* (2018). The Stanford report's recommendations include requiring a voter-verifiable paper audit trail and auditing of all

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

elections, securing election technology through independent code inspection and “white-hat” attacks, and committing regular funding streams to strengthen election cybersecurity.

The State of Georgia has faced especially serious problems with its voting systems. In 2018, a federal district court found that the state had failed to address the “mounting tide of evidence of the inadequacy and security risks” posed by its direct record electronic (DRE) voting system but declined to order an immediate rollout of a paper-based system. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1307 (N.D. Ga. 2018). As the 2020 election approached, the court found that the state’s DRE machines, election software, and voter databases were “antiquated, seriously flawed, and vulnerable to failure, breach, contamination, and attack,” posing “imminent threats of contamination, dysfunction, and attacks on State and county voting systems.” *Curling v. Raffensperger*, 397 F. Supp. 3d 1334, 1339-40 (N.D. Ga. 2019). In response, the district court issued a preliminary injunction requiring the state to stop using its current voting system and software. *Id.* at 1410. In its June 2020 primary, the state attempted to roll out a new ballot-marking device, a voting system that prints out a ballot with a bar code that can be read by an electronic scanner. *Id.* at 1341 n. 10.

The rollout of Georgia’s new voting system did not go well. Problems with the delivery and activation of equipment caused some voters to wait for hours, which polling places – understaffed due to the COVID-19 pandemic – struggled to troubleshoot. Nick Corasanti & Stephanie Saul, *Georgia Havoc Raises New Doubts on Pricey Voting Machines*, N.Y. TIMES, June 11, 2020. What’s the lesson from the Georgia fiasco? That state and local election officials should be more careful and deliberate when implementing new voting technology? That courts should hesitate to order technologically complex changes to a state’s voting system? Perhaps both?

ADD THE FOLLOWING AT THE END OF NOTE 4 ON PAGE 421:

Litigation over voter ID requirements continues in state courts. Missouri adopted a law requiring most voters to present photo ID, while providing an exception allowing voters to provide non-photo ID if they submit an affidavit that meets certain requirements. The Missouri Supreme Court concluded that this law was too burdensome on voters. The court therefore affirmed an order enjoining the state from requiring an affidavit from voters using non-photo ID and from disseminating materials indicating that photo ID is required – a decision that effectively eliminates the photo ID requirement. *Priorities USA v. State of Missouri*, 591 S.W. 3d 448 (Mo. 2020). In Iowa, a state trial court upheld that state’s ID law, while striking down a provision that would make it more difficult to get a voter ID card. Anna Sporre, *Judge Upholds ID Requirement at Polls but Strikes down Other Parts of 2017 Iowa Voting Reform Law*, DES MOINES REGISTER, Oct. 1, 2019.

ADD THE FOLLOWING AT THE END OF NOTE 5 ON PAGE 422:

Can voter mobilization efforts successfully counter the effects of voter ID laws? A recent empirical study finds evidence that they can. Jacob R. Neiheisel and Rich Horner, *Voter Identification Requirements and Aggregate Turnout in the U.S.: How Campaigns Offset the Costs of Turning Out When Voting Is Made More Difficult*, 18 ELECTION LAW JOURNAL 227 (2019). The authors find that while new voter ID laws decreased turnout by about two percentage points in

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

counties without a corresponding increase in campaign activity, there was no effect in counties with more campaign activity, presumably including voter mobilization.

REPLACE THE TEXT FROM THE FIRST FULL PARAGRAPH ON PAGE 425 THROUGH NOTE 6 ON PAGE 444 WITH THE FOLLOWING:

There is reason to believe that Section 2 is a less potent weapon against racially discriminatory vote denial than was Section 5. See Nicholas Stephanopoulos, *The South after Shelby County*, 2013 SUPREME COURT REVIEW 55 (2014). Nevertheless, voting rights advocates had some success in lower courts using Section 2 to stop practices alleged to impose a disproportionate burden on people of color. In the following case, the U.S. Supreme Court rejected a Section 2 challenge to Arizona rules alleged to make it more difficult for Latinos, African Americans, and Native Americans to vote. Consider the legal standard the Court applies to Section 2 vote denial claims, and how difficult it will be for future voters to challenge practices that impose a disproportionate burden on voters of color.

Brnovich v. Democratic National Committee

141 S.Ct. 2321 (2021)

Justice ALITO delivered the opinion of the Court.

In these cases, we are called upon for the first time to apply § 2 of the Voting Rights Act of 1965 to regulations that govern how ballots are collected and counted. Arizona law generally makes it very easy to vote. All voters may vote by mail or in person for nearly a month before election day, but Arizona imposes two restrictions that are claimed to be unlawful. First, in some counties, voters who choose to cast a ballot in person on election day must vote in their own precincts or else their ballots will not be counted. Second, mail-in ballots cannot be collected by anyone other than an election official, a mail carrier, or a voter’s family member, household member, or caregiver. After a trial, a District Court upheld these rules, as did a panel of the United States Court of Appeals for the Ninth Circuit. But an en banc court, by a divided vote, found them to be unlawful. It relied on the rules’ small disparate impacts on members of minority groups, as well as past discrimination dating back to the State’s territorial days. And it overturned the District Court’s finding that the Arizona Legislature did not adopt the ballot-collection restriction for a discriminatory purpose. We now hold that the en banc court misunderstood and misapplied § 2 and that it exceeded its authority in rejecting the District Court’s factual finding on the issue of legislative intent.

I A

Congress enacted the landmark Voting Rights Act of 1965, 52 U. S. C. §10301 et seq., in an effort to achieve at long last what the Fifteenth Amendment had sought to bring about 95 years earlier: an end to the denial of the right to vote based on race. Ratified in 1870, the Fifteenth Amendment provides in §1 that “[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

condition of servitude.” Section 2 of the Amendment then grants Congress the “power to enforce [the Amendment] by appropriate legislation.”

Despite the ratification of the Fifteenth Amendment, the right of African-Americans to vote was heavily suppressed for nearly a century. States employed a variety of notorious methods, including poll taxes, literacy tests, property qualifications, “white primar[ies],” and “grandfather clause[s].” Challenges to some blatant efforts reached this Court and were held to violate the Fifteenth Amendment. But as late as the mid-1960s, black registration and voting rates in some States were appallingly low.

Invoking the power conferred by § 2 of the Fifteenth Amendment, Congress enacted the Voting Rights Act (VRA) to address this entrenched problem. The Act and its amendments in the 1970s specifically forbade some of the practices that had been used to suppress black voting. Sections 4 and 5 of the VRA imposed special requirements for States and subdivisions where violations of the right to vote had been severe. And § 2 addressed the denial or abridgment of the right to vote in any part of the country.

As originally enacted, § 2 closely tracked the language of the Amendment it was adopted to enforce. Section 2 stated simply that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”

Unlike other provisions of the VRA, § 2 attracted relatively little attention during the congressional debates and was “little-used” for more than a decade after its passage. But during the same period, this Court considered several cases involving “vote-dilution” claims asserted under the Equal Protection Clause of the Fourteenth Amendment. See *Whitcomb v. Chavis*, 403 U.S. 124 (1971); *Burns v. Richardson*, 384 U.S. 73 (1966); *Fortson v. Dorsey*, 379 U.S. 433 (1965). In these and later vote-dilution cases, plaintiffs claimed that features of legislative districting plans, including the configuration of legislative districts and the use of multi-member districts, diluted the ability of particular voters to affect the outcome of elections....

[T]he question whether a VRA § 2 claim required discriminatory purpose or intent came before this Court in *Mobile v. Bolden*, 446 U.S. 55 (1980) [see p. 265 of the Casebook]. The plurality opinion for four Justices concluded first that § 2 of the VRA added nothing to the protections afforded by the Fifteenth Amendment. The plurality then observed that prior decisions “ha[d] made clear that action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose.” The obvious result of those premises was that facially neutral voting practices violate § 2 only if motivated by a discriminatory purpose....

Shortly after *Bolden* was handed down, Congress amended § 2 of the VRA. The oft-cited Report of the Senate Judiciary Committee accompanying the 1982 Amendment stated that the amendment’s purpose was to repudiate *Bolden* and establish a new vote-dilution test... The bill that was initially passed by the House of Representatives included what is now § 2(a). In place of the phrase “to deny or abridge the right . . . to vote on account of race or color,” the amendment

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

substituted “in a manner which results in a denial or abridgement of the right . . . to vote on account of race or color.”...

What is now § 2(b) was added, and that provision sets out what must be shown to prove a § 2 violation. It requires consideration of “the totality of circumstances” in each case and demands proof 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 protected class “*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)....

This concentration on the contentious issue of vote dilution reflected the results of the Senate Judiciary Committee’s extensive survey of what it regarded as Fifteenth Amendment violations that called out for legislative redress. That survey listed many examples of what the Committee took to be unconstitutional vote dilution, but the survey identified only three isolated episodes involving the outright denial of the right to vote, and none of these concerned the equal application of a facially neutral rule specifying the time, place, or manner of voting. These sparse results were presumably good news. They likely showed that the VRA and other efforts had achieved a large measure of success in combating the previously widespread practice of using such rules to hinder minority groups from voting.

This Court first construed the amended § 2 in *Thornburg v. Gingles*, 478 U.S. 30 (1986) [p. 296 of Casebook]—another vote-dilution case. Justice Brennan’s opinion for the Court set out three threshold requirements for proving a § 2 vote-dilution claim, and, taking its cue from the Senate Report, provided a non-exhaustive list of factors to be considered in determining whether § 2 had been violated. “The essence of a § 2 claim,” the Court said, “is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities” of minority and non-minority voters to elect their preferred representatives.

In the years since *Gingles*, we have heard a steady stream of § 2 vote-dilution cases, but until today, we have not considered how § 2 applies to generally applicable time, place, or manner voting rules. In recent years, however, such claims have proliferated in the lower courts.

B

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....

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

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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 and named as defendants (among others) the Arizona attorney general and secretary of state in their official capacities. Among other things, the plaintiffs claimed 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 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....

II

[The Court concluded that Attorney General Brnovich had standing to appeal.]

[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. Each of the parties advocated a different test, as did many amici and the courts below.... All told, no fewer than 10 tests have been proposed. But as 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

A

We start with the text of VRA § 2. [The majority quoted the text of subsections (a) and (b), set forth on pp. 424-25 of the Casebook.]

In *Gingles*, our seminal § 2 vote-dilution case, the Court quoted the text of amended § 2 and then jumped right to the Senate Judiciary Committee Report, which focused on the issue of vote dilution. Our many subsequent vote-dilution cases have largely followed the path that *Gingles* charted. But because this is our first § 2 time, place, or manner case, a fresh look at the statutory text is appropriate. Today, our statutory interpretation cases almost always start with a careful consideration of the text, and there is no reason to do otherwise here.

B

Section 2(a), as noted, omits the phrase “to deny or abridge the right . . . to vote on account of race or color,” which the *Bolden* plurality had interpreted to require proof of discriminatory

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

intent. In place of that language, § 2(a) substitutes the phrase “in a manner which *results in* a denial or abridgement of the right . . . to vote on account of race or color.” (Emphasis added.) We need not decide what this text would mean if it stood alone because § 2(b), which was added to win Senate approval, explains what must be shown to establish a § 2 violation. 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 (J. Stein ed. 1966), or “requiring no special status, identification, or permit for entry or participation,” Webster’s Third New International Dictionary (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.*

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.

C

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

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

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

“opportunity” to cast a ballot must tolerate the “usual burdens of voting.” *Crawford v. Marion County Election Bd.*, [*supra* p. 402 of Casebook] (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. The burdens associated with the rules in widespread use when § 2 was adopted are therefore useful in gauging whether the burdens imposed by a challenged rule are sufficient to prevent voting from being equally “open” or furnishing an equal “opportunity” to vote in the sense meant by § 2. Therefore, it is relevant that in 1982 States typically required nearly all voters to cast their ballots in person on election day and allowed only narrow and tightly defined categories of voters to cast absentee ballots. As of January 1980, only three States permitted no-excuse absentee voting. We doubt that Congress intended to uproot facially neutral time, place, and manner regulations that have a long pedigree or are in widespread use in the United States. We have no need to decide whether adherence to, or a return to, a 1982 framework is necessarily lawful under § 2, but the degree to which a challenged rule has a long pedigree or is in widespread use in the United States is a circumstance that must be taken into account.

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

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

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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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....

2

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. First, it is important to keep in mind that the *Gingles* or “Senate” factors grew out of and were designed for use in vote-dilution cases. Some of those factors are plainly inapplicable in a case involving a challenge to a facially neutral time, place, or manner voting rule. Factors three and four concern districting and election procedures like “majority vote requirements,” “anti-single shot provisions,” and a “candidate slating process.” Factors two, six, and seven (which concern racially polarized voting, racially tinged campaign appeals, and the election of minority-group candidates), have a bearing on whether a districting plan affects the opportunity of minority voters to elect their candidates of choice. But in cases involving neutral time, place, and manner rules, the only relevance of these and the remaining factors is to show that minority group members suffered discrimination in the past (factor one) and that effects of that discrimination persist (factor five). We do not suggest that these factors should be disregarded. After all, § 2(b) requires consideration of “the totality of circumstances.” But their relevance is much less direct.

We also do not find the disparate-impact model employed in Title VII and Fair Housing Act cases useful here. The text of the relevant provisions of Title VII and the Fair Housing Act differ from that of VRA § 2, and it is not obvious why Congress would conform rules regulating voting to those regulating employment and housing. For example, we think it inappropriate to read § 2 to impose a strict “necessity requirement” that would force States to demonstrate that their legitimate interests can be accomplished only by means of the voting regulations in question. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE L.J. 1566, 1617–1619 (2019) (advocating such a requirement). Demanding such a tight fit would have the effect of invalidating a great many neutral voting regulations with long pedigrees that are reasonable means of pursuing legitimate interests. It would also transfer much of the authority to regulate election procedures from the States to the federal courts. For those reasons, the Title VII and Fair Housing Act models are unhelpful in § 2 cases.

D

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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

That is a radical project, and the dissent strains mightily to obscure its objective. To that end, it spends 20 pages discussing matters that have little bearing on the questions before us. [The majority cited the historical background to the VRA and “points of law that nobody disputes.”]

Only after this extended effort at misdirection is the dissent’s aim finally unveiled: to undo as much as possible the compromise that was reached between the House and Senate when § 2 was amended in 1982. Recall that the 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. There is nothing to the dissent’s charge that we are departing from the statutory text by identifying some of those considerations....

Section 2 of the Voting Rights Act provides vital protection against discriminatory voting rules, and no one suggests that discrimination in voting has been extirpated or that the threat has been eliminated. But § 2 does not deprive the States of their authority to establish non-discriminatory voting rules, and that is precisely what the dissent’s radical interpretation would mean in practice. The dissent is correct that the Voting Rights Act exemplifies our country’s commitment to democracy, but there is nothing democratic about the dissent’s attempt to bring about a wholesale transfer of the authority to set voting rules from the States to the federal courts.

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* (opinion of Stevens, J.). 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.

Polling place information is also made available by other means. The secretary of state’s office operates websites that provide voter-specific polling place information and allow voters to make inquiries to the secretary’s staff. Arizona’s two most populous counties, Maricopa and Pima, provide online polling place locators with information available in English and Spanish. Other

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

groups offer similar online tools. Voters may also identify their assigned polling place by calling the office of their respective county recorder. And on election day, poll workers in at least some counties are trained to redirect voters who arrive at the wrong precinct.

The burdens of identifying and traveling to one's assigned precinct are also modest when considering Arizona's "political processes" as a whole.... [E]ven 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' decision ... 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. And the policy of not counting out-of-precinct ballots is widespread....

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....

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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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* (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.

Arizona also makes special provision for certain groups of voters who are unable to use the early voting system. Every county must establish a special election board to serve voters who are “confined as the result of a continuing illness or physical disability,” are unable to go to the polls on election day, and do not wish to cast an early vote by mail. At the request of a voter in this group, the board will deliver a ballot in person and return it on the voter's behalf. Arizona law also requires employers to give employees time off to vote when they are otherwise scheduled to work certain shifts on election day.

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. “A State indisputably has a compelling interest in preserving the integrity of its election process.” *Purcell v. Gonzalez* [see p. 161 of the Casebook]. 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....

[P]revention of fraud is not the only legitimate interest served by restrictions on ballot collection.... [T]hird-party ballot collection can lead to pressure and intimidation. And it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders.... Fraud is a real risk that accompanies mail-in voting even if Arizona had the good fortune to avoid it. Election fraud has had serious consequences in other States. For example, the North Carolina Board of Elections invalidated the results of a 2018 race for a seat in the House of Representatives for evidence of fraudulent mail-in ballots. The Arizona Legislature was not obligated to wait for something similar to happen closer to home.

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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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....

The court noted, among other things, that HB 2023's enactment followed increased use of ballot collection as a Democratic get-out-the-vote strategy and came "on the heels of several prior efforts to restrict ballot collection, some of which were spearheaded by former Arizona State Senator Don Shooter." Shooter's own election in 2010 had been close and racially polarized. Aiming in part to frustrate the Democratic Party's get-out-the-vote strategy, Shooter made what the 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. ____ (2017) [see Casebook, p. 373]. 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.

The Court of Appeals did not dispute the District Court's assessment of the sincerity of HB 2023's proponents... The Court of Appeals nevertheless concluded that the District Court committed clear error by failing to apply a "cat's paw" theory sometimes used in employment discrimination cases. A "cat's paw" is a "dupe" who is "used by another to accomplish his purposes." Webster's New International Dictionary 425 (2d ed. 1934). A plaintiff in a "cat's paw" case typically seeks to hold the plaintiff's employer liable for "the animus of a supervisor who was not charged with making the ultimate [adverse] employment decision." *Staub v. Proctor Hospital*, 562 U.S. 411, 415 (2011).

The "cat's paw" theory has no application to legislative bodies. The theory rests on the agency relationship that exists between an employer and a supervisor, but the legislators who vote to adopt a bill are not the agents of the bill's sponsor or proponents. Under our form of government,

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

legislators have a duty to exercise their judgment and to represent their constituents. It is insulting to suggest that they are mere dupes or tools.

* * *

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’s concurring opinion is omitted.]

Justice KAGAN, with whom Justice BREYER and Justice SOTOMAYOR join, dissenting.

If a single statute represents the best of America, it is the Voting Rights Act. It marries two great ideals: democracy and racial equality. And it dedicates our country to carrying them out. Section 2, the provision at issue here, guarantees that members of every racial group will have equal voting opportunities. Citizens of every race will have the same shot to participate in the political process and to elect representatives of their choice. They will all own our democracy together—no one more and no one less than any other.

If a single statute reminds us of the worst of America, it is the Voting Rights Act. Because it was—and remains—so necessary. Because a century after the Civil War was fought, at the time of the Act’s passage, the promise of political equality remained a distant dream for African American citizens. Because States and localities continually “contriv[ed] new rules,” mostly neutral on their face but discriminatory in operation, to keep minority voters from the polls. *South Carolina v. Katzenbach*. Because “Congress had reason to suppose” that States would “try similar maneuvers in the future”—“pour[ing] old poison into new bottles” to suppress minority votes. *Ibid*. Because Congress has been proved right.

The Voting Rights Act is ambitious, in both goal and scope. When President Lyndon Johnson sent the bill to Congress, ten days after John Lewis led marchers across the Edmund Pettus Bridge, he explained that it was “carefully drafted to meet its objective—the end of discrimination in voting in America.” He was right about how the Act’s drafting reflected its aim. “The end of discrimination in voting” is a far-reaching goal. And the Voting Rights Act’s text is just as far-reaching. A later amendment, adding the provision at issue here, became necessary when this Court construed the statute too narrowly. And in the last decade, this Court assailed the Act again, undoing its vital Section 5. See *Shelby County v. Holder* [*supra* p. 237 of the Casebook.] But Section 2 of the Act remains, as written, as expansive as ever—demanding that every citizen of this country possess a right at once grand and obvious: the right to an equal opportunity to vote.

Today, the Court undermines Section 2 and the right it provides. The majority fears that the statute Congress wrote is too “radical”—that it will invalidate too many state voting laws. So the majority writes its own set of rules, limiting Section 2 from multiple directions. Wherever it can, the majority gives a cramped reading to broad language. And then it uses that reading to

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

uphold two election laws from Arizona that discriminate against minority voters. I could say—and will in the following pages—that this is not how the Court is supposed to interpret and apply statutes. But that ordinary critique woefully undersells the problem. What is tragic here is that the Court has (yet again) rewritten—in order to weaken—a statute that stands as a monument to America’s greatness, and protects against its basest impulses. What is tragic is that the Court has damaged a statute designed to bring about “the end of discrimination in voting.” I respectfully dissent.

I

The Voting Rights Act of 1965 is an extraordinary law. Rarely has a statute required so much sacrifice to ensure its passage. Never has a statute done more to advance the Nation’s highest ideals. And few laws are more vital in the current moment. Yet in the last decade, this Court has treated no statute worse. To take the measure of today’s harm, a look to the Act’s past must come first. The idea is not to recount, as the majority hurriedly does, some bygone era of voting discrimination. It is instead to describe the electoral practices that the Act targets—and to show the high stakes of the present controversy.

A

Democratic ideals in America got off to a glorious start; democratic practice not so much. The Declaration of Independence made an awe-inspiring promise: to institute a government “deriving [its] just powers from the consent of the governed.” But for most of the Nation’s first century, that pledge ran to white men only. The earliest state election laws excluded from the franchise African Americans, Native Americans, women, and those without property. In 1855, on the precipice of the Civil War, only five States permitted African Americans to vote. And at the federal level, our Court’s most deplorable holding made sure that no black people could enter the voting booth. See *Dred Scott v. Sandford*, 19 How. 393 (1857).

But the “American ideal of political equality . . . could not forever tolerate the limitation of the right to vote” to whites only. *Mobile v. Bolden* (Marshall, J., dissenting). And a civil war, dedicated to ensuring “government of the people, by the people, for the people,” brought constitutional change. In 1870, after a hard-fought battle over ratification, the Fifteenth Amendment carried the Nation closer to its founding aspirations. “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” Those words promised to enfranchise millions of black citizens who only a decade earlier had been slaves. Frederick Douglass held that the Amendment “means that we are placed upon an equal footing with all other men”—that with the vote, “liberty is to be the right of all.”

Momentous as the Fifteenth Amendment was, celebration of its achievements soon proved premature. The Amendment’s guarantees “quickly became dead letters in much of the country.” . . . Many States, especially in the South, suppressed the black vote through a dizzying array of methods: literacy tests, poll taxes, registration requirements, and property qualifications. Most of those laws, though facially neutral, gave enough discretion to election officials to prevent significant effects on poor or uneducated whites....

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

“After a century’s failure to fulfill the promise” of the Fifteenth Amendment, “passage of the VRA finally led to signal improvement.” *Shelby County* (Ginsburg, J., dissenting). In the five years after the statute’s passage, almost as many African Americans registered to vote in six Southern States as in the entire century before 1965. The crudest attempts to block voting access, like literacy tests and poll taxes, disappeared. Legislatures often replaced those vote denial schemes with new measures—mostly to do with districting—designed to dilute the impact of minority votes. But the Voting Rights Act, operating for decades at full strength, stopped many of those measures too. As a famed dissent assessed the situation about a half-century after the statute’s enactment: The Voting Rights Act had become “one of the most consequential, efficacious, and amply justified exercises of federal legislative power in our Nation’s history.” *Shelby County* (Ginsburg, J., dissenting).

B

Yet efforts to suppress the minority vote continue. No one would know this from reading the majority opinion. It hails the “good news” that legislative efforts had mostly shifted by the 1980s from vote denial to vote dilution. And then it moves on to other matters, as though the Voting Rights Act no longer has a problem to address—as though once literacy tests and poll taxes disappeared, so too did efforts to curb minority voting. But as this Court recognized about a decade ago, “racial discrimination and racially polarized voting are not ancient history.” *Bartlett v. Strickland*, 556 U.S. 1, 25 (2009). Indeed, the problem of voting discrimination has become worse since that time—in part because of what this Court did in *Shelby County*. Weaken the Voting Rights Act, and predictable consequences follow: yet a further generation of voter suppression laws.

Much of the Voting Rights Act’s success lay in its capacity to meet ever-new forms of discrimination. [Justice Kagan went on to discuss Section 5 of the VRA and the decision in *Shelby County*, which relieved covered jurisdictions of the requirement that they preclear voting changes with the federal government.]

The rashness of the act soon became evident. Once Section 5’s strictures came off, States and localities put in place new restrictive voting laws, with foreseeably adverse effects on minority voters. On the very day *Shelby County* issued, Texas announced that it would implement a strict voter-identification requirement that had failed to clear Section 5. Other States—Alabama, Virginia, Mississippi—fell like dominoes, adopting measures similarly vulnerable to preclearance review. The North Carolina Legislature, starting work the day after *Shelby County*, enacted a sweeping election bill eliminating same-day registration, forbidding out-of-precinct voting, and reducing early voting, including souls-to-the-polls Sundays....

And that was just the first wave of post-*Shelby County* laws. In recent months, State after State has taken up or enacted legislation erecting new barriers to voting. Those laws shorten the time polls are open, both on Election Day and before. They impose new prerequisites to voting by mail, and shorten the windows to apply for and return mail ballots. They make it harder to register to vote, and easier to purge voters from the rolls. Two laws even ban handing out food or water to voters standing in line. Some of those restrictions may be lawful under the Voting Rights Act. But

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

chances are that some have the kind of impact the Act was designed to prevent—that they make the political process less open to minority voters than to others.

So the Court decides this Voting Rights Act case at a perilous moment for the Nation’s commitment to equal citizenship. It decides this case in an era of voting-rights retrenchment—when too many States and localities are restricting access to voting in ways that will predictably deprive members of minority groups of equal access to the ballot box.... [A]fter *Shelby County*, the vitality of Section 2—a “permanent, nationwide ban on racial discrimination in voting”—matters more than ever. For after *Shelby County*, Section 2 is what voters have left.

II

Section 2, as drafted, is well-equipped to meet the challenge. Congress meant to eliminate all “discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups.” S. Rep. No. 97–417, p. 28 (1982) (S. Rep.). And that broad intent is manifest in the provision’s broad text. As always, this Court’s task is to read that language as Congress wrote it—to give the section all the scope and potency Congress drafted it to have. So I start by showing how Section 2’s text requires courts to eradicate voting practices that make it harder for members of some races than of others to cast a vote, unless such a practice is necessary to support a strong state interest. I then show how far from that text the majority strays. Its analysis permits exactly the kind of vote suppression that Section 2, by its terms, rules out of bounds.

A

Section 2, as relevant here, has two interlocking parts. [Justice Kagan quoted the language of subsections (a) and (b).]

Those provisions have a great many words, and I address them further below. But their essential import is plain: Courts are to strike down voting rules that contribute to a racial disparity in the opportunity to vote, taking all the relevant circumstances into account.

The first thing to note about Section 2 is how far its prohibitory language sweeps. The provision bars any “voting qualification,” any “prerequisite to voting,” or any “standard, practice, or procedure” that “results in a denial or abridgement of the right” to “vote on account of race.” The overlapping list of covered state actions makes clear that Section 2 extends to every kind of voting or election rule.... So, for example, the provision “covers all manner of registration requirements, the practices surrounding registration,” the “locations of polling places, the times polls are open, the use of paper ballots as opposed to voting machines, and other similar aspects of the voting process that might be manipulated to deny any citizen the right to cast a ballot and have it properly counted.” All those rules and more come within the statute—so long as they result in a race-based “denial or abridgement” of the voting right....

The “results in” language, connecting the covered voting rules to the prohibited voting abridgement, tells courts that they are to focus on the law’s effects. Rather than hinge liability on state officials’ motives, Congress made it ride on their actions’ consequences.... Congress ... saw

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

an intent test as imposing “an inordinately difficult burden for plaintiffs.” Even if state actors had purposefully discriminated, they would likely be “ab[le] to offer a non-racial rationalization,” supported by “a false trail” of “official resolutions” and “other legislative history eschewing any racial motive.” So only a results-focused statute could prevent States from finding ways to abridge minority citizens’ voting rights.

But when to conclude—looking to effects, not purposes—that a denial or abridgment has occurred? Again, answering that question is subsection (b)’s function. It teaches that a violation 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 then the subsection tells us what that means. 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. When Congress amended Section 2, the word “opportunity” meant what it also does today: “a favorable or advantageous combination of circumstances” for some action. See American Heritage Dictionary. In using that word, Congress made clear that the Voting Rights Act does not demand equal outcomes. 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.

And that is so even if (as is usually true) the law does not single out any race, but instead is facially neutral.... 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.

Congress also made plain, in calling for a totality-of- circumstances inquiry, that equal voting opportunity is a function of both law and background conditions—in other words, that a voting rule’s validity depends on how the rule operates in conjunction with facts on the ground.... [S]ometimes government officials enact facially neutral laws that leverage—and become discriminatory by dint of—pre-existing social and economic conditions. The classic historical cases are literacy tests and poll taxes. A more modern example is ... limited registration hours. 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.... “The essence of a § 2 claim,” we have said, is that an election law “interacts with social and historical conditions” in a particular place to cause race-based inequality in voting opportunity. *Gingles* (majority opinion). That interaction is what the totality inquiry is mostly designed to discover.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

At the same time, the totality inquiry enables courts to take into account strong state interests supporting an election rule.... Among the “balance of considerations” a court is to weigh is a State’s need for the challenged policy. *Houston Lawyers’ Assn. v. Attorney General of Tex.*, 501 U.S. 419, 427 (1991). 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.*

So the text of Section 2, as applied in our precedents, tells us the following, every part of which speaks to the ambition of Congress’s action. Section 2 applies to any voting rule, of any kind. The provision prohibits not just the denial but also the abridgment of a citizen’s voting rights on account of race. The inquiry is focused on effects: It asks not about why state officials enacted a rule, but about whether that rule results in racial discrimination. The discrimination that is of concern is inequality of voting opportunity. That kind of discrimination can arise from facially neutral (not just targeted) rules. There is a Section 2 problem when an election rule, operating against the backdrop of historical, social, and economic conditions, makes it harder for minority citizens than for others to cast ballots. And strong state interests may save an otherwise discriminatory rule, but only if that rule is needed to achieve them—that is, only if a less discriminatory rule will not attain the State’s goal.

That is a lot of law to apply in a Section 2 case. Real law—the kind created by Congress.... Section 2 was indeed meant to do something important—crucial to the operation of our democracy. The provision tells courts—however “radical” the majority might find the idea —to eliminate facially neutral (as well as targeted) electoral rules that unnecessarily create inequalities of access to the political process. That is the very project of the statute, as conceived and as written—and now as damaged by this Court.

B

The majority’s opinion mostly inhabits a law-free zone. It congratulates itself in advance for giving Section 2’s text “careful consideration.” And then it leaves that language almost wholly behind.... So too the majority barely mentions this Court’s precedents construing Section 2’s text. On both those counts, you can see why. As just described, Section 2’s language is broad. To read it fairly, then, is to read it broadly. And to read it broadly is to do much that the majority is determined to avoid.... It only grudgingly accepts—and then apparently forgets—that the provision applies to facially neutral laws with discriminatory consequences. And it hints that as long as a voting system is sufficiently “open,” it need not be equally so. In sum, the majority skates over the strong words Congress drafted to accomplish its equally strong purpose: ensuring that minority citizens can access the electoral system as easily as whites.

The majority instead 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 as described above,

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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.” *De Grandy*. The totality inquiry requires courts to explore how ordinary-seeming laws can interact with local conditions—economic, social, historical—to produce race-based voting inequalities. That inquiry hardly gives a court the license to devise whatever limitations on Section 2’s reach it would have liked Congress to enact. But that is the license the majority takes. The “important circumstances” it invents all cut in one direction—toward limiting liability for race-based voting inequalities. (Indeed, the majority gratuitously dismisses several factors that point the opposite way.) Think of the majority’s list as a set of extra-textual restrictions on Section 2—methods of counteracting the law Congress actually drafted to achieve the purposes *Congress* thought “important.” The list—not a test, the majority hastens to assure us, with delusions of modesty—stacks the deck against minority citizens’ voting rights. Never mind that Congress drafted a statute to protect those rights—to prohibit any number of schemes the majority’s non-test test makes it possible to save....

The majority objects to an excessive “transfer of the authority to set voting rules from the States to the federal courts.” It even sees that transfer as “[un]democratic.” But maybe the majority should pay more attention to the “historical background” that it insists “does not tell us how to decide this case.” That history makes clear the incongruity, in interpreting this statute, of the majority’s paean to state authority—and conversely, its denigration of federal responsibility for ensuring non-discriminatory voting rules. The Voting Rights Act was meant to replace state and local election rules that needlessly make voting harder for members of one race than for others. The text of the Act perfectly reflects that objective. The “democratic” principle it upholds is not one of States’ rights as against federal courts. The democratic principle it upholds is the right of every American, of every race, to have equal access to the ballot box. The majority today undermines that principle as it refuses to apply the terms of the statute. By declaring some racially discriminatory burdens inconsequential, and by refusing to subject asserted state interests to serious means-end scrutiny, the majority enables voting discrimination.

III

Just look at Arizona. Two of that State’s policies disproportionately affect minority citizens’ opportunity to vote. The first—the out-of-precinct policy—results in Hispanic and African American voters’ ballots being thrown out at a statistically higher rate than those of whites. And whatever the majority might say about the ordinariness of such a rule, Arizona applies it in extra-ordinary fashion: Arizona is *the* national outlier in dealing with out-of-precinct votes, with the next-worst offender nowhere in sight. The second rule—the ballot-collection ban—makes voting meaningfully more difficult for Native American citizens than for others. And nothing about how that ban is applied is “usual” either—this time because of how many of the State’s Native American citizens need to travel long distances to use the mail. Both policies 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

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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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. In 2012, about 35,000 ballots across the country were thrown out because they were cast at the wrong precinct. Nearly one in three of those discarded votes—10,979—was cast in Arizona. As the Court of Appeals concluded, and the chart below indicates, Arizona threw away ballots in that year at 11 times the rate of the second-place discarder (Washington State). Somehow the majority labels that difference “marginal[],” but it is anything but... [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.

Votes in such numbers can matter—enough for Section 2 to apply. The majority obliquely suggests not, comparing the smallish number of thrown-out votes (minority and non-minority alike) to the far larger number of votes cast and counted. But elections are often fought and won at the margins—certainly in Arizona. Consider the number of votes separating the two presidential candidates in the most recent election: 10,457. That is fewer votes than Arizona discarded under the out-of-precinct policy in two of the prior three presidential elections... [T]he out-of-precinct policy—which discards thousands upon thousands of ballots in every election—affects more than sufficient votes to implicate Section 2’s guarantee of equal electoral opportunity.

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 record does not contain statewide figures for 2012. But in Maricopa and Pima Counties, the percentages were about the same as in 2016. Assessing those disparities, the plaintiffs’ expert found, and the District Court accepted, that the discriminatory impact of the out-of-precinct policy was statistically significant—meaning, again, that it was highly unlikely to occur by chance....

Facts also undermine the State’s asserted interests, which the majority hangs its hat on. A government interest, as even the majority recognizes, is “merely one factor to be considered” in Section 2’s totality analysis. Here, the 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

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

response. We know from the extraordinary number of ballots Arizona discards that its current system fails utterly to “induce[] compliance.” Presumably, that is because the system—most notably, its placement and shifting of polling places—sows an unparalleled level of voter confusion. A State that makes compliance with an election rule so unusually hard is in no position to claim that its interest in “induc[ing] compliance” outweighs the need to remedy the race-based discrimination that rule has caused.

B

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

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

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.” *Ibid.* 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. 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,

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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*. That Arizona did not do so shows, at best, selective indifference to the voting opportunities of its Native American citizens.

The majority’s opinion fails to acknowledge any of these facts.... Like the rest of today’s opinion, the majority’s treatment of the collection ban thus flouts what Section 2 commands: the eradication of election rules resulting in unequal opportunities for minority voters.

IV

Congress enacted the Voting Rights Act to address a deep fault of our democracy—the historical and continuing attempt to withhold from a race of citizens their fair share of influence on the political process. For a century, African Americans had struggled and sacrificed to wrest their voting rights from a resistant Nation. The statute they and their allies at long last attained made a promise to all Americans. From then on, Congress demanded, the political process would be equally open to every citizen, regardless of race....

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. Cf. *Shelby County* (“[T]hings have changed dramatically”). 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. There are two ways of showing a violation of Section 2 of the VRA. One is by showing that the challenged law or practice has a discriminatory *result*. The other is by showing that it was motivated by racially discriminatory *purpose*. The majority concludes that plaintiffs had shown neither a discriminatory result nor a discriminatory purpose. The dissent concludes that there was a discriminatory result, and therefore finds it unnecessary to address the question of purpose.

Starting with the results standard, both sides claim to rely on the text of Section 2, using dictionaries to bolster their arguments. Does the text provide meaningful guidance on how Section 2 should be interpreted? See Nicholas Stephanopoulos, *The Supreme Court Showcased Its ‘Textualist’ Double Standard on Voting Rights*, WASHINGTON POST, July 1, 2021. What about the legislative history of the 1982 amendments to Section 2, particularly the Senate Report upon which the dissent relies? The dissent also relies on the history preceding the enactment of the VRA, including the shameful history of suppressing the votes of Black Americans after the enactment of the Fifteenth Amendment. Of what relevance is this history to the interpretation of the statute?

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

2. Part II of Justice Alito’s opinion for the majority states that it “decline[s] in these cases to announce a test to govern all VRA § 2 claims involving rules ... that specify the time, place, or manner for casting ballots.” But the majority does seem to announce a test in Part III.C.1 of its opinion, setting forth five factors that courts should consider in determining whether there is a racially discriminatory result. Where do these factors come from? The dissent characterizes the majority of “inhabit[ing] a law-free zone.” The majority, for its part, accuses the dissent of adopting a “radical” interpretation of Section 2. Are either of these rather harsh criticisms warranted?

Prior to the court’s decision in *Brnovich*, some lower courts had applied a two-part test for determining whether Section 2’s results standard had been violated, looking to whether (1) there was a disparate impact on racial minorities, and (2) whether the challenged practice interacts with social and historical conditions to cause that disparate impact. Is that test more faithful to the text and purpose of Section 2 than the one the majority adopts? For pre-*Brnovich* academic commentary on the standard that should govern Section 2 vote denial cases, see Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 YALE LAW JOURNAL 1566 (2019); Joshua S. Sellers, *Election Law and White Identity Politics*, 87 FORDHAM LAW REVIEW 1515, 1546-51 (2019); Jamelia N. Morgan, *Disparate Impact and Voting Rights: How Objections to Impact-Based Claims Prevent Plaintiffs from Prevailing in Cases Challenging New Forms of Disenfranchisement*, 9 ALABAMA CIVIL RIGHTS & CIVIL LIBERTIES LAW REVIEW 93 (2018); Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO STATE LAW JOURNAL 763 (2016); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARVARD CIVIL RIGHTS — CIVIL LIBERTIES LAW REVIEW 439 (2015); Janai Nelson, *The Causal Context of Disparate Vote Denial*, 54 BOSTON COLLEGE LAW REVIEW 579 (2013); and Christopher Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 377 (2012).

3. Turning to the specifics of Arizona’s challenged practices, the majority upholds them partly because it finds that they imposed a minimal burden on voters. But isn’t the central question whether they imposed racial disparities, rather than the magnitude of the burden imposed? Does the majority conflate disparities and burdens? See Nicholas Stephanopoulos, *Brnovich and the Conflation of Disparities and Burdens*, ELECTION LAW BLOG, July 6, 2021, <https://electionlawblog.org/?p=123185>.

How difficult will *Brnovich* make it for future plaintiffs to succeed in Section 2 vote denial claims? Professor Hasen argues:

Thanks to *Brnovich*, a state can now assert an interest in preventing fraud to justify a law without proving that fraud is actually a serious risk, but at the same time, minority voters have a high burden: They must show that the state has imposed more than the “usual burdens of voting.”

Richard L. Hasen, *The Supreme Court Is Putting Democracy at Risk*, N.Y. TIMES, July 1, 2021.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

Consider too the majority's emphasis on whether the challenged practice "departs from what was standard practice when § 2 was amended in 1982." Given that absentee and early voting laws were much stricter in 1982 than they are today, can challenges to any new restrictions on these methods of voting succeed? What about challenges to strict voter ID laws, which were not common in 1982? For differing perspectives on this question, see Richard L. Hasen, *The Supreme Court's Latest Voting Rights Opinion Is Even Worse Than It Seems*, SLATE, July 8, 2021 (arguing that the majority offers "a new and impossible test for plaintiffs to meet to show a Section 2 vote denial claim"), and Nicholas Stephanopoulos, *Strong and Weak Claims After Brnovich*, ELECTION LAW BLOG, July 1, 2021, <https://electionlawblog.org/?p=123090> ("challenges to relatively novel restrictions," such as voter ID laws, "will be more likely to prevail" than challenges to practices that were common in 1982).

4. After dispensing with plaintiffs' results-based argument, Justice Alito's majority opinion concludes that they had also failed to show racially discriminatory *purpose*. According to the majority, partisan motives aren't the same as racial ones. Does that argument hold up in an era where there is a strong correlation between race and party affiliation? Is it possible to disentangle racial motivations from partisan ones? For discussion of this problem, see Richard L. Hasen, *Race or Party, Race as Party, or Party All the Time: Three Uneasy Approaches to Conjoined Polarization in Redistricting and Voting Cases*, 59 WILLIAM & MARY LAW REVIEW 1837 (2018), and Bruce E. Cain and Emily R. Zhang, *Blurred Lines: Conjoined Polarization and Voting Rights*, 77 OHIO STATE LAW JOURNAL 867 (2016).

Nowadays, it is unusual for courts to find that a voting law was enacted with racially discriminatory purpose, but the Fourth Circuit found that this showing had been made in a pre-*Brnovich* case, *North Carolina State Conference of the NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2017), cert. denied 137 S. Ct. 1399 (2017). Shortly after the Supreme Court's decision in *Shelby County*, North Carolina adopted an omnibus voting law that included a voter ID requirement, limits on early voting, the elimination of same-day registration, and restrictions on the counting of provisional ballots. Finding that these restrictions "target[ed] African Americans with almost surgical precision," the Fourth Circuit held that they were adopted with discriminatory intent. *Id.* at 214. Expert testimony in that case showed that African American race was a better predictor of whether someone would vote Democratic than being registered as a Democrat. *Id.* at 225. The Fourth Circuit issued its decision before *Brnovich*. Would this evidence be enough to show an impermissible discriminatory purpose after *Brnovich*?

A few days before the decision in *Brnovich*, the U.S. Department of Justice brought a lawsuit challenging a new law in Georgia. The complaint alleges that the Georgia law was adopted with the purpose of making it more difficult for African Americans to vote. See U.S. Department of Justice, *Justice Department Files Lawsuit Against the State of Georgia to Stop Racially Discriminatory Provisions of New Voting Law*, June 25, 2021, <https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-state-georgia-stop-racially-discriminatory>. What are the chances of this lawsuit succeeding after *Brnovich*?

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

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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).

5. Another area in which concerns of race discrimination have arisen is with so-called “ballot security” programs. In 1981, the Democratic National Committee filed a complaint against the Republican National Committee, alleging that the latter sent out mailings to predominantly minority precincts and created a list of voters whose mail was returned as undeliverable, so that those voters could be challenged at the polls. Critics sometimes refer to this practice as “caging.” That lawsuit was settled through a nationwide consent decree restricting ballot security program, which the district court declined to lift. *Democratic National Committee v. Republican National Committee*, 671 F. Supp. 2d 575 (D.N.J. 2009). The district court rejected the Republican National Committee’s argument that changed factual circumstances — including an increased risk of voter fraud — warranted dissolution of the consent decree. After reviewing “mountains of documentary evidence” from both sides, the court concluded that “[v]oter intimidation presents an ongoing threat to the participation of minority individuals in the political process, and continues to pose a far greater danger to the integrity of the process than the type of vote fraud the RNC is prevented from addressing by the Decree.” The Third Circuit affirmed, rejecting the RNC’s argument that the increase in minority registration and turnout showed that voter suppression was no longer a problem and noting that the “increase in minority voter registration and voter turnout could be evidence that the Decree is necessary and effective.” 673 F.3d. 192, 208–09 (3rd Cir. 2012).

The *DNC v. RNC* consent decree yet again became an issue during the 2016 presidential election. The Democratic Party claimed that the RNC was colluding with the Trump campaign to engage in prohibited ballot security efforts. The district court denied the DNC’s motion for sanctions and its request to extend the consent decree. *Democratic National Committee v. Republican National Committee*, 2016 WL 6584915 (D.N.J. 2016). Then in 2018, the court terminated the consent decree against Republican ballot security measures. *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 Third Circuit affirmed. *Democratic Nat’l Comm. v. Republican Nat’l Comm.*, __ Fed. Appx. __, 2019 WL 117555 (3d Cir. Jan. 7, 2019).

In the wake of the 2020 election, there are heightened worries that “election integrity” programs will be used to make it more difficult for some people, especially racial minorities, to vote. Did the court pull the plug on the *DNC v. RNC* consent decree too soon?

6. One commentator argues that existing laws are insufficient to protect racial minorities and other vulnerable voters, suggesting that jurisdictions be required to provide a “Voter Impact Statement” (analogous to an Environmental Impact Statement) before election administration rules can take effect. Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration That Disenfranchises Unwanted Voters*, 47 UNIVERSITY OF LOUISVILLE LAW REVIEW 57 (2008). Is it a good idea to require a Voter Impact Statement? Would

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

it discourage states from adopting laws that have the purpose or effect of discouraging voting by certain groups?

ADD THE FOLLOWING AFTER THE SECOND FULL PARAGRAPH ON PAGE 449:

Another recent article by Professor Tolson concludes that Congress has broad authority to limit state voter qualification standards under the Elections Clause of Article I, Section 4 of the Constitution:

Using the Elections Clause as its focal point, this Article argues that the Court should interpret federal election laws, and their underlying legislative record, within the broader scope of authority that the U.S. Constitution delegates to Congress over elections. The Elections Clause, which gives the states the power to “choose the Times, Places and Manner of . . . [federal] Elections,” is power that the states exercise freely, so long as Congress does not assert its authority to “make or alter” state regulations. In essence, Congress has a veto power over certain state electoral practices, a veto that is present in the VRA’s suspension of regulations that govern federal elections in targeted states. Thus, to interpret broadly means that the Court credits the authority that Congress has across constitutional provisions—here, the Elections Clause and the Fourteenth and Fifteenth Amendments—in assessing the legislative record underlying voting rights legislation. This multi-clause analysis shows how the Elections Clause complicates the federalism narrative that scholars and courts embrace in describing our election system because federalism is not a barrier to aggressive federal action under the Elections Clause seeking to protect the fundamental right to vote.

Franita Tolson, *The Spectrum of Congressional Authority over Elections*, 99 BOSTON UNIVERSITY LAW REVIEW 317, 321-22 (2019). Is such broad congressional power to regulate elections consistent with Article I, Section 2, which gives the *states* power to set qualifications for voting in congressional elections?

For more recent scholarship on Congress’s authority under the Elections Clause, see Nicholas Stephanopoulos, *The Sweep of the Electoral Power*, CONST. COMMENT. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3715826, Eliza Sweren-Becker & Michael Waldman, *The Meaning, History, and Importance of the Elections Clause*, 96 WASH. L. REV. — (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3873499, and Franita Tolson, *The Elections Clause and the Underenforcement of Federal Law*, 129 YALE L.J. FORUM 171, 177 (2019).

ADD THE FOLLOWING AFTER THE CARRYOVER PARAGRAPH AT THE TOP OF 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.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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).

For an argument that the voter purge in *Husted* should be understood as an intentional—and therefore unconstitutional—effort to keep eligible people from voting, see Lisa Marshall Manheim and Elizabeth G. Porter, *The Elephant in the Room: Intentional Vote Suppression*, 2019 SUPREME COURT REVIEW 213.

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*, 309 F. Supp. 3d 1048 (D. Kan. 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 1103. The Tenth Circuit affirmed. *Fish v. Schwab*, 957 F.3d 1105 (10th Cir. 2020).

ADD THE FOLLOWING NOTE AFTER THE FIRST FULL PARAGRAPH ON PAGE 458:

North Carolina recently witnessed the most egregious example of absentee voting fraud in many years, which led the State Board of Elections to order a new election for the state’s Ninth Congressional District. The 2019 election for that seat was closely contested between Republican Mark Harris and Democrat Dan McCready. On Election Night, Harris appeared to have won by a narrow margin. Some weeks afterwards, it came to light that a Republican operative named L. McCrae Dowless, Jr. had engaged in some old-fashioned ballot stuffing using absentee ballots. According to published reports, Dowless and his agents would request absentee ballots and then

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

go to voters' homes when the ballots were sent. After collecting the ballots, they would mark them for return. It was estimated that over 1,200 ballots were illegally marked in this way, more than the approximately 900 votes separating the candidates. There was also evidence that absentee ballot fraud was not new to this part of North Carolina, but had been going on for years. David A. Graham, *North Carolina Had No Choice: A House Election Tainted by Fraud Gets Its Inevitable Do-Over*, THE ATLANTIC, Feb. 22, 2019.

Should absentee voting laws be tightened to prohibit so-called “ballot harvesting,” the practice of collecting other people’s absentee ballots and returning them to election authorities? For an argument that they should, see Steven F. Huefner, *The Perils of Voting by Mail*, ELECTION LAW @ MORITZ, Dec. 9, 2018, <https://moritzlaw.osu.edu/election-law/article/?article=13451>.

ADD THE FOLLOWING TO THE END OF NOTE 3 ON PAGE 460:

A recent article develops and applies a new index for assessing state election administration. Quan Li, Michael J. Pomante II & Scot Schraufnagel, *Cost of Voting in the American States*, 17 ELECTION LAW JOURNAL 234 (2018). The authors develop a “Cost of Voting Index” (COVI), designed to measure the “totality of time and effort associated with casting a vote” in every state, by looking at rules regarding voter registration, convenience voting, voter ID, and polling hours. The authors rank Mississippi, Virginia, Tennessee, Indiana, and Texas (in that order) as the worst states in 2016, and Oregon, Colorado, California, North Dakota, Iowa, and Maine (again in order) as the best. The authors intend to update the COVI to keep pace with the ever-changing landscape of voting laws.

ADD THE FOLLOWING ON PAGE 461, RIGHT BEFORE PART IV:

Upon taking control of the U.S. House in early 2019, the Democratic leadership made election reform its first legislative priority. The “For the People Act of 2019” (H.R. 1), proposed major changes to federal election administration, as well as redistricting, campaign finance, and ethics. See For the People Act, H.R. 1, 116th Cong. (2019), *available at* <https://www.congress.gov/bill/116th-congress/house-bill/1/text>. Among its changes to election administration were expansion of early voting, automatic voter registration, limits on voter purges, and making Election Day a federal holiday. The bill also included provisions regarding election security, including the sharing of intelligence information on threats with state election officials. The bill passed on a party-line vote in the House, with all 234 Democrats who voted supporting it and all 193 Republicans opposing it. But it had no chance in the Senate, which had a Republican majority in 2019-20, and would surely have been vetoed by President Trump in any event.

Democrats introduced a revised version of the For the People Act was introduced in 2021. H.R. 1, 117th Cong. (2021). Democrats currently have a majority in the House and the slenderest of majorities in the Senate – which is split 50-50, with Vice President Kamala Harris holding the tiebreaking vote. Current Senate rules require a three-fifths majority (60 of 100 votes) to break a filibuster. As long as that rule remains in place, there is no chance of the For the People Act getting through the Senate. Should Democrats eliminate the filibuster in order to get this bill passed?

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, pandemic, or other emergency disrupts an election that has already begun.

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

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.

These questions have become very real and pressing during the COVID-19 pandemic, which caused some states to make last-minute changes to their 2020 primaries and is certain to cause additional disruption in the general election (see Supplement to page 397, note 9 above). One affected state was Wisconsin. The state had its presidential primary on April 7, 2020, in the midst of the pandemic lockdown. To accommodate voters who were concerned about voting in person, a federal district court issued an order allowing absentee ballots to be mailed and postmarked *after* election day, so long as they were received within one week. By a 5-4 vote, the U.S. Supreme Court stayed that court order, with Justice Kavanaugh writing for the majority:

Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election. And again, the plaintiffs themselves did not even ask for that relief in their preliminary injunction motions. Our point is not that the argument is necessarily forfeited, but is that the plaintiffs themselves did not see the need to ask for such relief. By changing the election rules so close to the election date and by affording relief that the plaintiffs themselves did not ask for in their preliminary injunction motions, the District Court contravened this Court’s precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election. See *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014).

The unusual nature of the District Court’s order allowing ballots to be mailed and postmarked after election day is perhaps best demonstrated by the fact that the District Court had to issue a subsequent order enjoining the public release of any election results for six days after election day. In doing so, the District Court in essence enjoined nonparties to this lawsuit. It is highly questionable, moreover, that this attempt to suppress disclosure of the election results for six days after election day would work. And if any information were released during that time, that would gravely affect the integrity of the election process. The District Court’s order suppressing disclosure of election results showcases the unusual nature of the District Court’s order allowing absentee ballots mailed and postmarked after election day to be counted. And all of that further underscores the wisdom of the *Purcell* principle, which seeks to avoid this kind of judicially created confusion.

Republican National Committee v. Democratic National Committee, 140 S. Ct. 1205 (2020).

Justice Ginsburg wrote a dissenting opinion, joined by Justices Breyer, Sotomayor, and Kagan. The dissenters expressed concern that “massive disenfranchisement” would result from the Court’s order, because some voters who timely requested an absentee ballot would not receive

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

them by election day. *Id.* at 1209. Those voters, she argued, faced a Hobson’s Choice of “brav[ing] the polls, endangering their own and others’ safety,” or “los[ing] their right to vote.” *Id.* at 1211.

Three months later, the Supreme Court again issued a stay of a district court order liberalizing voting rules in response to the pandemic. *Merrill v. People First of Alabama*, 2020 WL 3604049 (July 2, 2020). In that case, a federal district court had enjoined Alabama’s witness requirement and photo ID rules for at-risk voter voters, as well as the state’s de facto ban on curbside voting. This time, there was no published opinion, but the vote was again 5-4. As in the Wisconsin case, the Republican-appointed justices voted to stay the lower court’s order, while the Democratic-appointed justices would have denied the stay.

The Court’s skepticism of late-issued federal court injunctions continued in the general election. The Court affirmed the *Purcell*-based stay of a district court injunction in a case arising out of Wisconsin. *Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. 28 (2020). Justice Kavanaugh’s concurring opinion offered an especially strong version of the *Purcell* doctrine:

Even seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences. If a court alters election laws near an election, election administrators must first understand the court’s injunction, then devise plans to implement that late-breaking injunction, and then determine as necessary how best to inform voters, as well as state and local election officials and volunteers, about those last-minute changes. It is one thing for state legislatures to alter their own election rules in the late innings and to bear the responsibility for any unintended consequences. It is quite another thing for a federal district court to swoop in and alter carefully considered and democratically enacted state election rules when an election is imminent.

That important principle of judicial restraint not only prevents voter confusion but also prevents election administrator confusion — and thereby protects the State’s interest in running an orderly, efficient election and in giving citizens (including the losing candidates and their supporters) confidence in the fairness of the election.

Id. at 31 (Kavanaugh, J., concurring). For a contrasting view see *id.* at 42 (Kagan, J. dissenting) (arguing that *Purcell* should be understood as directing courts to “consider all relevant factors, not just the calendar,” consistent with the “usual rules of equity”).

Two Supreme Court justices have even suggested that the presumption against injunctions close to an election be extended to *state* courts. *Moore v. Cirsota*, 141 S.Ct. 46, 48 (2020) (Gorsuch, J., joined by Alito, J. dissenting) (agreeing with lower court dissenters who “thoughtfully explained . . . the broader problems with last-minute election-law-writing-by-lawsuit”). *But see Democratic National Committee v. Wisconsin State Legislature*, 141 S. Ct. at 28 (Roberts, C.J., concurring) (distinguishing state court and federal court election injunctions).

The Court’s decisions in *RNC v. DNC*, *Merrill*, and *DNC v. Wisconsin State Legislature* send an unambiguous message that a majority of justices will look skeptically on federal court

CHAPTER 6. ELECTION ADMINISTRATION AND REMEDIES

injunctions altering voting procedures shortly before election day, even in the middle of a crisis. Has the *Purcell* principle hardened into an ironclad rule against such injunctions? What impact are these decisions likely to have on future election litigation? Should we be concerned about the seemingly partisan character of the Court's decisionmaking, with all nine justices voting consistent with the preferences of the political party of the President who appointed them? See Richard L. Hasen, *Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them*, 19 ELECTION LAW JOURNAL 263 (2020).

Chapter 7. Ballot Propositions

ADD THE FOLLOWING AFTER THE THIRD PARAGRAPH ON PAGE 474:

In order for an initiative, referendum, or recall to appear on the ballot, its proponents must gather enough signatures within a set amount of time. These rules are specific to state and local law. The COVID-19 pandemic, and accompanying closures of public places, have made signature gathering substantially more difficult. Ballot measure proponents have asked federal and state courts to relax requirements, such as by cutting the number of signatures required to qualify a measure, lengthening the time for the collection of ballots, and allowing signatures submitted electronically rather than signed in ink on a physical paper. So far many courts have been reluctant to loosen such rules, even during the pandemic. *Arizonans for Fair Elections v. Hobbs*, 474 F. Supp. 3d 910 (D. Ariz. 2020); *Bambenek v. White*, 2020 WL 2123951, *2 (C.D. Ill. May 1, 2020); *Morgan v. White*, No. 1-20-cv-02189 (N.D. Ill. May 18, 2020); *Thompson v. DeWine*, 959 F.3d 804 (6th Cir. 2020); *Fight for Nevada v. Cegavske*, 460 F. Supp. 3d 1049 (D. Nev. 2020); *Miller v. Thurston*, 967 F.3d 727 (8th Cir. 2020).

Courts have been more willing to loosen signature requirements for candidates to qualify for the ballot. See, for example, *Esshaki v. Whitmer*, 813 Fed. Appx. 830 (6th Cir. 2020), requiring the state of Michigan to make reasonable accommodations for candidates seeking ballot access. These rulings can help minor parties and independent candidates, who often are not afforded automatic ballot access like Democratic and Republican candidates. *Libertarian Party v. Pritzker*, 455 F. Supp. 3d 738 (N.D. Ill. 2020) (loosening Illinois ballot access rules during the pandemic for Illinois minor parties).

For an argument that the courts should not treat ballot measure proponents worse than candidates when it comes to loosening qualifying rules in the time of a pandemic, See Richard L. Hasen, *Direct Democracy Denied: The Right to Initiative During a Pandemic*, UNIVERSITY OF CHICAGO LAW REVIEW ONLINE, June 26, 2020, <https://lawreviewblog.uchicago.edu/2020/06/26/pandemic-initiative-hasen/>. Chief Justice Roberts disagreed with this position in a short opinion concurring in the grant of a stay of a district court's order in *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020). He observed that "nothing in the Constitution requires Idaho or any other State to provide for ballot initiatives." *Id.* at 2617 (Roberts, C.J., concurring in the grant of stay). He added that "reasonable, nondiscretionary restrictions" of ballot access for voter initiatives "are almost certainly justified by the important regulatory interests in combating fraud and ensuring that ballots are not cluttered with initiatives that have not demonstrated sufficient grassroots support." *Id.*

ADD THE FOLLOWING ON PAGE 544 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 7. BALLOT PROPOSITIONS

Interestingly, plaintiffs attacking Michigan’s new independent redistricting commission (also adopted via voter initiative) did *not* argue that it violates the “Legislature thereof” language of the Elections Clause. Instead, they objected on First Amendment grounds to its eligibility criteria for commissioners, which excluded certain partisan officials and mandated a particular partisan composition (four Democrats, four Republicans, and five independents). The Sixth Circuit recently rejected this challenge. *See Daunt v. Benson*, 999 F.3d 299 (6th Cir. 2021). Why did these litigants not make a “Legislature thereof” argument? Could it be because this claim is relevant only to *congressional* redistricting while Michigan’s commission is responsible for drawing congressional *and state legislative* maps?

Chapter 8. Major Political Parties

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 573:

Fewer states chose their presidential delegates through caucuses in 2020. Spurred by the Democratic National Committee, the states of Washington, Minnesota, and Colorado (the three largest caucus states) moved to primaries, along with Utah, Idaho, and Nebraska. Nate Cohn, *Fewer States Will Have Caucuses in 2020. Will It Matter?*, N.Y. TIMES, Apr. 12, 2019. What effects does the move away from caucuses have? Is it a good thing? Consider that more people participate in primaries, while highly motivated voters tend to dominate the caucus process.

The Democratic Party reduced the influence of so-called “superdelegates,” political insiders who played a prominent role in the 2008 process. Astead W. Herndon, *Democrats Overhaul Controversial Superdelegate System*, N.Y. TIMES, Aug. 25, 2018. For a skeptical view of such “populist” reforms, designed to decrease the influence of party insiders and increase the voice of the people, see Stephen Gardbaum and Richard H. Pildes, *Populism and Institutional Design: Methods of Selecting Candidates for Chief Executive*, 93 NEW YORK UNIVERSITY LAW REVIEW 647 (2018). Professors Gardbaum and Pildes “challenge the unexamined notion that our current populist system of candidate selection is the best way to choose the nominees who then compete in the general election for President.” They argue in favor of institutional mechanisms providing more influence to party insiders, on the ground that they furnish a kind of “peer review” that helps prevent the party from being captured by extreme and even anti-democratic forces. Do you agree? For more suggestions on how the presidential selection process might be improved, see Symposium, *The Presidential Nominations Process*, 93 NEW YORK UNIVERSITY LAW REVIEW 589 (2018), available at <https://www.nyulawreview.org/symposia/>.

The 2020 presidential nominations were decided fairly quickly once primaries began. President Donald Trump secured the Republican nomination without serious opposition, and former Vice-President Joe Biden emerged as the preferred candidate among an initially crowded field of Democrats after South Carolina’s February primary. By early April, all of Biden’s opponents had suspended their campaigns. In a close race, the COVID-19 pandemic might have caused significant disruption to the presidential nominating process.

Even without a contested presidential nomination, there was still litigation in New York, over that state’s decision to cancel its Democratic primary after all the candidates except Biden had dropped out. On March 28, 2020, Governor Andrew Cuomo issued an executive order rescheduling the April primary for June 23, 2020. The state legislature subsequently enacted a statute authorizing the New York State Board of Elections – and specifically, commissioners affiliated with the major party holding a primary – to omit candidates who had suspended their campaigns or publicly announced their withdrawal. Then on April 27, 2020, the Board’s two Democratic commissioners removed the names of the ten candidates who had done so. With only Biden remaining, the commissioners cancelled New York’s primary, which they described as nothing more than a “beauty contest,” citing the COVID-19 pandemic as the reason for their decision.

Supporters of two presidential candidates, Andrew Yang and Bernie Sanders, disagreed with the Board’s decision. At their request, a federal district court ordered that the removed candidates be restored to the ballot and that the Democratic presidential primary take place. The

CHAPTER 8. MAJOR POLITICAL PARTIES

Second Circuit affirmed, applying the *Anderson-Burdick* balancing standard (Casebook, page 636-38), and concluding the burden on voters and delegates outweighed the state's interests. *Yang v. Kosinski*, 960 F.3d 119 (2d. Cir. 2020). Addressing the central question of what purpose a presidential primary would serve after the nominee had effectively been chosen, the Second Circuit explained:

Yang wants an opportunity to compete for delegates. And so does Sanders. . . . By the same token, the Yang and Sanders delegates also want to compete for an opportunity to attend the Democratic National Convention. These are not trivial interests. Those familiar with the internal structure of the Democratic Party and the history of its National Convention will have no difficulty appreciating their significance.

At the Democratic National Convention, delegates have many important responsibilities, some with long-term consequences. In addition to participating in the selection of the presidential nominee, they vote on the procedural rules of the Convention; the National Democratic Party electoral platform; issues of party governance; and not insignificantly, the selection of the vice-presidential nominee. Furthermore, the power of the elected delegates extends beyond the quadrennial national convention. The delegates of the National Convention remain “the highest authority [and governing body] of the Democratic Party” until new delegates are selected. Accordingly, the programs and policies adopted at the Democratic National Convention will continue to influence state party rules or actions of the Democratic National Committee.

Id. at 130-31.

Do you agree that voters and would-be delegates have an important interest in having a primary take place, even after all but one of the candidates has dropped out? Was it appropriate for a federal court to intervene in this intra-party dispute, especially during a pandemic? Why didn't “the *Purcell* principle,” which generally counsels against federal court injunctions just before a scheduled election, apply here? See Casebook page 462-63 and *Republican National Committee v. Democratic National Committee*, 140 S. Ct. 1205 (2020), discussed in this Supplement to Chapter 6.

ADD THE FOLLOWING AFTER NOTE 6 ON PAGE 575:

7. Under the Electoral College system, each state's voters actually select a slate of electors, who in turn for vote for presidential candidates. Most of the time, those electors vote for the candidate whom they agreed to support, consistent with the wishes of their state's voters. But not always. In 2016, three of the State of Washington's electors violated their pledge to support Hillary Clinton, in an unsuccessful effort to persuade Donald Trump's electors to do the same.

Electors who don't vote for the presidential candidate they are pledged to support are called “faithless electors.” Washington is one of 15 states that imposes sanctions on faithless electors, and the three electors who violated their pledge to support Clinton were each fined \$1000. They challenged their fines on the ground that the Constitution allows members of the Electoral College to vote as they wish. The U.S. Supreme court unanimously disagreed. In *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020), an opinion for eight justices (all but Justice Thomas), Justice Kagan concluded that the Constitution allows states to sanction faithless electors:

CHAPTER 8. MAJOR POLITICAL PARTIES

Article II, §1's appointments power gives the States far-reaching authority over presidential electors, absent some other constitutional constraint. [E]ach State may appoint electors "in such Manner as the Legislature thereof may direct." This Court has described that clause as "conveying the broadest power of determination" over who becomes an elector. *McPherson v. Blacker*, 146 U.S. 1, 27 (1892). And the power to appoint an elector (in any manner) includes power to condition his appointment—that is, to say what the elector must do for the appointment to take effect. . . .

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

But those words need not always connote independent choice. Suppose a person always votes in the way his spouse, or pastor, or union tells him to. We might question his judgment, but we would have no problem saying that he "votes" or fills in a "ballot." In those cases, the choice is in someone else's hands, but the words still apply because they can signify a mechanical act. . . .

The Electors' constitutional claim has neither text nor history on its side. Article II and the Twelfth Amendment give States broad power over electors, and give electors themselves no rights. Early in our history, States decided to tie electors to the presidential choices of others, whether legislatures or citizens. Except that legislatures no longer play a role, that practice has continued for more than 200 years. Among the devices States have long used to achieve their object are pledge laws, designed to impress on electors their role as agents of others. A State follows in the same tradition if, like Washington, it chooses to sanction an elector for breaching his promise. Then too, the State instructs its electors that they have no ground for reversing the vote of millions of its citizens. That direction accords with the Constitution—as well as with the trust of a Nation that here, We the People rule.

Is the Court right that the Constitution's use of the word "vote" need not be understood to imply an independent choice? Would we understand citizens to have a right to vote, if they were ordered to vote for a particular candidate on pain of monetary sanctions? Of what relevance is the consistent practice of states, which have long tied the members of the Electoral College to the preferences of state voters?

8. A federal statute, the Electoral Count Act of 1887, governs the process by which electoral votes are cast and counted. Among its key provisions are that states have 35 days after Election Day to resolve any disputes over the election result, if they want to avail themselves of the "safe harbor" date for ensuring that their determinations are conclusive. 3 U.S.C. § 5. Six days later, in mid-December, the electors meet in each of the states to cast their electoral votes. 3 U.S.C. § 7. Congress then meets to count the votes on January 6. 3 U.S.C. § 15. The President is then inaugurated on January 20.

Most years, the main drama is on Election Night, and the casting and counting of electoral votes is a soporific affair. Not in 2020.

CHAPTER 8. MAJOR POLITICAL PARTIES

President Trump refused to concede defeat, continuing to press his false claims of election fraud in court and in public statements (see *supra*, Chapter 6 of this Supplement). Many of his supporters believed him. With his attempts to overturn the election results in court failing, President Trump appealed to state legislatures in key states to overturn the result. Kyle Cheney, *Trump Calls on GOP State Legislatures to Overturn Election Results*, POLITICO, Nov. 21, 2020. He also tried to assemble a group of “alternative electors” who might try to keep him in office. Nicholas Riccardi, *Why Trump’s Latest Electoral College Ploy Is Doomed to Fail*, AP, Dec. 14, 2020. When all that failed, he delivered a lengthy but impassioned speech to supporters on January 6, 2020, the date that Congress was to meet to count the electoral votes. He claimed claiming that the election had been “rigged” against him and, toward the end, said the following:

We fight like hell. And if you don't fight like hell, you're not going to have a country anymore. . . .

So we're going to, we're going to walk down Pennsylvania Avenue. I love Pennsylvania Avenue. And we're going to the Capitol, and we're going to try and give.

The Democrats are hopeless — they never vote for anything. Not even one vote. But we're going to try and give our Republicans, the weak ones because the strong ones don't need any of our help. We're going to try and give them the kind of pride and boldness that they need to take back our country.

So let's walk down Pennsylvania Avenue.

Walk down Pennsylvania Avenue they did. That afternoon, a mob of President Trump’s supporters stormed the U.S. Capitol, disrupting the joint session of Congress as which the electoral votes were to be counted. Members of the mob occupied and looted the Capitol, some of them assaulting police officers and reporters. Members of Congress were evacuated. It took hours for the Capitol building to be cleared of the rioters after which the session to count the electoral votes recommenced. Senate Majority Leader Mitch McConnell, a Republican, referred to the events of that day as a “failed insurrection.” Early on the morning of January 7, after rejecting objections to some of the electoral votes, Congress finished counting the electoral votes and certified President-elect Joe Biden and Vice President-elect Kamala Harris as the winners.

The events of January 6, 2021 and the weeks-long drama that preceded it, reveal several vulnerable points in the Electoral College process. Even after all lawsuits have been resolved, a partisan Secretary of State might refuse to certify the result. A Governor might refuse to prepare and send the Certificates of Ascertainment after certification. State legislatures might overturn the vote of the people, as President Trump attempted to convince some of them to do. And Congress might ultimately refuse to count the electoral votes presented to it. What if anything can be done to address the vulnerabilities in this process?

ADD THE FOLLOWING NOTE ON PAGE 587, AFTER NOTE 7:

8. Under *Tashjian*, states may not bar independents from *voting* in a party primary when the party wants them to be able to participate. But what about a state bar on independents *running as candidates* in a party primary, when the party wants those independents to be able to run? In *State of Alaska v. Alaska Democratic Party*, 426 P.3d 901 (2018), the Alaska Supreme Court held that such a law violates the party’s freedom of association. Although relying on the state

CHAPTER 8. MAJOR POLITICAL PARTIES

constitution's protection of associational rights, the opinion cites *Tashjian* and other federal constitutional precedents.

The Alaska Democratic Party amended its bylaws to allow independents to run in party primaries, contrary to state law. Using a balancing test like that set forth in First Amendment association cases, the Alaska Supreme Court found that the law imposed a “substantial” burden on the party's rights. It then applied strict scrutiny, requiring that the law be narrowly tailored to the state's compelling interests. The court rejected the state's proffered interests in ensuring public support for the Democratic Party, ensuring that candidates have strong public support, and preventing voter confusion, and therefore held that the state-imposed burden on the party's associational rights was unjustified.

Isn't it reasonable to require that people running for office as a nominee of a political party be a member of that party? Should it matter that the party alleging a violation of its associational rights (the Alaska Democratic Party) is the minority party in the state?

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*, 892 F.3d 1085 (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 1095 (Tymkovich, C.J., concurring in part and dissenting in part). The Tenth Circuit subsequently denied rehearing en banc, with Chief Judge Tymkovich urging

CHAPTER 8. MAJOR POLITICAL PARTIES

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.

Id. at 1072 (concurring in denial of rehearing en banc). The Supreme Court denied certiorari. 139 S. Ct. 1290 (2019).

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:

Consider this criticism of 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

CHAPTER 8. MAJOR POLITICAL PARTIES

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? For an argument that Professor Abu El-Haj's diagnosis is accurate, but that legislative and party-based solutions are likely to be more productive than focusing on the courts, see Michael Kang, *The Problem of Irresponsible Party Government*, 119 CLR FORUM, No. 1, <https://columbialawreview.org/content/the-problem-of-irresponsible-party-government/>. Professor Abu El-Haj responds in *The Possibilities for Responsive Party Government*, 119 CLR FORUM, No. 4, <https://columbialawreview.org/content/the-possibilities-for-responsive-party-government/>.

CHAPTER 8. MAJOR POLITICAL PARTIES

Chapter 9. Third Parties and Independent Candidates

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

The Eleventh Circuit again ruled in favor of a third party and its candidates challenging Georgia's ballot-access laws in *Cowen v. Georgia Secretary of State*, 960 F.3d 1339 (11th Cir. 2020). That case challenged the state's qualification requirements for congressional candidates. The Eleventh Circuit reversed the district court's decision granting summary judgment to the state, on the ground that it had failed to apply the contextual balancing standard mandated by *Anderson*. *Id.* at 1345-46.

For a 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. On the other hand, the Seventh Circuit recently ruled in favor of an independent candidate challenging Illinois's ballot access requirements, on the ground that the district court had granted summary judgment to the state without applying the fact-intensive balancing standard that *Anderson* and *Burdick* demand. *Gill v. Scholz*, 962 F.3d 360 (7th Cir. 2020).

On the challenge of minor party and independent candidates qualifying for the ballot by collecting signatures during the COVID-19 pandemic, see this Supplement to Page 474.

CHAPTER 9. THIRD PARTIES AND INDEPENDENT CANDIDATES

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.

CHAPTER 10. CAMPAIGNS

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 had walked into a Houston polling place in 2020 wearing a red cap reading “America is Already Great,” would 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), cert. denied 138 S. Ct. 1598 (2018) 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).

Along similar lines, the Sixth Circuit rejected First Amendment and Equal Protection challenges to six provisions of the Ohio Code of Judicial conduct. These provisions included those: barring judicial candidates from making speeches on behalf of a political party or another candidate; endorsing or opposing a candidate for another public office; with three exceptions, preventing them from personally soliciting campaign contributions; and limiting the window for fundraising to 120 days before a primary and 120 days after a general election. Citing *Williams-Yulee*, the court applied strict scrutiny in upholding the provisions. *Platt v. Bd. of Comm’rs on Grievs. & Discipline*, 894 F.3d 235 (6th Cir. 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

CHAPTER 10. CAMPAIGNS

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?

Meanwhile, the Third Circuit concluded that a provision of the Delaware Constitution requiring that judicial candidates be members of the Democratic or Republican parties violated the First Amendment rights of a candidate who was neither. The Supreme Court ducked the issue in *Carney v. Adams*, 141 S. Ct. 493 (2020), holding that the candidate challenging the law lacked standing because he did not show he was ready and able to run for the office in the future.

CHAPTER 10. CAMPAIGNS

Chapter 11. Bribery

ADD THE FOLLOWING TO THE END OF NOTE 5 ON PAGE 791:

The Supreme Court again addressed the meaning of a “scheme or artifice to defraud” in *Kelly v. United States*, 140 S. Ct. 1565 (2020). That case arose out of New Jersey’s “Bridgegate” scandal. Employees in the office of then-Governor Chris Christie and the Port Authority of New York and New Jersey allegedly reallocated traffic lanes on the George Washington Bridge (which connects New Jersey and New York). This was allegedly done to create a massive traffic jam in Fort Lee, New Jersey, as political retaliation against the city’s mayor for not supporting Governor Christie’s reelection. Bridget Kelly was Deputy Chief of Staff in the Governor’s Office, and William Baroni was Deputy Executive Director of the Port Authority. Both Kelly and Baroni allegedly participated in this scheme.

The government alleged that this was a scheme to defraud, in violation of the federal wire fraud statute since electronic communications were used to accomplish the lane reallocation. It did not allege “honest services” fraud, as there was no evident bribery or kickback, as required under *Skilling*. Instead, the government’s theory was that these public officials defrauded the Port Authority of property (lanes and toll booths) and money (wages of public employee who worked on the lane closure) through their scheme. Kelly and Baroni were convicted, and the Third Circuit accepted the government’s theory on appeal. *United States v. Baroni*, 909 F.3d 550 (3d Cir. 2018).

The Supreme Court reversed, with Justice Kagan writing for a unanimous Court. While acknowledging that act could be characterized as “corrupt,” 140 S. Ct. at 1574, the Court explained that the defendant public officials could not be convicted under the wire fraud statute merely on a showing that they lied about their reasons for the lane closure. *Id.* at 1572. Rather, the officials must have had the “object” of obtaining public money or property. *Id.* Kelly and Baroni may have misused their authority to regulate traffic over the bridge, and may even have wasted public resources on their scheme, but they did not have the object of obtaining public property. *Id.* at 1574.

Should public officials be subject to federal criminal prosecution where they allocate public resources based on false pretenses? Does the Court’s narrow interpretation of the fraud statute open the door to government officials misuse of public resources for political payback? Conversely, would a broader reading of the statute lead to a different type of political retaliation, in the form of prosecutions of public officials on the ground that they lied about the reasons for their actions? After all, some public money or property is likely to be used in just about any action that a public official might take.

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

CHAPTER 11. BRIBERY

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.

Another high-profile bribery conviction was reversed, on the ground that the question or matter to be influenced must be identified at the time of the promise to perform an official act. 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 (2d Cir. 2017). Silver was retried and, after a revised instruction on official action, was again convicted. The Second Circuit again reversed the bribery conviction, on the ground that the “particular *question* or *matter* to be influenced” must be identified at the time of the official’s promise. *United States v. Silver*, 948 F.3d 538, 545 (2d Cir. 2020). Because the district court’s post-*McDonnell* jury instruction did not require that the specific matter be identified at the time the bribe was allegedly accepted, the Second Circuit vacated the second bribery conviction.

Has *McDonnell* made it too hard to convict public officials of bribery?

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.

CHAPTER 13. SPENDING LIMITS

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.

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.

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).

CHAPTER 13. SPENDING LIMITS

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, is now Justice Kavanaugh, having been named to the Supreme Court by President Trump. Does his confirmation increase or decrease the chances of the Court construing the foreign spending ban to apply only to express advocacy?

The much-anticipated report from Special Counsel Robert Mueller detailed Russian interference in the 2016 elections. Mueller's investigation "identified numerous links between the Russian government and the Trump Campaign. Although the investigation established that the Russian government perceived it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected it would benefit electorally from information stolen and released through Russian efforts, the investigation did not establish that members of the Trump Campaign conspired or coordinated with the Russian government in its election interference activities." I SPECIAL COUNSEL ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION 1-2 (Mar. 2019). The official version appears at <https://www.justice.gov/storage/report.pdf>, and a searchable version appears at <https://www.documentcloud.org/documents/5955379-Redacted-Mueller-Report.html#document/> [https://perma.cc/9TEW-JD3Z].

Foreign interference in the 2020 U.S. elections continued, although the full scope remains under investigation. Julian E. Barnes, [*Russia Continues Interfering in Election to Try to Help Trump, U.S. Intelligence Says*](#), N.Y. TIMES, Aug. 7, 2020 (updated Sept. 2, 2020); Natasha Bertrand & Daniel Lippman, [*Ratcliffe Went Off Script with Iran Remarks, Officials Say*](#), POLITICO, Oct. 28, 2020; Julian E. Barnes, Nicole Perlroth, & David E. Sanger, [*Russia Poses Greater Election Threat Than Iran, Many U.S. Officials Say*](#), N.Y. TIMES, Oct. 22, 2020; Julian E. Barnes, [*Russian Interference in 2020 Included Influencing Trump Associates, Report Says*](#), N.Y. TIMES, Mar. 16, 2021; Nat'l Intel. Council, [*Foreign Threats to the US 2020 Federal Elections*](#), Mar. 10, 2021; [*Joint Report of the Department of Justice and the Department of Homeland Security on Foreign Interference Targeting Election Infrastructure or Political Organization, Campaign, or Candidate Infrastructure Related to the 2020 US Federal Elections*](#), Mar. 2021.

CHAPTER 13. SPENDING LIMITS

Relying upon the Supreme Court's summary affirmance in *Bluman*, the Ninth Circuit rejected a challenge to the federal foreign contribution ban's application to state and local elections, finding the law within Congress's powers and not a First Amendment violation. *United States v. Singh*, 924 F.3d 1030, 1043 (9th Cir. 2019), cert. denied 140 S. Ct. 1265 (2020).

Chapter 14. Contribution Limits

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

The Supreme Court recently embraced Justice Breyer’s plurality analysis in *Randall* as the position of the Court. Courts had continued 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.), cert. denied 139 S. Ct. 639 (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 Ninth Circuit similarly upheld a \$500 individual contribution limit and a \$5,000 political party contribution limit to candidates for state office in Alaska. *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018).

The Supreme Court in a *per curiam* (unsigned) opinion reversed that portion of the Ninth Circuit opinion in *Hebdon* upholding the \$500 individual limit. *Thompson v. Hebdon*, 140 S. Ct. 348 (2019). The Court held that the Ninth Circuit erred in failing to apply Justice Breyer’s plurality opinion in *Randall*. The Ninth Circuit had failed to apply that precedent because no opinion for the Court commanded a majority. Now, the Supreme Court indicated that Justice Breyer’s opinion is the operable test, and it remanded the case for reconsideration by the Ninth Circuit in light of *Randall*. In doing so, the Court avoided deciding, for example, that contribution limits should be judged under strict scrutiny.

Despite the failure to tighten the scrutiny, *Hebdon* is not good news for supporters of the Alaska regulation, because the Court gave reasons to suggest that under the *Randall* test, the limits were so low as to violate the First Amendment:

In *Randall*, we identified several “danger signs” about Vermont’s law that warranted closer review. Alaska’s limit on campaign contributions shares some of those characteristics. First, Alaska’s \$500 individual-to-candidate contribution limit is “substantially lower than . . . the limits we have previously upheld.” The lowest campaign contribution limit this Court has upheld remains the limit of \$1,075 per two-year election cycle for candidates for Missouri state auditor in 1998 (citing *Shrink Missouri*). That limit translates to over \$1,600 in today’s dollars. Alaska permits contributions up to 18 months prior to the general election and thus allows a maximum contribution of \$1,000 over a comparable two-year period. Accordingly, Alaska’s limit is less than two-thirds of the contribution limit we upheld in *Shrink*.

Second, Alaska’s individual-to-candidate contribution limit is “substantially lower than . . . comparable limits in other States.” *Randall*. Most state contribution limits apply on a per-election basis, with primary and general elections counting as separate elections. Because an individual can donate the maximum amount in both the primary and general

CHAPTER 14. CONTRIBUTION LIMITS

election cycles, the per-election contribution limit is comparable to Alaska’s annual limit and 18-month campaign period, which functionally allow contributions in both the election year and the year preceding it. Only five other States have any individual-to-candidate contribution limit of \$500 or less per election: Colorado, Connecticut, Kansas, Maine, and Montana. Moreover, Alaska’s \$500 contribution limit applies uniformly to all offices, including Governor and Lieutenant Governor. But Colorado, Connecticut, Kansas, Maine, and Montana all have limits above \$500 for candidates for Governor and Lieutenant Governor, making Alaska’s law the most restrictive in the country in this regard.

Third, Alaska’s contribution limit is not adjusted for inflation. We observed in *Randall* that Vermont’s “failure to index limits means that limits which are already suspiciously low” will “almost inevitably become too low over time.” The failure to index “imposes the burden of preventing the decline upon incumbent legislators who may not diligently police the need for changes in limit levels to ensure the adequate financing of electoral challenges.” So too here. In fact, Alaska’s \$500 contribution limit is the same as it was 23 years ago, in 1996.

In *Randall*, we noted that the State had failed to provide “any special justification that might warrant a contribution limit so low.” The parties dispute whether there are pertinent special justifications here.

Justice Ginsburg concurred separately, accepting the remand but saying that under the *Randall* test, Alaska’s limits could still survive. This seems quite doubtful should the case make it back to the Supreme Court, and the Ninth Circuit is likely to get that message. It has ordered supplemental briefing in the case.

REPLACE THE LAST SENTENCE OF NOTE 7 ON PAGE 1005 WITH THE FOLLOWING:

The trial court again enjoined the attorney general from collecting the information following a trial on the merits. The Supreme Court eventually decided the case, as described in this Supplement to Chapter 16.

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

The Supreme Court recently declined 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), cert. denied *sub nom. Lair v. Mangan*, 139 S. Ct. 916 (2019), 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*:

CHAPTER 14. CONTRIBUTION LIMITS

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.

ADD THE FOLLOWING TO THE END OF NOTE 6 ON PAGE 1033:

The Court has once again turned down a case raising the question of the constitutionality of a corporate spending ban. *1A Auto, Inc. v. Dir. of Office of Campaign & Political Fin.*, 105 N.E.3d 1175 (Mass. 2018), cert. denied 139 S. Ct. 2613 (2019).

CHAPTER 14. CONTRIBUTION LIMITS

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

In *Deon v. Barasch*, 960 F.3d 152 (3d Cir. 2020), the Third Circuit held that Pennsylvania statute that prohibited individuals with interests in businesses that had gaming licenses from making any contributions, no matter how small, to any politician, political candidate, public official, or political organization violated the First Amendment.

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.), cert. denied 139 S. Ct. 639 (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. Compare to *Platt v. Bd. of Comm’rs on Grievs. & Discipline*, 894 F.3d 235 (6th Cir. 2018) (described in greater detail in this Supplement to Chapter 10), upholding temporal campaign finance limits in judicial elections.

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

The Eighth Circuit upheld a preliminary injunction against an Arkansas law that prohibited public officials from raising funds more than two years before election. *Jones v. Jegley*, 947 F.3d 1100 (8th Cir. 2020). “Arkansas has not shown that contributions made more than two years before an election present a greater risk of actual or apparent quid pro quo corruption than those made later.” *Id.* at 1105.

ADD THE FOLLOWING TO THE END OF THE FIRST FULL PARAGRAPH ON PAGE 1036:

In *Thompson v. Hebdon*, 909 F.3d 1027 (9th Cir. 2018) (discussed in this Supplement to page 984 on another point), the Ninth Circuit held unconstitutional a provision of Alaska law limiting candidates from accepting more than \$3,000 per year from out-of-state residents. The dissenting judge would have accepted as compelling Alaska’s stated interest in “self-governance” to justify the limitation on accepting contributions from out-of-state residents. Along similar lines, federal district court blocked a South Dakota ballot measure which banned out-of-state contributions to South Dakota ballot measure committees, rejecting the self-government interest. *SD Voice v. Noem*, 380 F. Supp. 3d 939 (D.S.D. 2019).

Chapter 15. Public Financing

ADD THE FOLLOWING TO THE END OF NOTE 7 ON PAGE 1089:

The Second Circuit unanimously affirmed. *Corren v. Condos*, 898 F.3d 209 (2d Cir. 2018).

ADD THE FOLLOWING TO THE END OF LAST FULL PARAGRAPH ON PAGE 1096:

The Washington Supreme Court rejected a First Amendment challenge to Seattle's voucher program, and the Supreme Court declined to intervene. *Elster v. City of Seattle*, 444 P.3d 590 (Wash. 2019), cert. denied 140 S. Ct. 2564 (2020).

CHAPTER 15. PUBLIC FINANCING

Chapter 16. Disclosure

DELETE THE REMAINDER OF THE CHAPTER BEGINNING WITH PAGE 1128 AND REPLACE WITH THE FOLLOWING:

II. The New Skepticism About Disclosure

As we saw in earlier chapters on spending limits and contribution limits, the Supreme Court has moved in a decisively deregulatory direction. Until recently, skepticism of regulation did not extend to laws that required disclosure of campaign finance information, even among most of the conservatives on the Court aside from Justice Thomas. Justices such as Antonin Scalia and Anthony Kennedy, both in the majority in *Citizens United* on the spending limits question, also saw disclosure as a much more narrowly tailored solution than limits to deal with the potential for corruption. The Court consistently upheld disclosure rules, including in *McConnell* and *Citizens United*.

But the addition of new conservative Justices on the Court, as well as the ease with which disclosed campaign finance information now flows on the Internet and on social media, seems to be changing the constitutional calculus. See William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 UNIVERSITY OF PENNSYLVANIA JOURNAL OF CONSTITUTIONAL LAW 1 (2003). We may be moving into a period of New Skepticism about disclosure as well.

The first signs of a potential shift came into sharp relief in *Doe v. Reed*, 561 U.S. 186 (2010). *Reed* concerned not a campaign finance disclosure law but one that required disclosure of the names of Washington state voters who sign petitions to place measures on the ballot. The dispute concerned the disclosure of the names of signers of a referendum petition that would have given voters the opportunity to reverse a Washington law giving certain rights to same-sex couples.

In a majority opinion written by Chief Justice Roberts, the Court upheld the law against a facial challenge and remanded for consideration of an as-applied challenge. In other words, the Court held that the disclosure law constitutionally could be applied to most petition signers, but that the signers of the same-sex rights referendum might be entitled to an exemption if they could prove a threat of harassment. The Court remanded the case to consider this as-applied challenge.

In addressing the facial challenge, the Court described the applicable standard of review of mandatory disclosure laws:

We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed “exacting scrutiny.” See, e.g., *Buckley v. Valeo*; *Citizens United*; *Davis v. FEC*; *ACLF*.

That standard “requires a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ governmental interest.” *Citizens United*. To withstand this

CHAPTER 16. DISCLOSURE

scrutiny, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”

Washington State sought to justify its disclosure law based on two interests: “(1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the petition.” The Court held that the first interest was sufficient to defeat the constitutional argument against it: “Because we determine that the State’s interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, we need not, and do not, address the State’s ‘informational’ interest.” It remanded the case to the lower court to consider whether the risk of harassment for signers of the particular referendum justified as as-applied exception.

Although the decision was 8-1, with only Justice Thomas dissenting, many Justices wrote concurring opinions. Justices Scalia and Sotomayor wrote strong defenses of the interests in disclosure, while Justice Alito stressed the potential for disclosure to chill protected First Amendment activity, especially in the Internet era. On the risks of disclosure chilling participation, Justice Scalia concluded his concurring opinion with this often-quoted passage:

Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. Of course nothing prevents the people of Washington from keeping petition signatures secret to avoid that — just as nothing prevented the States from moving to the secret ballot. But there is no constitutional basis for this Court to impose that course upon the States — or to insist (as today’s opinion does) that it can only be avoided by the demonstration of a “sufficiently important governmental interest.” And it may even be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

A decade after *Reed*, the Supreme Court returned to the question of disclosure. With a different conservative majority on the Court, the tone and standard of the Court’s analysis took a dramatic turn.

Americans for Prosperity Foundation v. Bonta

141 S. Ct. 2373 (2021)

Chief Justice ROBERTS delivered the opinion of the Court, except as to Part II–B–1.

To solicit contributions in California, charitable organizations must disclose to the state Attorney General’s Office the identities of their major donors. The State contends that having this

CHAPTER 16. DISCLOSURE

information on hand makes it easier to police misconduct by charities. We must decide whether California’s disclosure requirement violates the First Amendment right to free association.

I

The California Attorney General’s Office is responsible for statewide law enforcement, including the supervision and regulation of charitable fundraising. Under state law, the Attorney General is authorized to “establish and maintain a register” of charitable organizations and to obtain “whatever information, copies of instruments, reports, and records are needed for the establishment and maintenance of the register.” In order to operate and raise funds in California, charities generally must register with the Attorney General and renew their registrations annually. Over 100,000 charities are currently registered in the State, and roughly 60,000 renew their registrations each year.

California law empowers the Attorney General to make rules and regulations regarding the registration and renewal process. Pursuant to this regulatory authority, the Attorney General requires charities renewing their registrations to file copies of their Internal Revenue Service Form 990, along with any attachments and schedules. Form 990 contains information regarding tax-exempt organizations’ mission, leadership, and finances. Schedule B to Form 990—the document that gives rise to the present dispute—requires organizations to disclose the names and addresses of donors who have contributed more than \$5,000 in a particular tax year (or, in some cases, who have given more than 2 percent of an organization’s total contributions).

The petitioners are tax-exempt charities that solicit contributions in California and are subject to the Attorney General’s registration and renewal requirements. Americans for Prosperity Foundation is a public charity that is “devoted to education and training about the principles of a free and open society, including free markets, civil liberties, immigration reform, and constitutionally limited government.” Thomas More Law Center is a public interest law firm whose “mission is to protect religious freedom, free speech, family values, and the sanctity of human life.” Since 2001, each petitioner has renewed its registration and has filed a copy of its Form 990 with the Attorney General, as required by [California law]. Out of concern for their donors’ anonymity, however, the petitioners have declined to file their Schedule Bs (or have filed only redacted versions) with the State.

For many years, the petitioners’ reluctance to turn over donor information presented no problem because the Attorney General was not particularly zealous about collecting Schedule Bs. That changed in 2010, when the California Department of Justice “ramped up its efforts to enforce charities’ Schedule B obligations, sending thousands of deficiency letters to charities that had not complied with the Schedule B requirement.” The Law Center and the Foundation received deficiency letters in 2012 and 2013, respectively. When they continued to resist disclosing their contributors’ identities, the Attorney General threatened to suspend their registrations and fine their directors and officers.

The petitioners each responded by filing suit in the Central District of California. In their complaints, they alleged that the Attorney General had violated their First Amendment rights and the rights of their donors. The petitioners alleged that disclosure of their Schedule Bs would make

CHAPTER 16. DISCLOSURE

their donors less likely to contribute and would subject them to the risk of reprisals. Both organizations challenged the disclosure requirement on its face and as applied to them.

In each case, the District Court granted preliminary injunctive relief prohibiting the Attorney General from collecting their Schedule B information. The Ninth Circuit vacated and remanded. The court held that it was bound by Circuit precedent to reject the petitioners' facial challenge. And reviewing the petitioners' as-applied claims under an "exacting scrutiny" standard, the panel narrowed the injunction, allowing the Attorney General to collect the petitioners' Schedule Bs so long as he did not publicly disclose them.

On remand, the District Court held bench trials in both cases, after which it entered judgment for the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. Applying exacting scrutiny, the District Court held that disclosure of Schedule Bs was not narrowly tailored to the State's interest in investigating charitable misconduct. The court credited testimony from California officials that Schedule Bs were rarely used to audit or investigate charities. And it found that even where Schedule B information was used, that information could be obtained from other sources.

The court also determined that the disclosure regime burdened the associational rights of donors. In both cases, the court found that the petitioners had suffered from threats and harassment in the past, and that donors were likely to face similar retaliation in the future if their affiliations became publicly known. For example, the CEO of the Foundation testified that a technology contractor working at the Foundation's headquarters had posted online that he was "inside the belly of the beast" and "could easily walk into [the CEO's] office and slit his throat." And the Law Center introduced evidence that it had received "threats, harassing calls, intimidating and obscene emails, and even pornographic letters."

The District Court also found that California was unable to ensure the confidentiality of donors' information. During the course of litigation, the Foundation identified nearly 2,000 confidential Schedule Bs that had been inadvertently posted to the Attorney General's website, including dozens that were found the day before trial. One of the Foundation's expert witnesses also discovered that he was able to access hundreds of thousands of confidential documents on the website simply by changing a digit in the URL. The court found after trial that "the amount of careless mistakes made by the Attorney General's Registry is shocking." And although California subsequently codified a policy prohibiting disclosure—an effort the District Court described as "commendable"—the court determined that "[d]onors and potential donors would be reasonably justified in a fear of disclosure given such a context" of past breaches.

The Ninth Circuit again vacated the District Court's injunctions, and this time reversed the judgments and remanded for entry of judgment in favor of the Attorney General. The court held that the District Court had erred by imposing a narrow tailoring requirement. And it reasoned that the disclosure regime satisfied exacting scrutiny because the up-front collection of charities' Schedule Bs promoted investigative efficiency and effectiveness. The panel also found that the disclosure of Schedule Bs would not meaningfully burden donors' associational rights, in part because the Attorney General had taken remedial security measures to fix the confidentiality breaches identified at trial.

CHAPTER 16. DISCLOSURE

The Ninth Circuit denied rehearing en banc. Judge Ikuta dissented, joined by four other judges. In her view, the panel had impermissibly overridden the District Court’s factual findings and evaluated the disclosure requirement under too lenient a degree of scrutiny.

We granted certiorari.

II

A

The First Amendment prohibits government from “abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” This Court has “long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others.” *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). Protected association furthers “a wide variety of political, social, economic, educational, religious, and cultural ends,” and “is especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority.” *Ibid.* Government infringement of this freedom “can take a number of forms.” *Ibid.* We have held, for example, that the freedom of association may be violated where a group is required to take in members it does not want, see *id.*, at 623, where individuals are punished for their political affiliation, see *Elrod v. Burns* [Chapter 8—Eds] (plurality opinion), or where members of an organization are denied benefits based on the organization’s message, see *Healy v. James*, 408 U.S. 169, 181–182 (1972).

We have also noted that “[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action.” *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). *NAACP v. Alabama* involved this chilling effect in its starkest form. The NAACP opened an Alabama office that supported racial integration in higher education and public transportation. In response, NAACP members were threatened with economic reprisals and violence. As part of an effort to oust the organization from the State, the Alabama Attorney General sought the group’s membership lists. We held that the First Amendment prohibited such compelled disclosure. We explained that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,” and we noted “the vital relationship between freedom to associate and privacy in one’s associations.” Because NAACP members faced a risk of reprisals if their affiliation with the organization became known—and because Alabama had demonstrated no offsetting interest “sufficient to justify the deterrent effect” of disclosure—we concluded that the State’s demand violated the First Amendment.

B

1

NAACP v. Alabama did not phrase in precise terms the standard of review that applies to First Amendment challenges to compelled disclosure. We have since settled on a standard referred to as “exacting scrutiny.” *Buckley (per curiam)*. Under that standard, there must be “a substantial

CHAPTER 16. DISCLOSURE

relation between the disclosure requirement and a sufficiently important governmental interest.” *Doe v. Reed*. “To withstand this scrutiny, the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Ibid*. Such scrutiny, we have held, is appropriate given the “deterrent effect on the exercise of First Amendment rights” that arises as an “inevitable result of the government’s conduct in requiring disclosure.”

The Law Center (but not the Foundation) argues that we should apply strict scrutiny, not exacting scrutiny. Under strict scrutiny, the government must adopt “the least restrictive means of achieving a compelling state interest,” *McCullen v. Coakley*, 573 U.S. 464, 478 (2014), rather than a means substantially related to a sufficiently important interest. The Law Center contends that only strict scrutiny adequately protects the associational rights of charities. And although the Law Center acknowledges that we have applied exacting scrutiny in prior disclosure cases, it argues that those cases arose in the electoral context, where the government’s important interests justify less searching review. *Buckley*.

It is true that we first enunciated the exacting scrutiny standard in a campaign finance case. See *Buckley*. And we have since invoked it in other election-related settings. See, e.g., *Citizens United*; *Davis v. Federal Election Comm’n*. But exacting scrutiny is not unique to electoral disclosure regimes. To the contrary, *Buckley* derived the test from *NAACP v. Alabama* itself, as well as other nonelection cases. See *Buckley* (citing *Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963); *NAACP v. Button*, 371 U.S. 415 (1963); *Shelton v. Tucker*, 364 U.S. 479 (1960); *Bates v. Little Rock*, 361 U.S. 516 (1960)). As we explained in *NAACP v. Alabama*, “it is immaterial” to the level of scrutiny “whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.” Regardless of the type of association, compelled disclosure requirements are reviewed under exacting scrutiny.

2

The Law Center (now joined by the Foundation) argues in the alternative that even if exacting scrutiny applies, such review incorporates a least restrictive means test similar to the one imposed by strict scrutiny. The United States and the Attorney General respond that exacting scrutiny demands no additional tailoring beyond the “substantial relation” requirement noted above. We think that the answer lies between those two positions. While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest.

The need for narrow tailoring was set forth early in our compelled disclosure cases. In *Shelton v. Tucker*, we considered an Arkansas statute that required teachers to disclose every organization to which they belonged or contributed. We acknowledged the importance of “the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools.” On that basis, we distinguished prior decisions in which we had found “no substantially relevant correlation between the governmental interest asserted and the State’s effort to compel disclosure.” But we nevertheless held that the Arkansas statute was invalid because even a “legitimate and substantial” governmental interest “cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.”

CHAPTER 16. DISCLOSURE

Shelton stands for the proposition that a substantial relation to an important interest is not enough to save a disclosure regime that is insufficiently tailored. This requirement makes sense. Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—“[b]ecause First Amendment freedoms need breathing space to survive.” *Button*.

Our more recent decisions confirm the need for tailoring. In *McCutcheon v. Federal Election Commission*, for example, a plurality of the Court explained:

“In the First Amendment context, fit matters. Even when the Court is not applying strict scrutiny, we still require a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served, that employs not necessarily the least restrictive means but a means narrowly tailored to achieve the desired objective.”

McCutcheon is instructive here. 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.

The dissent reads our cases differently. It focuses on the words “broadly stifle” in the quotation from *Shelton* above, and it interprets those words to mean that narrow tailoring is required only for disclosure regimes that “impose a severe burden on associational rights.”. Because, in the dissent’s view, the petitioners have not shown such a burden here, narrow tailoring is not required.

We respectfully disagree. The “government may regulate in the [First Amendment] area only with narrow specificity,” *Button*, and compelled disclosure regimes are no exception. When it comes to “a person’s beliefs and associations,” “[b]road and sweeping state inquiries into these protected areas . . . discourage citizens from exercising rights protected by the Constitution.” *Baird v. State Bar of Ariz.*, 401 U.S. 1, 6 (1971) (plurality opinion). Contrary to the dissent, we understand this Court’s discussion of rules that are “broad” and “broadly stifle” First Amendment freedoms to refer to the scope of challenged restrictions—their breadth—rather than the severity of any demonstrated burden. That much seems clear to us from *Shelton*’s statement (in the sentence following the one quoted by the dissent) that “[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.” It also seems clear from the immediately preceding paragraph, which stressed that “[t]he scope of the inquiry required by [the law] is completely unlimited.... It requires [the teacher] to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher’s occupational competence or fitness.” In other words, the law was not narrowly tailored to the State’s objective.

Nor does our decision in *Reed* suggest that narrow tailoring is required only for laws that impose severe burdens. The dissent casts *Reed* as a case involving only “modest burdens,” and therefore “a correspondingly modest level of tailoring.” But it was only after we concluded that various narrower alternatives proposed by the plaintiffs were inadequate, that we held that the

CHAPTER 16. DISCLOSURE

strength of the government’s interest in disclosure reflected the burden imposed. The point is that a reasonable assessment of the burdens imposed by disclosure should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.

III

The Foundation and the Law Center both argued below that the obligation to disclose Schedule Bs to the Attorney General was unconstitutional on its face and as applied to them. The petitioners renew their facial challenge in this Court, and they argue in the alternative that they are entitled to as-applied relief. For the reasons below, we conclude that California’s blanket demand for Schedule Bs is facially unconstitutional.

A

As explained, exacting scrutiny requires that there be “a substantial relation between the disclosure requirement and a sufficiently important governmental interest,” *Reed*, and that the disclosure requirement be narrowly tailored to the interest it promotes, see *Shelton*. The Ninth Circuit found that there was a substantial relation between the Attorney General’s demand for Schedule Bs and a sufficiently strong governmental interest. Of particular relevance, the court found that California had such an interest in preventing charitable fraud and self-dealing, and that “the up-front collection of Schedule B information improves the efficiency and efficacy of the Attorney General’s important regulatory efforts.” The court did not apply a narrow tailoring requirement, however, because it did not read our cases to mandate any such inquiry. That was error. And properly applied, the narrow tailoring requirement is not satisfied by the disclosure regime.

We do not doubt that California has an important interest in preventing wrongdoing by charitable organizations. It goes without saying that there is a “substantial governmental interest[] in protecting the public from fraud.” *Schaumburg v. Citizens for Better Environment*, 444 U.S. 620, 636 (1980). The Attorney General receives complaints each month that identify a range of misconduct, from “misuse, misappropriation, and diversion of charitable assets,” to “false and misleading charitable solicitations,” to other “improper activities by charities soliciting charitable donations.” Such offenses cause serious social harms. And the Attorney General is the primary law enforcement officer charged with combating them under California law.

There is a dramatic mismatch, however, between the interest that the Attorney General seeks to promote and the disclosure regime that he has implemented in service of that end. Recall that 60,000 charities renew their registrations each year, and nearly all are required to file a Schedule B. Each Schedule B, in turn, contains information about a charity’s top donors—a small handful of individuals in some cases, but hundreds in others. This information includes donors’ names and the total contributions they have made to the charity, as well as their addresses.

Given the amount and sensitivity of this information harvested by the State, one would expect Schedule B collection to form an integral part of California’s fraud detection efforts. It does not. To the contrary, the record amply supports the District Court’s finding that there was not “a

CHAPTER 16. DISCLOSURE

single, concrete instance in which pre-investigation collection of a Schedule B did anything to advance the Attorney General’s investigative, regulatory or enforcement efforts.”

The dissent devotes much of its analysis to relitigating factual disputes that the District Court resolved against the Attorney General, notwithstanding the applicable clear error standard of review. For example, the dissent echoes the State’s argument that, in some cases, it relies on up-front Schedule B collection to prevent and police fraud. But the record before the District Court tells a different story. And even if the State relied on up-front collection in some cases, its showing falls far short of satisfying the means-end fit that exacting scrutiny requires. California is not free to enforce *any* disclosure regime that furthers its interests. It must instead demonstrate its need for universal production in light of any less intrusive alternatives. Cf. *Shelton*.

The Attorney General and the dissent contend that alternative means of obtaining Schedule B information—such as a subpoena or audit letter—are inefficient and ineffective compared to up-front collection. It became clear at trial, however, that the Office had not even considered alternatives to the current disclosure requirement. The Attorney General and the dissent also argue that a targeted request for Schedule B information could tip a charity off, causing it to “hide or tamper with evidence.” But again, the States’ witnesses failed to substantiate that concern. Nor do the actions of investigators suggest a risk of tipping off charities under suspicion, as the standard practice is to send audit letters asking for a wide range of information early in the investigative process. Furthermore, even if tipoff were a concern in some cases, the State’s indiscriminate collection of Schedule Bs in all cases would not be justified.

The upshot is that California casts a dragnet for sensitive donor information from tens of thousands of charities each year, even though that information will become relevant in only a small number of cases involving filed complaints. California does not rely on Schedule Bs to initiate investigations, and in all events, there are multiple alternative mechanisms through which the Attorney General can obtain Schedule B information after initiating an investigation. The need for up-front collection is particularly dubious given that California—one of only three States to impose such a requirement,—did not rigorously enforce the disclosure obligation until 2010. Certainly, this is not a regime “whose scope is in proportion to the interest served.” *McCutcheon*.

In reality, then, California’s interest is less in investigating fraud and more in ease of administration. This interest, however, cannot justify the disclosure requirement. The Attorney General may well prefer to have every charity’s information close at hand, just in case. But “the prime objective of the First Amendment is not efficiency.” Mere administrative convenience does not remotely “reflect the seriousness of the actual burden” that the demand for Schedule Bs imposes on donors’ association rights. *Reed*.

B

The foregoing discussion also makes clear why a facial challenge is appropriate in these cases. Normally, a plaintiff bringing a facial challenge must “establish that no set of circumstances exists under which the [law] would be valid,” *United States v. Salerno*, 481 U.S. 739, 745, 7 (1987), or show that the law lacks “a plainly legitimate sweep,” *Washington State Grange v. Washington State Republican Party* [Chapter 8—Eds]. In the First Amendment context, however,

CHAPTER 16. DISCLOSURE

we have recognized “a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *United States v. Stevens*, 559 U.S. 460, 473 (2010). We have no trouble concluding here that the Attorney General’s disclosure requirement is overbroad. The lack of tailoring to the State’s investigative goals is categorical—present in every case—as is the weakness of the State’s interest in administrative convenience. Every demand that might chill association therefore fails exacting scrutiny.

The Attorney General tries to downplay the burden on donors, arguing that “there is no basis on which to conclude that California’s requirement results in any broad-based chill.” He emphasizes that “California’s Schedule B requirement is confidential,” and he suggests that certain donors—like those who give to noncontroversial charities—are unlikely to be deterred from contributing. He also contends that disclosure to his office imposes no added burdens on donors because tax-exempt charities already provide their Schedule Bs to the IRS.

We are unpersuaded. Our cases have said that disclosure requirements can chill association “[e]ven if there [is] no disclosure to the general public.” *Shelton*. In *Shelton*, for example, we noted the “constant and heavy” pressure teachers would experience simply by disclosing their associational ties to their schools. Exacting scrutiny is triggered by “state action which *may* have the effect of curtailing the freedom to associate,” and by the “*possible* deterrent effect” of disclosure. *NAACP v. Alabama* (emphasis added); see *Talley v. California*, 362 U.S. 60, 65 (1960) (“identification and fear of reprisal *might* deter perfectly peaceful discussions of public matters of importance” (emphasis added)). While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it.*

It is irrelevant, moreover, that some donors might not mind—or might even prefer—the disclosure of their identities to the State. The disclosure requirement “creates an unnecessary risk of chilling” in violation of the First Amendment, indiscriminately sweeping up the information of *every* major donor with reason to remain anonymous. The petitioners here, for example, introduced evidence that they and their supporters have been subjected to bomb threats, protests, stalking, and physical violence. Such risks are heightened in the 21st century and seem to grow with each passing year, as “anyone with access to a computer [can] compile a wealth of information about” anyone else, including such sensitive details as a person’s home address or the school attended by his children. *Reed* (ALITO, J., concurring).

The gravity of the privacy concerns in this context is further underscored by the filings of hundreds of organizations as *amici curiae* in support of the petitioners. Far from representing uniquely sensitive causes, these organizations span the ideological spectrum, and indeed the full

* Here the State’s assurances of confidentiality are not worth much. The dissent acknowledges that the Foundation and Law Center “have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public,” but it concludes that the petitioners have no cause for concern because the Attorney General “has implemented security measures to ensure that Schedule B information remains confidential.” The District Court—whose findings, again, we review only for clear error—disagreed. After two full bench trials, the court found that the Attorney General’s promise of confidentiality “rings hollow,” and that “[d]onors and potential donors would be reasonably justified in a fear of disclosure.”

CHAPTER 16. DISCLOSURE

range of human endeavors: from the American Civil Liberties Union to the Proposition 8 Legal Defense Fund; from the Council on American-Islamic Relations to the Zionist Organization of America; from Feeding America—Eastern Wisconsin to PBS Reno. The deterrent effect feared by these organizations is real and pervasive, even if their concerns are not shared by every single charity operating or raising funds in California.

The dissent argues that—regardless of the defects in California’s disclosure regime—a facial challenge cannot succeed unless a plaintiff shows that donors to a substantial number of organizations will be subjected to harassment and reprisals. As we have explained, plaintiffs may be required to bear this evidentiary burden where the challenged regime is narrowly tailored to an important government interest. Such a demanding showing is not required, however, where—as here—the disclosure law fails to satisfy these criteria.

inally, California’s demand for Schedule Bs cannot be saved by the fact that donor information is already disclosed to the IRS as a condition of federal tax-exempt status. For one thing, each governmental demand for disclosure brings with it an additional risk of chill. For another, revenue collection efforts and conferral of tax-exempt status may raise issues not presented by California’s disclosure requirement, which can prevent charities from operating in the State altogether.

We are left to conclude that the Attorney General’s disclosure requirement imposes a widespread burden on donors’ associational rights. And this burden cannot be justified on the ground that the regime is narrowly tailored to investigating charitable wrongdoing, or that the State’s interest in administrative convenience is sufficiently important. We therefore hold that the up-front collection of Schedule Bs is facially unconstitutional, because it fails exacting scrutiny in “a substantial number of its applications . . . judged in relation to [its] plainly legitimate sweep.” *Stevens*.

The dissent concludes by saying that it would be “sympathetic” if we “had simply granted as-applied relief to petitioners based on [our] reading of the facts.” But the pertinent facts in these cases are the same across the board: Schedule Bs are not used to initiate investigations. That is true in every case. California has not considered alternatives to indiscriminate up-front disclosure. That is true in every case. And the State’s interest in amassing sensitive information for its own convenience is weak. That is true in every case. When it comes to the freedom of association, the protections of the First Amendment are triggered not only by actual restrictions on an individual’s ability to join with others to further shared goals. The risk of a chilling effect on association is enough, “[b]ecause First Amendment freedoms need breathing space to survive.” *Button*.

* * *

The District Court correctly entered judgment in favor of the petitioners and permanently enjoined the Attorney General from collecting their Schedule Bs. The Ninth Circuit erred by vacating those injunctions and directing entry of judgment for the Attorney General. The judgment of the Ninth Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

CHAPTER 16. DISCLOSURE

It is so ordered.

Justice THOMAS, concurring in Parts I, II–A, II–B–2, and III–A, and concurring in the judgment.

The Court correctly holds that California’s disclosure requirement violates the First Amendment. It also correctly concludes that the District Court properly enjoined California’s attorney general from collecting the forms at issue, which contain sensitive donor information. But, while I agree with much of the Court’s opinion, I would approach three issues differently.

First, the bulk of “our precedents ... require application of strict scrutiny to laws that compel disclosure of protected First Amendment association.” *Reed* (THOMAS, J., dissenting). California’s law fits that description. Although the Court rightly holds that even the less demanding “exacting scrutiny” standard requires narrow tailoring for laws that compel disclosure, invoking exacting scrutiny is at odds with our repeated recognition “that privacy of association is protected under the First Amendment.” The text and history of the Assembly Clause suggest that the right to assemble includes the right to associate anonymously. See 4 Annals of Cong. 900–902, 941–942 (1795) (defending the Democratic-Republican societies, many of which met in secret, as exercising individuals’ “leave to assemble”); see also *NAACP v. Alabama* (discussing the history of anonymous publications). And the right to associate anonymously often operates as a vehicle to protect other First Amendment rights, such as the freedom of the press. *McIntyre* (1995) (THOMAS, J., concurring) (“Founding-era Americans” understood the freedom of the press to include the right of printers and publishers not to be compelled to disclose the authors of anonymous works). Laws directly burdening the right to associate anonymously, including compelled disclosure laws, should be subject to the same scrutiny as laws directly burdening other First Amendment rights. *Reed*.

Second, the Court holds the law “overbroad” and, thus, invalid in all circumstances. But I continue to have “doubts about [the] origins and application” of our “overbreadth doctrine.” *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1583 (2020) (THOMAS, J., concurring). . . .

Third, and relatedly, this Court also lacks the power “to ‘pronounce that the statute is unconstitutional in *all* applications,’” even if the Court suspects that the law will likely be unconstitutional in every future application as opposed to just a substantial number of its applications. *Borden v. United States*, 141 S.Ct., at — (THOMAS, J., concurring). . . .

With those points of difference clarified, I join Parts I, II–A, II–B–2, and III–A of the majority’s opinion and concur in the judgment.

Justice ALITO, with whom Justice GORSUCH joins, concurring in Parts I, II–A, II–B–2, and III, and concurring in the judgment.

I am pleased to join most of THE CHIEF JUSTICE’s opinion. In particular, I agree that the exacting scrutiny standard drawn from our election-law jurisprudence has real teeth. It requires both narrow tailoring and consideration of alternative means of obtaining the sought-after information. For the reasons THE CHIEF JUSTICE explains, California’s blunderbuss approach

CHAPTER 16. DISCLOSURE

to charitable disclosures fails exacting scrutiny and is facially unconstitutional. The question is not even close. And for the same reasons, California's approach necessarily fails strict scrutiny.

THE CHIEF JUSTICE would hold that the particular exacting scrutiny standard in our election-law jurisprudence applies categorically "to First Amendment challenges to compelled disclosure." Justice THOMAS, by contrast, would hold that strict scrutiny applies in all such cases. I am not prepared at this time to hold that a single standard applies to all disclosure requirements. And I do not read our cases to have broadly resolved the question in favor of exacting scrutiny. . .

Because the choice between exacting and strict scrutiny has no effect on the decision in these cases, I see no need to decide which standard should be applied here or whether the same level of scrutiny should apply in all cases in which the compelled disclosure of associations is challenged under the First Amendment.

Justice SOTOMAYOR, with whom Justice BREYER and Justice KAGAN join, dissenting.

Although this Court is protective of First Amendment rights, it typically requires that plaintiffs demonstrate an actual First Amendment burden before demanding that a law be narrowly tailored to the government's interests, never mind striking the law down in its entirety. Not so today. Today, the Court holds that reporting and disclosure requirements must be narrowly tailored even if a plaintiff demonstrates no burden at all. The same scrutiny the Court applied when NAACP members in the Jim Crow South did not want to disclose their membership for fear of reprisals and violence now applies equally in the case of donors only too happy to publicize their names across the websites and walls of the organizations they support.

California oversees nearly a quarter of this Nation's charitable assets. As part of that oversight, it investigates and prosecutes charitable fraud, relying in part on a registry where it collects and keeps charitable organizations' tax forms. The majority holds that a California regulation requiring charitable organizations to disclose tax forms containing the names and contributions of their top donors unconstitutionally burdens the right to associate even if the forms are not publicly disclosed.

In so holding, the Court discards its decades-long requirement that, to establish a cognizable burden on their associational rights, plaintiffs must plead and prove that disclosure will likely expose them to objective harms, such as threats, harassment, or reprisals. It also departs from the traditional, nuanced approach to First Amendment challenges, whereby the degree of means-end tailoring required is commensurate to the actual burdens on associational rights. Finally, it recklessly holds a state regulation facially invalid despite petitioners' failure to show that a substantial proportion of those affected would prefer anonymity, much less that they are objectively burdened by the loss of it.

Today's analysis marks reporting and disclosure requirements with a bull's-eye. Regulated entities who wish to avoid their obligations can do so by vaguely waving toward First Amendment "privacy concerns." It does not matter if not a single individual risks experiencing a single reprisal from disclosure, or if the vast majority of those affected would happily comply. That is all irrelevant to the Court's determination that California's Schedule B requirement is facially

CHAPTER 16. DISCLOSURE

unconstitutional. Neither precedent nor common sense supports such a result. I respectfully dissent.

I

Charitable organizations that wish to solicit tax-deductible contributions from California residents must maintain membership in a registry managed by the California attorney general. As a condition of membership, the attorney general requires charities to submit a complete copy of Internal Revenue Service (IRS) Form 990, including Schedule B, on which 501(c)(3) organizations report the names and contributions of their major donors. California regulations expressly require that Schedule Bs remain confidential, and the attorney general's office has implemented enhanced protocols to ensure confidentiality.¹ California relies on Schedule Bs to investigate fraud and other malfeasance.

After the attorney general's office stepped up its efforts to enforce California's Schedule B reporting requirement, petitioners Americans for Prosperity Foundation (Foundation) and Thomas More Law Center (Law Center) sought an injunction against the requirement. They alleged that the requirement "unconstitutionally burden[ed] their First Amendment right to free association by deterring individuals from financially supporting them." They pointed to evidence that their supporters experienced threats, reprisals, and harassment when their identities and associations became publicly known in other contexts. Importantly, however, the Foundation and Law Center failed to show that such consequences would result from the confidential submission of their top donors' identities to California's attorney general's office in light of the security mechanisms the office has now implemented.

II

Because the freedom to associate needs "breathing space to survive," *Button*, this Court has recognized that associational rights must be "protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference," *Bates v. Little Rock*, 361 U.S. 516, 523 (1960). Publicizing individuals' association with particular groups might expose members to harassment, threats, and reprisals by opponents of those organizations. Individuals may choose to disassociate themselves from a group altogether rather than face such backlash.

Acknowledging that risk, this Court has observed that "privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *NAACP v. Alabama* (1958). That observation places special emphasis on the risks actually resulting from disclosure. Privacy "may" be indispensable to the preservation of freedom of association, but it need not be. It depends on whether publicity will lead to reprisal. For example, privacy can be particularly important to "dissident" groups

¹ Schedule Bs are kept in a confidential database used only by the Charitable Trusts Section and inaccessible to others in California's attorney general's office. Employees who fail to safeguard confidential information are subject to discipline. In light of previous security breaches disclosed in this litigation, the attorney general's office instituted a series of measures to ensure that Schedule B information remains confidential. The office has adopted a system of text searching forms before they are uploaded onto the Internet to ensure that none contain Schedule B information. The office now also runs automated scans of publicly accessible government databases to identify and remove any documents containing Schedule B information that may be inadvertently uploaded.

CHAPTER 16. DISCLOSURE

because the risk of retaliation against their supporters may be greater. For groups that promote mainstream goals and ideas, on the other hand, privacy may not be all that important. Not only might their supporters feel agnostic about disclosing their association, they might actively seek to do so.

Given the indeterminacy of how disclosure requirements will impact associational rights, this Court requires plaintiffs to demonstrate that a requirement is likely to expose their supporters to concrete repercussions in order to establish an actual burden. It then applies a level of means-end tailoring proportional to that burden. The Court abandons that approach here, instead holding that narrow tailoring applies to disclosure requirements across the board, even if there is no evidence that they burden anyone at all.

A

Before today, to demonstrate that a reporting or disclosure requirement would chill association, litigants had to show “a reasonable probability that the compelled disclosure of . . . contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties.” *Buckley*. Proof could include “specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself,” *ibid.*, as well as evidence that “fear of community hostility and economic reprisals that would follow public disclosure. . . had discouraged new members from joining” an organization or caused “former members to withdraw,” *Bates*. Although the Court has never imposed an “unduly strict requiremen[t] of proof,” *Buckley*, it has consistently required at least some record evidence demonstrating a risk of such objective harms.

Indeed, the Court has expressly held that parties do not have standing to bring claims where they assert nothing more than that government action will cause a “subjective ‘chill.’” *Laird v. Tatum*, 408 U.S. 1, 13–14 (1972). It does not matter if an individual perceives a government regulation “as inappropriate,” or believes “it is inherently dangerous for the [government] to be concerned with” a particular activity, or has “generalized yet speculative apprehensiveness that the [government] may at some future date misuse the information in some way that would cause direct harm” to her. *Id.* She must still allege a risk of objective harm. See *id.*

Consistent with this approach, the Court has carefully scrutinized record evidence to determine whether a disclosure requirement actually risks exposing supporters to backlash. . . .

Hence, in *Doe v. Reed*, the Court rejected a facial challenge to the public disclosure of referenda signatories on the ground that the “typical referendum” concerned revenue, budget, and tax policies unlikely to incite threats or harassment. Any judge who has witnessed local fights over raising taxes, funding schools, building sewer systems, or rerouting roads can surely envisage signatories with reason to keep their support for such measures private. But in *Reed*, such subjective reasons did not suffice to establish a cognizable burden on associational rights.

Today, the Court abandons the requirement that plaintiffs demonstrate that they are chilled, much less that they are reasonably chilled. Instead, it presumes (contrary to the evidence, precedent, and common sense) that all disclosure requirements impose associational burdens. For

CHAPTER 16. DISCLOSURE

example, the Court explains that there is a risk of chill in this suit because the government requires disclosure of the identity of any donor “with reason to remain anonymous.” The Court does not qualify that statement, nor does it require record evidence of such reasons. If the Court did, it would not be able to strike California’s Schedule B requirement down in all its applications, because the only evidence in the record of donors with any reason to remain anonymous is that of petitioners’.

At best, then, a subjective preference for privacy, which previously did not confer standing, now subjects disclosure requirements to close scrutiny. Of course, all disclosure requires some loss of anonymity, and courts can always imagine that someone might, for some reason, prefer to keep their donations undisclosed. If such speculation is enough (and apparently it is), then all disclosure requirements *ipso facto* impose cognizable First Amendment burdens.

Indeed, the Court makes obvious its presumption that all disclosure requirements are burdensome by beginning its analysis of “burden” with an evaluation of means-end fit instead. “[A] reasonable assessment of the burdens imposed by disclosure,” the Court explains, “should begin with an understanding of the extent to which the burdens are unnecessary, and that requires narrow tailoring.”

I disagree. A reasonable assessment of the burdens imposed by disclosure should begin by determining whether those burdens even exist. If a disclosure requirement imposes no burdens at all, then of course there are no “unnecessary” burdens. Likewise, if a disclosure requirement imposes no burden for the Court to remedy, there is no need for it to be closely scrutinized. By forgoing the requirement that plaintiffs adduce evidence of tangible burdens, such as increased vulnerability to harassment or reprisals, the Court gives itself license to substitute its own policy preferences for those of politically accountable actors.

B

All this would be less troubling if the Court still required means-end tailoring commensurate to the actual burden imposed. It does not. Instead, it adopts a new rule that every reporting or disclosure requirement be narrowly tailored.

1

Disclosure requirements burden associational rights only indirectly and only in certain contexts. For that reason, this Court has never necessarily demanded such requirements to be narrowly tailored. Rather, it has reserved such automatic tailoring for state action that “directly and immediately affects associational rights.” *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000); see also *Buckley* (requiring a “closely drawn” fit for political contribution limits, which directly “limit one important means of associating with a candidate or committee”). When it comes to reporting and disclosure requirements, the Court has instead employed a more flexible approach, which it has named “exacting scrutiny.”

Exacting scrutiny requires two things: first, there must be “a ‘substantial relation’ between the disclosure requirement and a ‘sufficiently important’ government interest,” and second, “the

CHAPTER 16. DISCLOSURE

strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.” *Reed*. Exacting scrutiny thus incorporates a degree of flexibility into the means-end analysis. The more serious the burden on First Amendment rights, the more compelling the government’s interest must be, and the tighter must be the fit between that interest and the government’s means of pursuing it. By contrast, a less substantial interest and looser fit will suffice where the burden on First Amendment rights is weaker (or nonexistent). In other words, to decide how closely tailored a disclosure requirement must be, courts must ask an antecedent question: How much does the disclosure requirement actually burden the freedom to associate?

This approach reflects the longstanding principle that the requisite level of scrutiny should be commensurate to the burden a government action actually imposes on First Amendment rights. See, e.g., *Burdick v. Takushi* [Chapter 9—Eds] (“[T]he rigorousness of our inquiry ... depends upon the extent to which a challenged regulation burdens” First Amendment rights); *Board of Trustees of State Univ. of N. Y. v. Fox*, 492 U.S. 469, 477 (1989) (“[C]ommercial speech enjoys a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, and is [thus] subject to modes of regulation that might be impermissible in the realm of noncommercial expression” (internal quotation marks and alterations omitted)); see also *Fulton v. Philadelphia*, 141 S.Ct. —, (2021) (BARRETT, J., concurring) (noting the “nuanced” approach the Court generally takes in the “resolution of conflicts between generally applicable laws and ... First Amendment rights”).

Compare, for instance, the Court’s approaches in *Shelton v. Tucker* and *Doe v. Reed*. At issue in *Shelton* was an Arkansas statute passed in 1958 that compelled all public school teachers, as a condition of employment, to submit annually a list of every organization to which they belonged or regularly contributed.. The Court held that the disclosure requirement “comprehensive[ly] interfere[d] with associational freedom,” because record evidence demonstrated a significant risk that the information would be publicly disclosed, and such disclosure could lead to public pressure on school boards “to discharge teachers who belong to unpopular or minority organizations.” Arkansas’s statute did not require that the information remain confidential; each school board was “free to deal with the information as it wishe[d].” Indeed, “a witness who was a member of the Capital Citizens['] Council” (an organization dedicated to resisting school integration) “testified that his group intended to gain access” to the teachers’ affidavits “with a view to eliminating from the school system persons who supported organizations unpopular with the group.” Moreover, a starkly asymmetric power dynamic existed between teachers, who were “hired on a year-to-year basis,” and the hiring authorities to whom their membership lists were submitted. The Arkansas Legislature had made no secret of its desire for teachers’ disclosures to be used for hiring and firing decisions. One year after enacting the disclosure requirement at issue in *Shelton*, the legislature enacted another provision that made it outright unlawful for state governmental bodies to employ members of the NAACP. It is thus unsurprising that the Court found that Arkansas teachers would feel a “constant and heavy” pressure “to avoid any ties which might displease those who control [their] professional destin[ies].” Because Arkansas’s purpose (ensuring teachers’ fitness) was “pursued by means that broadly stifle fundamental personal liberties,” the Court demanded that Arkansas “more narrowly achiev[e]” its interest.

CHAPTER 16. DISCLOSURE

Now consider this Court's approach in *Reed*. *Reed* involved a facial challenge to a Washington law permitting the public disclosure of referendum petitions that included signatories' names and addresses. The Court found that Washington had a number of other mechanisms in place to pursue its stated interest in preventing fraudulent referendum signatures. For instance, the secretary of state was charged with verifying and canvassing the names on referendum petitions, advocates and opponents of a measure could observe the canvassing process, and citizens could challenge the secretary's actions in court. Publicly disclosing referendum signatories was thus a mere backstop, giving citizens the opportunity to catch the secretary's mistakes. Had Washington been required to achieve its interests narrowly, as in *Shelton*, it is unlikely the disclosure requirement would have survived.⁴

In crucial contrast to *Shelton*, however, the *Reed* Court found "scant evidence" that disclosure exposed signatories of typical referendums to "threats, harassment, or reprisals from either Government officials or private parties." Given the "modest burdens" imposed by the requirement, the Court required a correspondingly modest level of tailoring. Under that standard, the disclosure requirement passed muster, and the Court refused to facially strike it down.

The public disclosure regimes in both *Shelton* and *Reed* served important government goals. Yet the Court's assessment of each differed considerably because the First Amendment burdens differed. This flexible approach is necessary because not all reporting and disclosure regimes burden associational rights in the same way.

2

The Court now departs from this nuanced approach in favor of a "one size fits all" test. Regardless of whether there is any risk of public disclosure, and no matter if the burdens on associational rights are slight, heavy, or nonexistent, disclosure regimes must always be narrowly tailored.

The Court searches in vain to find a foothold for this new approach in precedent. The Court first seizes on *Shelton*'s statement that a governmental interest "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." The Court could not have cherry-picked a less helpful quote. By its own terms, *Shelton* held that an end must be "more narrowly achieved" only if the means "broadly stifle" First Amendment liberties, that is, only if the means impose a severe burden on associational rights.⁵ . . .

⁴ For instance, the Court did not ask whether the public disclosure of signatories' names and addresses was "in proportion to the" government's interest in policing fraud. Nor did it feel any need to respond to the dissent's description of ways in which Washington's interest could be met without public disclosure. It was enough that public disclosure could "help" advance electoral integrity. The Court is clearly wrong to suggest it applied narrow tailoring in *Reed*.

⁵ The Court claims that "broadly stifle" refers "to the scope of challenged restrictions" rather than "the severity of any demonstrated burden." That reading ignores the verb "stifle" and its object, "fundamental personal liberties." The Court wishes the sentence said that a government interest "cannot be pursued by [broad] means." It does not.

The Court also finds meaning in the fact that *Shelton* criticized Arkansas' challenged disclosure regime for not being narrowly tailored. But the *Shelton* Court had already explained why the failure to narrowly tailor was problematic: because the statute significantly burdened Arkansas teachers' associational rights. In no way did the Court suggest that narrow tailoring was necessary in the absence of a significant burden on associational rights.

CHAPTER 16. DISCLOSURE

The Court next looks to *McCutcheon*, which addressed political contribution limits, not disclosure regimes. It is no surprise that the Court subjected the former to narrow tailoring, as *Buckley* had already held that contribution limits directly “impinge on protected associational freedoms.” *Buckley*; see also *McCutcheon* (explaining that aggregate limits on contributions “diminish an individual’s right of political association” by “limit[ing] the number of candidates he supports” or the amount of money he gives). *Buckley* itself distinguished the First Amendment burdens of disclosure requirements and contribution limits. *Buckley* (noting that, unlike contribution limits, “disclosure requirements impose no ceiling on campaign-related activities” and concluding only that compelled disclosure “can” infringe associational rights). Apparently, those distinctions no longer matter.

Neither *Shelton* nor *McCutcheon*, then, supports the idea that all disclosure requirements must be narrowly tailored. *McCutcheon* arose in the context of a direct limit on associational freedoms, while the law in *Shelton* “broadly stifle[d]” associational rights. Ignoring these distinctions, the Court decides that it will indiscriminately require narrow tailoring for every single disclosure regime. The Court thus trades precision for blunt force, creating a significant risk that it will topple disclosure regimes that should be constitutional, and that, as in *Reed*, promote important governmental interests.

III A

Under a First Amendment analysis that is faithful to this Court’s precedents, California’s Schedule B requirement is constitutional. Begin with the burden it imposes on associational rights. Petitioners have unquestionably provided evidence that their donors face a reasonable probability of threats, harassment, and reprisals if their affiliations are made public. California’s Schedule B regulation, however, is a nonpublic reporting requirement, and California has implemented security measures to ensure that Schedule B information remains confidential.

Nor have petitioners shown that their donors, or any organization’s donors, will face threats, harassment, or reprisals if their names remain in the hands of a few California state officials. The Court notes that, under *Shelton*, disclosure requirements can chill association even absent public disclosure. In *Shelton*, however, there was a serious concern that hiring authorities would punish teachers for their organizational affiliations. By contrast, the Court in no way suggests that California officials will use Schedule B information to retaliate against any organization’s donors. If California’s reporting requirement imposes any burden at all, it is at most a very slight one.

B 1

Given the modesty of the First Amendment burden, California may justify its Schedule B requirement with a correspondingly modest showing that the means achieve its ends. See *Reed*. California easily meets this standard.

CHAPTER 16. DISCLOSURE

California collects Schedule Bs to facilitate supervision of charities that operate in the State. As the Court acknowledges, this is undoubtedly a significant governmental interest. In the United States, responsibility for overseeing charities has historically been vested in States' attorneys general, who are tasked with prosecuting charitable fraud, self-dealing, and misappropriation of charitable funds. Effective policing is critical to maintaining public confidence in, and continued giving to, charitable organizations. California's interest in exercising such oversight is especially compelling given the size of its charitable sector. Nearly a quarter of the country's charitable assets are held by charities registered in California.

The Schedule B reporting requirement is properly tailored to further California's efforts to police charitable fraud. See *Reed* (noting that disclosure "helps" combat fraud, even if it is not the least restrictive method of doing so). The IRS Schedule B form requires organizations to disclose the names and addresses of their major donors, the total amount of their contributions, and whether the donation was cash or in-kind. If the gift is in-kind, Schedule B requires a description of the property and its fair market value.

Schedule B and other parts of Form 990 help attorneys in the Charitable Trusts Section of the California Department of Justice (Section) uncover whether an officer or director of a charity is engaged in self-dealing, or whether a charity has diverted donors' charitable contributions for improper use. It helps them determine whether a donor is using the charity as a pass-through entity, including as a source of improper loans that the donor repays as a contribution. It helps them identify red flags, such as discrepancies in reporting contributions across different schedules. And it helps them determine whether a charity has inflated the value of a donor's in-kind contribution in order, for instance, to overstate how efficiently the charity expends resources. . . .

In sum, the evidence shows that California's confidential reporting requirement imposes trivial burdens on petitioners' associational rights and plays a meaningful role in Section attorneys' ability to identify and prosecute charities engaged in malfeasance. That is more than enough to satisfy the First Amendment here.

2

Much of the Court's tailoring analysis is categorically inappropriate under the correct standard of review. In any event, the Court greatly understates the importance to California of collecting information on charitable organizations' top donors.

The Court claims that the collection of Schedule Bs does not form an "integral" part of California's fraud detection efforts and has never done "anything" to advance investigative efforts. The record reveals otherwise. . . .

The Court next insists that California can rely on alternative mechanisms, such as audit letters or subpoenas, to obtain Schedule B information. But the Section receives as many as 100 charity-related complaints a month. It is not feasible for the Section, which has limited staff and resources, to conduct that many audits. S. The subpoena process is also time consuming: Letters must go through multiple layers of review and waiting for a response causes further delays during which a charity can continue its malfeasance.

CHAPTER 16. DISCLOSURE

Implicitly acknowledging that audits and subpoenas are more cumbersome and time consuming, the Court trivializes the State's interest in what it calls "ease of administration." Yet in various contexts, the Court has recognized that an interest in "efficiency" is critical to the effective operation of public agencies. . . .

IV

In a final coup de grâce, the Court concludes that California's reporting requirement is unconstitutional not just as applied to petitioners, but on its very face. "In the First Amendment context," such broad relief requires proof that the requirement is unconstitutional in "a substantial number of ... applications ..., judged in relation to the statute's plainly legitimate sweep." *Stevens*. "Facial challenges are disfavored for several reasons," prime among them because they "often rest on speculation." *Washington State Grange*. Speculation is all the Court has. The Court points to not a single piece of record evidence showing that California's reporting requirement will chill "a substantial number" of top donors from giving to their charities of choice.¹¹ Yet it strikes the requirement down in every application.

The average donor is probably at most agnostic about having their information confidentially reported to California's attorney general. A significant number of the charities registered in California engage in uncontroversial pursuits. They include hospitals and clinics; educational institutions; orchestras, operas, choirs, and theatrical groups; museums and art exhibition spaces; food banks and other organizations providing services to the needy, the elderly, and the disabled; animal shelters; and organizations that help maintain parks and gardens. It is somewhat hard to fathom that donors to the Anderson Elementary School PTA, the Loomis-Eureka Lakeside Little League, or the Santa Barbara County Horticultural Society ("[c]elebrating plants since 1880") are less likely to give because their donations are confidentially reported to California's Charitable Trusts Section.

In fact, research shows that the vast majority of donors prefer to publicize their charitable contributions. See Drennan, *Where Generosity and Pride Abide: Charitable Naming Rights*, 80 U. Cin. L. Rev. 45, 50 (2011) ("Research reveals that anonymous largesse from the wealthy has become rare"); Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 Wis. L. Rev. 567, 574, n. 17 ("[C]haritable gifts are rarely made anonymously"). One study found that anonymous gifting accounted for less than 1% of all donations to Yale Law School, Harvard Law School, and Carnegie Mellon University. Glazer & Konrad, *A Signaling Explanation for Charity*, 86 Am. Econ. Rev. 1019, 1021 (1996). Symptomatic of this trend is the explosion in charitable naming rights since the mid-1990s. Drennan, 80 U. Cin. L. Rev., at 50, 55. As one author

¹¹ The Court highlights the "filings of hundreds of organizations as *amici curiae* in support of" petitioners in this suit. Those briefs, of course, are not record evidence. Moreover, even if those organizations had each provided evidence that California's reporting requirement would subject their top donors to harassment and reprisals (they did not), this still would not demonstrate that a substantial proportion of the reporting requirement's applications are unconstitutional when "judged in relation to [its] plainly legitimate sweep." *Stevens*. Some 60,000 charities renew their registrations with California each year, and nearly all must file a Schedule B. The *amici* are just a small fraction of the disclosure requirement's reach.

CHAPTER 16. DISCLOSURE

has recounted, “every nook and cranny of [public] buildings” is now “tagged by some wealthy, generous and obviously not publicity-shy donor.” Isherwood, *The Graffiti of the Philanthropic Class*, N. Y. TIMES, Dec. 2, 2007.

Of course, it is always possible that an organization is inherently controversial or for an apparently innocuous organization to explode into controversy. The answer, however, is to ensure that confidentiality measures are sound or, in the case of public disclosures, to require a procedure for governments to address requests for exemptions in a timely manner. It is not to hamper all government law enforcement efforts by forbidding confidential disclosures en masse.

Indeed, this Court has already rejected such an indiscriminate approach in the specific context of disclosure requirements. Just over a decade ago, in *Reed*, petitioners demonstrated that their own supporters would face reprisal if their opposition to expanding domestic partnership laws became public. That evidence did not support a facial challenge to Washington’s public disclosure law, however, because the “typical referendum petitio[n] concern[ed] tax policy, revenue, budget, or other state law issues,” and “there [was] no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.” *Reed*; see also *id.* (ALITO, J., concurring) (“Many referendum petitions concern relatively uncontroversial matters, and plaintiffs have provided no reason to think that disclosure of signatory information in those contexts would significantly chill the willingness of voters to sign. Plaintiffs’ facial challenge therefore must fail”).

So too here. Many charitable organizations “concern relatively uncontroversial matters” and petitioners “have provided no reason to think that” confidential disclosure of donor information “would significantly chill the willingness of” most donors to give. Nor does the Court provide such a reason. It merely highlights threats that public disclosure would pose to these two petitioners’ supporters. Those threats provide “scant evidence” of anything beyond “the specific harm” that petitioners’ donors might experience were their Schedule B information publicly disclosed. Petitioners’ “facial challenge therefore must fail.” *Reed* (ALITO, J., concurring).

How, then, can their facial challenge succeed? Only because the Court has decided, in a radical departure from precedent, that there no longer need be any evidence that a disclosure requirement is likely to cause an objective burden on First Amendment rights before it can be struck down.

* * *

Today’s decision discards decades of First Amendment jurisprudence recognizing that reporting and disclosure requirements do not directly burden associational rights. There is no other explanation for the Court’s conclusion that, first, plaintiffs do not need to show they are actually burdened by a disclosure requirement; second, every disclosure requirement demands narrow tailoring; and third, a facial challenge can succeed in the absence of any evidence a state law burdens the associational rights of a substantial proportion of affected individuals.

That disclosure requirements directly burden associational rights has been the view of Justice THOMAS, but it has never been the view of this Court. Just 11 years ago, eight Members

CHAPTER 16. DISCLOSURE

of the Court, including two Members of the current majority, recognized that disclosure requirements do not directly interfere with First Amendment rights. In an opinion barely mentioned in today's decision, the Court in *Reed* did the opposite of what the Court does today. First, it demanded objective evidence that disclosure risked exposing supporters to threats and reprisals; second, it required only a loose means-end fit in light of the “modest” burden it found; and third, it rejected a facial challenge given petitioners’ failure to establish that signatories to the “typical” referendum had any reason to fear disclosure. In so doing, the Court ensured that it would not “short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution.” *Washington State Grange*.

The Court 11 years later apparently has a different view of its role. It now calls upon the federal courts to serve “as virtually continuing monitors of the wisdom and soundness of [governmental] action.” *Laird*. There is no question that petitioners have shown that their donors reasonably fear reprisals if their identities are publicly exposed. The Court and I, however, disagree about the likelihood of that happening and the role Schedule Bs play in the investigation of charitable malfeasance. If the Court had simply granted as-applied relief to petitioners based on its reading of the facts, I would be sympathetic, although my own views diverge. But the Court’s decision is not nearly so narrow or modest. Instead, the Court jettisons completely the longstanding requirement that plaintiffs demonstrate an actual First Amendment burden before the Court will subject government action to close scrutiny. It then invalidates a regulation in its entirety, even though it can point to no record evidence demonstrating that the regulation is likely to chill a substantial proportion of donors. These moves are wholly inconsistent with the Court’s precedents and our Court’s long-held view that disclosure requirements only indirectly burden First Amendment rights. With respect, I dissent.

Notes and Questions

1. *Petition Signing, Charity Disclosures, and Campaign Finance*. Neither *Reed* nor *AFPF* is about campaign finance disclosure, but the Supreme Court has now made abundantly clear that the same “exacting scrutiny” standard that applies in those cases also applies to campaign finance disclosure challenges.

2. *Exacting Scrutiny*. What is the exacting scrutiny standard? It appears to have changed in two significant ways from *Reed* to *AFPF*. First, the Court has adopted a “narrow tailoring” requirement: “While exacting scrutiny does not require that disclosure regimes be the least restrictive means of achieving their ends, it does require that they be narrowly tailored to the government’s asserted interest.” And this narrow tailoring requirement applies even if the law imposes only a modest burden on a plaintiff’s First Amendment rights. Second, plaintiffs need not demonstrate “chill,” and it may be presumed in a facial challenge. Plaintiffs in *AFPF* proved that they faced a danger of harassment, which would justify success in an as-applied challenge. The Court nonetheless allowed the facial challenge, striking down the law for everyone, even those not chilled by disclosure. How can this be squared with the approach in *Reed*? See Lloyd Mayer, *Justices Open the Door Wider for Donor Info Challenges*, LAW 360 (July 2, 2021).

3. *Standards for Judging Contribution Limits*. The Court in *AFPF* cites *McCutcheon* in setting out the need for narrow tailoring and the dissent seems to accept the idea of narrow tailoring

CHAPTER 16. DISCLOSURE

in the campaign finance context. Does *AFPP* make it harder for jurisdictions to defend the constitutionality of their contribution limits? For an argument in the affirmative, see Richard L. Hasen, *The Supreme Court is Putting Democracy at Risk*, NY TIMES (July 1, 2021) [<https://perma.cc/7EG7-PA95>].

4. *Chill and the Result of As-Applied Challenges*. On remand in *Reed on the as-applied challenge*, the district court found very little evidence of harassment, with nothing more serious than ballot petition signature gatherers being “mooned” by passers-by. A federal district court considering similar evidence in the context of contributors to California’s Proposition 8, barring gay marriage, similarly found evidence of harassment lacking. *Doe v. Reed*, 823 F. Supp. 2d 1195 (W.D. Wash. 2011); *ProtectMarriage.com v. Bowen*, 830 F. Supp. 2d 914 (E.D. Cal. 2011). For an argument that opponents of disclosure have been overstating the threat of harassment, see Richard L. Hasen, *Chill Out: A Qualified Defense of Campaign Finance Disclosure in the Internet Era*, 27 JOURNAL OF LAW AND POLITICS 557 (2012). Is such evidence no longer relevant in cases challenging disclosure laws? Does the rise of social media and the ability to harass people online change the constitutional calculus? Or does it just create an appearance that harassment is more common? Note that the dissenters in *AFPP* were “sympathetic” to an as-applied challenge based on evidence that the plaintiffs faced a real danger of harassment. Why did they not concur in the judgment favoring the plaintiffs?

5. *The “Information Interest.”* The majority opinion in *Reed* did not need to address the question whether the information interest could justify Washington State’s law, given the anti-fraud rationale. However, in the *Citizens United* case the Court recognized the information interest as a sufficient basis for broad disclosure in the campaign finance context:

The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley* the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell* three Justices who would have found § 441b [52 U.S.C. § 30118] to be unconstitutional nonetheless voted to uphold BCRA’s disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. *United States v. Harriss*, 347 U.S. 612, 625 (1954) (Congress “has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose”). For these reasons, we reject Citizens United’s contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Citizens United also disputes that an informational interest justifies the application of [BCRA’s disclosure requirements] to its ads, which only attempt to persuade viewers to see the film. Even if it disclosed the funding sources for the ads, Citizens United says, the information would not help viewers make informed choices in the political marketplace. This is similar to the argument rejected above with respect to disclaimers. Even if the ads only pertain to a commercial transaction, the public has an interest in knowing who is speaking about a candidate shortly before an election. Because the informational interest

CHAPTER 16. DISCLOSURE

alone is sufficient to justify application of [the disclosure law] to these ads, it is not necessary to consider the Government's other asserted interests.

Can the information interest help campaign finance laws survive the new exacting scrutiny standard under *AFPP*? Is that stronger or weaker than arguments for disclosure based upon (the Court's new narrow definition of) corruption.

6. *Campaign Finance Disclosure Challenges in the Lower Courts.* Following *Citizens United* and *Reed*, many lower courts have rejected general constitutional challenges to campaign finance disclosure laws. *E.g.*, *National Association for Gun Rights v. Mangan*, 933 F.3d 1102 (9th Cir. 2019), cert. denied 140 S. Ct. 2825 (2020); *Doe v. Federal Election Commission*, 920 F.3d 866 (D.C. Cir. 2019), cert. denied 140 S. Ct. 2506 (2020); *Chula Vista Citizens for Jobs and Fair Competition v. Norris*, 782 F.3d 520 (9th Cir. 2015) (en banc); *Independence Institute v. FEC*, 216 F. Supp. 3d 176 (D.D.C. 2016); *Ctr. for Individual Freedom, Inc. v. Tennant*, 706 F.3d 270 (4th Cir. 2013); *Ctr. for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012); *The Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 546 (4th Cir. 2012), cert. denied, 133 S. Ct. 841 (2013); *Free Speech v. FEC*, 720 F.3d 788 (10th Cir. 2013); *ProtectMarriage.Com — Yes on 8 v. Bowen*, 752 F.3d 827 (9th Cir. 2014); *National Organization for Marriage v. McKee*, 723 F. Supp. 2d 245 (D. Maine 2010). See Ciara Torres-Spelliscy, *Has the Tide Turned in Favor of Disclosure? Revealing Money in Politics After Citizens United and Doe v. Reed*, 27 GEORGIA STATE UNIVERSITY LAW REVIEW 1057 (2011).

Some courts have, however, struck down more burdensome reporting requirements. See, *e.g.*, *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864 (8th Cir. 2012). In *Washington Post v. McManus*, 944 F.3d 506 (4th Cir. 2019), the Fourth Circuit held unconstitutional a Maryland law requiring online publishers to self-publish information about paid political advertisements posted on their websites and to make records about those ads available for state inspection, which news outlets alleged were unconstitutional. Nothing prevented the state from requiring those running their ads to make the required disclosures.

And some lower courts have turned much more hostile to disclosure generally. In a long-running dispute over the Federal Election Commission's disclosure rules for McCain-Feingold's "electioneering communications," a panel of D.C. Circuit judges upheld the FEC's rules despite reformers' contention that the rules were impermissibly lax given the language of the McCain-Feingold law. In the course of siding with the FEC, the appeals court criticized the Supreme Court's disclosure doctrine as not sufficiently protective of the right to engage in anonymous political speech:

Both an individual's right to speak anonymously and the public's interest in contribution disclosures are now firmly entrenched in the Supreme Court's First Amendment jurisprudence. And yet they are also fiercely antagonistic. The deleterious effects of disclosure on speech have been ably catalogued. "Disclaimer and disclosure requirements enable private citizens and elected officials to implement political strategies *specifically calculated* to curtail campaign-related activity and prevent the lawful, peaceful exercise of First Amendment rights." *Citizens United* (Thomas, J., dissenting) (highlighting how mandatory disclosure of contributors to California's controversial "Yes on Proposition 8"

CHAPTER 16. DISCLOSURE

campaign led to their being singled out for ruthless retaliation and intimidation). “[T]he advent of the Internet enables prompt disclosure of expenditures, which provides political opponents with the information needed to intimidate and retaliate against their foes.” *Id.* “Disclosure also makes it easier to see who has not done his bit for the incumbents, so that arms may be twisted and pockets tapped.” *Majors v. Abell*, 361 F.3d 349, 356 (7th Cir.2004) (Easterbrook, J., dubitante).

In addition to these general burdens, the specific disclosure requirement Van Hollen advocates here would present its own unique harms. For instance, an American Cancer Society donor who supports cancer research but not ACS’s political communications must decide whether a cancer cure or her associational rights are more important to her. This is categorically distinct from deciding whether a political issue, such as tax reform, is as important as one’s associational right. Cancer research isn’t a political issue, but disclosure rules of this sort would undeniably transform it into one. These disclosure rules also burden privacy rights in another crucial way: modest individuals who’d prefer the amount of their charitable donations remain private lose that privilege the minute their nonprofit of choice decides to run an issue ad. The Supreme Court routinely invalidates laws that chill speech far less than a disclosure rule that might scare away charitable donors. *See Watchtower Bible and Tract Soc’y of New York, Inc. v. Stratton*, 536 U.S. 150 (2002) (striking a law requiring religious canvassers to obtain a permit before advocating door-to-door on private property).

The ones who would truly bear the burden of Van Hollen’s preferred rule would not be the wealthy corporations or the extraordinarily rich private donors that likely motivated Congress to compel disclosure in the first place. Such individuals would have “little difficulty complying” with these laws, as they can readily hire “legal counsel who specialize in election matters,” who “not only will assure compliance but also will exploit the inevitable loopholes.” *Majors* (Easterbrook, J., dubitante). Instead, such requirements “have their real bite when flushing small groups, political clubs, or solitary speakers into the limelight, or reducing them to silence.” *Id.*

Van Hollen v. FEC, 811 F.3d 486, 500-01 (D.C. Cir. 2016). Why did the appeals court include this dicta? Who has the better of the argument on the benefits and risks of mandated disclosure?

The group Citizens United was partially able to obtain an as-applied exemption from Colorado’s disclosure laws on grounds that it was entitled to a media exemption:

Citizens United brought the present action against the Colorado Secretary of State (the Secretary) in the United States District Court for the District of Colorado to challenge under the First Amendment the disclosure provisions both on their face and as applied to Citizens United because it is treated differently from various media that are exempted from the provisions (the exempted media). It sought a preliminary injunction against enforcing the provisions that do not apply to exempted media. The district court denied relief, and Citizens United appeals.

CHAPTER 16. DISCLOSURE

Although we agree with much of what the district court said, we must reverse. We do not address the facial challenge to the disclosure provisions, because we afford Citizens United the relief it requested through its as-applied challenge. We hold that on the record before us Citizens United would likely prevail on the merits and therefore is entitled to a preliminary injunction. In light of (1) the Colorado disclosure exemptions for printed periodicals, cable and over-the-air broadcasters, and Internet periodicals and blogs, (2) the rationale presented for these exemptions, and (3) Citizen United’s history of producing and distributing two dozen documentary films over the course of a decade, the Secretary has not shown a substantial relation between a sufficiently important governmental interest and the disclosure requirements that follow from treating *Rocky Mountain Heist* as an “electioneering communication” or treating the costs of producing and distributing the film as an “expenditure” under Colorado’s campaign laws. Citizens United has also sought to have its advertising for *Rocky Mountain Heist* exempted from the disclosure provisions. But it has not demonstrated that the Secretary would exempt advertising placed by the exempted media if the advertisements mentioned a candidate or advocated for the election or defeat of a candidate. Having failed to show that in this respect it would be treated differently from the exempted media, Citizens United is not entitled to relief regarding advertising. To explain our holding, we begin by describing the pertinent disclosure provisions of Colorado law. . . .

Citizens United v. Gessler, 773 F.3d 200, 202-03 (10th Cir. 2014).

In the meantime, scholars continue to explore the tradeoffs accompanying compelled disclosure of campaign finance information. See Michael D. Gilbert, *Campaign Finance Disclosure and the Information Tradeoff*, 98 IOWA LAW REVIEW 1847 (2013).

7. *FEC Enforcement*. For years, the FEC has deadlocked along party lines in important cases, including those involving disclosure requirements. See Michael M. Franz, *Federal Election Commission Divided: Measuring Conflict in Commission Votes Since 1990*, 20 ELECTION L.J. 224 (2021); Daniel P. Tokaji, *Beyond Repair: FEC Reform and Deadlock Deference*, in DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE REFORM IN AMERICA (Eugene D. Mazo & Timonthy K. Kuhner, eds. 2018). When the FEC deadlocks or otherwise fails to act in an enforcement matter, campaign finance watchdogs may seek judicial review. 52 U.S.C. § 30109(a)(8)(A), (C). In *Citizens for Responsibility & Ethics in Washington v. Federal Election Commission*, 993 F.3d 880 (D.C. Cir. 2021) (“CREW”), the court held that when a non-enforcement decision is based upon an exercise of “prosecutorial discretion,” that decision is judicially unreviewable, even if it is just part of the rationale for non-enforcement. The dissenting judge saw the issue differently:

The question in this case is whether a federal agency can immunize its conclusive legal determinations and evidentiary analyses from judicial review simply by tacking a cursory reference to prosecutorial discretion onto the end of a lengthy and substantive merits decision. In holding that such an incantation precludes all scrutiny, the majority opinion creates an easy and automatic ‘get out of judicial review free’ card for the Federal Election Commission. That should not be the law of this circuit. *Id.* at 895 (Millet, J. dissenting).

CHAPTER 16. DISCLOSURE

Soon after this ruling, Republican commissioners cited “prosecutorial discretion” in declining to investigate former President Donald Trump for payments made to adult film actress Stormy Daniels allegedly to keep her silence about an affair with Trump to benefit his campaign. Democratic commissioner Ellen Weintraub used the decision as an opportunity to urge the entire D.C. Circuit to rehear the CREW case en banc. Ellen L. Weintraub, Opinion: *Close This FEC Loophole That Killed the Case Over Trump’s Payment to Stormy Daniels*, WASH. POST, May 9, 2021.

8. *Lobbying Disclosure*. To what extent do the government interests supporting campaign finance disclosure also justify disclosure of lobbying activities? Because lobbying is protected by the First Amendment, mandatory disclosure is the primary means by which such activities are regulated. See Chapter 12, Part III. Congress first adopted comprehensive lobbying disclosure in 1946. The current scheme of federal lobbying disclosure derives from the Lobbying Disclosure Act of 1995, as amended in by the Honest Leadership and Open Government Act of 2007. These statutes require that those engaged in specified lobbying contacts make periodic reports regarding their lobbying activities, including disclosure of their clients and the income received from them. Should compelled disclosure of lobbying activities be subject to the same level of scrutiny as campaign finance disclosure? In *National Association of Manufacturers v. Taylor*, 582 F.3d 1 (D.C. Cir. 2009), the D.C. Circuit rejected a First Amendment challenge to some of the disclosure requirements imposed by federal law. In an opinion by Judge Merrick Garland, the court assumed without deciding that strict scrutiny was the proper standard, and upheld the challenged provisions under that standard. Relying on the text of the federal lobbying statute, the court concluded that Congress’s goal was to increase “public awareness of paid lobbyists to influence the public decisionmaking process.” *Id.* at 13 (citing 2 U.S.C. § 1601(1)). The court found this interest compelling based largely on *Buckley v. Valeo*, reasoning that “[t]ransparency in government, no less than transparency in choosing our government, remains a vital national interest in a democracy.” *Id.* at 14. The court proceeded to find the challenged lobbying disclosure requirements narrowly tailored to this informational interest. Should lobbying disclosure requirements be subjected to strict scrutiny or the slightly more relaxed standard of exacting scrutiny? Are the interests served by lobbying disclosure as strong as those served by campaign finance disclosure?

9. *Political Impediments to Fuller Disclosure*. In *Citizens United*, Justice Kennedy remarked that “A campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today . . . With the advent of the Internet, prompt disclosure of expenditures can provide shareholders and citizens with the information needed to hold corporations and elected officials accountable for their positions and supporters.”

The world Justice Kennedy imagined has not materialized. Thanks in part because of inaction from the FEC and Internal Revenue Service, spending by groups that do not disclose, or fully disclose, their donors continues to rise, amounting to over \$1 billion in the first decade since *Citizens United*. Opensecrets.org, *Dark Money Basics* (last accessed July 7, 2021) [<https://perma.cc/PK9S-FN2T>]. The means of avoiding disclosure include using the 501(c)(4) status, as well as having limited liability companies (LLCs) contribute money to Super PACs. Many disclosure rules also do not cover spending on campaign ads avoiding express advocacy appearing on the Internet.

CHAPTER 16. DISCLOSURE

Congress for years has debated beefing up disclosure rules, but political stalemate in Washington has blocked new legislation, with most Democrats supporting new legislation and most Republicans opposing it. Until recently, constitutional constraints on disclosure legislation were minimal. Now, *AFPP* changes the calculus, adding legal constraints to political impediments for fuller disclosure.