INTRODUCTION

THE LAW OF DEMOCRACY AT A CROSSROADS:
REFLECTING ON FIFTY YEARS OF VOTING RIGHTS
AND THE JUDICIAL REGULATION OF
THE POLITICAL THICKET

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The fiftieth anniversary of the Voting Rights Act of 1965 presents an opportunity to reflect, not only on what the U.S. Supreme Court has done in the area of election law, but also to chart a path forward. This symposium issue, which includes contributions from some of the best and brightest scholars in the field, reflects on the aspirations, ideals, and goals of our political system after five decades of meaningful voting rights and political participation. The substantive critiques and proposals presented by each author are especially timely given that we are in the midst of a presidential election year that has forced the average American to confront the question of who we are as a polity. This question encompasses more than just asking who can vote and in what election; it also includes the contested issue of whether the rules and regulations governing our elections lead to the selection of individuals who best reflect our collective political identity.²

Despite the abstract nature of the question of how we should define the body politic, it is clear that this is the very issue that the Supreme

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1. My sincerest thanks to Brian Barnes, Joshua Douglas, Michael D. Gilbert, Richard Hasen, Michael Herron, Steve Kolbert, Justin Levitt, Eugene Mazo, Michael Morley, Derek Muller, Michael Pitts, Daniel Smith, and Daniel Tokaji, all of whom contributed articles to the print issue of this symposium. I am also grateful to Kareem Crayton, Michael Kang, Ellen Katz, Garrick Pursley, Bertrall Ross, Ciara Torres-Spelliscy, and Nicholas Stephanopoulos for their participation in the “live” version of this symposium. A special thanks and a huge shout out to Debo Adegbile, former Acting President and Director Counsel of the NAACP Legal Defense Fund, for keynoting the event and inspiring everyone in attendance to “run a lap for Thurgood.” I am also indebted to Dean Donald Weidner for his generosity and unwavering support of this symposium from its infancy. You are the best, Dean Don! Last but not least, thanks to the members of the Florida State University Law Review for all of their excellent work on this issue.

Court has struggled with for more than half a century. In Reynolds v. Sims, the Court defined the polity as one of political equals, represented by elected officials who are responsive and indebted to all, not just some, voters. To further this principle of broad inclusion, the Court declared that all state legislative and congressional districts must be of equal population—one person, one vote. Similarly, in Harper v. Virginia State Board of Elections, the Court declared that, not only are we political equals, indistinguishable by wealth or class, but the State cannot adopt regulations that infringe on the fundamental right to cast a ballot. In many of the cases that followed Reynolds, Wesberry, and Harper, the Court strictly scrutinized state regulations that made it more difficult for individuals to have an effective and meaningful voice in the political process. Likewise, the Court upheld regulations that limited the amount of money in politics in order to prevent candidates from feeling beholden, not to the voters, but to the wealthy donor class. In doing so, the Court recognized that the undue influence of money in politics can be just as corrosive of individual political participation as outright restrictions on the right to vote itself.

In embracing a more pluralistic view of our political system, the Court also gave Congress broad leeway to enact federal legislation that protected the right to vote. In 1965, Congress passed the Voting Rights Act ("VRA" or "the Act"), which is one of the most successful federal civil rights statutes in history. The most controversial provisions of the Act—sections 4(b) and 5—suspended all voting laws in certain jurisdictions, mostly in the deep South, and required that any changes be precleared with the federal government before going into effect. In South Carolina v. Katzenbach, the Court upheld section 5 of the Act on the grounds that the law was an appropriate means of

8. The Fourteenth Amendment protects the right to vote as a fundamental interest, Harper, 383 U.S. at 670, and the Fifteenth Amendment prohibits abridgment or denial of the right to vote on the basis of race, color, or previous condition of servitude, U.S. CONST. amend. XV, § 1. Congress has the authority to enact legislation to enforce both of these Amendments. See U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.
carrying out the objectives of the Fifteenth Amendment. Katzenbach recognized that unprecedented federal action was necessary to ensure that the right to vote was extended equally to all individuals; the VRA was therefore a foreseeable consequence of the southern states’ unapologetic denial of basic voting rights to African Americans.

In subsequent decades, and with more conservative judicial appointments, the Court became less willing to adopt an interpretation of the right to vote that, in its view, unduly infringed on the states’ sovereignty over elections. To limit these federalism concerns, the Court altered the standard of review in voting rights cases from strict scrutiny to a balancing test that weighed “the asserted injury to the right to vote against the ‘precise interests put forward by the State as justifications for the burden imposed by its rule.’” Notably, in Anderson v. Celebrezze, the Court used this balancing test to strike down a restrictive state law that limited the ability of presidential candidates to get on the Ohio ballot. In practice, the manner in which the Court applied the balancing test in Anderson was nearly identical to Harper’s strict scrutiny standard, but in later cases, the Court took advantage of the flexibility inherent in “balancing” so as to be more deferential to the states’ authority over elections.

In Burdick v. Takushi, for example, the Court was unwilling to closely scrutinize the State’s rationale for its ban on write-in voting, accepting at face value the State’s interest in “avoiding the possibility of unrestrained factionalism at the general election” without requiring proof that the write-in ban furthered this interest. Crawford v. Marion County Election Board, like Burdick, was also overly deferential to the State. In Crawford, the Court applied the Anderson balancing test in rejecting a claim that Indiana’s voter identification law unduly burdened the right to vote, and the Court demanded very little evidence from Indiana to vindicate its interest in preventing voter fraud.

The Court’s retreat from broad protection for the right to vote coincided with its increasing scrutiny of congressional efforts to enforce the mandates of the Fourteenth and Fifteenth Amendments. In reviewing the constitutionality of federal civil rights legislation, the Court

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12. See id. at 310-15; see also Katzenbach v. Morgan, 384 U.S. 641 (1966) (striking down New York’s English literacy requirement to the extent that it was inconsistent with section 4(e) of the VRA).
15. 504 U.S. at 439 (quoting Munro v. Socialist Workers Party, 479 U.S. 189, 196 (1986)). But see id. at 448-49 (Kennedy, J., dissenting) (arguing that the State had failed to justify the ban “under any level of scrutiny” because the ban does not serve the State’s interest in preventing sore loser candidacies).
adopted the congruence-and-proportionality test, which requires that Congress establish a pattern of intentionally discriminatory behavior on the part of the states before it can legislate a remedy pursuant to Section 5 of the Fourteenth Amendment. While it is unclear whether the Court will apply the congruence-and-proportionality test or take a broader view of congressional authority in assessing the constitutionality of federal legislation enacted pursuant to Section 2 of the Fifteenth Amendment, the Court has been increasingly receptive to the state sovereignty objections lodged against the VRA, circumscribing the Act’s reach in a series of decisions.

The Court finally addressed the federalism issues head-on in *Shelby County v. Holder*, invalidating the coverage formula of section 4(b) of the VRA because Congress relied on forty-year-old data and long-eradicated practices such as literacy tests and poll taxes in selecting the states that had to ask “permission to implement laws that they would otherwise have the right to enact and execute on their own.” Since the formula resulted in mostly southern jurisdictions being subject to the preclearance requirement, but not northern states that have equally problematic voting rights records, the Court held that section 4(b) violated the constitutional principle that the states enjoy equal

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17. City of Boerne v. Flores, 521 U.S. 507, 519-20 (1997). To determine whether there is a fit between the remedy imposed by Congress and the evil to be addressed, the Court will first “identify with some precision the scope of the constitutional right at issue,” and then the Court will “examine whether Congress identified a history and pattern of unconstitutional . . . discrimination . . . .” Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365, 368 (2001).

18. Although Congress originally enacted the VRA pursuant to its authority under the Fifteenth Amendment, it reauthorized various provisions of the Act under both the Fourteenth and Fifteenth Amendments over the last four decades. See Shelby Cty. v. Holder, 679 F.3d 848, 855-56 (D.C. Cir. 2012), cert. granted, 133 S. Ct. 594, 594 (2012) (granting petition for a writ of certiorari and acknowledging that the preclearance regime is based on dual sources of constitutional authority), rev’d, 133 S. Ct. 2612, 2631 (2013). The Court has yet to resolve this issue. See Shelby Cty., 133 S. Ct. at 2622 n.1 (stating that *Northwest Austin Municipal Utility District No. One v. Holder*, 557 U.S. 193 (2009), “guides [the Court’s] review under [the Fourteenth and Fifteenth] Amendments in this case” although that decision never resolved whether the congruence and proportionality standard applies to Fifteenth Amendment claims).

19. See, e.g., *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 197 (2009) (avoiding the constitutional question but suggesting that section 5 is potentially unconstitutional on federalism grounds); Bartlett v. Strickland, 556 U.S. 1, 25-26 (2009) (holding that the State was not obligated to protect a minority influence district where doing so would violate state law because minorities were less than fifty percent of the voting population in the district and therefore had no cognizable claim under the VRA); Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 336 (2000) (holding that the Department of Justice could not deny preclearance to a plan that was discriminatory but nonretrogressive because this would “exacerbate the ’substantial’ federalism costs that the preclearance procedure already exacts” (quoting *Lopez v. Monterey Cty.*, 525 U.S. 266, 282 (1999))).

20. 133 S. Ct. at 2624.
In its view, Congress did not build a sufficient record, based on current conditions, to justify legislation that distinguished between the sovereign states.22

Shelby County stands in marked contrast to a case that took an expansive view of congressional authority, decided just eleven days earlier. In Arizona v. Inter Tribal Council of Arizona, the Court held that the National Voter Registration Act preempted Arizona’s proof of citizenship requirement that was a prerequisite for voter registration in all elections.23 But the Court’s concern about state power lurked in the background of the decision, and it used this pro-federal power opinion to vindicate state authority, holding that Congress’s power under the Elections Clause is limited to setting the “Times, Places, and Manner of holding elections” and confers no authority on Congress “to make or alter” voter qualifications.24 Instead, these qualifications are linked to the state franchise by various provisions of the Constitution, including Article I, Section 2 and the Seventeenth Amendment.25

Notably, concerns about state sovereignty have not extended into the area of campaign finance in recent years. In Citizens United v. FEC, the Court invalidated a federal law that prohibited corporations from engaging in independent expenditures to elect candidates for public office,26 and in the view of some commentators, ushered in an era of unlimited campaign spending. Citizens United was closely followed by American Tradition Partnership, Inc. v. Bullock, which overturned a one hundred-year-old state ban on corporate spending on First Amendment grounds.27 These two decisions stand for the proposition that the government’s goal to combat corruption, broadly defined, and keep excessive amounts of money from distorting the political marketplace are insufficient to justify infringing upon the First Amendment rights of corporations. Unlike the federal ban at issue in Citizens United, Montana’s ban was passed in response to actual, documented corruption in state politics, but this fact was not enough to persuade the Court to uphold the law.28

21. Id.
22. Id. at 2629.
23. 133 S. Ct. 2247, 2258-60 (2013).
24. Id. at 2265 (quoting U.S. CONST. art. I, § 4, cl. 1).
25. Id. at 2267 (citing U.S. CONST. art 1 § 2, cl. 2).
28. See Michael T. Morley, Contingent Constitutionality, Legislative Facts, and Campaign Finance Law, 43 FLA. ST. U. L. REV. 679 (2016). As Professor Morley observed, the state likely did not show that “the evidence before the [Montana Supreme Court] was sufficient to justify a prohibition on independent expenditures.” Id. at 712. Nonetheless, “If the [Supreme] Court wished to categorically preclude any governmental entity from limiting independent expenditures as a matter of law, without regard to the existence of extrinsic facts,
More recently, in McCutcheon v. FEC, worries about the First Amendment rights of donors led the Court to invalidate the aggregate contribution limits to national party and federal candidate committees.\textsuperscript{29} By adopting a very narrow view of the government’s authority to combat corruption in elections, all of these decisions stand in stark contrast to cases decided in the last twenty years that gave the government substantially more leeway to regulate contributions by individuals, coordinated spending by political parties, and independent expenditures by corporations and unions. And, ironically enough, it is unclear that the campaign finance regulations that remain in place actually prevent corruption in any meaningful sense,\textsuperscript{30} a fact that highlights the divide on the Court and in the legal scholarship about what effective campaign finance regulation should look like.

Given the limitations on their authority to determine how elections are financed, most states have used their power over voter qualifications, which is significantly broader in the wake of Shelby County, to sharply define and limit who can participate in elections.\textsuperscript{31} In the last few years alone, states have enacted dozens of laws that make it considerably harder to vote,\textsuperscript{32} and courts have had to weigh in on the validity of these regulations, often on the eve of scheduled elections.\textsuperscript{33} These newest restrictions on the right to vote raise fundamental questions about the law of democracy that we must confront if we hope to then it should have framed its conclusion . . . as a purely legal assertion, rather than a factually contingent holding.” Id. at 713-14.

\textsuperscript{29} 134 S. Ct. 1434, 1462 (2014).

\textsuperscript{30} For example, one of the contributions to this symposium argues that the limitations on coordinated expenditures, upheld by the Court, violate the Constitution because they can be circumvented by sophisticated actors and do not prevent corruption. See Michael D. Gilbert & Brian Barnes, The Coordination Fallacy, 43 FLA. ST. U. L. REV. 399, 421 (2016).

\textsuperscript{31} See Justin Levitt, Quick and Dirty: The New Misreading of the Voting Rights Act, 43 FLA. ST. U. L. REV. 573, 575 (2016) (noting the “troublesome tendency” of states to apply a “cartoonish” version of the Voting Rights Act and view it “through the lens of a revisionist retrograde stereotype” by packing minorities into districts that dilute real minority political power, an approach which threatens the constitutionality of the Act).


\textsuperscript{33} See Richard L. Hasen, Reining in the Purcell Principle, 43 FLA. ST. U. L. REV. 427, 443-44 (2016) (arguing that courts should be willing to issue emergency stays to halt the implementation of laws that disenfranchise voters, even if the stay would effectuate a last minute change in election rules).
retain robust electoral participation across race, class, and gender lines: Has our political system become one in which the Supreme Court and Congress “govern” by crisis,\textsuperscript{34} or does Congress still have broad authority to address voting rights violations after Shelby County?\textsuperscript{35} Are states trying to innovate in ways that result in better-run and better-functioning elections,\textsuperscript{36} or are they simply making it harder to vote and to be a candidate for elected office?\textsuperscript{37} When a state government is unwilling or unable to pass nonpartisan election administration regulations, do the citizens of a state have the power to address the ills of the political system directly?\textsuperscript{38} Have litigants learned from the lessons of the past in challenging the rules and regulations that govern state and federal elections in this new political environment?\textsuperscript{39} Are courts receptive to creative arguments and theories as we confront new challenges to the right to vote?\textsuperscript{40}

\textsuperscript{34} See, e.g., Bush v. Gore, 531 U.S. 98 (2000) (ending the manual recount of ballots cast in Florida for the 2000 presidential election on equal protection grounds); Hasen, supra note 33.

\textsuperscript{35} See Franita Tolson, What is Abridgment?: A Critique of Two Section Twos, 67 ALA. L. REV. 433 (2015) (arguing that Section 2 of the Fourteenth Amendment expands Congress’s authority to address voting rights violations pursuant to its authority under Section 5 of the Fourteenth Amendment).

\textsuperscript{36} See Joshua A. Douglas, A “Checklist Manifesto” for Election Day: How to Prevent Mistakes at the Polls, 43 FLA. ST. U. L. REV. 353 (2016) (proposing a checklist that poll workers should follow in order to avoid Election Day errors that can lead to voter confusion and post-election litigation).

\textsuperscript{37} See Wendy R. Weiser & Erik Opsal, The State of Voting in 2014, BRENNACTR FOR JUST. (June 17, 2014), http://www.brennancenter.org/analysis/state-voting-2014 (stating that, since 2010, twenty-two states have passed new voting restrictions); Herron & Smith, supra note 32. But see Eugene D. Mazo, Residency and Democracy: Durational Residency Requirements from the Framers to the Present, 43 FLA. ST. U. L. REV. 611 (2016) (arguing that residency requirements help states run elections effectively by identifying the relevant constituency and also by ensuring that those who are elected are residents who have an incentive to further the policy preferences of their specific geographic district).

\textsuperscript{38} Compare Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n, 135 S. Ct. 2652 (2015) (upholding an Arizona ballot initiative that delegated the state legislature’s authority to draw congressional districts to an independent commission in order to address partisan gerrymandering), with Derek T. Muller, Legislative Delegations and the Elections Clause, 43 FLA. ST. U. L. REV. 717 (2016) (examining several historical sources, including congressional adjudication of election disputes, and concluding that the Elections Clause contains a nondelegation principle that prohibits voters from divesting the state legislature of the power to set the “Times, Places and Manner” of federal elections via direct democracy).

\textsuperscript{39} See Michael J. Pitts, Rescuing Retrogression, 43 FLA. ST. U. L. REV. 741 (2016) (arguing that the nonretrogression test of Section 5 of the Voting Rights Act, which asks whether the proposed change has the purpose or effect of making minorities worse off than under the prior law, should be incorporated into litigation brought under Section 2 of the VRA, which prohibits any law that abridges the right to vote on the basis of race).

\textsuperscript{40} See Steve Kolbert, The Nineteenth Amendment Enforcement Power (But First, Which One is the Nineteenth Amendment, Again?), 43 FLA. ST. U. L. REV. 507 (2016) (pointing to the Nineteenth Amendment as a source of congressional power to combat election laws that have a disproportionate effect based on sex); Daniel P. Tokaji, Voting Is Association, 43 FLA. ST. U. L. REV. 763 (2016) (arguing that the balancing test that the Supreme Court cur-
The contributions to this symposium suggest answers to these questions and others, and lay the foundation for a discussion that must continue if we are to live in a more inclusive political system in which our elected officials are accountable to all voters.\textsuperscript{41} It is clear from both the caselaw and current political debates that this symposium occurred at a time in which the law of democracy is at a crossroads, where it is unclear whether our polity will be defined by the progress that has been made or the significant gains that have been lost. Hopefully, the voters will have a starring role in a story that is still being written, a narrative that is based on broad inclusion and access in the political system for everyone.

\textsuperscript{41} Indeed, one of the basic principles of our system— one person, one vote— was under attack in a case that the Supreme Court decided this Term. See Evenwel v. Abbott, 136 S. Ct. 1120 (2016) (rejecting the plaintiffs’ claim that the Constitution requires one person, one vote to be equalized based on registered voters and total population instead of just total population).
A “CHECKLIST MANIFESTO” FOR ELECTION DAY: HOW TO PREVENT MISTAKES AT THE POLLS

JOSHUA A. DOUGLAS

ABSTRACT

Mistakes happen—especially at the polls on Election Day. To fix this complex problem inherent in election administration, this Article proposes the use of simple checklists. Errors occur in every election, yet many of them are avoidable. Poll workers should have easy-to-use tools to help them on Election Day as they handle throngs of voters. Checklists can assist poll workers in pausing during a complex process to avoid errors. This is a simple idea with a big payoff: fewer lost votes, shorter lines at the polls, a reduction in post-election litigation, and smoother election administration. Further, unlike many other suggested election reforms, this idea is likely to gain traction and see actual implementation. That is because the idea is “non-legal” in nature, in that it comes from the private sector and is achievable outside of the political process. Given the structural impediments to legislative or judicial change, non-legal solutions such as the use of checklists are the way forward in election reform.

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I. INTRODUCTION

Mistakes happen. Nowhere is that more true than at the polls on Election Day. Poll workers may erroneously ask voters to show a photo identification in a state that does not require one; voters may go to the wrong precinct, where poll workers make them cast provisional ballots instead of directing them to the correct location; election officials may fail to verify that they have the correct vote count in their computers; machines may falter, without adequate back-ups. These errors cause disenfranchisement, confusion, long lines, and even possibly Election Day or post-election litigation.

These problems occur in part because poll workers, who run our elections, often have little training and few resources to help them when issues arise. Their errors, which happen in every election, are avoidable if we give them the right tools.

A simple solution can prevent many of these Election Day mistakes: a checklist. Checklists are powerful instruments. They can stop doctors from making crucial errors during surgery, assist pilots in crash-landing a plane safely, and ensure buildings are constructed so they do not collapse. Poll workers are like surgeons and distressed pilots—under pressure and with significant time constraints—but they have much less training in completing their tasks. They can certainly benefit from tools like checklists to help them avoid mistakes. One paradox of human existence is that we continue to learn about and understand extremely complex matters, and yet we still make routine errors that can have grave consequences.


7. See id. at 28-30.
well-designed checklist can force us to stop at crucial pause points during a process to ensure we take the required steps to complete the task correctly.

The proposal to use Election Day checklists follows other calls to reform our election administration, but unlike the others, adopting checklists is an easily achievable goal. Other reform efforts are often as complex as the voting process itself. Further, most of the ideas require new legislation, which make them politically unfeasible. Judicial reforms are also hard to achieve. Numerous scholars have suggested judicial remedies and specific rules to apply when an election goes awry, but these ideas do not address how to avoid the errors in the first place. They also require judges or legislatures to alter the substance of judicial analysis, an admittedly tall task.

The more successful proposed reforms, like checklists, derive from the private sector and can be implemented outside of the political or judicial realm—making them “non-legal” in nature. For instance, drawing on the power of rankings, Professor Heather Gerken crafted a “Democracy Index” to rank states on their election administration, providing easily digestible information that can spur greater reform

8. For example, Professor Rick Hasen has offered three reforms that might help to avoid the next “electoral meltdown”: government-run universal voter registration coupled with a voter identification program, nonpartisan election administration, and procedurally easier modes for pre-election litigation accompanied with higher hurdles for a post-election lawsuit. Richard L. Hasen, Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown, 62 WASH. & LEE L. REV. 937, 945 (2005).


on the voting process. Although a Democracy Index, which the Pew Charitable Trusts actually created based on Professor Gerken’s idea, is an immensely worthwhile heuristic, it is simply a first step that can help to create the impetus for reform rather than a tool that we can implement at the polls themselves. Similarly, President Obama’s 2013 bipartisan Presidential Commission on Election Administration also relied on the private sector to craft non-political solutions to improve our voting system, but the Commission’s report mentioned checklists only once.

Like these approaches, the idea to use checklists for elections draws on the best practices of the private sector to solve a problem that plagues many industries: how do we complete complex tasks without error? The proposal is politically feasible, as the use of checklists is unlikely to favor systematically one political party or the other, meaning that both sides can support it. Checklists are scalable, as larger jurisdictions with greater resources can create initial checklists that smaller jurisdictions can then adopt and tweak for their own use. Crafting the best checklists requires time, effort, trial-and-error, and revision, but the payoffs can be significant: fewer lost votes, less confusion on Election Day, shorter lines at the polls, a lower likelihood of post-election litigation, and better overall election administration.

This Article explains how checklists for poll workers and voters can help to improve the voting process. Part II considers the kinds of mistakes that routinely occur on Election Day through the fault of both poll workers and voters. Part III looks at the training guides that states and localities use to train their poll workers. These

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12. See infra notes 141-42 and accompanying text.
13. Using tools such as checklists during the voting process would presumably help states move up in the Democracy Index rankings because their election administration will become better.
15. Indeed, some jurisdictions already have checklists for certain election-related processes, like closing the polling place at the end of the night. But, their use is inconsistent, and hardly any jurisdictions employ checklists throughout the day when processing voters. See discussion infra Part III.
16. By “Election Day,” I mean more broadly any time votes are cast and counted, which can include early voting periods and absentee balloting as well as the official Election Day itself.
training manuals are long, complex, and wordy. They include anything and everything that might happen on Election Day, making them essentially useless as a reference in the heat of the moment when an issue actually arises. Well-designed, easy-to-use checklists can supplement these guides. Part IV equates the call for checklists with other proposed non-legal approaches to fixing our election system; these ideas, which come from the private sector and are achievable outside of the political process, are the best way forward in election reform. Part V considers the power of checklists, explaining how we can implement checklists as part of the voting process for both poll workers and voters. It offers some suggestions for the kinds of checklists that would be most useful, such as for poll workers in processing provisional ballots or for voters in filling out absentee ballot envelopes. It further provides models for jurisdictions to use as a starting place for their own Election Day checklists.

II. COMMON MISTAKES IN CASTING A BALLOT

It is inevitable that errors will occur in the vote-casting process. Election regulations are complex, and it is unrealistic to expect perfection when millions of voters interact with thousands of poll workers to follow detailed requirements for voting in a short period of time. As just one example, Professor Justin Levitt describes poignantly the minutia of regulations with which a voter must comply to vote successfully via an absentee ballot in California:

[O]fficials must prepare a specific application form, with particular notices and particular requests for information; the voter must complete the application with specified information in specified locations on the specified form; the voter must ensure that the application is received by specified officials within a designated period; officials must process the application according to specific criteria; officials must prepare the actual ballots, with specified notices and instructions; officials must deliver the appropriate absentee ballot, enclosure envelope, and ballot pamphlet to the voter at a specified address within a designated period; the voter must complete the enclosure envelope, with specified information in specified locations; the voter must complete the absentee ballot itself; the voter must enclose the absentee ballot in the proper manner within the enclosure envelope; the voter must ensure that the ballot and envelope are delivered by specified means to specified officials within a designated period; officials must compare information on the envelope with information on other election records in a specified
manner; and officials must transmit the envelopes to the entity responsible for counting ballots within a specific time frame.\footnote{17}

These byzantine procedures “breed[] plentiful opportunities for error.”\footnote{18} As Professor Mike Pitts notes, “Elections are fundamentally imperfect.”\footnote{19} The “complicated structure” of federal, state, and local laws that poll workers must administer, “combined with the fact that those responsible for conducting elections are typically hired just for that day to facilitate voting, creates an election system that is ripe for error.”\footnote{20}

Indeed, we should applaud the fact that the error rate in most elections is fairly small.\footnote{21} But that does not mean that we should be complacent in trying to avoid these mistakes. Election errors sometimes lead to post-election disputes about the correct winner of the election.\footnote{22} As Professor Levitt explains, “In every single election cycle, errors occur. Some are major, some are minor; some are novel, some familiar. And in every single cycle, these errors prove outcome determinative somewhere.”\footnote{23} We therefore must understand what kinds of errors occur and find solutions to avoid them.

Both election officials and voters may make mistakes in the voting process. Poll workers might erroneously preclude an eligible voter from casting a ballot or allow an ineligible person to vote, might give incorrect instructions to voters, or might cause voters to cast provisional instead of regular ballots. Voters may not follow instructions on how to vote, or more commonly, on how to fill out a provisional or absentee ballot. This Part examines the most common electoral errors both groups make, which in turn will help to identify the kinds of mistakes that a simple checklist can prevent.

\textbf{A. Errors by Poll Workers}

Poll workers are at the front lines of our election system. We do not have one method of voting but hundreds of precincts with thou-
sands of election officials administering our elections.24 These mostly
volunteer or low-paid temporary workers are prone to make errors
during the course of the thousands of interactions they have with
voters.25 The U.S. Election Assistance Commission has stated that
the rising age of poll workers presents one of the “biggest threat[s]”
to election administration because of the likelihood that they will suf-
f er confusion and commit errors.26

Most poll worker errors on Election Day fall into one of four cate-
gories: improperly operating the polling place or voting technology,
making mistakes when checking in voters, erroneously forcing
an individual to vote using a provisional ballot or providing wrong
instructions for the provisional or absentee balloting process, and
misplacing or otherwise failing to secure the ballots on Election
Night.27 Often these errors come about through a poll worker’s wrong
decision, particularly when aspects of the voting process are open to

24. See, e.g., Daniel P. Tokaji, Public Rights and Private Rights of Action: The En-

25. These errors are in addition to the mistakes full-time election workers might
make in compiling registration lists, creating a readable and correct ballot, crafting voter
instructions, or otherwise administering the election leading up to Election Day. See, e.g.,
Willis v. Thomas, 600 P.2d 1079, 1087 (Alaska 1979) (discussing mistakes in the registra-
tion lists); see also Richard L. Hasen, The Voting Wars: From Florida 2000 to the
Next Election Meltdown 16-17 (2012) (discussing the flawed “butterfly ballot” in Palm
Beach County, Florida for the 2000 presidential election); Daniel P. Tokaji, Voter Registra-
tion and Election Reform, 17 WM. & MARY BILL RTS. J. 453, 476 (2008) (highlighting elec-
tion official mistakes in compiling registration lists); Ed Payne & Michael Martinez, Arizo-
na County Gives Wrong Election Date in Spanish Voter Cards, CNN (Oct. 18, 2012, 5:40
AM), http://www.cnn.com/2012/10/18/us/arizona-spanish-election-ballot. Election offi-
cials might also make errors in the vote counting process. See, e.g., Alex Isenstadt, West, Barber
stories/1112/83955.html#ixzz2VLz4wAp6 (discussing vote tabulation errors).

This Article focuses mainly on checklists that voters and poll workers can use on Elec-
tion Day when time pressures are paramount. Pre-Election Day issues such as registration
lists and ballot design, or post-Election Day issues involving the vote counting process, also
can benefit from reform, including the use of checklists. See, e.g., Kroff & Kimball, supra
note 21, at 73-75 (discussing the impact of ballot design on voting accuracy); Edward B.
Foley, How Fair Can Be Faster: The Lessons of Coleman v. Franken, 10 ELECTION L.J. 187
(2011) (proposing model procedures for post-election disputes); Tokaji, supra, at 495-505
(advocating for reforms in the registration process). Checklists make the most sense, how-
ever, in time-pressed situations when routine and rote activities can lead to errors, such as
on Election Day itself. See discussion infra Part V.

26. Jim Drinkard, Panel Cites Poll Workers’ Age as Problem, USA TODAY (Aug. 8,
workers_x.htm.

27. See Huefner, supra note 9, at 273-74 (“Mistakes could also include errors in who is
allowed to vote, errors (including miscommunications) in voting instructions, errors in
providing appropriate accommodations for voters with disabilities, other errors related to
polling place operations, and confusing, misleading, or defective ballots or equipment.”).
interpretation—such as whether the identification a voter presents satisfies the state’s law. That is, mistakes occur when poll workers use their discretion to administer a voting rule.\textsuperscript{28}

First, poll workers can make mistakes in setting up the polling place and operating the voting technology. For example, Florida received new electronic touchscreen voting machines for the 2002 midterm election, but some election officials did not turn them on until right before the polls opened—requiring voters to wait during the long boot-up time—or failed to plug them in to ensure the machines would keep running if the backup batteries ran out of power.\textsuperscript{29} In San Diego, California, about 600 sites experienced delays because poll workers did not know how to troubleshoot the new electronic voting machines.\textsuperscript{30} Election officials also can fail to understand a machine’s capacities in storing information, leading to lost votes.\textsuperscript{31} Even paper ballots can create opportunities for error: in one Kentucky county election, workers gave some voters the wrong paper ballot, meaning that they were unable to vote for a particular local office.\textsuperscript{32}

Second, checking in voters presents another category of potential errors. Poll workers can direct voters to the wrong precinct within a polling location\textsuperscript{33} or improperly turn voters away.\textsuperscript{34} During the 2014 election, some Hartford, Connecticut election officials refused to issue ballots when the polls opened because the registration lists were not

\textsuperscript{28} See R. Michael Alvarez & Thad E. Hall, \textit{Controlling Democracy: The Principal-Agent Problems in Election Administration}, 34 POL’Y STUD. J. 491, 496 (2006); Watts, \textit{supra} note 20, at 209-10, 213.


\textsuperscript{31} See Hasen, \textit{supra} note 8, at 951.


delivered on time, even though their training supposedly directed them to allow voters to write their names down and then cast a ballot. As a city election official lamented,

Throughout the city, the right thing that should have taken place this morning was allow the voter to vote, write their names down and issue a ballot. We don’t stop the process; I apologize if people, moderators, election officials, did not recall that from the training and put that into practice this morning.

Similarly, in recent elections, poll workers have asked voters to show their photo identification even though the state’s law does not require an ID. During a 2014 primary election, elderly voters in Kansas were turned away because they did not have a photo ID; poll workers failed to offer them provisional ballots. As Secretary of State Kris Kobach commented, the poll workers “just didn’t understand the instructions.”

Poll workers sometimes record individuals as voting even though they did not yet vote because election workers incorrectly marked off the wrong person in the poll book. In the converse situation, poll workers can improperly allow an individual to vote again even though that person already voted in the election, perhaps via an absentee ballot. Poll workers also might simply allow ineligible people to vote. Accordingly, “poll workers, and not professional election


39. Id.


41. See Huefner, supra note 9, at 273.

staff, often make final determinations with regards to important decisions like individual voter eligibility,” and “their ability to do their job well impacts the franchise.”

Third, provisional ballots, which voters may be forced to use if there is a problem with their registration or eligibility, present a further area of confusion and error. Under federal law, if a voter’s name is not in the poll books or the voter does not have the required ID, poll workers must allow that person to cast a provisional ballot, which is set aside and considered later. There are many steps in the provisional voting process, which, when done incorrectly, can lead to the rejection of otherwise-valid votes. Yet poll workers sometimes wrongly require people to vote provisionally even though the voters should actually receive a regular ballot. This might occur if, for instance, the election officials fail to find the voter’s name in the poll books or improperly try to enforce certain eligibility requirements like a nonexistent voter identification law. Poll workers also might provide erroneous instructions to voters on how to fill out the provisional ballot envelope, which can render the vote invalid.

Improper implementation of the provisional balloting process affects thousands of voters, leading to uncounted ballots. In a report studying the 2012 presidential election, the city of Philadelphia found that almost 5000 voters citywide were incorrectly forced to cast provisional ballots due to poll worker error, largely because poll workers erroneously failed to locate the voters’ names in the poll books. These problems occurred despite the fact that poll workers had a fairly comprehensive “Guide for Election Officers” that laid out the proper procedures. The report laments the fact that the election worker guide was not “user friendly” because it was presented in a “tabloid” format that was “time consuming and impractical” to use.

43. Watts, supra note 20, at 193-94.
45. See Foley, supra note 9, at 357 n.14 (citing Eagleton Inst. of Politics, Rutgers, State Univ. of N.J. & Moritz Coll. of Law, Ohio State Univ., Report to the U.S. Election Assistance Commission on Best Practices to Improve Provisional Voting (2006)) (suggesting that inexperience in processing provisional ballots can lead to administrative errors that disqualify otherwise-eligible provisional votes).
47. See Levitt, supra note 9, at 92-93 n.38.
49. Id. at 5.
50. Id. at 6.
Mistakes leading to provisional balloting can also affect election outcomes. A 2010 Juvenile Court Judge race in Hamilton County, Ohio exemplifies the problems that can occur from poll worker error that results in voters having to cast provisional ballots. Hamilton County (which includes Cincinnati) often locates several precincts within the same polling location. Voters must both find their correct polling location and go to the correct precinct—or table—within that polling place. Many voters showed up to the polling place believing that they were in the correct spot without realizing that they also had to find the right precinct at that location. Poll workers sometimes failed to direct voters to the correct table at the polling station. Then, at the table, instead of sending the voters to the correct precinct across the room, poll workers told those individuals to vote via a provisional ballot. Poll workers testified that if a voter showed up at their table, they preferred giving the voter a ballot instead of turning them away, which had the effect of rendering the provisional ballot invalid under state law. Some voters experienced similar problems when they went to the County’s Board of Election office to vote early: the election workers mistakenly gave many of these voters a provisional ballot for the wrong precinct. These two sets of provisional ballots spelled the difference in the extremely close race for Juvenile Court Judge. After a year-and-a-half-long battle, the courts ultimately required Hamilton County to count all of the ballots that voters had cast incorrectly due to poll worker error. Still, we could have avoided a lot of time, hassle, and court involvement had election officials not made these mistakes in the first place.

52. Id.
53. See Hunter v. Hamilton Cty. Bd. of Elections, 850 F. Supp. 2d at 818 (denying Defendants’ motions for dismissal and for summary judgment). Being at the correct polling location but going to the wrong precinct at that site is known as the “right church, wrong pew” problem.
54. Id.
55. Id.
56. Id. at 820 (quoting a poll worker who testified, “I have a rule . . . . let’s say a person walks in and then we’ll look and then they’ll say, well, they’re not supposed to be here, I figure if they made enough effort to vote, I am going to let them vote and I am going to just make it provisional.”) (alteration in original).
57. See Hunter, 635 F.3d at 237.
58. See id. at 222.
59. Id. at 247.
Finally, sometimes ballots go missing based on the honest mistakes of election officials. In Sacramento County, California, warehouse workers found a bag containing over 400 uncounted ballots more than three months after the election. Similarly, in Broward County, Florida, workers found almost 1000 ballots in a warehouse. One of the issues in the 2008 Norm Coleman-Al Franken contested election for U.S. Senate in Minnesota involved missing ballots. In another notable example that actually changed the outcome of a race, an election official in Waukesha County, Wisconsin failed to save on her computer and then tally 14,315 votes for the 2011 state Supreme Court Justice election; once counted, these ballots altered the result.

In sum, election worker errors run the gamut, encompassing most interactions these officials have with voters and their ballots: from setting up the polling station in the morning, to checking in voters during the day, to erroneously requiring people to vote via a provisional ballot, to securing the ballots at the end of the night. Although poll workers receive comprehensive training guides, these materials obviously have not been sufficient to prevent these mistakes. We need a simpler solution, such as a checklist, for election workers to use on Election Day.

B. Errors by Voters

Voters are also prone to make mistakes, especially when trying to comply with complex rules for an activity they perform only intermittently, such as voting. In particular, both absentee and provisional ballots invite errors because voters must follow very specific instructions to fill them out properly.

60. Of course, this assumes that poll workers are not themselves engaging in fraud. As Professors Heather Gerken and Rick Hasen have both pointed out, however, most often what looks like election worker malfeasance in reality exemplifies "Hanlon's razor": "one should never attribute something to malice that can be adequately explained by stupidity." GERKEN, INDEX, supra note 11, at 84-85; HASEN, supra note 25, at 7.


65. See discussion infra Part III.
The most common voter errors fall into three main categories based on the type of ballot that voters use: absentee ballots, provisional ballots, or regular ballots.66 First, voters can make mistakes in applying for and then completing an absentee ballot.67 To vote via an absentee ballot, voters must first apply for the absentee ballot by the specified date, receive the ballot, fill it out correctly, and then mail in the completed ballot on time. The specific requirements at each stage of this process can generate mistakes. For example, the Ohio Secretary of State rejected absentee ballot applications when the voters failed to check a box on the application form designating the voter as a qualified elector.68 Voters might also fail to sign an absentee ballot or sign it in the wrong place,69 or the signature on the absentee ballot application might not sufficiently match the signature on the ballot.70

Second, voters can make errors on the ballot itself when they are required to vote provisionally.71 Voters might fail to both print and sign their names in the correct spot on a provisional ballot.72 They can also forget to check the box describing why they had to vote provisionally or commit other errors on the provisional ballot envelope.73 These mistakes will often render the ballots invalid under state laws.74

Finally, voters can make mistakes in the regular ballot-casting process. They might show up at the wrong precinct to vote.75 They

66. Voters also can make mistakes when registering to vote. See Tokaji, supra note 25, at 475. Moreover, with the increased use of alternative voting forms such as in-person early voting, these categories are somewhat fluid.


68. See State ex rel. Myles v. Brunner, 899 N.E.2d 120, 121-22 (Ohio 2008) (per curiam). The Ohio Supreme Court ultimately ordered the Secretary of State to issue a directive to local boards of elections to accept these absentee ballot applications. Id. at 125.


73. See Editorial, Count All Valid Votes, DENVER POST, Nov. 21, 2002, at B-06.

74. See Foley, supra note 9, at 372.

might forget to bring a proper form of identification.\textsuperscript{76} They can misspell a candidate’s name on a write-in ballot\textsuperscript{77} or fail to check the box next to the write-in candidate spot.\textsuperscript{78} They could also mistakenly fail to vote for all races (undervotes) or vote for more than one candidate for a race (overvotes).\textsuperscript{79} They can fail to press “confirm” when the voting machine includes a summary screen before the ballot is cast, which can lead to the votes not counting or even open the door to fraud if a complicit poll worker changes the vote after the voter leaves, as occurred in several eastern Kentucky elections.\textsuperscript{80} All of these errors can cause inaccurate vote counts and post-election litigation.

Many of the errors listed above are avoidable. We need clearer guidance for voters so that they can more easily cast an absentee, provisional, or regular ballot without making a harmful mistake. Checklists are an easy solution.

III. THE INEFFECTIVENESS OF CURRENT POLL WORKER GUIDES FOR ELECTION DAY

Election Day is fraught with potential mistakes, and yet the people who are supposed to be the stopgap to avoid these errors—poll workers—are temporary employees with little training and inadequate resources to do their jobs effectively.\textsuperscript{81} States hire thousands of poll workers, who must set up and open polling places, ensure that the polling site is accessible, process voters throughout the day, control access to the precinct, manage lines, check voter IDs, administer provisional ballots, close down the precincts, and sometimes even tabulate and secure the ballots.\textsuperscript{82} Accordingly, states and localities have training processes in place for these individuals, requiring poll workers to read lengthy manuals and usually mandating that poll workers attend a training session.\textsuperscript{83}

\begin{itemize}
\item \textsuperscript{77} See Miller v. Treadwell, 245 P.3d 867, 869 (Alaska 2010) (per curiam).
\item \textsuperscript{78} See Dayhoff v. Weaver, 808 A.2d 1002, 1005-13 (Pa. Commw. Ct. 2002).
\item \textsuperscript{79} See KROPP & KIMBALL, supra note 21, at 36.
\item \textsuperscript{81} See Watts, supra note 20, at 176.
\item \textsuperscript{82} Id. at 177.
\item \textsuperscript{83} Id. at 188-89.
\end{itemize}
Yet mistakes still occur despite these resources. “[P]oll workers operate in an environment where they may have to make quick decisions, based on little information, with few concrete incentives for accuracy, and with minimum opportunity to learn from their errors.”

As detailed below, the training guides that states and counties provide to poll workers are lengthy and overly comprehensive, rendering them virtually unusable on Election Day. Poll workers might have to read two long poll worker manuals, one from the state and the other from the local county. No one, especially a temporary employee who performs the job only once every two years, can master all of that information and then apply it correctly in a high-pressure situation while voters are waiting. Even the U.S. Election Assistance Commission admits that election officials should not “expect anyone, except the editor, to read the entire manual.”

Moreover, few states or counties supplement these guides with simplified tools, such as a checklist, to assist poll workers in carrying out their numerous responsibilities.

A. State Poll Worker Guides

Most state training guides for poll workers are long, bulky, and filled to the brim with information about how to run the election. This is not necessarily bad; poll workers need all of the relevant information ahead of time to operate their precinct successfully on Election Day. It is important to have training guides that are complete and comprehensive. But these guides are generally not written in an easy-to-use format for quick reference in the heat of the moment when the issues actually arise. And it is too much to think that poll workers can remember all of the various details from memory. Checklists should not replace these guides, but they can serve as useful supplements on Election Day itself.

Kentucky, for example, gives its “election officers” a sixty-four page “Quick Reference Guide” that contains all aspects of Kentucky election law. The sheer size of this document makes referring to it anything but “quick.”

Florida’s poll worker guide is thirty-three pages long. Although there is an index at the back to make it easier to find certain topics, the descriptions and explanations are too wordy. The guide is printed in a two-column format that uses long paragraphs to explain the various issues poll workers might encounter on Election Day. The explanations do not provide an easy sequence to follow. For instance, the training guide uses a lot of cross-references, thereby forcing the reader to jump to different pages to resolve scenarios, making the guide even more cumbersome to use on Election Day when lines are long and voters are frustrated. Here is a sample page:

**Figure 1: Florida Polling Place Procedures Manual, page 8**

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**Polling Place Procedures Manual**

A voter may present an ID (such as the Florida driver’s license) that has both the photo and signature. A voter could also present instead two separate forms of ID, one with a photo on it and another with a signature, such as student ID with a photo and a credit card with the voter’s signature, which is acceptable.

2. Compare the person in the photo to the person who presents himself or herself to vote.

- If determined to be the same person, proceed to paragraph 3.
- If you doubt they are the same person, the voter shall be allowed to vote a provisional ballot. Follow the procedure for Voting a Provisional Ballot on page 14.
- If the voter does not present the proper photo and signature ID, he or she shall still be allowed to vote a provisional ballot. Follow the procedure for Voting a Provisional Ballot on page 14.

3. Locate the voter’s name on the precinct register, follow the procedure for Voter’s Name is Not on the Precinct Register on page 10 before continuing the Voter Check-in process.

- Be thorough when looking for a voter’s name. For example, if the person states that her name is “Mary Smith-Collins,” search under the names of “Smith Collins,” “Smith-Collins,” “Smith,” and “Collins.” If the person’s name includes an ethnic surname such as Maria Morena de Arroyo, search for “Moreno,” “deArroyo,” or “Arroyo.”
- Be careful not to confuse voters’ with the same name but different suffixes such as Sr., Jr., or II, or voters who are twins with similar sounding names like Ferriya and Terriyan or Ethan and Evan.

4. Ask each voter (if you have not already asked before an ID was presented) if he or

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aspex (search in search bar for “Quick Reference Guide”; then follow the link provided for the first result, “Precinct Election Officer’s Quick Reference Guide . . .”).

87. DIV. OF ELECTIONS, FLA. DEP’T OF STATE, POLLING PLACE PROCEDURES MANUAL (2012).
California’s guide, which is directed at those who will train poll workers, is thirty-one pages long. It includes a six-page section on “Procedures for New Voters, Vote-by-Mail Voting, Provisional Voting, and Other Situations.” The explanations are wordy and technical. It is useful only if the training session actually goes over this information and a poll worker retains it when the situation arises; it is not helpful on Election Day itself when the poll worker is confronted with the voter. Here is one example from this training manual:

**Figure 2: California Poll Worker Training Standards, page 19**

- If voters are in the wrong polling place, poll workers should tell them they can either go to their assigned polling place to vote a regular ballot or they can stay and cast a provisional ballot. The poll workers should also explain the advantages and disadvantages of each option. For example, the polling place ballot may not contain all of the same candidates and measures as the ballot in a voter’s home precinct. If this type of situation occurs late in the day, the poll worker should let the voter know that if the voter arrives at their assigned polling place after 8:00 p.m., the voter will not be allowed to cast a ballot.

- Poll workers should be informed how to handle provisional ballots and ensure voters fill out and sign the provisional envelopes. Poll workers should segregate provisional ballots so they can be processed separately. (§ 14310)

Texas gives its poll workers a fifty-four-page handbook. It is difficult to follow. The guide contains eleven sample “situations” of potential problems voters might present and details the steps poll workers should take for each one. But the explanations are technical and likely confusing to most poll workers. For instance, the guide has over two full-text pages on how to handle the fairly routine problem of a voter showing up at the wrong precinct because he or she has moved. Here is just one paragraph of that explanation to give a flavor of the technical detail of the instructions:

A voter who has moved from one county to another may, under some circumstances, be eligible to vote a limited ballot in the new

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89. Id. at 17-22.


91. Id. at 14-16.
county of residence before his or her registration in the new county is effective, but voting under this procedure may only be done by personal appearance or by mail during the early voting period. [Sec. 112.001, et seq.] The voter must be a current registered voter in his or her county of former residence when the voter requests a limited ballot. When the voter completes a limited ballot application, the application will act as a voter registration, if the voter has not already submitted a voter registration application to the new county voter registrar.92

There are also lengthy paragraphs on specific rules for primary elections, which muddy the instructions and make it harder for poll workers to find the relevant information during a general election.93 In its effort to be as comprehensive as possible, Texas has made its poll worker guide virtually unusable on Election Day itself—the very time when poll workers need to refer to it.

Not every state has taken the approach of putting anything and everything into its Election Day guides. Ohio, for example, provides both a comprehensive precinct manual and a flow chart for dealing with the most common issues poll workers will face.94 The guide is written in different colors with numerous headings, few lengthy paragraphs, and easy-to-read font. The state also issues a supplemental training guide for primary elections.95 The “Processing Voters Flowchart,” printed in the training guide, but also available separately, leads poll workers through various scenarios involving a voter whose name is not in the poll book, whose address is incorrect, or who does not have a proper form of identification.96

92. Id. at 15.

93. See, e.g., id. at 15 (“In a primary runoff election, only one list of registered voters is used. This list will indicate voters who voted in the first primary of the opposite party. If a voter attempts to vote in a party primary runoff of a different party than the one in which the voter voted in the first primary, the voter is ineligible to vote. A voter becomes affiliated with a political party when the voter votes in that party’s primary. A voter commits an offense if the voter votes or attempts to vote in a primary election after having voted in a primary election of another party during the same voting year. (The voting year is January 1 through December 31.) [Sec. 162.014”).


96. Husted, supra note 94, at 28.
Although perhaps daunting at first glance, this flowchart is relatively easy to follow and provides guidance to poll workers on how to handle these various common issues. It is similar to a checklist in that it can reduce the possibility of human error. Ohio’s example can serve as a model for other states that want to strengthen their election administration. However, as the flowchart does not cover all aspects of the voting process, Ohio should create additional, simplified flowcharts or checklists for other issues that might arise.

It may seem strange to tout Ohio’s election processes when the state has been the site of various Election Day errors and regularly has a high rate of provisional balloting.\(^{97}\) Why should we emulate a system that has produced well-known election mistakes?

The simple answer is that these errors have occurred in spite of poll workers having this flowchart. We just know more about Ohio’s struggles because it is a swing state, meaning that campaigns and the national media pay more attention to its voting problems.\textsuperscript{98} It is also unclear if poll workers actually use the flowchart with regularity when issues arise. Indeed, Ohio ranks in the middle of the pack on the Election Performance Index—a measure of how well states run their elections—suggesting that its problems are typical of other states.\textsuperscript{99} Even with its useful training manuals, therefore, Ohio and other states need better tools to assist poll workers on Election Day. Of course, checklists or flowcharts cannot address every possible problem or human error. But they can make significant headway in helping poll workers avoid common mistakes.

In sum, state poll worker guides are long and comprehensive—so long, in fact, that they are too difficult to use. The sheer amount of information the training materials provide to poll workers, no matter how well organized, makes clear why poll workers are prone to commit simple mistakes. There is simply too much information for volunteer workers to be expected to master and recall instantly during an election. A poll worker facing a long line of voters on Election Day does not have the time to flip through a multi-page document with lengthy paragraph descriptions to figure out what to do. A user-friendly checklist would help to alleviate that pressure. We need to equip poll workers with tools that are easy to use. We then need to inculcate a culture in which poll workers routinely reference these checklists throughout Election Day.

B. Local Poll Worker Guides

Local election worker guides are also generally difficult to use and, in many instances, are even more confusing than state guides. They are extremely comprehensive, but, as one post-2012 election report noted, are awkward for a poll worker to access while trying to resolve an issue on Election Day.\textsuperscript{100}


\textsuperscript{100} See \textit{Office of the Controller}, supra note 48, at 5.
Miami-Dade County—a jurisdiction with regular Election Day woes\(^{101}\)—produces a 108-page training manual for “Clerks, Assistant Clerks, Inspectors, and Deputies.”\(^{102}\) The guide walks users through the materials for a four-hour training class on Election Day procedures. This manual is, quite likely, very useful during the class itself, but it would have little utility for poll workers in the heat of the moment on Election Day, especially with long lines and frustrated voters. The forty-seven-page training manual for Harris County, Texas—where Houston is located—is also geared toward a pre-Election Day class, not for use on Election Day.\(^{103}\)

New York City gives its poll workers a nearly 200-page manual.\(^{104}\) Notably, the manual references an Election Day checklist that the Inspectors—one of eleven positions on an election team at each precinct—can use: “An Election Day Checklist for Inspectors at the ED/AD Table is provided in the ED Supply Bag. The checklist summarizes the steps for opening, serving the voter and closing. Please use the checklist.”\(^{105}\) The training manual, however, says nothing more about this checklist, such as explaining its contents or how Inspectors should use it.

Jefferson County, Kentucky, which includes Louisville, gives its poll workers a seventy-three-page document with lots of text.\(^{106}\) It includes a chapter on “What If & FAQs”\(^{107}\) that would be difficult to reference if the “What If” situations actually occurred on Election Day. The pages are full of lengthy prose, with the largest words on each one being “What If . . . .” making it difficult to find relevant information about the actual situation.\(^{108}\) Here is an example:

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105. Id. at 60.


107. Id. at 33.

108. See id.
The only checklists in Jefferson County’s guide are in an appendix, and they are for the return of voting equipment, not for managing the polls or processing voters.109

The guidebook for poll workers in Maricopa County, Arizona (Phoenix) is fifty-three pages long, comprised of lengthy double-column explanations in small font.110 There are a few checklists—with text-heavy instructions—for setting up and closing the polls, but none for processing voters.111 Here is a sample page:

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109. Id. at 50-52.


111. See id. at 12, 14-26, 31, 41, 44-49.
PROVISIONAL VOTING PROCEDURE

There are the six reasons why someone may be required to vote a provisional ballot:

- The voter does not have the required identification.
- The voter’s name does not appear in the Signature Roster.
- The voter has moved.
- The voter requested an Early Ballot.
- The voter has changed their name.
- The voter is challenged at the polling place.

Once it has been determined that the voter needs to vote a Provisional Ballot, follow this procedure:

1. Verify the voter’s address on the map. In order for the ballot to be counted, the voter must live in the precinct at which they vote. If the voter does not vote with you, carefully determine the correct polling place. If there is a problem identifying where the voter should vote, direct her/him to the voter assistance line at 602-506-1511. Please do not call the Hotline for this issue.

2. Ask the voter for the required proof of identity, from List #1, 2 items from List #2, or one item from List #3 and one item from List #2, CIRCLE "YES" at the top of the pink provisional ballot form. Circle "NO" ONLY IF: the voter has no identification at all OR if the voter has only one item from List #2 or only a military identification or passport. Only in these cases does the board worker circle "NO" at the top of the provisional ballot form. If the answer is NO, the voter may still vote a provisional ballot, but instruct the voter that he/she must provide identification within 5 days after the election in order for his/her vote to count and give him/her the list of locations where he/she may go to have identification verified.

3. Detach the pink Provisional Ballot Receipt, provide it to the voter, and then completely fill out the provisional ballot form.

4. Write the four digit precinct number on Line #1 of the provisional ballot form.

5. One BOARD WORKER and the VOTER must sign the form in order for the ballot to be counted.

Philadelphia’s thirty-seven-page Election Board Training Manual\textsuperscript{112} looks like a PowerPoint presentation with lots of text and many bullet points. Madison, Wisconsin has separate training manuals for new versus experienced poll workers, but they, too, are PowerPoint-style documents that are probably great for a training session but are likely difficult to use on Election Day.\textsuperscript{113} Some cities in Wisconsin, such as Waukesha—the site of recent election irregularities\textsuperscript{114}—simply rely

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\end{itemize}
on the state’s training manual, a 154-page document titled “Election Day Manual for Wisconsin Election Officials,” which has a few checklists for polling place supplies and post-election procedures but nothing for workers to reference during voting hours.\(^{115}\)

Poll workers in the Cincinnati area—the site of the contested Hamilton County Juvenile Court Judge race that was fraught with poll worker errors—had to rely on the county’s thirty-seven page “Poll Worker Quick Guide,” which contained a few checklists for opening and closing the polls and for ensuring that polling places had the required supplies but did not have easy-to-use tools for processing voters during the day.\(^{116}\) The County, moreover, did not even intend for poll workers to use the Quick Guide on Election Day itself; the beginning of the manual directs poll workers to “study the material in advance of the election, as well as use the Comprehensive Manual during election day,” thereby implying that the lengthier manual was the proper reference tool when issues arose.\(^{117}\)

Some poll worker guides have useful materials embedded within the lengthy descriptions, and these can be models for other jurisdictions. Franklin County, Ohio, the home of the state’s largest city, Columbus, has a 226-page election official guidebook.\(^{118}\) Although a manual of this length is obviously too long for an individual to process in a single day, the guide does include a few checklists, such as for handling “curbside voting” for mobility-impaired voters,\(^{119}\) setting up a table at the polling place,\(^{120}\) and processing regular voters.\(^{121}\) The checklists, however, are too wordy, making them difficult to follow and therefore less useful. Moreover, the checklists are buried within


\(^{119}\) Id. at 17.

\(^{120}\) Id. at 78.

\(^{121}\) Id. at 87.
the other descriptions for Election Day processes, and it is unclear if poll workers receive the checklists separately from the lengthier manual.

Chicago’s guidebook is the best example of how a local jurisdiction can provide usable materials in the form of checklists. Although the manual is nearly eighty pages long, there are several simple and easy-to-follow checklists included within the materials. The majority of the checklists are only a single page, and they list out every step in numbered order, with a box to actually check off once the poll worker has completed the task.

Figure 6: Cook County Clerk Judge, Election Manual, page 14

The Chicago manual has checklists for verifying the supplies in the morning, setting up the voting equipment, closing the equipment at night, and processing write-in votes, to name just a few examples. The checklists even have a notation with a bold icon saying

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“new” when there is an added step from previous years.125 Chicago’s poll worker manual has excellent checklists for opening and closing the polling site; however, it does not include any checklists or flowcharts for managing voters during the day.126 Nevertheless, Chicago’s checklists are good models for other jurisdictions to consider when reforming their own poll worker materials. Similarly, some California counties have “What To Do If” flipbooks for poll workers to consult that, although too wordy and detailed to catch all mistakes, can serve as a starting place for creating usable checklists.127

In sum, current election worker materials are generally sufficient for what they are: guides for pre-election training. But few state or local jurisdictions provide poll workers with easy-to-use tools for Election Day itself. Although some of the training guides include checklists, these checklists are wordy, incomplete, and embedded within other material. Election administrators can augment these guides with simple checklists for poll workers to use while they are actually managing the polls. In addition, election officials can design simple voter checklists to help voters avoid mistakes and speed the process along.

IV. NON-LEGAL APPROACHES TO FIXING ELECTION ADMINISTRATION PROBLEMS

Adopting checklists might seem like an easy reform. But the reality of our political environment is that hardly any election reform is easy. One of the difficulties in finding a workable solution to the election administration issues plaguing our voting processes is that any proposed reform must clear a significant political hurdle: legislators are highly unlikely to pass a law if it might hurt their side’s electoral chances.

This struggle is what Professor Gerken refers to as the “here-to-there” problem in election reform128: scholars and policymakers can come up with great ideas to improve our election system, but it is often difficult to enact these changes because of political realities.129 There is a structural impediment in moving from the “here” of reform

125. See, e.g., id. at 56.
126. The manual provides several sections with text and images for handling tasks during polling hours, but this information is not translated into usable checklists. Id. at 23-55.
129. See id. at 38.
proposals to the “there” of actual change because one side or the other will block the reform if it might negatively impact their side on Election Day. After all, legislators are also politicians, so they will support changes to election processes only if it will not hurt their electoral chances in the future.

We can achieve meaningful election reform, however, if we create solutions that are “non-legal,” such that they draw from the lessons of the private sector and do not require legislators to cast difficult political votes. Creative, non-legal solutions are the best path forward for legal or policy problems, such as difficulties in election administration, because election officials can implement the changes outside of the political process. We should borrow from the private sector to solve the same kinds of problems that come up in similar situations. Doctors, airline pilots, and building contractors use checklists to ensure that they do not make crucial mistakes when completing complex tasks. Poll workers also engage in complex processes that often lead to mistakes; checklists can help them too. Further, election administrators are less likely to face opposition to the changes if they do not obviously impact one side versus the other and, instead, simply improve the election experience for all voters.

This Part examines two reform efforts that are achievable outside of the legal system, draw on private sector techniques, and do not have an obvious political impact. Checklists also have these same traits. The overarching point is that these kinds of non-legal approaches are the best way to fix our election mechanics.

A. The Democracy Index

Every election has problems with election administration, yet the voting experience varies across states and jurisdictions. By and large, we do not have a strong grasp on which jurisdictions do well in running their elections and which ones do poorly. Professor Heather Gerken’s “Democracy Index”—a non-legal solution that derives from private sector success and does not require politically-charged legislation—represents one path toward solving that problem.

130. See sources cited supra note 10.
131. See GAWANDE, supra note 6 and accompanying text.
132. See discussion supra Part II.
133. See GERKEN, INDEX, supra note 11, at 13.
134. Id. at 5.
The Democracy Index is a ranking of states and localities on their election performance.\textsuperscript{135} It is a data-driven indicator of how well, comparatively, each election system performs in registering voters, allowing voters to cast ballots, and counting votes.\textsuperscript{136} Importantly, it takes the lessons of the private sector and some governmental agencies—that data-driven rankings can help to improve performance—and applies them to the election administration setting.\textsuperscript{137} As Professor Gerken writes, “The Democracy Index would . . . give us the same diagnostic tool used routinely by corporations and government agencies to figure out what’s working and what’s not.”\textsuperscript{138}

A state ranking of election administration has the potential to improve how our elections are run. People and institutions care about rankings; no one wants to be at the bottom. The Democracy Index creates incentives for passing meaningful reforms as well as inculcates a standard of professional norms for election administrators.\textsuperscript{139} In explaining the practicality of the idea, Professor Gerken notes:

\begin{quote}
The Democracy Index is a quintessentially here-to-there solution. It doesn’t impose standards on how our elections are run. It doesn’t take power away from partisan officials. It doesn’t professionalize the bureaucracy that runs our elections. Instead, it pushes in the direction of better performance, less partisanship, and greater professionalism.\textsuperscript{140}
\end{quote}

It is thus a non-legal proposal that can have a meaningful impact on our elections.

Indeed, the Democracy Index is now a reality. The Pew Charitable Trusts, a non-profit organization, has created an Elections Performance Index, which uses quantifiable data on seventeen different metrics to assess all fifty states’ election administration.\textsuperscript{141} Users can determine which state has the best overall election system (North Dakota) and the worst (Mississippi) as well as analyze how each state performs for each of the measured factors.\textsuperscript{142} This data can spur election officials to study what the best states do and change their processes to try to “climb the rankings.”

The Democracy Index, and its actual implementation, shows that an idea from outside the partisan-laden world of election law that

\begin{footnotes}
\textsuperscript{135} Id.
\textsuperscript{136} Id. at 28.
\textsuperscript{137} Id. at 49-52.
\textsuperscript{138} Id. at 59.
\textsuperscript{139} Id. at 92.
\textsuperscript{140} Id. at 134.
\textsuperscript{141} See Elections Performance Index, supra note 99.
\textsuperscript{142} See id.
\end{footnotes}
does not require politically-untenable legislation is the way forward for election reform. The proposal to adopt checklists has the same attributes: it is a non-legal proposal that uses guidance from the private sector and is implementable without requiring a difficult legislative vote. Moreover, using checklists might help states improve their performance on several of the factors that comprise the Democracy Index, thereby assisting states in strengthening their overall election administration.

B. Presidential Commission on Election Administration

The recommendations of the bipartisan Presidential Commission on Election Administration—the most recent federal study into our voting processes—are similarly “non-legal,” drawing on private sector practices to propose easily-adoptable reforms.

President Obama created the Commission to address the significant long lines and other pervasive voting problems that occurred during the 2012 election. The co-chairs were Obama’s (Democrat) and Mitt Romney’s (Republican) election lawyers, Bob Bauer and Ben Ginsberg, but importantly, many of the commissioners were members of the private sector, such as the Vice President of Global Park Operations and Initiatives at Walt Disney World. Having business leaders on the Commission was significant because they could draw upon their experiences to craft solutions to election problems that have analogs in their own industries.

In January 2014, the Commission issued a 112-page report that contained various suggestions for reforming election administration. The Commission’s formal recommendations and list of best practices were unanimous, written with the goal of “significantly improv[ing] the American voter’s experience and promot[ing] confidence in the administration of U.S. elections.” Importantly, many of the proposals were “non-legal” in nature, drawing from the best


144. Id.

145. President Obama Announces His Intent to Appoint Individuals to the Presidential Commission on Election Administration, WHITE HOUSE (May 21, 2013), http://www.whitehouse.gov/the-press-office/2013/05/21/president-obama-announces-his-intent-appoint-individuals-presidential-co.


147. PRESIDENTIAL COMM’N ON ELECTION ADMIN., supra note 14 (introducing the report in a cover letter addressed to the President).
practices of the private sector. The ideas were also non-legal in that election officials can implement many of them under their administrative authority without new legislation.

The report placed its “key recommendations” into four main categories: voter registration, access to the polls, poll management, and voting technology. For example, on poll management, the report states that “[l]ocal officials need to maintain a diagram of every polling place used in the jurisdiction to include at a minimum: room dimensions, location of power outlets, the proposed positioning of voting and voter processing equipment, the entry and exit routes, and signage required by the Americans with Disabilities Act.” Having a diagram of the polling place is a non-partisan, easily implementable solution that can have an immediate impact. Although it is not part of the report’s recommendations, a checklist that includes these necessary attributes of a polling station would further assist poll workers in ensuring that everything is in order on Election Day.

The report also suggests that local officials employ “line walkers” to assist voters and address potential problems as voters wait—a non-legal solution that the private sector already uses, much like at airport security. Similarly, election officials should “[k]eep track of wait times at individual polling places [by] using simple management techniques, such as recording line length at regular intervals during Election Day and giving time-stamped cards to voters during the day to monitor turnout flow.” Checklists would assist poll workers in completing these tasks correctly. On voting technology, checklists could help jurisdictions certify their machines, which is currently a costly and difficult task.

The report, however, does not provide specific details on how jurisdictions should help poll workers in handling issues that arise on Election Day itself. It gives little guidance on how to train poll

148. See, e.g., id. at 70 (“Much has been made in recent years of the puzzling gap between the technological revolution in the lives of most Americans and the technological systems voters encounter when they register and when they cast their ballots. A new technological gap is beginning to emerge, between the data analytical capacity that has improved customer service in the private sector, and the lack of data-driven efforts to improve the experience of voters. Without new management capacities and tools that draw on what is available in the private sector, the problems that gave rise to this Commission’s creation are guaranteed to recur in the future.”).

149. Id. at i.

150. Id. at 33.

151. Id. at 36-37.

152. Id. at 43; see also id. at 37 (“The private sector employs other techniques to deal with long lines. Whether in restaurants or theme parks, customers are quite familiar with the notion of ‘taking a number’ or ‘making an appointment’ instead of waiting in line.”).

153. See id. at 64-66.
workers or provide them with the tools they need to deal with the problems that inevitably will occur. On the training of poll workers, for instance, the Commission simply rests on a report from the U.S. Election Assistance Commission (EAC) titled Successful Practices for Poll Worker Recruitment, Training, and Retention. That report, in turn, focuses on how to conduct training simulations, not on providing Election Day tools for poll workers.

Effective checklists can greatly assist poll workers in responding to the Election Day issues that the Presidential Commission on Election Administration highlighted. Indeed, the report itself recommends that states use a checklist to ensure that a polling place is accessible for disabled individuals. Beyond that brief mention, however, the Commission did not discuss the power of checklists in helping to solve many of the problems with election administration that it identified in its report.

As both the Democracy Index and the Commission’s recommendations show, the best election reforms are those that come from outside of the political process. Ranking states, or improving access to the polls and poll management, are inherently non-controversial, or at least non-ideological, solutions to the political problem of election reform. Similarly, the creation of checklists for both poll workers and voters is an easily adoptable and non-partisan solution that, drawing on private sector experience, will have an immediate impact on our elections.

Checklists are a “there” solution to the “here-to-there” problem: although legislative bodies are unlikely to enact most proposed reforms because there are strong political incentives to block the change, there are no obvious partisan motivations against using a checklist as part of the voting process. No one knows, especially ahead of time, which side’s voters are hurt more by poll worker mistakes, so the benefit of smoother election administration can fall on both sides of the party line. Checklists would also help to institutionalize greater professionalism among election administrators because

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154. *Id.* at 46.
157. Specifically, the Commission lists as a best practice: “A checklist ensuring that each polling place is accessible should be kept by the responsible election official for each election and kept on file to prepare for the next election.” PRESIDENTIAL COMM’N ON ELECTION ADMIN., *supra* note 14, at vi. The report then simply points to a checklist that the Civil Rights Division of the Department of Justice has published as part of its materials on ensuring accessibility of polling places. *Id.* at 51.
158. See Gerken, *supra* note 128 and accompanying text.
the officials will see how these tools, used successfully in many other industries, also will have a positive impact on their jobs.\textsuperscript{159}

V. INCORPORATING CHECKLISTS INTO ELECTION DAY PROCEDURES

Our current approach to poll worker materials is flawed. The number of mistakes that routinely occur on Election Day shows that providing only lengthy training guides is counterproductive. Most poll workers will not read the entire guide, and if they do, it is unlikely they will memorize most of the information. We need to take the opposite approach, giving poll workers simple, easily digestible tools to facilitate their work and reduce discretion when issues arise. Checklists are the answer.

A. Finding a Solution to Complex Problems Where Mistakes Are Likely to Occur

We have more human knowledge than ever before. As Atul Gawande remarks in The Checklist Manifesto, “Know-how and sophistication have increased remarkably across almost all our realms of endeavor . . . .”\textsuperscript{160} As society has gained a better understanding of our world, our world in turn has become more complex.\textsuperscript{161} Gawande, a surgeon, explains this phenomenon most clearly with respect to medicine. “Medicine has become the art of managing extreme complexity—and a test of whether such complexity can, in fact, be humanly mastered.”\textsuperscript{162} For instance, we have uncovered the existence of over 13,000 diseases or ailments, and most have different procedures or tactics to handle them.\textsuperscript{163} It is inevitable, then, that humans will fail repeatedly when trying to manage this extreme complexity. As Gawande laments, “The complexity is increasing so fast that even the computers cannot keep up.”\textsuperscript{164} There is so much knowledge, and so many intricacies to manage, that simple things are sometimes forgotten. For example, every year there are nearly 150,000 deaths or major complications following surgery, and at least half of those problems would not have occurred if medical professionals had followed the correct procedures.\textsuperscript{165} “The knowledge exists. But

\textsuperscript{159} See PRESIDENTIAL COMM’N ON ELECTION ADMIN., supra note 14, at 18-19 (discussing the value of creating professional norms for election administration).

\textsuperscript{160} GAWANDE, supra note 6, at 11.

\textsuperscript{161} See id. at 19.

\textsuperscript{162} Id.

\textsuperscript{163} Id.

\textsuperscript{164} Id. at 22.

\textsuperscript{165} Id. at 31.
however supremely specialized and trained we may have become, steps are still missed. Mistakes are still made.”

Medicine, of course, is not unique in this regard. Flying a plane is extremely complex, especially when something goes awry. Constructing a new building entails layers upon layers of specialized knowledge and proper implementation. For the best venture capitalists, choosing the start-up companies in which to invest requires mastery and assimilation of tons of information and data. Lawyers are not immune to making avoidable mistakes. As Gawande notes, our struggle to deliver on increased knowledge and specialization in the legal field resulted in a thirty-six percent increase between 2004 and 2007 in legal malpractice lawsuits; “the most common [mistakes were] simple administrative errors, like missed calendar dates and clerical screwups [sic], as well as errors in applying the law.”

Administering Election Day is similarly complex and prone to error. Poll workers must complete a multitude of tasks under an array of legal regulations. They must properly set up the polling place and ensure everything is ready by the time the polls open early in the morning. They must check voters in, which often involves complexities with poll books or issues regarding voter eligibility. They must understand various legal rules, such as how to process provisional ballots, which, if there are both federal and state candidates, requires knowledge of both federal and state law. They have to ensure the integrity of the polling station and ward off voter fraud. And they must do all of this in high-pressure situations when lines are long, voters are anxious, and, for high-profile elections, the nation is watching. In almost every election, something

166. Id.
167. Id. at 33-34, 132-35, 175-79.
168. Id. at 53.
169. Id. at 162.
170. Id. at 11.
171. See Galveston County Polls Stay Open Late to Make Up for Morning Delays, KHOU.COM (Nov. 6, 2012, 8:09 PM), http://www.khou.com/story/local/2014/08/05/11862028/.
along this process fails. Often the mistakes do not alter the outcome of the election. But sometimes they do. Therefore, we need to understand what kinds of election errors poll workers make and then design effective solutions to combat them. We can also help voters prevent their own mistakes by giving them easy-to-use guidelines on how to vote correctly.

As Gawande notes, “We don’t study routine failures in teaching, in law, in government programs, the financial industry, or elsewhere. We don’t look for the patterns of our recurrent mistakes or devise and refine potential solutions for them. But we could, and that is the ultimate point.”

B. The Power of Checklists

Implementing a simple checklist for complex processes can alter outcomes dramatically. “[C]hecklists seem able to defend anyone, even the experienced, against failure in many more tasks than we realized. They provide a kind of cognitive net. They catch mental flaws inherent in all of us—flaws of memory and attention and thoroughness.” In Gawande’s own field of surgery, using a checklist in the operating room reduced infections by nearly fifty percent, saving scores of people from death or serious complications. The checklists were effective in both rich and poor hospitals, in both rich and poor countries.

An effective checklist has various attributes. First, there must be a clear “pause point” when the user must stop doing the task and reference the checklist. This pause, at key moments, will ensure that the checklist actually hits upon the important parts of the process. Second, the checklist must be the correct type for the situation. Gawande explains the two primary kinds of checklists, which he calls

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175. See Foley, supra note 9, at 351-53.
177. Gawande, supra note 6, at 185.
178. Id. at 48.
179. Id. at 154.
180. Id. at 155. Given these results, it may be somewhat surprising that doctors and other medical professionals are slow to adopt checklists in their own operating rooms. Gawande explains that in today’s age of increased knowledge and specialization, people are reluctant to believe that something as simple as a checklist can help. See id. at 161. Therefore, in the broader sense, Gawande calls for not just the implementation of checklists, but also for a change in our culture regarding how we manage increased knowledge and complexity. Id. at 160-61.
181. Id. at 122-23.
“DO-CONFIRM” and “READ-DO.”\(^{182}\) When using a DO-CONFIRM checklist, the individual completes several tasks from memory and experience but then stops at set points to confirm that he or she has done each one.\(^{183}\) That is, the user proceeds through the activity, having completed the process before many times, but pauses throughout to reference the checklist and ensure that nothing was missed. When using a READ-DO checklist, by contrast, the individual references each stated task and then completes it in turn.\(^{184}\) DO-CONFIRM checklists are best for routine processes in which pausing intermittently can help to verify that everything was done; READ-DO checklists are best for activities that occur less frequently and require certain steps in a certain order or otherwise benefit from the user going through the task one step at a time.\(^{185}\)

Third, the checklist must be the correct length; between five to nine items is about right.\(^{186}\) This means that the checklist must focus on the “killer items”—“the steps that are most dangerous to skip and sometimes overlooked nonetheless.”\(^{187}\) They must be precise. Good checklists “do not try to spell out everything—a checklist cannot fly a plane. Instead, they provide reminders of only the most critical and important steps—the ones that even the highly skilled professionals using them could miss.”\(^{188}\) Fourth, the font and formatting must be easy to read and use so that individuals do not have to spend extra effort deciphering the text or looking for the relevant part. After all, a checklist is supposed to help all kinds of potential users, especially in high-pressure situations, not make it harder for them to complete the task.\(^{189}\) Finally, and crucially, the drafters should test the checklist in actual or simulated settings and revise accordingly until it actually works well.\(^{190}\) A good checklist requires trial and error and revision so

\(^{182}\) *Id.* at 123.

\(^{183}\) *Id.*

\(^{184}\) *Id.* For example, recipes are usually READ-DO checklists. *Id.*

\(^{185}\) *See id.*

\(^{186}\) *Id.*

\(^{187}\) *Id.* Narrowing the checklist to only certain items thus requires good data on where the mistakes happen.

\(^{188}\) *Id.* at 120.

\(^{189}\) *See id.* at 123-24.

\(^{190}\) *Id.* at 124.
that it touches on only the most crucial points in the process. On his website, Gawande has a “checklist for checklists,” listing the items that all effective checklists should include.191

C. Checklists for Election Day

States and localities can improve their Election Day administration through the creation and implementation of checklists. In doing so, election officials should break down their processes, step-by-step, to identify precisely where mistakes occur. The triggers for common errors will then become the crucial pause points in the checklist when poll workers must stop to make sure they are completing the process correctly.

A single “Election Day Checklist” will not do. Instead, states and counties should create various checklists for the different situations poll workers might encounter.192 Election officials must understand the kinds of errors their poll workers make most frequently. They should then devise checklists that aid these individuals in completing their processes without committing a mistake that will disenfranchise someone or lead to lost votes. Regarding appearance, election officials should consult the “checklist for checklists”193 to ensure that their checklists are of the proper length, font, and design. Jurisdictions can also create checklists for voters to use before they head to the polls or for absentee balloting. Officials must then simulate the use of these checklists before Election Day and tweak the checklists before every election to respond to evolving knowledge.

Creating a useful checklist is hard work. Election officials will have to take a large and complex web of regulations and accurately distill them into the most salient and useful points, all in a format that is understandable for temporary, non-professional poll workers. Moreover, there must be safeguards to ensure that the checklists themselves are non-partisan, so that election officials are not skewing the process in a way that could affect election outcomes. That said, the difficult work is worthwhile. Strong checklists can protect voters and ward off Election Day headaches. They are less expensive than other potential reforms or post-election litigation and can save


192. This is similar to the approach that airlines take for their airplanes. The various checklists are in a spiral binder with numerous tabs, each one a different one-page checklist for various scenarios. See GAWANDE, supra note 6, at 116.

money in the long term. Further, checklists are scalable—once created, perhaps by a larger jurisdiction that has the resources—smaller jurisdictions can adopt them, simply tweaking them for their own needs. The initial allocation of resources for this reform can pay large dividends for years to come.

1. Checklists for Poll Workers

States and counties should include simple checklists in their materials for poll workers. They should simulate the use of these checklists during training and update and revise the checklists to respond to poll worker feedback. They should also mandate that poll workers actually use the checklists on Election Day in the myriad tasks they undertake.

One significant benefit of checklists is that they generally reduce the amount of discretion that a poll worker can exercise in completing a task. Many Election Day errors result from poll workers improperly using their discretion to administer an election regulation. Checklists can reduce that discretion by requiring poll workers to follow a particular order to accomplish various steps in the voting process.

Although they represent an addition to current procedures in processing voters, checklists will not increase the overall wait time on Election Day; in fact, a checklist’s streamlined process will mean that election officials can more quickly handle voters with problems. In addition, any marginal extra time a checklist might require is certainly offset by the benefits of smoother election administration.

Several poll worker processes can benefit from checklists. First, there should be a checklist for preparing the precinct before the polls open. This should be a READ-DO checklist, which requires poll workers to pause along the way, read each step, and then complete the task before moving on to the next step. This process will ensure that the poll worker does not miss something important. A READ-DO checklist makes sense in this setting because timing is not much of a concern, meaning that the poll worker has the luxury of stopping at each step before moving on to the next one. This checklist should include items such as (1) ensuring that each machine is on and working a sufficient time before the polls open, (2) checking to see if there are enough paper ballots and other supplies available, (3) posting the required signage, and (4) ensuring that the polling place is accessible for voters with disabilities. Many jurisdictions already include these

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194. See Alvarez & Hall, supra note 28, at 496.
195. See supra Section V.B.
kinds of checklists in their training guides,\textsuperscript{196} so the key here is to update them for each election cycle to respond to anything that occurred previously.

Next, election administrators should create checklists for processing voters during the day. For most “regular” voters, this can consist of a simple DO-CONFIRM checklist posted at the poll worker table. When using a DO-CONFIRM checklist, the poll worker completes all tasks required when checking in a voter before referencing the checklist to make sure nothing was missed. Poll workers will process hundreds or thousands of these voters throughout the day, making it a routine activity that would benefit most from a check at the end for each voter, without causing significant delays.\textsuperscript{197} For instance, in a state that requires a voter ID, the checklist could provide the following:

- Voter name is in poll book
- Voter is not marked as requesting absentee ballot
- Voter is not marked as voting already
- Address in poll book is correct
- Voter presents acceptable identification

A pause before the poll worker moves on to the next voter, for a glance at the DO-CONFIRM checklist to ensure everything was done properly, will help alert poll workers to errors in this routine process. It will also assist poll workers in ensuring that they treat each voter uniformly.

When there is a problem with one of the five items in the simple checklist for “regular” voters, however, a READ-DO checklist would work best so that the poll worker can carefully go through each step in the less-than-routine process of handling the voter’s issue. There should be a separate checklist for each problem the voter might present. In the situation from above, then, there should be five READ-DO checklists: one to use if the voter’s name is not in the poll book, one if the poll book says the voter requested an absentee ballot, one if the poll book says that the individual has voted already, one if the voter’s address is incorrect, and one if the voter does not have the correct form of identification.

\textsuperscript{196} See supra Part III.

\textsuperscript{197} Requiring the poll workers to stop and work through a READ-DO checklist for every routine voter—forcing a pause for each step—would slow down the process considerably. This is also not the area in which mistakes are common, so there is no need for multiple pause points during the checking-in process.
For instance, if the voter’s name is not in the poll books, the READ-DO checklist could provide the following, which is taken from Ohio’s Processing Voters Flowchart:

☑ Check the precinct street directory

☑ If address is in precinct street directory, give voter provisional ballot

☑ If address is not in precinct street directory, check precinct voting location guide. Direct voter to the correct precinct

☑ If voter insists on voting at this precinct, give voter provisional ballot but advise that vote will not count if voter does not live in precinct

If the voter’s name is in the poll book, but the address in the poll book does not match the voter’s stated address because the voter moved within the precinct, the READ-DO checklist could provide:

☑ Check the precinct street directory to ensure new address is in precinct

☑ Ask for acceptable identification

☑ Give voter new voter registration form

☑ Provide regular ballot

The previous two checklists could have prevented the significant poll worker error that was the subject of lengthy litigation in Hamilton County, Ohio over a Juvenile Court Judge election. In that case, many voters used provisional ballots in the wrong precinct because poll workers directed them to the wrong tables at the multi-precinct polling location. At the precinct’s table, the poll workers gave the voters provisional ballots instead of looking up their addresses in the precinct street directory. If the poll workers had looked up the addresses, they would have sent these voters to cast regular ballots at their correct precinct—which was across the room! Actively working through a checklist that sets out each step likely would have avoided this kind of mistake and the subsequent litigation that it caused.

Closing the polls and securing the ballots are additional areas in which checklists can help. Indeed, many jurisdictions already use

198. See HUSTED, supra note 95, at 28.
201. Id.
checklists at this step in the process, but they are either poorly designed or focus on less important items like creating an “Inspector’s statement” as opposed to processing the vote totals accurately. Wisconsin’s post-election checklist, for example, has nineteen items listed in two columns for poll workers to complete. This is too long. Moreover, this checklist does not address an issue that has plagued at least one county in Wisconsin—accurately reporting the vote totals.

On the evening of the 2011 Wisconsin Supreme Court election, the Waukesha County Clerk, Kathy Nickolaus, initially omitted over 14,000 votes that she “lost” on her computer, which changed the outcome of the race. She made a human mistake, probably because she was rushing the process on election night in an effort to declare who won, resulting in missing votes in the reported totals. As an independent investigation revealed,

It appears [that] Ms. Nickolaus simply inadvertently uploaded a blank template into the database that did not contain the vote totals for Brookfield and posted inaccurate results on election night. While this error may be fairly characterized as a human error, the problem appears to stem from potentially larger issues.

Ms. Nickolaus was the sole person responsible for uploading the spreadsheet/templates into the Access 2007 database on election night. There was not a system in place to check for potential errors in this process. Ms. Nickolaus also was responsible for posting the results to the website. By her own account, she failed to go back and double check the numbers before posting the final results. The Waukesha County Clerk’s Office failed to have adequate systems and procedures in place to receive and verify vote totals before posting the results to the public.

A checklist for county clerks, which would detail the steps for tabulating each precinct’s totals, double checking the results, and then conducting a separate verification of these numbers, would have reduced the potential for this kind of human error.

202. See, e.g., ELECTIONS DIV., supra note 115, at 104.
203. Id. at 134.
205. Davey, supra note 3. In the April 2012 primary, the same county’s reporting program would not function, requiring workers to count the vote totals manually. Walker, supra note 204.
Some jurisdictions do try to employ checklists in the election process, but their actual use is inconsistent. For example, a report on provisional ballots cast in Philadelphia during the 2012 presidential election noted that the “Pennsylvania Department of State created a checklist of procedures to be completed by the counties prior to finalizing voter information and printing the poll books.” However, the city commissioners in Philadelphia admitted that “the checklist is not formally signed-off by the individual performing the procedures.” This had a tangible result: the officials preparing the poll books in Philadelphia failed to change the status for voters who were seventeen years old when they registered but eighteen by Election Day from a pending file to actively registered. This meant that these voters were not officially registered to vote. Properly using a READ-DO checklist would have avoided this problem, as it would have required election officials to pause at the key moments to ensure they were completing each step.

Thus, even when jurisdictions have checklists, election administrators need to ensure widespread and uniform use. Officials can encourage poll workers to follow these checklists through training simulations, by posting the checklists at the spots where the person would actually use them (such as at the poll worker table), and by emphasizing their importance even when the tasks seem ministerial. Local election officials should adopt well-vetted checklists and create a professional culture among poll workers that encourages their use.

Checklists, when used at various points throughout the voting process, can benefit election officials, poll workers, and ultimately voters. Each checklist must be specific to the particular task at hand, tested in hands-on simulations, and revised accordingly. State and local election officials know the kinds of issues poll workers face and the types of mistakes they are most likely to make. Using the framework and models offered above, these election professionals can create checklists attuned to the needs of their precincts. They should refine and tweak the checklists based on simulations and poll worker feedback. They should then update their checklists each election cycle to respond to issues that may have arisen. Further, those jurisdictions that have the resources to take on the task initially can share their checklists with other jurisdictions, spreading these best practices throughout the country. None of this is expensive, but

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207. See OFF. OF THE CONTROLLER, supra note 48, at 9.
208. Id.
209. Id.
210. See GAWANDE, supra note 6, at 124.
it takes a commitment from election officials who want to provide user-friendly materials to poll workers. This small step can reap big rewards in the form of smoother election administration.

2. Checklists for Voters

Voters can also benefit from checklists regarding their responsibilities in casting a ballot. There could be a checklist for absentee balloting as well as a checklist for in-person voting. States could mail these checklists to every voter and make them available electronically and could also sponsor advertisements to encourage their use.

For absentee balloting, a state could create a checklist for the steps a voter must take to cast his or her ballot successfully and include it with the absentee ballot instructions. This checklist would help voters avoid mistakes that may render their ballots invalid. Using Minnesota’s rules for absentee balloting as an example, a balloting checklist for these voters might provide:

- Request absentee ballot using absentee ballot request form (or online)
- After receiving ballot, find a registered voter or notary willing to serve as a witness
- Have witness or notary observe that the ballot is blank before you fill it out
- Have witness or notary observe you filling out the ballot (from a distance)
- Place ballot in absentee ballot envelope
- Sign and date ballot envelope in correct spot
- Have witness sign and date ballot envelope in correct spot
- Have witness write his or her mailing address where indicated
- If witness is a notary, have notary place seal in correct spot
- Return ballot envelope to county clerk via mail by Election Day, in person by 5:00 on Election Day, or by someone else in person by 3:00 on Election Day

To be sure, Minnesota’s absentee balloting instructions now already provide all of this information, albeit in a numbered list in-

Instead of a formal checklist. But that is only after Minnesota “clarified ballot instructions for voters” following the 2008 Senate recount and post-election litigation that revolved around mistakes in the absentee balloting process.

In that 2008 election, many voters failed to “strictly comply” with the absentee balloting procedure. For example, some voters failed to sign the absentee ballot envelope in the designated space. Other voters made mistakes with respect to the witness or notary information they needed to provide on the ballot envelope. These ballots were the main focus of the post-election dispute between Republican Norm Coleman and Democrat Al Franken, which was finally resolved in Franken’s favor over seven months after Election Day when the Minnesota Supreme Court ruled that ballots were invalid if the voters did not “strictly comply” with the absentee balloting rules. It is not surprising that thousands of voters made mistakes when completing their absentee ballot envelopes. The instructions that the state sent with the absentee ballots were lengthy, wordy, written in paragraph form, and generally difficult to follow.

A clearer sequence for voters back in 2008 might have avoided some of these troubles, which is surely why Minnesota has re-written its absentee ballot instructions to be more user-friendly. Minnesota should go further by crafting its instructions as a READ-DO checklist so that voters stop at each crucial point in the process. Other states should follow Minnesota’s lead and revise their absentee balloting instructions to be clearer and easier to use. A simple checklist can avoid disenfranchisement due to mistakes and reduce the likelihood of post-election litigation.

Even the typical in-person voter could benefit from a checklist. States should create checklists for voters and then encourage voters to consult them before they go to the polls—perhaps by mailing them to every registered voter and making them available at the polling

213. Stassen-Berger, supra note 211.
215. See Levitt, supra note 9, at 127.
216. See id.
217. See In re Contest of Gen. Election, 767 N.W.2d at 462.
sites. States could use the following voter checklist as a guideline, adding whatever state-specific instructions are necessary to this template:

Before heading to your precinct on Election Day, complete the following tasks:

☑ Ensure you are registered to vote by checking your registration status on the voter registration website (applicable for all states besides those that have Election Day registration, such as Minnesota)

☑ Find your correct precinct by visiting the voter registration website

☑ Know the hours the polls will be open, and ensure you have time in the day to go to the polls

☑ Ensure you have the proper form of identification with you before you leave (if the state has a voter ID requirement)

☑ Inform yourself of the candidates and their positions, and familiarize yourself with the language and purpose of any ballot referenda

There could also be a checklist for the steps the voter should take at the polling place, walking them through the check-in process and how to use the voting machine.\(^{219}\) For instance, if the voting machine requires a voter both to select the candidates and also click “vote” on a final confirmation screen, a checklist could lay out those steps. Listing this step on a checklist would reduce the likelihood that a voter might forget to click the final “vote” confirmation button, a common voter error.\(^{220}\) It also would have prevented the election fraud that occurred in eastern Kentucky, where complicit poll workers noticed when voters failed to confirm and went into the voting booth afterward to change their votes.\(^{221}\)

Of course, as with any of these checklists, the particular checklist a state or county creates would have to reflect the current law and voting process of that jurisdiction. Further, election officials will have to educate the public and convince voters of the benefits of using the checklist, pointing out that by taking a couple of minutes to follow the checklist, they are less likely to have problems at the polls and more likely to have their votes included in the count.

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219. State and local officials should also create specific checklists for voters with disabilities.

220. See Estep, supra note 80.

221. Id.
Creating a checklist for voters can make election administration easier for election officials. If voters have an easy-to-use guide for how to cast their ballot, they are less likely to have questions, slow up lines, or make mistakes. In turn, the rate of provisional ballots will go down. Fewer mistakes will produce a more accurate voting and counting process. A well-designed checklist that voters actually use could also reduce the number of disputed ballots in a post-election contest. Checklists work to ensure people do not skip important steps in a complex process. If states educate voters on using a checklist, everyone benefits.

Implementing checklists for Election Day is an inexpensive, non-partisan solution to reform election administration. It will take time and foresight, but few other resources. Election officials can create the checklists using the guidelines and models above, test them in simulations, and revise them accordingly. They can then share their efforts with other election officials. Because the idea is scalable and adoptable across jurisdictions, it just takes one locality to try this out; others will surely follow suit once they see the benefits.

Both Democrats and Republicans should support this idea, as it will help to ensure a smoother and more accurate voting process and does not obviously benefit one party over the other. Election officials will like it because it will make their precincts operate more smoothly. And voters will support any measure that makes Election Day easier. Although checklists cannot fix every problem with our elections, they offer a positive step in helping poll workers and voters avoid mistakes as they wade through the complexities of the voting process.

VI. Conclusion

Sometimes the simplest solutions are the best, even for complex problems. This certainly rings true for Election Day. The voting process involves a complicated web of rules and regulations, run largely by poll workers who are not professional election administrators. Poll workers are faced with myriad situations in which voting can go awry, and voters must comply with various requirements to ensure their votes count. But poll workers and voters are not given simple tools to help them through the process. Instead, the training guides poll workers receive are lengthy, comprehensive, and difficult to use in the heat of the moment when an issue arises. It is no wonder that poll workers, other election officials, and voters make mistakes in every election, which lead to long lines and lost votes. A simple checklist can supplement these materials and help to avoid the human errors that occur in elections. Checklists have helped improve outcomes in various private sector industries; elections can also bene-
fit from these tools. Further, it is hard to object, on political or other grounds, to a jurisdiction using a checklist to fix its voting system. Well-designed and well-vetted checklists are therefore the perfect non-legal solution to the legal and policy problem of reducing errors in the operation of our elections. In a time in which policymakers are searching for how to remedy the voting woes in our country, checklists provide a simple, non-legal, non-partisan, and low-cost idea to improve election administration.
This symposium piece tackles an important issue in campaign finance: the relationship between coordinated expenditures and corruption. Only one form of corruption, the quid pro quo, is constitutionally significant, and it has three logical elements: (1) an actor, such as an individual or corporation, conveys value to a politician, (2) the politician conveys value to the actor, and (3) a bargain links the two. Campaign finance regulations aim to deter quid pro quos by impeding the first or third element. Limits on contributions, for example, fight corruption by capping the value an actor can convey to a politician. What about limits on coordinated expenditures? By preventing coordination on large expenditures like television ads, the law turns very useful support into less useful support, reducing the value an actor can convey. But actors can surmount this with more money: $1 million spent on less useful ads can convey a lot of value, often more than smaller amounts spent on very useful ads or contributions. Limits on coordination may also inhibit bargaining, the third element of a quid pro quo, but again, sophisticated actors can surmount this: they can bargain without discussing the substance of any expenditures. So coordination regulations cannot deter much corruption, at least not when wealthy and sophisticated actors are involved, the very actors who cause the most concern. Consequently, coordination regulations may violate the Constitution. This is not because coordinated expenditures do not corrupt but because the regulations do not deter. Solving this problem requires more than a broader set of regulations. It requires confronting a fallacy at the heart of campaign finance: the belief that coordination relates in an operational way to corruption.

I. INTRODUCTION

In *Citizens United v. Federal Election Commission,* the Supreme Court concluded that independent political expenditures do not cause quid pro quo corruption. Because preventing such corruption is the only permissible justification for restricting money in politics, the
Court held that the government cannot limit independent expenditures.4 The case invalidated many rules on political spending, including spending by corporations on ads supporting candidates, and prompted sharp criticism. Politicians, scholars, and others worried that the decision would inject enormous sums into American politics.5 As President Obama declared, the Court “open[ed] the floodgates for special interests . . . to spend without limit in our elections.”6

Since the decision, and beneath the cacophonous debate about money in politics, a more technical, legal dispute has simmered. The government cannot limit independent political expenditures, but it can (and does) limit non-independent expenditures—known as coordinated expenditures—because those, in the Court’s view, can cause corruption. This raises a question: how to distinguish the two?7 Federal law draws the line by asking if the politician directed the expenditure, either by requesting it or dictating its content.8 If the answer is yes, then the expenditure was coordinated.

Critics claim that this approach opens a loophole.9 To illustrate, suppose the owner of an oil company gives money to a super PAC run

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5. See, e.g., id. at 454 ("Corporations . . . have vastly more money with which to try to buy access and votes.") (Stevens, J., dissenting); Michael S. Kang, The End of Campaign Finance Law, 98 VA. L. REV. 1, 30 (2012) ("When . . . independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions."); Trevor Potter & Bryson B. Morgan, Campaign Finance: Remedies Beyond the Court, 27 DEMOCRACY J., Winter 2013, at 38, 38 ("The immediate impact of Citizens United and subsequent cases was a dramatic increase in the amount that outside groups . . . could raise and spend in federal elections."); John McCain Blasts Citizens United Ruling, HUFFINGTON POST (Jan. 12, 2012, 8:35 AM) (quoting John McCain), http://www.huffingtonpost.com/2012/01/12/john-mccain-citizens-united-super-pac_n_1201425.html ("I predict to you that there will be huge scandals associated with this huge flood of money.").


7. See Daniel P. Tokaji & Renata E. B. Strause, The New Soft Money: Outside Spending in Congressional Elections, 63 (2014) ("Without a doubt, the questions about the current landscape that prompted the most animated responses concerned coordination between campaigns and outside groups. . . . The challenge in this critical area of campaign finance law is to grapple with the gap between the line the law draws and the line outside observers expect it to draw."); see also Eliza Newlin Carney, The Citizens United Ruling in the Real World, NAT’L J. (Jan. 25, 2010) ("The biggest unanswered question is what defines coordination between a corporation, union or other political player and a candidate.").

8. We discuss federal law in detail infra Section II.B.

by a politician’s friend. The super PAC then uses the money to air television ads supporting the politician. Neither the company owner nor the friend consulted the politician, and so the politician did not direct the expenditure, and that makes the expenditure independent. But because the friend knows the politician and his electoral strategy, the expenditure benefits the politician as much as a coordinated ad—and can corrupt like one (think favorable oil regulations). This means politicians and their benefactors can coordinate as a matter of fact without coordinating as a matter of law. As one observer put it, “noncoordination is a joke.”

Prominent voices have called for reform, advocating new and stricter approaches to regulating coordination. Their proposals assume that the concept of coordination makes sense; it just needs broader reach. In other words, they accept that “whole, total, true” independence of expenditures and candidates would stymie corruption, just as the Supreme Court has said, but they argue that existing coordination rules fail to achieve that level of independence.

We believe this reasoning is faulty. Quid pro quo corruption has three necessary elements: (1) a conveyance of value from an individual to a politician, (2) a conveyance of value from a politician to an individual, and (3) a bargain linking the two. By putting distance between individuals and politicians, coordination rules can make it harder for the former to determine what would be very valuable to the latter (perhaps a television ad during primetime) and what would be only a little bit valuable (perhaps a radio spot about the environment). This distance decreases the effectiveness of individuals’ expenditures (they may run the radio spot), which reduces the

http://www.huffingtonpost.com/2014/03/13/obama-super-pacs_n_4958485.html (“Right now our campaign finance system is more loophole than law, and nowhere is that more apparent than what constitutes ‘coordination’ . . . .”); see also Richard Briffault, Coordination Reconsidered, 113 COLUM. L. REV. SIDEBAR 88, 93-94 (2013) (observing that coordination rules “reflect naive thinking about the way a candidate . . . and a supportive organization can coordinate” given the modern ease of communicating ideas through the press and social media); Richard Posner, Unlimited Campaign Spending – A Good Thing?, BECKER-POSNER BLOG (Apr. 8, 2012), http://www.becker-posner-blog.com/2012/04/unlimited-campaign-spending-a-good-thing-posner.html (pointing out that allies of a candidate can figure out what will be most helpful to the candidate “without even talking to the candidate or to party officials”).

10. Kyle Langvardt, The Sorry Case for Citizens United: Remarks at the 2012 Charleston Law Review and Riley Institute of Law and Society Symposium, 6 CHARLESTON L. REV. 569, 574 (2012); see also Potter & Morgan, supra note 5, at 40 (“FEC regulations that govern whether a group is considered to ‘coordinate’ its expenditures with a candidate or political party are so permissive that they have proven more apt as a source of comedic inspiration than anything else.”); The Editorial Bd., Editorial, The Line at the ‘Super PAC’ Trough, N.Y. TIMES (Feb. 15, 2014), http://www.nytimes.com/2014/02/16/opinion/sunday/the-line-at-the-super-pac-trough.html (calling single-candidate super PACs “a form of legalized bribery” and calling the prohibition on their contact with candidates “a joke”).

11. See infra Section II.C.

12. See Potter & Morgan, supra note 5, at 40.
value conveyed. In theory, this should deter corruption by stifling the first element of quid pro quo corruption—the value conveyed to the politician. In practice, however, deterrence is limited because one can offset a drop in effectiveness with more money. Spending $1 million on a somewhat effective ad can convey a lot of value, more than a smaller amount spent on a very effective ad. Alternatively, coordination rules, by putting distance between individuals and politicians, can make it harder for them to communicate and negotiate. In theory, this should deter corruption by stifling the third element of quid pro quo corruption—the bargain. But again, this fails in practice. Coordination rules do not target bargaining effectively, and it is not clear that they could.

These observations lead us to a tentative conclusion: coordination rules simply cannot deter much corruption, at least not when wealthy and sophisticated actors—the very actors who cause the most concern—are involved. As a result, coordination rules may violate the Constitution. This is not because coordinated expenditures do not corrupt but because the coordination rules do not deter. They interfere with political speech without combating much corruption.

This problem cannot be resolved with a broader set of regulations, or even with a broader definition of corruption. Instead, it requires confronting a fallacy of the Supreme Court’s making at the heart of campaign finance: the belief that coordination relates in an operational way to corruption.

II. BACKGROUND: THE COORDINATION CONTROVERSY

Corruption comes in many forms, but only one, according to today’s Supreme Court, has constitutional significance: the quid pro quo. The quid pro quo—in a typical case, money for votes—has a long history in American politics. George Washington bought votes with liquor, and Spiro Agnew accepted hundreds of thousands of dollars in bribes. More recently, Congressman Randy Cunningham


14. See McCutcheon v. FEC, 134 S. Ct. 1434, 1441 (2014) (“Any regulation must instead target what we have called ‘quid pro quo’ corruption or its appearance.”); Citizens United v. FEC, 558 U.S. 310, 359 (2010) (“When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”).


traded defense contracts for a Rolls Royce, and the FBI found $90,000 of dirty money in Congressman William Jefferson’s freezer.

Federal bribery law prohibits quid pro quo corruption, but many consider that insufficient on its own because the crime is difficult to prove. As the Supreme Court wrote in Buckley, bribery laws “deal with only the most blatant and specific attempts of those with money to influence governmental action.” Congress has responded to this problem with campaign finance regulations, which serve as “prophylactic controls,” meaning they do not punish corruption ex post but aim to prevent it ex ante. They do so by limiting the flow of corruptive money to politicians. Of course, they also limit the flow of uncorruptive money, meaning they prevent some lawful political speech. The Court in Citizens United gestured to the tradeoff when it stated that contribution limits “are preventative, because few if any contributions to candidates will involve quid pro quo arrangements.”

Recognizing that Congress designs campaign finance regulations to act as prophylactics sharpens the analysis. Before explaining why, we examine some other legal details.

A. Basics of Campaign Finance

The law distinguishes contributions and expenditures. In brief, a contribution refers to money given to a campaign, while an expenditure refers to other money spent to influence an election. The law divides expenditures into two types, independent and coordinated.

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19. See 18 U.S.C. § 201(b) (Supp. I 2012) (The statute applies to whoever “directly or indirectly, corruptly gives, offers or promises anything of value” to a public official with intent to influence an official act, or to a public official who “directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value” in return for being influenced regarding an official act.).


21. See, e.g., McCutcheon v. FEC, 134 S. Ct. 1434, 1458 (2014) (“It is worth keeping in mind that the base [contribution] limits themselves are a prophylactic measure.”). The prophylactic nature of the regulations may make these types of offenses easier to prove by describing them in relatively broad terms.

22. Of the speech that gets limited, the relative shares of corruptive and un-corruptive speech depend, of course, on one’s definition of corruption.


25. See 52 U.S.C. § 30101(9) (Supp. II 2014); 11 C.F.R. §§ 100.110-100.114 (2015); Kang, supra note 5, at 5 n.11. To illustrate, donating $2000 to a candidate would constitute a contribution, and spending $2000 on a newspaper ad supporting the candidate would constitute an expenditure.
The next Section examines this distinction, but for now an example will suffice. If an individual runs a newspaper ad without any input from the politician it supports, then that individual makes an independent expenditure. If an individual runs the ad at the request of the politician, or if the politician dictates the ad’s content, then the individual makes a coordinated expenditure.

Congress has long imposed limits on both contributions and expenditures, and litigants have long challenged those limits on constitutional grounds. The government has defended the limits by arguing that it has an interest in combating corruption. In general, the Supreme Court has sided with the government on contributions and coordinated expenditures and the challengers on independent expenditures.

What explains the Court’s decisions? The answer lies in its understanding of corruption. The Court has recognized that states have an interest in preventing corruption and the appearance of corruption, where “corruption” means quid pro quos. Contributions, which involve the direct conveyance of money to campaigns, raise a

26. See, e.g., McCutcheon, 134 S. Ct. at 1444-45 (reciting the Buckley Court’s evaluation of “the constitutionality of the original contribution and expenditure limits set forth in FECA”).

27. See, e.g., Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam). The Supreme Court sympathizes with challengers’ claims, stating in Buckley: “[C]ontribution and expenditure limitations operate in an area of the most fundamental First Amendment activities.” Id. at 14.

28. See, e.g., id. at 26-27.


30. See Citizens United v. FEC, 558 U.S. 310, 356-58 (2010); Buckley, 424 U.S. at 47 (“The absence of prearrangement and coordination of an expenditure . . . alleviates the danger that expenditures will be given as a quid pro quo . . ..”).

31. See Buckley, 424 U.S. at 45 (invalidating limits on independent expenditures); Citizens United, 558 U.S. at 357 (same).

32. It also lies in the Court’s conclusion that independent expenditures are a purer form of political speech and merit greater protection. The Buckley Court “explained that expenditure limits ‘represent substantial rather than merely theoretical restraints on the quantity and diversity of political speech,’ while contribution limits ‘entai[l] only a marginal restriction upon the contributor’s ability to engage in free communication.’” Nixon, 528 U.S. at 413 (Thomas, J., dissenting) (alteration in original) (citations omitted) (quoting Buckley, 424 U.S. at 19, 20-21).

33. See Citizens United, 558 U.S. at 345 (“The Buckley Court recognized a ‘sufficiently important’ governmental interest in ‘the prevention of corruption and the appearance of corruption.’” (quoting Buckley, 424 U.S. at 25)). We focus on actual corruption but briefly address the appearance of corruption infra, Part IV.

34. See Citizens United, 558 U.S. at 359 (“When Buckley identified a sufficiently important governmental interest in preventing corruption or the appearance of corruption, that interest was limited to quid pro quo corruption.”).
substantial risk of quid pro quo corruption.\textsuperscript{35} Likewise with coordinated expenditures, which, because of the coordination, can “amount[] to disguised contributions.”\textsuperscript{36} In contrast, independent expenditures do not have such potential for corruption.\textsuperscript{37} As the Court wrote in \textit{Buckley}:

Unlike contributions [and coordinated expenditures], such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive. The absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.\textsuperscript{38}

The Court doubled down on this reasoning in \textit{Citizens United}. There the Court declared that “independent expenditures . . . do not give rise to corruption.”\textsuperscript{39} Because such expenditures do not corrupt, the government cannot limit them on anti-corruption grounds.\textsuperscript{40}

Hence the state of the law today: limits on contributions and coordinated expenditures exist at the federal level and in many states, but

\textsuperscript{35} See McCutcheon v. FEC, 134 S. Ct. 1434, 1460 (2014) (“[T]he risk of corruption arises when an individual makes large contributions to the candidate or officeholder himself.”); \textit{Buckley}, 424 U.S. at 26-27 (“[A] candidate lacking immense . . . wealth must depend on financial contributions . . . . To the extent that large contributions are given to secure a political quid pro quo . . . the integrity of our system of representative democracy is undermined.”).

\textsuperscript{36} \textit{Buckley}, 424 U.S. at 47.

\textsuperscript{37} The Court’s view of the corruptive value of these forms of speech is intertwined with its view of their expressive value. Professor Ortiz describes the “dual hydraulics” at work in this area, “a hydraulics of expression . . . and a hydraulics of influence.” Daniel R. Ortiz, Commentary, \textit{Water, Water Everywhere}, 77 TEX. L. REV. 1739, 1744 (1999). The shift from contributions to independent expenditures represents an “increasingly less efficient means of influence,” while “the Court believes the hydraulic efficiency of expression works in the opposite direction.” \textit{Id.} at 1745.

\textsuperscript{38} \textit{Buckley}, 424 U.S. at 47.

\textsuperscript{39} \textit{Citizens United}, 558 U.S. at 357. Many people reject this conclusion. See, e.g., W. Tradition P’ship v. Attorney Gen. of Mont., 271 P.3d 1, 35 (Mont. 2011), \textit{rev’d sub nom. Am. Tradition P’ship v. Bullock}, 132 S. Ct. 2490 (2012) (“I absolutely do not agree that corporate money in the form of ‘independent expenditures’ . . . cannot give rise to corruption or the appearance of corruption.”) (Nelson, J., dissenting); Briffault, \textit{supra} note 9, at 100 (“The Supreme Court’s insistence that independent spending does not pose dangers of corruption or the appearance of corruption has been doubtful from the start . . . .”); Michael W. McConnell, \textit{Reconsidering Citizens United as a Press Clause Case}, 123 YALE L.J. 412, 417 (2013) (“I find the majority’s sunny dismissal of the corrupting influence of independent expenditures wholly unpersuasive.”).

\textsuperscript{40} Some believe the Court’s conclusion is legal rather than factual, rendering empirical evidence moot. See Douglas M. Spencer & Abby K. Wood, \textit{Citizens United, States Divided: An Empirical Analysis of Independent Political Spending}, 89 IND. L.J. 315, 360-61 (2014) (“[T]he Court admitted that it did not care whether independent expenditures actually corrupt the political process because, in the Court’s eyes, independent expenditures cannot corrupt as a matter of law, any evidence to the contrary notwithstanding.”).
limits on independent expenditures—whether by individuals or corporations—do not and cannot exist because they violate the First Amendment.41

This overview uncovers a tension. Many actors spending money on elections prefer to make independent expenditures, as they are unlimited. But they also like to coordinate, as that increases the value of their spending to the politicians they support (they run the primetime television ad and not the radio spot). This tension has led to expenditures that toe the line between independent and coordinated and focused attention on where that line falls.

B. Coordination Defined

What counts as coordination?42 The question has “long stymied Congress and the FEC”43 and just about everyone else.44 Part of the problem is that the question has two parts. The first involves the Constitution. Following Citizens United, Congress can limit only one type of expenditure, a coordinated one. The constitutional question, then, is: what counts as coordinated for purposes of determining the scope of congressional authority?45 The second part involves existing federal regulations: assuming they are constitutional, what exactly do they mean? We focus on the second part, but eventually we will return to the first.

The Code of Federal Regulations defines a coordinated expenditure as one “made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized


42. We focus on current law. For a brief and helpful overview of the development of the law on coordination, see Meredith A. Johnston, Note, Stopping “Winks and Nods”: Limits on Coordination as a Means of Regulating 527 Organizations, 81 N.Y.U. L. Rev. 1166, 1175-79 (2006).

43. Carney, supra note 7.

44. See Bradley A. Smith, Super PACs and the Role of “Coordination” in Campaign Finance Law, 49 WILLAMETTE L. REV. 603, 606 (2013) (“There is, indeed, a great deal of confusion about what coordination prohibits and why.”); Posner, supra note 9 (observing that “the notion of ‘coordination’ is vague”).

45. We await an answer from the Supreme Court. See O’Keefe v. Chisholm, 769 F.3d 936, 941 (7th Cir. 2014) (“The Supreme Court has yet to determine what ‘coordination’ means. Is the scope of permissible regulation limited to groups that advocate the election of particular candidates, or can government also regulate coordination of contributions and speech about political issues, when the speakers do not expressly advocate any person’s election? What if the speech implies, rather than expresses, a preference for a particular candidate’s election? If regulation of coordination about pure issue advocacy is permissible, how tight must the link be between the politician’s committee and the advocacy group?”).
committee, or a political party committee.” The FEC operationalizes this definition with a three-prong test: payment, content, and conduct. The “conduct” prong, which is the source of controversy, involves the relationship between spender and candidate.

The FEC identifies five situations that, individually or together, satisfy the conduct prong. We summarize them. Consistent with the FEC, we refer to the expenditure in question as a communication.

1. The communication is created, produced, or distributed at the request or suggestion of the candidate.

2. The candidate is materially involved in decisions about a communication’s content, intended audience, specific media outlet, timing, frequency, size, prominence, or duration.

3. The communication is created after substantial discussions about the communication between the actor funding it and the candidate.

4. The actor funding the communication hires a commercial vendor (i.e., pollster or media consultant) who provided services to the candidate in the prior 120 days, and the vendor either uses or conveys to the actor information about the campaign material to the communication.

5. A person who worked for the candidate’s campaign in the prior 120 days conveys information about the plans or needs of the candidate to the actor funding the communication that are material to the communication.

46. 11 C.F.R. § 109.20 (2015); see § 109.21 (defining “coordinated communication”); TREVOR POTTER & MATTHEW T. SANDERSON, POLITICAL ACTIVITY, LOBBYING LAWS & GIFTS RULES GUIDE, 3D § 10:19, Westlaw (database updated Oct. 2014); cf. 52 U.S.C. § 30101(17) (Supp. II 2014) (defining an independent expenditure as one that is “not made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents”).

47. 11 C.F.R. § 109.21(a) (2015); FEC, COORDINATED COMMUNICATIONS AND INDEPENDENT EXPENDITURES 2-3 (2015), http://www.fec.gov/pages/brochures/ie_brochure.pdf. The first prong addresses payment: the expenditure must be funded by someone “other than a candidate, a candidate’s authorized committee, a political party committee or an agent of the above.” Id. at 3; see 11 C.F.R. § 109.21(a)(1) (2015). The second prong addresses content: “[T]he expenditure must be either express advocacy, an electioneering communication, or the republication of the candidate’s own materials.” Briffault, supra note 9, at 96 n.47.

48. Briffault, supra note 9, at 96 n.47 (“The real issue for single-candidate Super PACs is the conduct standard.”).


50. “A discussion is ‘substantial’ if information about the candidate’s or political party committee’s campaign plans, projects, activities, or needs is conveyed to a person paying for the communication, and that information is material to the creation, production, or distribution of the communication.” FEC, supra note 47, at 4 n.3; see 11 C.F.R. § 109.21(d)(3) (2015).
The FEC qualifies these situations in two ways. First, “agreement or formal collaboration between the person paying for the communication and the candidate . . . is not required” to satisfy the conduct prong. Second, except for when the candidate requests an expenditure (situation number one above), the conduct prong is not satisfied if the communication relies only on publicly available information.

An example may clarify. If an individual runs a newspaper ad without any interaction with or input from the candidate, then that constitutes an independent expenditure. That is true even if the ad includes a photo taken by the candidate’s staff, as long as the photo was publicly available. If the candidate requested or dictated the content of the ad, even without a formal agreement, then the ad constitutes a coordinated expenditure.

C. Controversy and Reform

In the newspaper example, the law may resonate with intuitions. The independent ad probably has less corruptive potential than the coordinated one, so it may seem sensible to impose limits only on the latter. But now consider the scenario from the introduction. An oil baron gives money to a super PAC run by a politician’s friend who, up until 121 days ago, worked for the politician. The super PAC runs a supportive ad. The politician did not request the ad, nor did she have any input on it, so the ad is not a coordinated expenditure. But because the friend knows the politician and her strategy, the ad benefits the politician like a coordinated expenditure. Now the law clashes with intuitions. The actual ad has the same corruptive potential as a coordinated ad, but the law classifies it as an independent expenditure that, according to the Supreme Court, does not and cannot corrupt.

This scenario is hypothetical, but it captures the flavor of real events. During the 2012 presidential election, Mitt Romney and top advisors to Barack Obama appeared at fundraisers for supportive super PACs. Those super PACs were run by former aids to those...
candidates. In 2010, the National Republican Congressional Committee publicly revealed its ad buy strategy, allowing outside groups to fill gaps in the schedule. Recently, politicians used anonymous Twitter accounts to provide polling information to outside groups running ads. In 2012, the independent group supporting Jon Huntsman raised $2.8 million, $1.9 million of which came from Huntsman’s father. Similarly, Space PAC, which supported Congressional candidate Gabriel Rothblatt, raised $225,000, all of it from Rothblatt’s parent. Rothblatt claimed that he had “taken pains” not to communicate with his parent, stating, “You don’t want to, in a casual conversation, cross a [coordination] line that can turn around and bite you.” A recent report concluded that hundreds of millions of dollars spent by outside groups in 2012 involved a “high degree of cooperation” between candidates and those groups. These activities and spending do not run afoul of the coordination limits. The candidates (apparently) have not requested expenditures, nor (apparently) have they provided input on them. This leaves many observers incredulous.

PACs, not to fundraise directly but to “draw an audience to their cause.” See Stein, supra note 9.


62. TOKAJI & STRAUSE, supra note 7, at 2.

63. The practice of posting polling information via anonymous Twitter accounts may be an exception. See Moody, supra note 58 (noting that the practice “raises questions about whether [Republicans and outside groups] violated campaign finance laws that prohibit coordination”).

64. See Bob Bauer, Coordinating with a Super PAC, Raising Money for It, and the Difference Between the Two, MORE SOFT MONEY HARD LAW (Jan. 27, 2014), http://www.moresoftmoneyhardlaw.com/2014/01/coordinating-super-pac-raising-money-difference-two/. Bauer explains:

To many unhappy observers of the state of contemporary campaign finance doctrine, the latitude of the Super PAC to operate with the support of allies of the candidate, former staff and friends, and to benefit from the candidate’s endorsement or fundraising, seems intolerably silly. So they say that the committee having this connection to the candidate cannot be “truly”
side groups routinely coordinate—and may corrupt—as a matter of fact, even if they do not coordinate as a matter of law.\textsuperscript{65} As Senator Kent Conrad stated, “[T]his whole idea well, oh, they don’t coordinate, therefore it’s really independent is just nonsense.”\textsuperscript{66}

Many observers have advocated reforms. Professor Richard Briffault argues that expenditures by groups who focus their support on only one candidate or a very small number of candidates and who have tight links to the candidate(s) should be considered coordinated.\textsuperscript{67} The American Anti-Corruption Act, drafted by former FEC Chairman Trevor Potter and promoted by Professor Larry Lessig, would broaden coordination rules.\textsuperscript{68} Minnesota’s Campaign Finance and Public Disclosure Board has concluded that candidates cannot solicit funds for supportive super PACs without crossing the coordination line.\textsuperscript{69} The list goes on.\textsuperscript{70}

Id. in \textit{Buckley’s} terms, though, it is, and any complaints should be directed there.


\textsuperscript{66} \textit{TOKAJI & STRAUSE, supra} note 7, at 65.

\textsuperscript{67} See Briffault, \textit{supra} note 9, at 97-98. This position is one aspect of Professor Briffault’s thoughtful proposal. Interested readers should consult \textit{Coordination Reconsidered} for the full proposal.


\textsuperscript{69} See Caleb P. Burns & Eric Wang, \textit{Minnesota Campaign Finance Board Adopts Stricter Position on Super PAC Coordination}, WILEY REIN LLP (Mar. 2014),
These proposals assume that the theory of coordination makes sense, it just needs broader reach. In other words, they assume that classifying more expenditures as coordinated, and therefore limited by law, would combat quid pro quo corruption. For that logic to hold, coordination and corruption must be meaningfully linked. But are they?

III. COORDINATION AND CORRUPTION

Consider again the three necessary, logical elements of quid pro quo corruption. First, an actor must convey value to a politician (the “quid”). The value could come in many forms, including a campaign contribution, a briefcase full of cash, or a favor. Second, the politician must convey value to the actor (the “quo”). This could include a vote on favorable legislation, a helpful call to a regulator, assistance promoting the actor’s product, and so forth. Third, a bargain must link the two (the “pro”). The actor’s conveyance must cause the politician’s conveyance and vice versa. The money buys the vote, and the vote buys the money.


Bribery laws punish the satisfaction of these elements: if they are met (or attempted), then the actor and politician go to prison. Campaign finance regulations impede the satisfaction of these elements. This follows from their prophylactic character. The regulations do not punish the crime of bribery but aim to prevent it by blocking one or more steps necessary for its consummation.

To illustrate, consider limits on campaign contributions. They do not impede politicians from conveying value to contributors, nor do they make it harder for individuals and politicians to bargain. Contribution limits do not address these activities (the quo and the pro) in any way. Instead, they limit the value contributors can convey to politicians. By prohibiting donations beyond a certain size—no big quid—they frustrate corruption.

Now consider limits on coordinated expenditures. They do not impede politicians from casting favorable votes, awarding lucrative contracts, making helpful calls, employing supporters’ relatives, or promoting products. Nor could they impede most of these activities, as most are fundamental to politicians’ jobs. The limits do deter politicians from providing direct input on expenditures. However, that involvement is not independently valuable to the makers of those expenditures in the corruption context. For bad actors, using politicians’ input to increase the effectiveness of their expenditures is just a means to an end. It seems clear, then, that limits on coordinated expenditures do not aim to prevent corruption by limiting the value that politicians can convey.

If the limits do not target the quo, they must target the quid or the pro. The Supreme Court thinks they do both. Recall Buckley, where the Court wrote, “The absence of . . . coordination of an expenditure . . . undermines the value of the expenditure to the candidate.” This implies that a coordinated expenditure conveys value. Limits on coordinated expenditures then, like limits on contributions, limit quids. The Court also wrote that the absence of coordination “allevi-
ates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” This implies that coordination facilitates bargaining—the pro—and limits on coordination prevent it. We consider these possibilities in turn. Before doing so, we note that discussions of coordination often blur the line between value (quid) and bargain (pro). Part of our objective is to sharpen that line. Doing so clarifies the theory behind coordination and its weaknesses.

A. Coordination and Quids

In general, politicians have better information about their campaigns than outsiders, meaning they can spend money in support of their campaigns more efficiently. This makes contributions especially valuable, as politicians can use them to maximal effect. So, too, with coordinated expenditures, which politicians can direct or influence to suit their needs. This explains why contributions and coordinated expenditures can act as quids—they convey value to politicians—and why campaign finance law limits them. Now consider independent expenditures. Without input from the relevant politician, who has superior information, such expenditures will be less effective. A

76. Id. (emphasis omitted).

77. For example, Hasen seems to offer a value theory, observing that a “candidate who raises funds for a group by definition is coordinating fundraising strategy with that group; the candidate is taking time to raise funds for the group rather than for his campaign.” Hasen, supra note 68, at 20. Presumably, the candidate is raising funds for the group because he expects the group’s expenditures to convey value to him. Ferguson also focuses on value and would allow expenditures to be treated as contributions if there are “reliable indications” that the “expenditure will provide sufficient utility or perceived utility to a candidate such that quid pro quo corruption becomes a strong concern.” Ferguson, supra note 70, at 510. But Ferguson also notes that his approach would leave the spender free to make any expenditure “as long as it does not collaborate with the candidate,” which suggests some focus on bargaining. Id. at 519 n.231. Smith, interpreting Buckley, offers a bargain theory, stating that “corruption is in the bargain.” Smith, supra note 44, at 618; see also Thomas R. McCoy, Understanding McConnell v. FEC and Its Implications for the Constitutional Protection of Corporate Speech, 54 DEPAUL L. REV. 1043, 1052 (2005) (“[A] restriction on coordinated expenditures . . . must be understood not as a restriction on the expenditures, but rather as a restriction on the action of ‘coordinating’ the speech with the candidate . . . .”). Bauer seems to focus on both value and coordination. See Bauer, supra note 64 (arguing that for an interaction between speaker and candidate to constitute coordination, it “must involve a matter of strategic significance . . . the core organizational strategy for persuading voters.”). Briffault seems to focus on value. See Briffault, supra note 9, at 91, 94 (arguing that single-candidate super PACs are essentially “alter egos for the official campaign committees of the candidates whom they exist[] to serve” and thus it is “unnecessary to establish coordination,” which we interpret to mean that value is conveyed even absent a bargain). Hasen criticizes Briffault’s analysis for “apparently conflating coordination with common purpose.” Hasen, supra note 68, at 19.

78. The Court’s analysis assumes that independent expenditures often do not convey much value and may even take away value. See Buckley, 424 U.S. at 47 (“Unlike contributions, such independent expenditures may well provide little assistance to the candidate’s campaign and indeed may prove counterproductive.”); Bauer, supra note 64 (“Hence the difference between the contribution and the independent expenditure: the
supporter running an independent ad may say the wrong thing or say it at the wrong time with the wrong images.\textsuperscript{79} Instead of conveying a lot of value, the expenditure conveys only a little.

This conventional account works in theory. To work in practice, the law must do a good job of sorting. Put differently, for coordination regulations to suppress the conveyance of value, expenditures designed with “inside” information from campaigns must properly be classified as “coordinated” and therefore limited. Does the law properly sort? Consider again, briefly, the five situations in which an expenditure satisfies the conduct prong of the coordination test.\textsuperscript{80} The first arises when the expenditure is “created, produced, or distributed at the request or suggestion of a candidate.”\textsuperscript{81} The other four arise when a politician or someone else connected to a campaign directly provides information to an outsider who uses that information when crafting an ad.

These situations capture many expenditures designed with inside information, but they do not capture all. The rules permit outsiders to use any inside information that politicians make public. Outsiders can listen to candidates’ speeches; check their websites; read their Facebook posts; follow their Tweets;\textsuperscript{82} or use statements, strategies, images, or videos that politicians have made publicly available.\textsuperscript{83} This means that outsiders can, without coordinating, get much of the information they need to make their expenditures effective. This is independent expenditure is fraught with the risk of failure, or worse, in advancing the candidate’s prospects.”). We will show that the logic behind that assumption is not strong.

\textsuperscript{79} See, e.g., Lee Drutman, \textit{Five Takeaways from a New Campaign Finance Report}, SUNLIGHT FOUND. (June 18, 2014, 10:00 AM), http://sunlightfoundation.com/blog/2014/06/18/new-soft-money/ (summarizing takeaways from a recent report, one of which being that campaigns “don’t like all the outside money,” as it sometimes causes candidates to lose control of their message or makes their campaign look “dumber and sillier”); James Hohmann & Burgess Everett, \textit{Weiland Escalates Feud with Reid}, POLITICO (Oct. 31, 2014, 11:56 AM), http://www.politico.com/story/2014/10/rick-weiland-harry-reid-feud-112375.html (noting that a Democratic Senate candidate said that the Democratic Senatorial Campaign Committee’s expenditures “hurt more than they helped”); Daniel Lippman, \textit{Year of the Regular Folk}, POLITICO (Sept. 15, 2014, 11:23 AM), http://www.politico.com/story/2014/09/year-of-the-regular-folk-110912.html (observing that sometimes campaign ads backfire when the “average Joes” featured on the commercial are not properly vetted and embarrassing information is later revealed about them).

\textsuperscript{80} See supra Section II.B.

\textsuperscript{81} See 11 C.F.R. § 109.21(d)(1) (2015); see also supra Section II.B.

\textsuperscript{82} See Briffault, supra note 9, at 94 (“Why do they have to meet when they can tweet?”).

what prompts observers to state that “there’s always coordination—the media is the coordination,” which makes non-coordination a “farce.”

To make this observation concrete, suppose that the value conveyed to a politician by political spending depends on the product of two numbers: the amount spent, and the Efficiency Factor, or “EF” for short. EF takes a value between -1 and 1, where higher values indicate greater efficiency. For contributions and coordinated expenditures, which have maximal effect, EF equals 1. Thus, a contribution of $2000 conveys $2000 in value. What about independent expenditures? An outsider with little knowledge of a campaign’s needs and strategies may spend $2000 on a clunky, independent ad. That expenditure may have an EF of just 0.1, meaning it conveys only $200 in value, or even a negative EF, meaning it takes value from the candidate. Here the Supreme Court is right: the absence of coordination undermines the value of the expenditure, reducing the risk of corruption. But now suppose the outsider has a lot of knowledge, all acquired from public sources, of the campaign’s needs and strategies. The outsider spends $2000 on a helpful ad with an EF of 0.9, and the ad conveys $1800 in value. That independent ad, which the Court tells us by definition cannot corrupt, looks suspiciously like a coordinated ad that can.

Much of the controversy over coordination reduces to a dispute about EF. Critics argue that outsiders can, without violating the regulations, collect enough information to run valuable ads. This means EF is large. We can understand reforms in the same terms. Proposals to broaden coordination rules by putting more distance between politicians and outsiders would make it harder for outsiders to acquire campaign information. This would reduce EF.

84. TOKAJI & STRAUSE, supra note 7, at 65.
85. To simplify, we assume that the maximum value an expenditure can convey to a politician is the face value of the money spent (in other words, EF cannot exceed 1). Likewise, we assume the most harm an expenditure can cause is the negative face value of the money spent (thus the smallest value of EF is -1). These assumptions keep the math simple without affecting the logic.
86. See, e.g., Briffault, supra note 9, at 93-94 (One of the several reasons offered by Briffault is that “[c]andidates and committees don’t have to talk . . . they can communicate through the press.”); Cummings, supra note 57 (describing how a congressional committee publicly revealed its ad buy strategy, allowing independent groups to use the information to the candidates’ benefit without violating coordination rules).
87. The American Anti-Corruption Act, for example, would count as coordinated and therefore limit any expenditure that was crafted with input from a family member or former colleague of the politician. See THE AMERICAN ANTI-CORRUPTION ACT, pt. 2, provision 7, at 7-8 (2015), https://represent.us/wp-content/uploads/2015/04/AACA-Full-Provisions.pdf (recommending that the FEC’s coordination regulations be revised).
Suppose critics are right, EF is too large.\textsuperscript{88} This means the law classifies some expenditures that are effectively coordinated—they use campaign information and thus convey a lot of value to politicians—as independent expenditures that do not and cannot corrupt. Can the law do better? Stricter coordination rules could further separate outsiders and politicians, but practical and constitutional hurdles limit this possibility. Unless the law prohibits candidates from publicizing their platforms and strategies, and outsiders from paying attention, then outsiders will always have enough information to make expenditures that convey at least some value. Stricter rules might drop EF to 0.6 or 0.3, but they almost certainly cannot drop it below zero.\textsuperscript{89}

This leads to a deep flaw in the coordination-rules-suppress-quids logic. Recall that the value conveyed by an expenditure equals the amount spent multiplied by EF. Reforms may shrink EF, but they cannot shrink the amount spent. \textit{Citizens United} holds that independent expenditures cannot be capped.\textsuperscript{90} As a result, outsiders who want to convey value to politicians can always do so by simply spending more. Suppose a politician, as part of a corrupt exchange, demands $50,000 in value. If EF equals 0.9, the outsider can convey that amount by spending about $56,000 on independent ads.\textsuperscript{91} If EF equals 0.5, the outsider must spend $100,000. As long as EF exceeds zero—as long as independent expenditures benefit politicians, even if just a tiny amount—then outsiders can convey the value necessary for a corrupt transaction.\textsuperscript{92}

EF almost certainly exceeds zero. The Supreme Court recognizes as much. In \textit{McCutcheon v. FEC},\textsuperscript{93} the Court stated the absence of coordination “undermines the value of the expenditure to the cand-
date. . . . But probably not by 95 percent.” 94 EF almost certainly will continue to exceed zero following any tightening of coordination rules. This means the law, now and always, sorts imperfectly. Some effectively coordinated ads will get treated as independent ads. Those ads, like contributions and coordinated expenditures, convey value and can serve as quids. In fact, because they are unlimited, they make better quids. 95 When EF equals just 0.1, an independent expenditure of $100,000—chump change in American politics 96—conveys $10,000 in value, much more than any lawful contribution. 97

One might respond that this argument goes too far. If coordination rules are somewhat effective and EF is small, then the rules provide some deterrent effect. If EF is 0.2, for example, conveying $1 million in value requires $5 million in expenditures. Many outsiders cannot afford such large amounts, or if they can, the quo they expect in return will not justify the expense. So while it may be true that, in theory, outsiders can convey value regardless of the (positive) value of EF, in practice they cannot or will not. It follows that coordination rules, even if they do not limit all valuable expenditures, limit some. Better to stop some corruption than none. 98

The response is valid, but note two points. As EF grows, the objection dissipates. Even after a tightening of coordination rules, EF might be close to 1. More fundamentally, to make this argument is to concede an irony of coordination: the law focuses on the least harmful targets. Coordination regulations make it harder for relatively poor outsiders to engage in corruption. They make it harder for outsiders whose corrupt acts will not benefit them much. Such acts probably do

94. Id. at 1454 (emphasis added) (citations omitted) (quotation marks omitted).
95. See Kang, supra note 5, at 30 (“When . . . independent expenditures can be made without restriction in very large amounts, the risk of corruption may even be greater than the risk from capped contributions.”).
98. As Brad Smith observes, “[N]o system will address every potential source of corruption, and . . . a regulatory regime can be effective without being even close to perfect.” See Smith, supra note 44, at 609.
relatively little harm to society. Coordination regulations do not deter outsiders with lots of money from engaging in very lucrative—and presumably very harmful—corruption.

B. Coordination and Pros

Corruption, at least the kind modern campaign finance law focuses on, requires a bargain. Someone must convey value to a politician in exchange for a favor and vice versa. The bargain could be explicit, as when conspirators agree to terms over dinner, or implicit, as when a “wink or nod” closes the deal. Coordination limits can deter corruption by frustrating bargaining. The Supreme Court believes they do exactly this, or aspire to, and others have described the Court’s reasoning in that manner. Professor Brad Smith uses the term “coordination” synonymously with “discussions and dealings between the parties.” Professor Larry Lessig explains the Court’s understanding of independent expenditures as follows: “There may be a quid. There may be a quo. But because the two are independent, there is no pro.

Do existing coordination rules frustrate bargaining? In theory, maybe a little, but in practice, almost certainly not. Recall, this time in reverse order, the situations in which an expenditure satisfies the conduct prong of the coordination test. The fifth and fourth situations arise when someone (not the politician) recently connected to a campaign provides information to an outsider that is material to that outsider’s ad or other expenditure. These situations have very little to do with bargaining. They do not prevent an outsider from hiring someone recently connected to a campaign—the kind of person who could negotiate a deal—nor do they prevent outsiders from talking directly to politicians. The third and second situations arise when the politician provides input on the contents or form of an expenditure.


100. See Smith, supra note 44, at 632. Smith uses this language to describe the Supreme Court’s reasoning, not necessarily his own.

101. Lawrence Lessig, Democracy After Citizens United, Bos. Rev. (Sept. 4, 2010), http://bostonreview.net/lessig-democracy-after-citizens-united. We understand Lessig to be explaining the Supreme Court’s reasoning, not accepting it.

102. See supra Section II.B.

103. In fact, these situations have almost nothing at all to do with bargaining. These conduct prongs would only apply if the common vendor (prong 4) or former staffer (prong 5) conveyed information to the outside group that is “material to the creation, production, or distribution of the communication.” 11 C.F.R. § 109.21(d)(4)(iii) (2015); see also 11 C.F.R. 109.21(d)(5)(ii) (2015) (same). The person can join the outside group, convey all sorts of “inside” information, and (illegally) negotiate a bargain with the candidate, all without violating these conduct prongs.
These situations cannot block much bargaining. For one thing, enforcement presents a challenge. Imagine a bad actor and a crooked politician prepared to engage in an illegal deal. All they need is a chance to bargain over details, like the exact contents of the ad that will serve as a quid. Will coordination rules cause them to pull back, or will they violate the rules under the safe assumption that not every conversation gets monitored? We suspect the latter. But suppose we are wrong and would-be criminals, for whatever reason, respect this particular rule and do not discuss the substance of the quid. As far as the coordination rules are concerned, they can still bargain; they just cannot discuss the substance of the expenditure.

To illustrate, suppose an outsider and a politician agree to a corrupt exchange. The outsider gets a favorable vote on a bill, and the politician gets expenditures worth $100,000 to her. How can the outsider convey the $100,000? The parties could coordinate on the contents of an ad. The ad would have an EF of 1, or close to it, and the outsider could fulfill his end of the bargain by spending $100,000, or only slightly more. Of course, that ad would violate the limit on coordinated expenditures. Alternatively, the parties could not coordinate on the contents of the ad. Instead, they could agree that the outsider would contribute money to a third-party group—say, a super PAC—that supports the candidate. The super PAC need not know about the illegal exchange; the parties surely would prefer that it not. The higher the super PAC’s EF, the less the outsider would have to contribute to convey $100,000. This exchange, though illegal, would not violate the coordination rules. Even if perfectly enforced, the rules mentioned so far would not address this kind of bargaining.

However, we are left with the first prong, which arises when the expenditure is “created, produced, or distributed at the request or suggestion of the candidate.” Although the fifth, fourth, third, and second situations in which an expenditure becomes coordinated would not capture the scenario just described, the first one would. Nonetheless, the first prong also has limitations. Enforcement again

104. See supra Section II.A.

105. Professor Rick Hasen makes these arguments: “[U]nscrupulous donors and candidates could agree to a bribe, with the money going to a[n outside] group committed to doing everything to elect the candidate. That [group] need not even know about the bribe[.]” Hasen, supra note 68, at 7. Disclosure requirements can facilitate this kind of illegal bargaining. The politician can confirm that the outsider contributed the money as promised by checking the FEC’s website. See generally Michael D. Gilbert & Benjamin F. Aiken, Disclosure and Corruption, 14 Election L.J. 148 (2015).


107. See supra Section II.B.
presents a challenge: can we monitor politicians’ utterances? Can we be sure Rothblatt and his parent, while barbequing in the family’s backyard, do not exchange a few words about expenditures? Setting that aside, bad actors could avoid this situation by not discussing expenditures. In the example, the outsider and politician could agree to the corrupt exchange while leaving the nature of the quid open-ended. Instead of agreeing to convey expenditures worth $100,000, they could agree that the outsider would convey $100,000 in value. The outsider could then opt to convey the value with expenditures. The coordination rules do not address this kind of corrupt bargaining.

Could tighter coordination rules make it harder for outsiders and politicians to bargain? Probably not, as practical and constitutional hurdles stand in the way. Bargaining proceeds through communication, and the First Amendment takes a dim view of limitations on communication. The law can forbid bargaining over expenditures and campaign strategy, but it cannot forbid discussions generally. Outsiders, politicians, and their low-profile agents can talk on the phone, exchange emails or texts, chat on the subway, exchange a few words at a fundraiser, or meet for drinks in a private backyard. These are settings in which corrupt bargaining may take place, and these are modes of communication that the law probably cannot—and for political reasons, almost certainly will not—reach.

IV. CoORDINATION AND THE CONSTITUTION

Recall that the constitutionality of campaign finance regulations turns on their potential to fight corruption.108 Recall also that the regulations serve as prophylactics,109 They supplement bribery laws, not by punishing corruption but by stifling one or more of its necessary elements. This means that courts, in assessing the constitutionality of such regulations, must consider their marginal effect on corruption. The question is not, how much corruption does the combination of bribery laws and campaign finance regulations prevent? The question is, how much corruption does the combination prevent above and beyond bribery laws alone?

Answering this question requires an omniscience that we sadly lack. But we can, as courts do, make headway with intuitions. Existing coordination rules cannot stifle a lot of quids. As discussed, the rules allow outsiders to gather information about campaign needs and strategies from public sources. This means their expenditures, even without any campaign contact, can be effective (EF is positive). Effectiveness plus the ability to make unlimited independent expenditures means outsiders can convey value to politicians. Candidates

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108. See supra Section II.A.
109. See supra Part II.
appreciate $1 million spent on somewhat useful (independent) ads, perhaps more than they appreciate smaller amounts spent on very useful (coordinated) ads.

Just as existing rules cannot suppress many quids, or many big ones, they cannot prevent much bargaining. As discussed, most of the provisions do not target bargaining, and bad actors can sidestep the provisions that do. They can bargain without discussing the details of an expenditure or without raising the possibility of an expenditure at all.

These intuitions suggest that existing coordination rules do not prevent much corruption, as bad actors can easily evade the limits. As a result, in the balance that determines the constitutionality of coordination rules, the weight on the “permissible” side of the scale may be light. Meanwhile, the weight on the “impermissible” side remains the same as always. Some non-corrupt outside groups, hoping to exercise their First Amendment rights, would like to coordinate with politicians, and coordination limits stymie them. How to weigh these pros and cons? We do not believe the Constitution provides a clear answer. Our point is simply that the constitutional argument for existing coordination limits may be weaker than commonly supposed. The problem is not that the limits chill a lot of speech (though they might), and the problem is not that coordinated expenditures do not corrupt (they might corrupt a lot). The problem is that the coordination rules hardly deter.110

One might respond that this reasoning, whatever its implications for existing coordination limits, can be disarmed with stricter rules. Broader regulations that reclassify many independent expenditures as coordinated would do a better job of combating corruption, which would in turn strengthen the argument for their constitutionality. Suppose, for example, that the government adopted Professor Briffault’s proposal to classify as coordinated, and therefore limited, all expenditures by groups who focus their support on only one candidate or a very small number of candidates and who have tight links to the candidate(s).111 To spend freely, groups would have to support more candidates and loosen their ties to them—no more former campaign managers on the super PAC staff. This might reduce the effectiveness of the group’s expenditures. Rather than relying on the former campaign manager’s insights about the politician’s needs, the group would have to resort to public sources. Of

110. Recall that our analysis focuses on actual corruption. We briefly address the appearance of corruption below.

111. Briffault, supra note 9, at 97-100. Again, we do not describe the proposal in full, and interested readers should consult Professor Briffault’s paper.
course, those sources are plentiful and easily accessible, so perhaps their effectiveness would not suffer much. EF may dwindle, but only by a little.

Rather than focusing on ties, one might focus on numbers. Requiring a group to support multiple candidates might make it harder to convey value. Giving $50,000 to a super PAC that supports one candidate benefits that candidate, or is likely to, in a way that giving the money to a super PAC that supports dozens of candidates may not. But this reasoning has a limit, too. If a politician sees an uptick in support from a group following a contribution to that group, he or she may reasonably infer that the support traces to the contributor. Even if not, this problem resolves with the usual antidote: more money. A politician who seeks $50,000 in value from a corrupt actor may not be satisfied by a contribution of $100,000 to a group that supports him and many other candidates. He might, however, be satisfied by a contribution of $500,000.

Dilemmas like these will infect any reform proposal that targets quids. As discussed, unless the government prevents politicians from broadcasting information, and outsiders from listening, those outsiders, or at least the wealthy ones capable of causing the greatest social harm, will have what they need to convey value. Stricter coordination rules cannot do much to suppress bargains either. No plausible, constitutional set of rules will prevent outsiders and politicians from conversing.

This suggests that the constitutional case for stricter coordination rules may not be so strong. Such rules cannot frustrate bargaining, and though they might make it harder to convey value, that effect, given the workarounds, could be small. Meanwhile, stricter rules would chill more speech. Depending on the magnitudes of these effects (and the weights one gives them on the First Amendment balance) the constitutional case for stricter rules might be weaker than that for existing rules.

The preceding arguments may look different if we shift focus from actual corruption to the appearance of corruption. Recall that states have an interest in preventing quid pro quos and the appearance of quid pro quos. Given the widespread dissatisfaction with the existing coordination rules, we doubt that they reduce the appear-

112. See id. at 97 ("If an organization is involved in multiple election contests, then donations to the organization cannot be said to go to the aid of a specific candidate. In that case . . . the link between a particular donor and a particular candidate is attenuated.").

113. Suppose, for example, that a group was required to support at least ten candidates. A donor could give the group $100,000, and the group could then spend $1000 supporting each of the first nine candidates, saving the remaining $91,000 for the tenth candidate.

114. See supra Section II.A.
ance of corruption in a meaningful way. If we are wrong, then the constitutional case for such rules is stronger than we have suggested. Similarly, if new, stricter coordination rules would reduce the appearance of corruption, then the constitutional case for those rules would also grow stronger.

Before carrying these ideas too far, however, consider the mechanisms through which coordination rules might improve appearances. One possibility is that the appearance of corruption correlates with actual corruption, so that as actual corruption declines appearances improve and vice versa. If that is the mechanism, and given the doubts expressed above about the ability of coordination rules to dampen corruption, we are skeptical that coordination rules, however strict, can improve appearances in a meaningful way. Another possible mechanism is more instinctual: politics just seems less corrupt with coordination rules in place. If that is the mechanism, then things get complicated—and possibly paradoxical. If coordination rules improve the appearance of corruption, and if improving appearances reduces vigilance and enforcement, then coordination rules can improve appearances while making actual corruption worse.

V. CONCLUSION: COORDINATION AS THE WRONG PATH

The foregoing analysis does not square with Supreme Court doctrine. Since Buckley, the Court has made clear that Congress can limit coordinated expenditures. Consequently, there must be a way to define “coordinated” in a constitutional way. Likewise, there must be a way to distinguish “independent” expenditures, which the government cannot limit, from the rest. But the Court has never tried to do this work, perhaps because the challenge is too great.

Consider the Court’s declaration in Citizens United: “[I]ndependent expenditures . . . do not give rise to corruption,” where corruption means quid pro quos. The term “independent”

115. For the possibility that an improved appearance of corruption might reduce actual corruption as the result of a “beneficial self-fulfilling prophecy,” see Adam M. Samaha, Regulation for the Sake of Appearance, 125 Harv. L. Rev. 1563, 1609-10 (2012) (“[T]he chance of a beneficial self-fulfilling prophecy counterbalances concerns about regulatory efficacy. . . . [A] favorable appearance would pull reality toward lower actual corruption levels.”). For that to be the case in this setting, coordination regulations would first have to improve the appearance of corruption.

116. This point relates to one developed by Gilbert and a coauthor in a separate paper. See Gilbert & Aiken, supra note 105 (suggesting laws requiring disclosure of campaign finance information can improve the appearance of corruption while worsening actual corruption).


118. Citizens United, 558 U.S. at 357.
cannot mean “non-corrupt,” or the reasoning becomes tautological. Instead, independent must mean an expenditure that does not convey a quid, involve a pro, or both.\footnote{119} Now the logic works, but the operational problem looms. The law cannot sort expenditures into the “independent” category based on whether the spender and politician actually bargained. We almost never know if they bargained, and if we know they did, then the government can prosecute them under bribery laws, rendering proper categorization of the expenditure moot.\footnote{120} Likewise, the law cannot sort them on the basis of whether there was an opportunity to bargain. While discussing the contents of an expenditure, an outsider and politician have an opportunity to bargain illegally. But that opportunity is one of many; they can bargain illegally just about any time. Expenditures that come after $x+1$ bargaining opportunities cannot raise significantly greater corruption concerns than expenditures that come after $x$ bargaining opportunities when $x$ is a half-dozen, twenty, or a hundred.

To see the depth of the problem in another way, consider what it would take for coordination rules targeting corrupt bargaining to serve as a prophylactic, that is, to deter corrupt bargaining that would not be deterred by bribery laws alone. An outsider and a politician would have to be prepared to negotiate a quid pro quo in violation of coordination limits but not prepared to discuss details of an expenditure in violation of coordination limits.\footnote{121}

\footnote{119. It could also mean an expenditure that does not involve a quo but, as discussed, that does not work in practice or seem to be the target of the law.}

\footnote{120. Federal bribery law only requires an offer of a favor. 18 U.S.C. § 201(b)(1) (2012).}

\footnote{121. If a violation of coordination rules were easier for the government to detect than bribery, or carried a severer sanction, or both, then an outsider and politician might behave as the sentence states. Perhaps these conditions could be satisfied, but it is hard to see how. The government can prosecute a person for bribery if they simply offer illegal favors. 18 U.S.C. § 201(b). We see no reason to believe that observing a conversation about coordination could be easier than observing a conversation involving an offer of illegal favors. Likewise, the sanction for coordination violations probably will not exceed the sanction for bribery. The sanction for bribery may include imprisonment for up to fifteen years, a fine the greater of three times the value of the bribe or the statutory maximum of $250,000, or both. See 18 U.S.C. § 201(b); Public Corruption, 51 Am. Crim. L. Rev. 1549, 1564-65 (2014). For coordination violations, civil penalties shall not exceed the greater of $7500 or the amount of the contribution or expenditure in question, or the greater of $16,000 or 200% of the amount involved for knowing and willful violations. See 11 C.F.R. § 111.24(a) (2015). Criminal sanctions for coordination violations are only appropriate if the violations were committed “knowingly and willfully,” and such sanctions may include prison sentences. See 52 U.S.C. § 30109(d) (Supp. II 2014) (formerly codified at 2 U.S.C. § 437g (2012)); Election Law Violations, 51 Am. Crim. L. Rev. 963, 979 (2014). However, the sanction for coordination violations is usually derived through a conciliation process, see 11 C.F.R. § 111.18 (2015), and most often leads to civil penalties, see Quick Answers to Compliance Questions, FEC, http://www.fec.gov/ans/answers_compliance.shtml#penalties (last visited Mar. 11, 2016). Punishment for coordination violations is “up to the six-member FEC – split evenly between Republicans and Democrats . . . .” Rachael Marcus & John Dunbar, Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce, CTR. FOR PUB. INTEGRITY (May 19, 2014, 12:19 PM),}
The law also performs poorly when sorting expenditures into the independent category by focusing on value. Here there are two choices: focus on EF, or focus on amount spent. By definition, coordination focuses on EF, which creates the problems discussed. Even broad definitions of coordination will not keep outsiders from gathering what they need, and this plus unlimited spending means they can reliably convey value. This dilemma presumably worsens as technologies change and politicians get better at publicizing, and outsiders at absorbing, key information.

One might respond that we have misdiagnosed the problem. The trouble is not with coordination rules per se but with coordination rules in a world where the only relevant form of corruption is quid pro quo corruption. Perhaps such rules would make more sense if the government had an interest in combating quid pro quos and also “the broader threat from politicians too compliant with the wishes of large contributors.” That was the state of the law before the Roberts Court. But we do not believe this is right. However corruption is defined, it presumably worsens when individuals can convey value to politicians and meet with them or their representatives for quiet conversations. As explained, coordination rules can do little to prevent these activities, at least when wealthy and sophisticated actors are involved. The flaws with coordination do not depend on particular definitions of corruption.

Perhaps all of these observations, troubling though they may be, just support the usual maxim that rules are under and over-inclusive. We have shown that coordination rules cannot capture some behaviors they should (corrupt speech) and capture others they should not (non-corrupt speech). Those deficiencies reduce but do not eliminate the value of the rules: surely they stop some corruption.

They probably do stop some corruption, but we have shown that they stop less—perhaps substantially less—than one might think. This does not mean coordination rules should be abandoned. But it does mean that their under-inclusiveness is worse than commonly supposed.

We should not assume that the Supreme Court, when it drew the line between coordinated and independent expenditures, understood the deficiencies with the coordination framework. Nor should we assume that the Court, had it understood the deficiencies, would nevertheless have drawn the line it did. Perhaps the Court, had it considered all of the above, would have concluded that the independ-
ent/coordinated distinction led down the wrong path, one that could not reduce corruption by much, and therefore made the constitutional structure unsound. Perhaps the Court would have selected the other choice, ignoring EF and permitting the government to limit the amount one could spend, whether that spending was in some sense coordinated or not. That may have chilled more speech, but it would have related much more logically to the problem of corruption.
REINING IN THE PURCELL PRINCIPLE

RICHARD L. HASEN*

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I. INTRODUCTION

About a month before the 2014 election, the United States Supreme Court issued a series of four extraordinary orders in election law cases. Without any explanation, the Court: stayed a district court order which would have required Ohio to restore extra days of early voting;¹ stayed a Fourth Circuit order (partially reversing a district court) which would have restored same-day voter registration and the counting of certain provisional ballots in North Carolina;² vacated a Seventh Circuit stay of a district court order barring Wisconsin from implementing its new strict voter identification law;³ and refused to vacate a Fifth Circuit stay of a district court order which would have barred Texas from continuing to use its new strict voter

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¹ Husted v. Ohio State Conference of NAACP, 135 S. Ct. 42 (2014) (mem.).
² North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014) (mem.).
³ Frank v. Walker, 135 S. Ct. 7 (2014) (mem.).
identification law. The district court, after a trial on the merits, had declared Texas’ law unconstitutional and in violation of the Voting Rights Act.

The orders appeared contradictory, for example by allowing strict voter identification requirements to be used on Election Day 2014 in Texas but not Wisconsin. But the apparent common thread, as suggested by Justice Alito’s dissent from the order in the Wisconsin case and by Justice Ginsburg’s dissent from the order in the Texas case, was the Supreme Court’s application of “the Purcell principle:” the idea that courts should not issue orders which change election rules in the period just before the election. This idea has appeared in earlier Supreme Court cases, most prominently in Purcell v. Gonzalez, a 2006 short per curiam case in which the Court vacated a Ninth Circuit injunction which had temporarily blocked use of Arizona’s strict new voter identification law. The Court in Purcell criticized the Ninth Circuit both for not explaining its reasoning and for issuing an order just before an election which could cause voter confusion and problems for those administering elections. In the 2014 election cases, the Court consistently voted against changing the electoral status quo just before the election. Ironically, given the Court’s criticism of the Ninth Circuit for not giving reasons in Purcell, the Court did not explain its reasons in any of the 2014 election orders.

In this Article, I argue the Supreme Court should rein in the Purcell principle. Certainly the potential for voter confusion and electoral chaos raise a strong public interest argument against last minute changes in election rules. But under normal Supreme Court remedial standards for considering stays and injunctions, the effect of a court order on the public interest is only one factor to consider. Indeed, in Purcell itself the Court cautioned that “considerations specific to election cases” should be a factor “in addition to [weighing] the harms attendant upon issuance or nonissuance of an injunction.”

Although the precise test the Court uses in these emergency situations is somewhat fluid and uncertain, there is no doubt that ordinarily the Court considers the likelihood of success on the merits and

6. Frank, 135 S. Ct. at 7 (Alito, J., dissenting) (“There is a colorable basis for the Court’s decision due to the proximity of the upcoming general election. It is particularly troubling that absentee ballots have been sent out without any notation that proof of photo identification must be submitted.”).
7. Veasey, 135 S. Ct. at 10 (referencing and criticizing the application of the Purcell principle to this case).
9. Id. at 4-5.
10. Id. at 4 (emphasis added).
relative hardship to the parties as two crucial factors in deciding whether to grant or vacate a stay or impose an injunction. By making the Purcell principle paramount, the Court runs the risk of issuing orders, which can disenfranchise voters or impose significant burdens on election administrators for no good reason. Had the Court applied all the ordinary appropriate factors for emergency relief to the four 2014 election cases, in addition to special concerns attendant in election cases, there is a strong argument it would have reached a different decision in at least the Texas case and potentially in the North Carolina case.

Part II of this Article explains the tests that the Court applies in considering emergency stays and related orders, arguing that the Purcell principle should properly be understood not as a stand-alone rule but instead as relevant to one of the factors (the public interest) the Court usually considers. Part III applies the proper standards to the four 2014 emergency election cases considered by the Supreme Court, arguing that the Court got it wrong in, at least, the Texas case and possibly in the North Carolina case. Part IV briefly argues that, regardless of whether the Supreme Court agrees with this call to rein in the Purcell principle, the Court should issue opinions, even weeks or months after the Court acts in an emergency elections case, explaining its reasoning. Such opinions would provide valuable guidance to lower courts considering election cases and help legitimize the Court’s actions by making them more transparent. It also might discipline the Justices to decide controversial cases more consistently.

II. SITUATING PURCELL IN THE USUAL PRACTICE FOR EMERGENCY STAYS AND INJUNCTIONS AT THE SUPREME COURT

A. The Supreme Court’s Usual Practice for Granting Stays, Vacating Stays, and Issuing Injunctions

Many Supreme Court practices and procedures are opaque and mysterious; the opacity recently got attention when the Court failed to explain its decision not to hear a large number of cases challenging the constitutionality of same-sex marriage bans and when it failed to explain its emergency orders in controversial voting and abortion cases.11

The Court’s practices and procedures for reviewing emergency stay and injunction requests are among the most mysterious, in part because the Court often decides these cases without written explanation. The Court’s formal rules describe only the mechanics of seeking stays and other emergency relief and not the substantive standards of review or any requirement of an explanation. A request for emergency relief ordinarily starts with an application directed to the Supreme Court Justice assigned as Circuit Justice to hear emergency matters from the Circuit. The Justice can decide the matter in chambers or refer it to the full Court for decision.\(^1\)

Although the Justices have stated a variety of standards for deciding on emergency matters, they share factors typical for court review of preliminary relief requests: likelihood of success on the merits, the potential for irreparable injury to both parties, and the public interest. They all also give some measure of deference to the decision of the lower court.\(^2\)

1. **Stays.**

Perhaps the most common articulation of the standard for reviewing a request to stay a lower court ruling is Justice Brennan’s statement in the *Rostker v. Goldberg* case.\(^3\) Individual Justices frequently


13. See SHAPIRO, supra note 12, § 17.II.13, at 898 (listing the factors the Court considers for stays and temporary injunctions); id. at 907-08 (“How much weight is given the ruling of the lower court will depend in large measure upon whether other factors to be considered leave the Circuit Justice certain or uncertain as to whether a stay should be granted. While not bound by the orders of the lower courts, the Circuit Justice will be inclined to accept the prior ruling if the matter is deemed a close one, but not if the balance of equities or the likelihood of reversal clearly call for a different result.”).

It does not appear that the Court has ever explained how the special standards for reviewing requests for emergency stays, vacating stays, and granting injunctions mesh with the usual “abuse of discretion” standard of review that an appellate court applies to a non-emergency review of a trial court’s decision on a preliminary injunction.


The principles that control a Circuit Justice’s consideration of in-chambers stay applications are well established. Relief from a single Justice is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct. In a case like the present one, this can be accomplished only if a four-part showing is made. First, it must be established that there is a “reasonable probability” that four Justices will consider the issue sufficiently meritorious to grant certiorari or to note probable jurisdiction. Second, the applicant must persuade me that there is a fair prospect that a majority of the Court will conclude that the decision below was erroneous. While related to the first inquiry, this question may involve some-
have cited the *Rostker* standard in in-chambers opinions as Justices decided stay requests as a Circuit Justice.\(^{15}\) Only recently, however, did the Supreme Court explicitly cite the *Rostker* test as the standard *the entire Court* applies in considering whether or not to stay a lower court order.

In the 2010 *Hollingsworth v. Perry* case,\(^{16}\) the Court considered a motion to stay a trial court order to broadcast live proceedings from the Proposition 8 same-sex marriage trial in San Francisco. In considering the stay request of same-sex marriage opponents, the Court set forth the *Rostker* standard:

> To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent. *Lucas v. Townsend* (1988) (Kennedy, J., in chambers); *Rostker* (Brennan, J., in chambers).\(^{17}\)

Although the *Hollingsworth* decision staying the trial court’s broadcast order split the Court 5-4, the dissenters articulated a substantially similar test for determining when the Court should grant a stay of a lower court order. The dissent’s main concern instead was what different considerations, especially in cases presented on direct appeal. Third, there must be a demonstration that irreparable harm is likely to result from the denial of a stay. And fourth, in a close case it may be appropriate to “balance the equities”—to explore the relative harms to applicant and respondent, as well as the interests of the public at large.

*Id.* at 1308 (citations omitted).

\(^{15}\) According to a Westlaw search conducted in January 2015, *Rostker* has been cited nineteen times in Court opinions, seventeen of which were in opinions from individual Justices whom were sitting as a Circuit Justice. The case was cited once by Justice Brennan (also joined by Justice Marshall) in a dissenting opinion from Justice Rehnquist’s decision to grant a stay. Heckler v. Lopez, 464 U.S. 879, 885 (1983) (Brennan, J., dissenting). *Hollingsworth*, discussed below, is the most recent Supreme Court case citing *Rostker*. Hollingsworth v. Perry, 558 U.S. 183 (2010) (per curiam). Justice Thomas, in a very recent statement joined by Justice Scalia, respected the denial of stay and also cited *Hollingsworth*’s recitation of the *Rostker* standard, writing: “I join my colleagues in denying this application only because there appears to be no ‘reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari.’ That is unfortunate.” Maricopa County v. Lopez-Valenzuela, 135 S. Ct. 428, 428 (2014) (citing *Hollingsworth*, 558 U.S. at 190). Justice Thomas’s statement was noteworthy because it made reference to, and criticized, the Court’s denial of certiorari in a number of same-sex marriage cases. See *id.* For more on stay standards, see SHAPIRO, supra note 12, § 17.II.3, at 877-78.

\(^{16}\) 558 U.S. 183 (2010).

\(^{17}\) *Id.* at 190 (citing *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers); *Rostker* v. Goldberg, 448 U.S. 1306, 1308 (1980) (Brennan, J., in chambers)).
with application of the test to the facts of the case. Justice Breyer for the dissenters stated the applicable test as follows:

The Court agrees that it can issue this extraordinary legal relief only if (1) there is a fair chance the District Court was wrong about the underlying legal question, (2) that legal question meets this Court’s certiorari standards, (3) refusal of the relief would work “irreparable harm,” (4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance, (5) the party’s right to the relief is “clear and undisputable,” and (6) the “question is of public importance” (or otherwise “peculiarly appropriate” for such action).18

2. Vacating Stays.

The Court’s standard for vacating a lower court stay appears similar to the standard for granting stays. However, the in-chambers Western Airline opinion of Justice O’Connor19 and the in-chambers Coleman opinion of then-Justice Rehnquist20 state that a Justice should show great deference to a lower court (or at least a Court of Appeals)21 which has granted a stay. Circuit Justices asked to vacate a lower court stay have cited this standard in in-chambers opinions, but these opinions have not yet been cited in a majority Supreme Court opinion.22

However, the Court has come close. In a 2013 case, Planned Parenthood v. Abbott,23 the Court denied a request to vacate a stay of a trial court injunction limiting Texas’ ability to implement some new Texas abortion restrictions that the Fifth Circuit had ordered. The Fifth Circuit’s stay kept the restrictions in place pending further litigation in the lower courts.

Justice Scalia (in a concurring statement for himself, Justice Alito, and Justice Thomas) relied on Western Airlines and Coleman in explaining the standard the Court should apply when asked to vacate

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18. Id. at 199 (Breyer, J., dissenting). Justice Breyer cited the majority’s standard and Rostker as the appropriate standard. Id. The Justices also discussed the standards for the Court’s mandamus power, an issue that is beyond the scope of this Article. Id. at 190.


21. I was unable to find any cases discussing whether the same standard of deference should apply when a trial court stays its own order and an appellate court refuses to vacate the stay.


the Fifth Circuit stay: “We may not vacate a stay entered by a court of appeals unless that court clearly and ‘demonstrably’ erred in its application of ‘accepted standards.’”

Justice Breyer in his dissent in Planned Parenthood also relied on Western Airlines and Coleman in setting forth the standard:

This Court may vacate a stay entered by a court of appeals where the case ‘could and very likely would be reviewed here upon final disposition in the court of appeals,’ “the rights of the parties . . . may be seriously and irreparably injured by the stay,’ ” and “the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay.”

The Justices in Planned Parenthood emphasized different aspects of the Western Airlines/Coleman test. Justice Breyer mentioned consideration of the parties’ serious and irreparable injury, absent from Justice Scalia’s formulation, which focused on demonstrable error.

Whether or not there are appreciable differences in how the Justices view the Western Airlines/Coleman standard (and certainly there are differences in application of the standard), both Justice Scalia and Justice Breyer agreed that in determining whether the Court of Appeals has made a “demonstrable error” in applying “accepted standards” for the granting of a stay, the Court will examine whether the Court of Appeals properly applied the stay standards the Court set out in its 2009 Nken v. Holder case:

(1) Whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. There is substantial overlap between these and the factors governing preliminary injunctions; not because the two are one and the same,

24. Id. at 506 (Scalia, J., concurring) (quoting W. Airlines, Inc., 480 U.S. at 1305 (O’Connor, J., in chambers)) (quoting Coleman, 424 U.S. at 1304 (Rehnquist, J., in chambers)).

25. Id. at 508-09 (Breyer, J., dissenting) (quoting W. Airlines, Inc., 480 U.S. at 1305).

26. Id. at 506, 509.

27. See William Baude, Foreword: The Supreme Court’s Shadow Docket, 9 N.Y.U. J. L. & Liberty 1, 13 & n.38 (2015) (noting the lack of clarity over whether Justice Breyer’s dissenting opinion disagreed with Justice Scalia’s opinion on whether a state necessarily suffers irreparable injury when the state cannot enforce its laws).

28. Planned Parenthood, 134 S. Ct. at 506 (Scalia J., concurring) (“When deciding whether to issue a stay, the Fifth Circuit had to consider [Nken’s] four factors . . . ”); id. at 509 (Breyer, J., dissenting) (“Given these considerations, in my view, the standard governing the Fifth Circuit’s decision whether to stay the District Court’s injunction was not satisfied, and the standard governing this Court’s decision whether to vacate the Fifth Circuit’s stay is satisfied.” (first citing Nken v. Holder, 556 U.S. 418, 426 (2009); then citing W. Airlines, Inc., 480 U.S. at 1305)).
but because similar concerns arise whenever a court order may allow or disallow anticipated action before the legality of that action has been conclusively determined.

The first two factors of the traditional standard are the most critical.29

3. Issuing Interlocutory Injunctions.

Finally, as noted in Nken,30 the Supreme Court applies a similar standard to the stay standard in considering requests for an injunction before a final judgment. This point is worth considering because the Court at least once has enjoined a local election after lower courts have declined to do so.31 The Court has held that a request for such an injunction “‘demands a significantly higher justification’ than a request for a stay, because unlike a stay, an injunction ‘does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts.’”32

There are many in-chambers opinions from Justices (though apparently no majority opinion for the Court) stating that the right to an injunction from the Supreme Court must be “indisputably clear” before a Justice will grant it.33

As with the Court’s decisions on granting stays and vacating stays, a court decision to grant an injunction requires looking at the merits, the harm to the parties, and the public interest. As the Court stated in its 2008 Winter case, “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.”34

30. See id. (“There is substantial overlap between these [stay standards] and the factors governing preliminary injunctions . . . .”).
31. Lucas v. Townsend, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) (enjoining local election when date of election had not been precleared as required by section 5 of the Voting Rights Act and lower court made “most problematic” conclusion under Supreme Court precedent that changing the date of the local election need not be precleared under section 5).
32. Respect Me. PAC v. McKee, 562 U.S. 996, 996 (2010) (quoting Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm’n, 479 U.S. 1312, 1313 (1986); see also Shapiro, supra note 12, § 17.12.4, at 878-80 (noting that several Justices have explained that an injunction requires a greater justification than a stay).

Although the Supreme Court standards for (1) granting a stay, (2) vacating a stay, and (3) issuing an injunction differ somewhat in terms of the burden placed on the party seeking relief and the deference owed to the lower court, the standards all weigh the same issues of likelihood of success on the merits, irreparable injury to the parties, and the public interest.

How important is each of these factors relative to each other, and how does deference to lower courts play into the Court’s decision? It is hard to say as a general matter, especially when many of these orders lack accompanying opinions. It appears, however, that the Justices’ views as to the merits of the parties’ claims loom heavily in many of the cases, as does a desire to avoid changing the status quo or making major legal pronouncements in some controversial cases in which the issue is before the Court on an expedited and emergency basis and perhaps likely to return soon on a fuller record.

Consider, for example, the Court’s order issued a few days after the final opinion day of the October 2013 term involving religious exemptions to the Affordable Care Act’s contraception mandate. In *Wheaton College v. Burwell*, the Supreme Court issued an injunction allowing a religious college not to use a form prescribed by the U.S. Department of Health and Human Services to let the Department know of the College’s religious objections to contraception coverage through its insurance plan so long as the College “informs the Secretary of Health and Human Services in writing that it is a non-profit organization that holds itself out as religious and has religious objections to providing coverage for contraceptive services.” The Court noted that lower courts had divided on the question whether such an accommodation was required, and the Court cautioned that “this order should not be construed as an expression of the Court’s views on the merits.” It was an odd statement given that the test for granting an injunction requires considering the likelihood of success on the merits and given some authority for the standard that petitioners’ right to relief be “indisputably clear.”

Justice Sotomayor, dissenting for herself and Justices Ginsburg and Kagan, argued that the Court did not follow its usual skeptical standards for issuing an injunction:

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36. *Id.* at 2807.
37. *Id.*
38. See cases cited supra note 33.
Even if one accepts Wheaton’s view that the self-certification procedure violates RFRA, that would not justify the Court’s action today. The Court grants Wheaton a form of relief as rare as it is extreme: an interlocutory injunction under the All Writs Act, 28 U.S.C. § 1651, blocking the operation of a duly enacted law and regulations, in a case in which the courts below have not yet adjudicated the merits of the applicant’s claims and in which those courts have declined requests for similar injunctive relief. Injunctions of this nature are proper only where “the legal rights at issue are indisputably clear.” Yet the Court today orders this extraordinary relief even though no one could credibly claim Wheaton’s right to relief is indisputably clear.39

The short but controversial order and dissent left Professor Richard Re scratching his head as to why the Court majority in Wheaton College did not even discuss the applicable standard of review and whether the “indisputably clear” standard might apply only to in-chambers, and not full Court, injunctions.40

The Justices’ concerns about the merits may have explained the result: all the conservative Justices apparently agreed with (or at least did not publicly dissent from) the Court’s order granting the injunction; all of the liberal Justices (aside from Justice Breyer) expressly stated their disagreement with the order in Justice Sotomayor’s dissent.42 This tracked the division in the Court’s recent Burwell v. Hobby Lobby Stores, Inc.43 case raising similar issues and offering a similar split. Or perhaps, as Professor Will Baude suggests,

39. 134 S. Ct. at 2808 (Sotomayor, J., dissenting) (citation omitted).
41. See id. Chief Justice Rehnquist succinctly stated the stringent standard he used in deciding whether to issue an injunction pending appeal in another election case:

An injunction pending appeal barring the enforcement of an Act of Congress would be an extraordinary remedy, particularly when this Court recently held BCRA facially constitutional and when a unanimous three-judge District Court rejected applicant’s request for a preliminary injunction. The All Writs Act, 28 U.S.C. § 1651(a), is the only source of this Court’s authority to issue such an injunction. That authority is to be used “sparingly and only in the most critical and exigent circumstances.” It is only appropriately exercised where (1) “Necessary or appropriate in aid of [our] jurisdictio[n],” 28 U.S.C. § 1651(a), and (2) the legal rights at issue are “indisputably clear.”

42. 134 S. Ct. at 2807-15.
43. 134 S. Ct. 2751 (2014).
the Court decided that preserving the status quo was more important than applying the usual test. We do not know because the Court did not tell us.

B. Fitting Purcell into the Supreme Court’s Usual Practice

As in Wheaton College, the Supreme Court in Purcell v. Gonzalez declined to opine on the merits of the case involving Arizona’s voter identification law. The Court noted that disputes over voter identification laws are “hotly contested,” declaring: “We underscore that we express no opinion here on the correct disposition, after full briefing and argument.” This was not the only unusual thing about how the Supreme Court handled the Purcell case.

Purcell arose out of a ballot initiative, Proposition 200, which Arizona voters approved in 2004. The measure required proof of citizenship upon registering to vote and presentation of certain forms of identification to cast an in-person ballot on Election Day. After the United States Department of Justice precleared the Arizona law under section 5 of the Voting Rights Act, a group of individuals and organizations opposed to the law filed a federal lawsuit in May 2006.

On September 11, 2006, the trial court denied the challengers’ request for a preliminary injunction, without issuing findings of facts or conclusions of law. Plaintiffs appealed the denial of a preliminary injunction to the Ninth Circuit, which set a briefing schedule that would have concluded two weeks after the November 7, 2006 election. Plaintiffs then requested an injunction pending appeal from the Ninth Circuit preventing the State from enforcing the voter identification requirement at the November 7 election. On October 5,

[A]fter receiving lengthy written responses from the State and the county officials but without oral argument, the panel issued a four-

44. Baude, supra note 27, at 11-12.

On one hand, they seem to have been motivated by a common-sense desire to preserve the status quo. But the Court has rules for these things, and it is not easy to tell how they permitted these orders. For instance, in her Wheaton College dissent, Justice Sotomayor pointed out that members of the majority had previously written that an injunction could issue only if the plaintiffs’ entitlement to relief was “indisputably clear.” The majority seemed to reject this standard by protesting that its “order should not be construed as an expression of the Court’s views on the merits,” but did not explain more. The Court issued a four-paragraph unsigned opinion that left the legal standard and its legal basis a mystery.

Id. (footnotes omitted).

45. 549 U.S. 1 (2006) (per curiam). The facts described in the next few paragraphs appear in similar form in Purcell. Id. at 2-4.

46. Id. at 5.

47. Under the law, a voter who voted early did not need to present identification. Id. at 2.
sentence order enjoining Arizona from enforcing Proposition 200’s provisions pending disposition, after full briefing, of the appeals of the denial of a preliminary injunction. The Court of Appeals offered no explanation or justification for its order. Four days later, the court denied a motion for reconsideration. [Yet again the Court] gave no rationale for [its] decision.48

Despite the time-sensitive nature of the proceedings and the pendency of a request for emergency relief in the Court of Appeals, the District Court did not issue its findings of fact and conclusions of law until October 12. It then concluded that “plaintiffs have shown a possibility of success on the merits of some of their arguments but the Court cannot say that at this stage they have shown a strong likelihood.” The District Court then found the balance of the harms and the public interest counseled in favor of denying the injunction.49

Arizona and county officials moved to stay the Ninth Circuit’s grant of an injunction.50 The Supreme Court construed the filings as a petition for certiorari, granted the petition, and vacated the order of the Court of Appeals,51 a rare enough event that Professor Orin Kerr referred to it as equivalent to a judicial bolt of lightning.52

In analyzing whether the Ninth Circuit erred in granting a stay, the Supreme Court began with a paragraph that seemed deliberately drafted to present both sides of the contentious debate over voter identification laws.53 (Elsewhere, I have criticized one statement in this paragraph, as unsupported by citation or empirical evidence,

48. Id. at 3.
49. Id. at 3-4 (citations omitted).
50. Id. at 2.
51. Id.
53.

A State indisputably has a compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. [T]he right of suffrage 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. Countering the State’s compelling interest in preventing voter fraud is the plaintiffs’ strong interest in exercising the fundamental political right to vote. Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs’ challenges.

Purcell, 549 U.S. at 4 (alteration in original) (citations omitted).
suggesting that voter identification laws promote voter confidence and that voters “who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”\footnote{Richard L. Hasen, The Untimely Death of Bush v. Gore, 60 STAN. L. REV. 1, 32, 35-36 (2007); see Stephen Ansolabehere & Nathaniel Persily, Essay, Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements, 121 HARV. L. REV. 1737 (2008) (finding that voter confidence in the electoral process is not correlated with the presence or absence of voter identification laws in the state).}

The Court then stated the basis for staying the Ninth Circuit’s order and vacating the injunction:

Faced with an application to enjoin operation of voter identification procedures just weeks before an election, the Court of Appeals was required to weigh, in addition to the harms attendant upon issuance or nonissuance of an injunction, considerations specific to election cases and its own institutional procedures. Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase. So the Court of Appeals may have deemed this consideration to be grounds for prompt action. Furthermore, it might have given some weight to the possibility that the nonprevailing parties would want to seek en banc review. In the Ninth Circuit that procedure, involving voting by all active judges and an en banc hearing by a court of 15, can consume further valuable time. These considerations, however, cannot be controlling here. It was still necessary, as a procedural matter, for the Court of Appeals to give deference to the discretion of the District Court. We find no indication that it did so, and we conclude this was error.

Although at the time the Court of Appeals issued its order the District Court had not yet made factual findings to which the Court of Appeals owed deference, by failing to provide any factual findings or indeed any reasoning of its own the Court of Appeals left this Court in the position of evaluating the Court of Appeals’ bare order in light of the District Court’s ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect. In view of the impending election, the necessity for clear guidance to the State of Arizona, and our conclusion regarding the Court of Appeals’ issuance of the order we vacate the order of the Court of Appeals.

We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court’s September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested, and “[n]o bright line separates permissible election-related regulation from unconstitutional infringements.”

en the imminence of the election and the inadequate time to resolve the factual disputes, our action today shall of necessity allow the election to proceed without an injunction suspending the voter identification rules.\textsuperscript{55}

This was the entirety of the Supreme Court’s substantive analysis. Justice Stevens issued a three-sentence concurrence noting the factual disputes over the extent of disenfranchisement and fraud and stating that the Court’s order “will provide the courts with a better record on which to judge their constitutionality.”\textsuperscript{56}

The \textit{Purcell} decision is both overdetermined and undertheorized. We do not know how much the case turned upon the failure of the Ninth Circuit to give reasons for its order (despite the trial court’s failure to make timely factual findings and issue conclusions of law for the Ninth Circuit to review) and how much turned on the Ninth Circuit’s failure to take into account “considerations specific to election cases and its own institutional procedures.”\textsuperscript{57} On considerations specific to election cases, the Court mentioned both the potential for voter confusion which could depress turnout and the State of Arizona’s need for “clear guidance” to run its election.\textsuperscript{58}

We also do not know how much the close timing of the election, combined with the possibility of en banc review, mattered. The Court wrote only that the Ninth Circuit “might” have taken the possibility of further review into account in drafting its order.\textsuperscript{59} Arizona in its filing asked the Court to apply the \textit{Coleman} “demonstrably wrong” test in the case,\textsuperscript{60} but the Court in \textit{Purcell} did not cite \textit{Coleman} or apply it.

Even though the Court criticized the Ninth Circuit for its failure to give reasons or to defer to the district court (even in the absence of the district court’s factual findings), the Court itself refused to weigh in on the merits of the parties’ arguments.\textsuperscript{61} This agnosticism, like in \textit{Wheaton College}, appears to violate the Court’s own standards for a stay. Under \textit{Rostker}, the Court should have considered the likelihood that the challengers could have successfully challenged the law as well as the potential irreparable injury to all the parties and to the public interest.

\textsuperscript{55} \textit{Purcell}, 549 U.S. at 4-6 (alteration in original) (citations omitted).
\textsuperscript{56} \textit{Id.} at 6 (Stevens, J., concurring).
\textsuperscript{57} \textit{Id.} at 4.
\textsuperscript{58} \textit{Id.} at 5.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} Application for Stay of Injunction Pending Appeal at 10, Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007) (Nos. 06-16702, 06-16706).
\textsuperscript{61} \textit{Purcell}, 549 U.S. at 5.
The Court was right to note special considerations in election cases, what I call “the Purcell principle.” When the rules for elections change, voters may not only be confused; they can be disenfranchised (for example, by not having the right documentation or showing up at the wrong polling place). Further, electoral chaos can ensue when election officials face conflicting court orders on how to run an election. Adding, removing, or changing election procedures just before the election can be difficult. Professional election administrators, especially in large jurisdictions, rely on cadres of poll worker volunteers who must be trained. It is tough to retrain these workers on new rules or procedures close to the election and to produce appropriate new written instructions the period just before the election—especially in jurisdictions using multiple languages.

These special concerns in election cases should have counted toward the public interest factor in the Court’s Rostker test. But these considerations should not have been considered while disregarding the other traditional factors for granting or denying preliminary relief: the likelihood of success on the merits and the relative hardship to the parties. The Court acknowledged that point by noting that it was raising special election-related considerations “in addition to the harms attendant upon the issuance or nonissuance of an injunction.”

Two examples demonstrate why courts should consider all relevant factors (likelihood of success on the merits, relative irreparable harm to the parties, and the public interest) in deciding whether to grant a stay or other preliminary relief:

**Example 1:** A local city council passes an ordinance requiring voters to pay a poll tax in city elections one month before the election. A group of voters goes to court to have the poll tax declared unconstitutional. A week before the election, a court issues an injunction preventing the city from enforcing the poll tax. Before the court order, all poll workers had been sent instructions on how to implement the poll tax. The city seeks a stay from an appellate court.

**Example 2:** Plaintiffs bring a complex challenge arguing that parts of a state legislative redistricting plan violate section 2 of the Voting Rights Act. Two months before the election, when campaigns are underway and ballots have been printed, a federal court in a split decision determines that some of the districts violate the Act and must be redrawn. The court issues an order requiring that elections be run under new district lines, with a new candidate residency period and new ballots. Whether the court properly interpreted section 2 is uncertain. The State seeks a stay from the Supreme Court to run elections under the old lines.

62. *Id.* at 4.
In both examples, the Purcell principle, applied to its fullest, would tell the courts to stay the lower court’s order because we are in the period just before the election, when voters can be confused and election administrators burdened by election changes. However, these public interest concerns, while relevant, should not be the sole consideration.

In Example 1, the poll tax has been unconstitutional on the state and local level since the 1966 Supreme Court opinion in Harper v. Virginia State Board of Elections. Therefore, the challengers’ chances of success on the merits are 100 percent, and that should be a major factor in favor of the lower court injunction and against a stay. Further, a poll tax imposes a huge burden on poor voters who could be disenfranchised by the tax, making the irreparable injury on the challengers’ side greater. Despite timing close to the election, and any hassle for election administrators to change instructions for running the election, the lower court should enjoin the poll tax and an appellate court should not stay such an order. Even a Supreme Court inclined to usually follow the Purcell principle would likely give way in a case like this one.

In Example 2, the likelihood of success on the merits is uncertain. Further, there are great reliance interests in running elections under the already-declared lines. Voters, candidates, and others campaigned under the old district lines. It is not just a question of election administrators being inconvenienced but also of disrupting settled expectations throughout the jurisdiction. Minority voters may have less effective votes in these districts, but they are not literally disenfranchised. With an election looming, courts should make their changes effective for the next election cycle. This is precisely what the courts did in the 1960s redistricting cases when the Court declared elections from substantially unequal districts to be unconstitutional. Timing matters much more here, as do reliance inter-

64. See Reynolds v. Sims, 377 U.S. 533, 586 (1964) (“We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State’s legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remediating the constitutional deficiencies in the State’s legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.”); see also Riley v. Kennedy,
ests, as measured against uncertain success on the merits. The court likely should not make any changes close to the election.

It would be a much harder case, however, if the courts had determined that the State’s section 2 liability was clearly established. In that case the merits would point strongly in one direction and the other factors strongly in the other. In such a case, the timing and disruption issues seem important, as does the judgment of the lower court as to what is feasible in terms of election administration changes in the period just before the election.

All of this complex balancing was missing in *Purcell*. The Court not only ignored the likelihood of success on the merits; it affirmatively refused to take a position on it.65 It did not look at harms to the parties aside from the public interest in not changing the rules close to an election.66

It is certainly understandable that the Court in *Purcell* avoided saying anything on the merits, given how controversial voter identification laws were and are. The next time the Court considered a voter identification law, in the 2008 *Crawford v. Marion County Election Board* case,67 the Court divided 3-3-3 in setting forth the constitutional standard and applying that standard to review Indiana’s voter identification law. As we will see in the next Part, if and when the Court considers these issues on the merits, it is likely to divide along ideological lines once again.

But in eschewing discussion of the merits and of the relative irreparable harms to the challengers and to the State of Arizona (aside from its incorporation in the special election considerations), the Court in *Purcell* deviated from its normal (stated) practice for emergency relief, raising risks to both voters and those who run elections.

There is one benefit to strict application of the *Purcell* principle: it cabins some discretion of lower court judges through a per se rule to not allow last-minute judicial changes to election rules. That could be a benefit in highly charged political cases, but the price is too high, as it requires courts to ignore other important factors in deciding whether to grant extraordinary relief. Further, if we do not trust the courts to fairly decide cases on emergency measures for elections, why should we trust courts to fairly decide cases on other controversial issues, like abortion or religious exemptions to health care?

In sum, the Court correctly drew attention to special questions of timing before elections. But the *Purcell* principle needs to be domes-

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66. See id.
ticated. Courts (including the Supreme Court) should consider the likelihood of success on the merits, potential irreparable harm to both sides, and other public interest factors in deciding whether or not to issue orders affecting elections in the period close to the election. When both the likelihood of success and irreparable harm point in the same direction, this is a strong argument for the Court to rule in that direction regardless of the direction pointed by the Purcell principle.

The parties’ diligence is also relevant. In Purcell, the challengers waited months (and two elections) before seeking a preliminary injunction. Consideration of laches would be appropriate. Further, courts should consider whether it might be possible to run elections using the rules already set by election officials but with the use of provisional ballots to resolve disputes after the election. On the other hand, doing so would put even greater pressure on courts deciding issues post-election, when the decision is more likely to be outcome determinative.

In sum, the Supreme Court should adjudicate its election disputes consistent with the general standards and levels of deference it has established for considering non-election requests to stay a lower court order, vacate a lower court stay, or issue an injunction in its own right. Special considerations related to elections should be one, but not a dominating, factor. Adherence to the usual rules makes it less likely the Court will be fully swayed by perceived differences in the merits in these highly political and ideologically-charged cases.

III. PROPERLY APPLYING USUAL SUPREME COURT PRACTICE TO THE 2014 EMERGENCY ELECTION CASES

A. The Reason for the Flurry of Election 2014 Emergency Cases

The spate of emergency election cases reaching the Supreme Court in the fall of 2014 was unsurprising for those in the election law field. Since the disputed 2000 election, culminating in the Supreme Court’s controversial decision in *Bush v. Gore* ending the Florida recount and ensuring George W. Bush’s ascendance to the

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70. See Hasen, supra note 68, at 991-99 (arguing for courts, if possible, to resolve election disputes before, rather than after, an election to avoid just such a problem).

71. 531 U.S. 98 (2000).
presidency, the amount of election legislation and litigation has increased markedly. Litigation has more than doubled in the post-2000 period compared to the pre-2000 period. Among other things, this period of the Voting Wars has seen Republican state legislatures pass laws which have made it more difficult to register and vote and Democratic state legislatures pass laws which have made it easier to vote. Cries (often unsubstantiated) of great problems with voter fraud and voter suppression fill not only the airwaves and internet but also courthouses across the country as laws have been challenged.

The latest wave of litigation follows the Supreme Court’s 2008 decision in the Crawford case rejecting a facial challenge under the Equal Protection Clause to Indiana’s voter identification law and the Supreme Court’s decision in the 2013 Shelby County v. Holder case effectively removing a provision of the Voting Rights Act requiring jurisdictions with a history of racial discrimination in voting from getting preclearance from the federal government before making any changes in their voting rules.

In the wake of these decisions, both jurisdictions which were subject to preclearance (Texas) and those not subject to preclearance but under Republican control (Wisconsin) passed stricter voter identification and other restrictive election laws. When preclearance ended, Texas put its stalled voter identification law into immediate effect, a law which had been blocked first by the Department of Justice and then denied preclearance by a federal court in Washington, D.C. North Carolina, which used to be partially covered by preclearance, passed the strictest set of voting rules since the passage of the 1965 Voting Rights Act. Among other things, the law ended same-day

74. See generally Hasen, supra note 68 (describing efforts to change election rules on a partisan basis in states across the United States).
76. 133 S. Ct. 2612 (2013).
77. See generally Richard L. Hasen, Shelby County and the Illusion of Minimalism, 22 WM. & MARY BILL RTS. J. 713 (2014) (describing and analyzing the Shelby County decision).
80. See generally Richard L. Hasen, Race or Party?: How Courts Should Think About Republican Efforts to Make it Harder to Vote in North Carolina and Elsewhere, 127 HARV.
voter registration, cut back on early voting, stopped the counting of provisional ballots cast in the wrong precinct (even if the result of pollworker error), imposed a new voter identification requirement (but not to be put into effect until the 2016 elections), and made other changes making it harder to register and to vote. In Ohio, the state legislature cut back on the amount of early voting, after an earlier attempt to do so was blocked by a federal court.

Federal challenges to the new voting restrictions raised two main claims: that these laws violated section 2 of the Voting Rights Act and that the laws violated the Fourteenth Amendment’s Equal Protection Clause. Both claims posed significant challenges for plaintiffs. Ever since the Supreme Court’s 1986 decision in *Thornburg v. Gingles*, section 2 had been widely used in the redistricting context to challenge a jurisdiction’s failure to create enough majority-minority districts. However, section 2 had not been used much (or at least with much success) to challenge election administration rules such as voter identification, in what Professor Dan Tokaji has aptly named the “new vote denial” cases. Further, since *Crawford*, constitutional equal protection challenges to voter identification laws seemed difficult for plaintiffs to win under the sliding scale approach endorsed by the three Justices in the middle of the Supreme Court.
As Republican-dominated states enacted identification laws stricter than Indiana’s, however, some plaintiffs had new hopes equal protection challenges could succeed.  

B. The Ohio, North Carolina, Wisconsin, and Texas Emergency Cases

The four cases that made it to the Supreme Court—Ohio, North Carolina, Wisconsin, and Texas—each raised both section 2 Voting Rights Act claims and equal protection claims. Below, I briefly describe the claims and their likelihood of success, leaving a fuller discussion of the merits of the claims to another time.

1. Ohio.

Ohio’s case appeared to be the weakest on the merits, yet it succeeded in both the federal district court and the United States Court of Appeals for the Sixth Circuit before being reversed by the Supreme Court. Plaintiffs challenged Ohio’s cutback on early voting from thirty-five days to twenty-eight days, including the elimination of “Golden Week,” a week’s period in which voters could both register to vote and cast an early vote in the same transaction. The Republican legislature passed the measure after an earlier attempt to cut back on early voting failed in 2012. In that first cutback, the legislature (apparently inadvertently) cut back on the last weekend of early voting for all voters except certain military and overseas voters. A federal district court held that this disparate treatment violated equal protection.

In the new challenge, plaintiffs appeared before the same district court judge as in the 2012 case, and the judge held the new cutback violated both the Equal Protection Clause and section 2 of the Voting Rights Act. Minority voters were especially likely to use both early voting and Golden Week, and the judge found the cutbacks illegal. The district court, relying in part on Ohio’s decision to cut back early voting (as opposed to analyzing the total amount of early voting Ohio offered under the new law), found both constitutional and voting rights violations. The trial judge ordered Ohio to restore the cut early voting period.


89. On post-Crawford developments, see HASEN, supra note 73, at 308-10.

90. For the facts and procedural history described below, see Ohio State Conference of NAACP v. Husted, 43 F. Supp. 3d 808 (S.D. Ohio 2014) (granting preliminary injunction), stay denied pending appeal, 769 F.3d 385 (6th Cir. 2014), aff’d on merits, 768 F.3d 524 (6th Cir. 2014), stay granted, 135 S. Ct. 42 (2014) (mem.).
Even with the cutbacks, Ohio offered more than the average amount of early voting, and many states (such as New York) offered no early voting at all. Further, Ohio offered no excuse absentee balloting across the state and sent every single voter an absentee ballot application. The judge found African-American voters mistrustful of absentee voting and held it not a sufficient substitute for the loss on in-person early voting.

The United States Court of Appeals for the Sixth Circuit first refused to stay the trial court’s order and later issued an opinion affirming the district court. Ohio then sought a stay with the Supreme Court. The Court granted the stay, with the four more liberal Justices noting their dissent from the order. There was no written opinion or explanation offered by any Justice.91


In North Carolina, plaintiffs filed voting rights and constitutional challenges to a number of provisions of the 2013 omnibus law making it harder to register and vote.92 The federal government sued as well, seeking to also get North Carolina “bailed in” to preclearance under section 3 of the Voting Rights Act, a claim which remains pending.93 The federal district court set a trial date of July 2015, and plaintiffs moved for a preliminary injunction to block some of the election

91. The Court’s order reads in full:

Application for stay presented to Justice Kagan and by her referred to the Court granted, and the district court’s September 4, 2014, order granting a preliminary injunction stayed pending the timely filing and disposition of a petition for writ certiorari. Should the petition for writ of certiorari be denied, this stay shall terminate automatically. In the event the petition for writ of certiorari is granted, the stay shall terminate upon the sending down of the judgment of this Court. Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application for stay.


93. Press Release, Dep’t of Justice, Justice Department to File Lawsuit Against the State of North Carolina to Stop Discriminatory Changes to Voting Law (Sept. 30, 2013), http://www.justice.gov/opa/pr/justice-department-file-lawsuit-against-state-north-carolina-stop-discriminatory-changes (“The complaint asks the court to prohibit North Carolina from enforcing these requirements, and also requests that the court order bail-in relief under section 3(c) of the Voting Rights Act. If granted, this would subject North Carolina to a new preclearance requirement.”).
changes for the 2014 election season. The voter identification law was not yet in effect for 2014, but there was a “soft rollout” set for 2014 (in which poll workers would ask for identification but not turn people away who lacked it). One of the sets of plaintiffs sought to block that soft roll out.

The federal district court denied the preliminary injunction sought to enjoin a number of the new voting rules, primarily on grounds that based upon the evidence presented thus far, coupled with the judge’s views of how to decide section 2 vote denial claims, the plaintiffs were not likely to succeed on the merits and did not face irreparable injury.

Plaintiffs then appealed to the United States Court of Appeals for the Fourth Circuit. In a 2-1 vote, the court granted a preliminary injunction in part. The injunction was granted only as to two provisions of the law, which were the subject of the preliminary injunction motion: the rollback in early voting and the end of counting ballots cast in the wrong precinct. The Fourth Circuit held plaintiffs were likely to succeed on their section 2 claims as to these two provisions. The dissent, after running through the Winter factors for a preliminary injunction, cited Purcell as an additional reason to deny the request.94

94. Judge Motz wrote in her dissent:

While securing reversal of a denial of preliminary relief is an uphill battle for any movant, Appellants face a particularly steep challenge here. For “considerations specific to election cases,” including the risk of voter confusion, counsel extreme caution when considering preliminary injunctive relief that will alter electoral procedures. Because those risks increase “[a]s an election draws closer,” so too must a court’s caution. Moreover, election cases like the one at hand, in which an appellate court is asked to reverse a district court’s denial of a preliminary injunction, risk creating “conflicting orders” which “can themselves result in voter confusion and consequent incentive to remain away from the polls.”

League of Women Voters of N.C., 769 F.3d at 250-51 (Motz, J., dissenting) (alteration in original) (footnote omitted) (citations omitted). Judge Motz added in a footnote:

Although the majority steadfastly asserts that the requested injunction seeks only to maintain the status quo, the provisions challenged by Appellants were enacted more than a year ago and governed the statewide primary elections held on May 6, 2014. Appellants did not move for a preliminary injunction until May 19, 2014, almost two weeks after the new electoral procedures had been implemented in the primary. Moreover, regardless of how one conceives of the status quo, there is simply no way to characterize the relief requested by Appellants as anything but extraordinary. Appellants ask a federal court to order state election officials to abandon their electoral laws without first resolving the question of the legality of those laws.

Id. at 250 n.*. The majority also distinguished Purcell noting that:

In Purcell, on which the dissenting opinion relies, the Supreme Court seemed troubled by the fact that a two-judge motions panel of the Ninth Circuit entered a factless, groundless “bare order” enjoining a new voter identification provision in an impending election. At the time of the “bare order,” the appellate court also lacked findings by the district court. By contrast, neither district
North Carolina then asked the Supreme Court to stay the Fourth Circuit’s ruling. The Supreme Court stayed the Fourth Circuit’s grant of a preliminary injunction, with Justices Ginsburg and Sotomayor noting their dissent. The majority again offered no reasoning to accompany its order. Justice Ginsburg wrote a four-paragraph dissent, stating in part that:

The Court of Appeals determined that at least two of the measures—elimination of same-day registration and termination of out-of-precinct voting—risked significantly reducing opportunities for black voters to exercise the franchise in violation of § 2 of the Voting Rights Act. I would not displace that record-based reasoned judgment.95

Justice Ginsburg did not explain why she would defer to the Court of Appeals’ “record-based” judgment over the “record-based” judgment of the trial court.

3. Wisconsin.

In Wisconsin, a federal district court issued a lengthy opinion holding that Wisconsin’s strict voter identification law violated both section 2 of the Voting Rights Act and the Equal Protection Clause.96 The judge offered a very broad reading of section 2’s application to vote denial cases and held that Wisconsin could not implement its law or any revised voter identification law without court approval. The trial judge concluded that over 300,000 Wisconsin voters lacked the proper identification and had no easy way of securing it.

The State of Wisconsin appealed to the United States Court of Appeals for the Seventh Circuit, and sought a stay of the district court’s order so that it could use the identification requirement in its upcoming election. The Seventh Circuit put off the stay request until after oral argument in the case, which took place about eight weeks before the election. Later, the same day as the oral argument, the

court nor appellate court reasoning, nor lengthy opinions explaining that reasoning, would be lacking in this case.

Id. at 248 n.6 (citation omitted).

95. League of Women Voters of N.C., 135 S. Ct. at 6 (Ginsburg, J., dissenting).

96. For the facts and procedural history described below, see Frank v. Walker, 17 F. Supp. 3d 837 (E.D. Wis. 2014) (holding that Wisconsin’s voter identification law violated Voting Rights Act Section 2 and the U.S. Constitution’s Equal Protection Clause and enjoining the law’s use in elections), stay granted, 766 F.3d 755 (7th Cir. 2014), reh’g en banc denied by equally divided court, 769 F.3d 494 (7th Cir. 2014) (per curiam), rev’d, 768 F.3d 744 (7th Cir. 2014), vacating stay, 135 S. Ct. 7 (2014) (mem.), reh’g en banc denied by equally divided court, 773 F.3d 783 (7th Cir. 2014) (mem.).
Seventh Circuit panel in a brief order stayed the trial court’s order and allowed the State to move forward with implementing its voter identification law pending the outcome of the appeal.

Plaintiffs sought en banc review in the Seventh Circuit, arguing that there was no time to implement the law and get identification cards in the hands of all voters that wanted cards before the election. The State’s original plan called for an eight-month rollout of the identification law in the event it was upheld by the courts. The State of Wisconsin conceded in its filings that up to ten percent of the state’s voters would be unable to get identification in time for the upcoming election, and the problem would be especially acute for Wisconsin residents born in another state, who could have delays in securing a birth certificate from another state. Further, some voters had already received and voted with absentee ballots, but those ballots would not count unless voters supplied new identification information.

The full Seventh Circuit denied the request for an en banc hearing, evenly dividing 5-5 on the request. Judge Williams, for the five dissenters, called the order to allow the identification requirement to go into immediate effect with the admitted reality of disenfranchisement “shocking.” The challengers then sought a Supreme Court vacatur of the Seventh Circuit stay. While the case was being briefed at the Supreme Court, the Seventh Circuit panel, in an opinion by Judge Easterbrook, issued an opinion on the merits, strongly rejecting the section 2 and constitutional claims. The full Seventh Circuit, upon the request of a judge on the court, then sua sponte considered rehearing the panel’s final ruling en banc. That request failed again on a 5-5 even vote, with Judge Posner writing a scathing dissent.

97. Frank, 769 F.3d at 498 (Williams, J., dissenting). Judge Williams, dissenting from denial of rehearing en banc, wrote:

The district court found that 300,000 registered voters—registered voters, not just persons eligible to vote—lack the most common form of identification needed to vote in the upcoming elections in Wisconsin. (To put this number in context, the 2010 governor’s race in Wisconsin was decided by 124,638 votes and the election for United States Senator by 105,041 votes.) And how does the state reply to the fact that numerous registered voters do not have qualifying identification with elections so imminent? It brazenly responds that the district court found that “more than 90% of Wisconsin’s registered voters already have a qualifying ID” and can vote and that “the voter ID law will have little impact on the vast majority of voters.” But the right to vote is not the province of just the majority. It is not just held by those who have cars and so already have driver’s licenses and by those who travel and so already have passports. The right to vote is also held, and held equally, by all citizens of voting age. It simply cannot be the answer to say that 90% of registered voters can still vote. To say that is to accept the disenfranchisement of 10% of a state’s registered voters; for the state to take this position is shocking.

Id.
dissent for the five dissenters. Among other things, Judge Posner remarked, “As there is no evidence that voter impersonation fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one? If the Wisconsin legislature says witches are a problem, shall Wisconsin courts be permitted to conduct witch trials?”

The Supreme Court vacated the Seventh Circuit’s stay, with the effect of blocking use of Wisconsin’s voter identification law in the November 2014 election. Once again, the Court offered no rationale for its order. Justice Alito, joined by Justice Scalia, issued a brief dissent which read in full:

There is a colorable basis for the Court’s decision due to the proximity of the upcoming general election. It is particularly troubling that absentee ballots have been sent out without any notification that proof of photo identification must be submitted. But this Court “may not vacate a stay entered by a court of appeals unless that court clearly and ‘demonstrably’ erred in its application of ‘accepted standards.’” Under that test, the application in this case should be denied.

4. Texas.

The Texas case also involved a state voter identification law. The federal district court held a lengthy trial to consider section 2 and constitutional claims against the strict identification law. As in North Carolina, the Department of Justice got involved in the case and sought to get Texas bailed back into federal preclearance (an issue still pending in the case). Less than weeks before the start of early voting, on October 20, the court issued a 147-page opinion holding Texas’ law a violation of the Voting Rights Act and the Constitution, both the Equal Protection Clause and the Twenty-fourth Amendment’s prohibition on poll taxes in federal elections. The trial court further found that Texas engaged in intentional discrimination in voting, a prerequisite to consideration for potential renewed preclearance.

98. 773 F.3d at 795 (Posner, J., dissenting).
99. 135 S. Ct. at 7 (citations omitted). A few months later, the Supreme Court denied certiorari on the merits. Frank v. Walker, 135 S. Ct. 1551 (2015) (mem.).
100. For the facts and procedural history described below, see Vasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014), stayed, 769 F.3d 890 (5th Cir. 2014), denying motion to vacate stay, 135 S. Ct. 9 (2014), aff’d in part and rev’d in part, 796 F.3d 487 (5th Cir. 2015).
The trial court’s opinion was not clear as to whether its injunction in using the identification law went into effect immediately, which would stop Texas from continuing to use its voter identification law as it had in the 2014 primaries and other elections. The trial court then clarified that the law was blocked for the 2014 general election.\footnote{Final Judgment, Veasey v. Perry, 71 F. Supp. 3d 627 (S.D. Tex. 2014) (No. 13-CV-00193), http://moritzlaw.osu.edu/electionlaw/litigation/documents/Veasey689.pdf.}

The State of Texas sought a stay of the trial court’s order from the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit granted the stay, with the effect of allowing Texas to use the identification law in the 2014 general election. The Court of Appeals refused to consider the merits of the arguments against Texas’ identification law, stating that the issues were difficult. Although the court purported to apply the Nken factors for a stay, it found that Texas was likely to succeed on the merits only because the district court imposed a stay just before the election in violation of the Purcell principle.\footnote{First, the State has made a strong showing that it is likely to succeed on the merits, at least as to its argument that the district court should not have changed the voting identification laws on the eve of the election. The court offered no reason for applying the injunction to an election that was just nine days away, even though the State repeatedly argued that an injunction this close to the election would substantially disrupt the election process. As discussed in Part III above, the Supreme Court has instructed that we should carefully guard against judicially altering the status quo on the eve of an election. And, just this term, the Court has stepped in to prevent such alterations several times. We find that the State has made a strong showing that the district court erred in applying the injunction to this fast-approaching election cycle.}

The other questions on the merits are significantly harder to decide, given the voluminous record, the lengthy district court opinion, and our necessarily expedited review. But, given the special importance of preserving orderly elections, we find that this factor weighs in favor of issuing a stay.
ruling. The dissenters could well have been trying to call attention in a dramatic way to the injustice they saw in the Court’s refusal to vacate a stay.\footnote{Or so I have suggested. See Richard L. Hasen, \textit{Dawn Patrol: Justice Ruth Bader Ginsburg’s Critically Important 5 a.m. Wake-Up Call on Voting Rights}, SLATE (Oct. 19, 2014, 1:05 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/ginsburg_s_dissent_in_texas_voter_id_law_supreme_court_order.html.}

Justice Ginsburg, joined by Justices Kagan and Sotomayor, issued a lengthy dissent. The dissent began by distinguishing the Ohio and North Carolina cases and then turned to \textit{Purcell}:

Neither application involved, as this case does, a permanent injunction following a full trial and resting on an extensive record from which the District Court found ballot-access discrimination by the State. I would not upset the District Court’s reasoned, record-based judgment, which the Fifth Circuit accorded slim, if any, deference. Cf. \textit{Purcell v. Gonzalez} (Court of Appeals erred in failing

\textbf{Nina Totenberg:} Justice Ginsburg, you were up until . . . Friday night/Saturday morning, writing a passionate dissent in the Texas voter id case. Just to let people in the audience know, this was a procedural question in some measure. And you can note a dissent in those kinds of cases and not write and it is fairly common for that to happen. But you wrote; you were joined by Justices Kagan and Sotomayor. So why did you write and why did it take until 5 in the morning?

\textbf{Justice Ginsburg:} Why till 5 in the morning? We didn’t get the last filing from Texas until Friday morning and then the Circuit Justice [Justice Scalia in this case] as you know has to write a memo. And that came around some time in the middle of the afternoon. So there wasn’t much time to write the dissent. I had written a dissent in the North Carolina voting case, voting rights case. This one was . . . I would say it was very well-reasoned. You called it passionate.

\textbf{Nina Totenberg:} The point you were making . . . to explain a fact of law here is that in 2006 the Supreme Court issued a decision that basically said we try not to disturb what’s going on in an election right before an election because people will get confused. And you said you did not think that applied here. Why?

\textbf{Justice Ginsburg:} First this case was unlike others because it had gone through a complete 9 day trial, reams of evidence, and an excellent decision written by the district court. This was a new system for Texas. From 2003-2013, they have a voter id that was reasonable. There were many things you could present. The new law cut back drastically on that. There had never been a federal election held under the new law. There had been local elections with very small turnout. So the poll watchers [workers?-Ed] were more familiar with old procedur[e]. So I didn’t think this case fell into the mold of we can’t disturb an election. There had been very little in the way of educational efforts, so that people knew what the new law required, so that the poll watchers would know. So I thought that the old system would involve less disruption than this never-done-in-a-federal-election-before [system].

to accord deference to “the ruling and findings of the District Court”). The fact-intensive nature of this case does not justify the Court of Appeals’ stay order; to the contrary, the Fifth Circuit’s refusal to home in on the facts found by the District Court is precisely why this Court should vacate the stay.

Refusing to evaluate defendants’ likelihood of success on the merits and, instead, relying exclusively on the potential disruption of Texas’ electoral processes, the Fifth Circuit showed little respect for this Court’s established stay standards. See Nken v. Holder (“most critical” factors in evaluating request for a stay are applicant’s likelihood of success on the merits and whether applicant would suffer irreparable injury absent a stay). Purcell held only that courts must take careful account of considerations specific to election cases, not that election cases are exempt from traditional stay standards.105

The remainder of Justice Ginsburg’s dissent disputed the Fifth Circuit’s reasoning that a stay would disrupt Texas’ election processes.

True, in Purcell and in recent rulings on applications involving voting procedures, this Court declined to upset a State’s electoral apparatus close to an election. Since November 2013, however, when the District Court established an expedited schedule for resolution of this case, Texas knew full well that the court would issue its ruling only weeks away from the election. The State thus had time to prepare for the prospect of an order barring the enforcement of [the law]. Of greater significance, the District Court found “woefully lacking” and “grossly underfunded the State’s efforts to familiarize the public and poll workers regarding the new identification requirements.106

The remainder of Justice Ginsburg’s dissent reviewed the trial court’s evidence that the law had a discriminatory purpose and would have a discriminatory impact on minority voters.107

The potential magnitude of racially discriminatory voter disenfranchisement counseled hesitation before disturbing the District Court’s findings and final judgment. Senate Bill 14 may prevent

105. Veasey, 135 S. Ct. at 10 (Ginsburg, J., dissenting) (partial citations omitted).
106. Id. Justice Ginsburg added:

Furthermore, after the District Court’s injunction issued and despite the State’s application to the Court of Appeals for a stay, Texas stopped issuing alternative “election identification certificates” and completely removed mention of [the law’s] requirements from government Web sites. In short, any voter confusion or lack of public confidence in Texas’ electoral processes is in this case largely attributable to the State itself.

Id. at 10-11 (citation omitted).

107. Id. at 11-12. Justice Ginsburg also noted that the district court held the law was an unconstitutional poll tax, an issue not presented in the other 2014 election cases. Id. at 12.
more than 600,000 registered Texas voters (about 4.5% of all registered voters) from voting in person for lack of compliant identification. A sharply disproportionate percentage of those voters are African-American or Hispanic.\textsuperscript{108} 

C. Freeing the 2014 Election Cases of the Purcell Principle 

I cannot say for certain that rigid application of the Purcell principle is responsible for the Supreme Court orders in the 2014 election cases. The Court majority in each case did not give a word of reasons for its orders. We do not even know if additional Justices dissented but chose not to note their dissents in the North Carolina, Wisconsin, or Texas cases.\textsuperscript{109} But Justice Alito’s\textsuperscript{110} and Justice Ginsburg’s\textsuperscript{111} dissents certainly make it appear that Purcell was behind the Court’s orders. This is also how the Fifth Circuit understood the cases when it considered a stay of the Texas order\textsuperscript{112} and how I understood the cases\textsuperscript{113} while they were in progress. 

Properly applying the standards from the Court’s general rules for considering emergency relief, there is a strong argument that the Court reached the right result in the Ohio and Wisconsin cases. North Carolina is a closer case. The Court’s decision in the Texas case appears incorrect. 

1. Ohio. 

The Court was correct to stay the trial court’s order in the Ohio case. Challengers seemed unlikely to succeed on the merits in the Supreme Court, despite winning in the courts below. While the pre- 

\textsuperscript{108} Id. (citation omitted).

\textsuperscript{109} In Ohio, there were four noted dissents, so no other Justices could have dissented. Husted v. Ohio State Conference of the NAACP, 135 S. Ct. 42 (2014) (mem.).


\textsuperscript{111} Veasey, 135 S. Ct. at 10 (Ginsburg, J., dissenting).

\textsuperscript{112} Veasey v. Perry, 769 F.3d 890, 897 (5th Cir. 2014) (Costa, J., concurring) (“I agree with Judge Clement that the only constant principle that can be discerned from the Supreme Court’s recent decisions in this area is that its concern about confusion resulting from court changes to election laws close in time to the election should carry the day in the stay analysis. The injunction in this case issued even closer in time to the upcoming election than did the two out of the Fourth and Sixth Circuits that the Supreme Court recently stayed. On that limited basis, I agree a stay should issue.”).

\textsuperscript{113} Richard L. Hasen, \textit{How to Predict a Voting Rights Decision: The Supreme Court Just Made It Harder to Vote in Some States and Easier in Others}, SLATE (Oct. 10, 2014, 10:16 AM), http://www.slate.com/articles/news_and_politics/jurisprudence/2014/10/supreme_court_voting_rights_decisions_contradictions_in_wisconsin_ohio_north.html (“But there is a consistent theme in the court’s actions, which we can call the ‘Purcell principle’ after the 2006 Supreme Court case Purcell v. Gonzalez: Lower courts should be very reluctant to change the rules just before an election, because of the risk of voter confusion and chaos for election officials. The Texas case may raise the hardest issue under the Purcell principle, and how it gets resolved will matter a lot for these types of election challenges going forward.”).
cise application of section 2 of the Voting Rights Act to vote denial cases remains up in the air.\textsuperscript{114} it is doubtful that the conservative Supreme Court—the same court which recently hobbled section 5 of the Voting Rights Act in the \textit{Shelby County} case and has displayed routine skepticism and hostility toward race-based claims—would read the Voting Rights Act so expansively as to cover a jurisdiction’s cutback of early voting from five weeks to four weeks, especially when the jurisdiction sent every voter in the state an application for a no-excuse absentee ballot to be voted during the early voting period. Even with proof that African-American voters in Ohio used early voting, and especially “Golden Week,” more than white voters, the current Supreme Court is quite unlikely to hold that the Ohio legislature’s cutback in early voting, which makes it marginally more difficult to cast a vote and has a disparate impact on minority voters, deprives minority voters of an opportunity to participate in the political process and to elect representatives of their choice.

This lack of a major burden on voters also factors into the balance of hardships to the parties, another key part of the \textit{Rostker} test for stays and related tests. Ohio voters deprived of the extra week to vote have other ample ways to cast a vote. The State’s burden of adding an extra week is small as well, requiring additional personnel and administration.

Finally, the public interest does not cut strongly in one direction. On the one hand, expanding opportunities to vote can serve the public interest. On the other hand, the public has an interest in efficient administration of elections, and adding back the week would impose additional costs. Of course, the timing close to the election (the \textit{Purcell} principle) cuts against a late court order to change election timing.

Given the weakness of the merits on the plaintiffs’ side, the Court seemed correct in staying the lower court. The \textit{Purcell} factor reinforces this decision.

2. \textit{Wisconsin}.

The Supreme Court also seemed correct in its decision in the Wisconsin case, vacating the Seventh Circuit stay which would have had the effect of allowing the State of Wisconsin to immediately implement its voter identification law.\textsuperscript{115} This case was a no-brainer for reversal. The State admitted that such a precipitous implementation of its law would disenfranchise up to ten percent of the state’s population, especially residents born out of state who would have

\textsuperscript{114} See HASEN, supra note 73, at 288-92.

\textsuperscript{115} Frank v. Walker, 135 S. Ct. 7 (2014).
difficulty getting the right documentation in time, and put burdens on those voters who had already received their absentee ballots which, if the law were implemented, would not be counted unless the voters produced identification—something not required by the original instructions.\textsuperscript{116}

Putting aside whether Wisconsin’s voter identification law as a whole was likely to be found by the Supreme Court to violate either section 2 of the Voting Rights Act or the Constitution’s Equal Protection Clause, there was no real question that the immediate implementation of the law would violate both, by disenfranchising voters for no compelling reason, and with that burden falling disproportionately on minority voters. Aside from the likelihood of convincing the Supreme Court that the precipitous disenfranchisement was likely illegal, the relative burdens faced by the parties tilted heavily in favor of the challengers. On the one side were the many voters who would be disenfranchised when a rollout planned for eight months was compressed into a few weeks. On the other hand, the State posited an interest in preventing voter fraud, which was totally hypothetical and unproven.\textsuperscript{117} As in other states, Wisconsin could not point to significant instances of voter impersonation fraud which would justify imposing such a law at all,\textsuperscript{118} much less imposing such a law on a truncated schedule. Many members of the public who were not plaintiffs stood the risk of being disenfranchised when a rollout planned for eight months was compressed into a few weeks. On the other hand, the State posited an interest in preventing voter fraud, which was totally hypothetical and unproven.\textsuperscript{117} As in other states, Wisconsin could not point to significant instances of voter impersonation fraud which would justify imposing such a law at all,\textsuperscript{118} much less imposing such a law on a truncated schedule. Many members of the public who were not plaintiffs stood the risk of being disenfranchised, tilting the public interest in Wisconsin’s favor. Finally, the Purcell principle seemed to have strong application here, with a change just before the election likely to both confuse voters and put new burdens on election administrators.

Even accepting Justice Alito and Justice Scalia’s statement in the Wisconsin case dissent that the Court should apply the “demonstrable error” standard in determining whether to vacate a stay imposed by a Court of Appeals,\textsuperscript{119} the Wisconsin case—with its certainty of disenfranchisement, lack of strong government interest in immediate implementation of its law, and timing so close to the election as to risk both voter confusion and election administrator chaos—meets the standard. It is troubling that these dissenting Justices would tolerate certain disenfranchisement out of deference to the Court of Appeals, an appellate court which, considering the issue en banc twice, split evenly on the question.

\textsuperscript{117} Id. at 847.
\textsuperscript{118} Id. at 847-48.
\textsuperscript{119} 135 S. Ct. at 7 (Alito, J., dissenting).

North Carolina presents a closer case on the Supreme Court’s decision to stay the Fourth Circuit’s order putting North Carolina’s end of same-day voter registration and out-of-precinct voting on hold.\(^\text{120}\) Compared to Ohio, North Carolina’s case presented both more evidence of a disparate effect of legislative rollbacks of voting rights as well as a more nuanced understanding of the scope of section 2 of the Voting Rights Act. It is not at all clear that the Supreme Court will agree with the Fourth Circuit’s views on the facts and the law, but the Fourth Circuit’s analysis was nuanced and careful, with the potential to be affirmed on the merits. Further, the burdens on voters in North Carolina appeared more significant than the modest cut-back in early voting days in Ohio.

On the other hand, North Carolina voters still had many other opportunities to vote.\(^\text{121}\) Further, as noted by the Fourth Circuit dissent,\(^\text{122}\) making these changes close to the election burdened election administrators: the State had already set out its procedures for voting, and this change would mean new instructions in the period just before the election.\(^\text{123}\)

In such a close case, arguably, the Supreme Court should have deferred to the Fourth Circuit’s decision to grant the narrow preliminary injunction in North Carolina. Deference seems to make the most sense in close cases. Or perhaps the Court should have deferred to the district court, which actually considered the evidence first. Recall that in Purcell, the Supreme Court criticized the Ninth Circuit for lack of deference to the decision of the district court not to grant a preliminary injunction.\(^\text{124}\) The Court’s rules on which court deserves deference remain uncertain and underdeveloped.

4. Texas.

The Court erred in failing to vacate the Fifth Circuit’s stay, even applying the “demonstrable error” standard of review.\(^\text{125}\) As Justice

\(^\text{120}\) North Carolina v. League of Women Voters of N.C., 135 S. Ct. 6 (2014).

\(^\text{121}\) Despite the loss of same-day voter registration and cutbacks in early voting, the amount of early voting actually increased in 2014 compared to the 2010 midterm election, especially among Democrats. Nate Cohn, For Democrats, Turnout Efforts Look Successful (Though Not Elections), N.Y. TIMES (Nov. 14, 2014), http://www.nytimes.com/2014/11/15/upshot/evaluating-the-success-of-democratic-get-out-the-vote-efforts.html?_r=0 (“Since 2010, turnout increased by 14 percent in North Carolina counties that voted for President Obama, but just 4 percent in counties that voted for Mitt Romney.”).


\(^\text{123}\) Id. at 252-53.


\(^\text{125}\) Veasey v. Perry, 135 S. Ct. 9 (2014).
Ginsburg pointed out in dissent, the court failed to properly apply the *Nken* standard to consider whether or not to stay the district court order enjoining Texas’ continued use of its voter identification law.\textsuperscript{126} Instead, the Fifth Circuit decided the question of a stay solely as a matter of timing under the *Purcell* principle.\textsuperscript{127}

By failing to properly apply the *Nken* standard, the Court of Appeals never examined the likelihood of success on the merits or the relative hardship of the parties.\textsuperscript{128} With the Court of Appeals failing to examine the merits, it (and the Supreme Court) should have deferred on the facts to the trial court, which held a full trial. The trial court determined not only that the law was likely to have a disparate impact on minority voters but also that the Texas legislature passed the law with racially discriminatory intent.\textsuperscript{129} Further, the trial court determined the law was an unconstitutional poll tax because of the costs associated with getting needed documentation.\textsuperscript{130}

Whether or not the Supreme Court would likely agree with the district court’s more expansive reading of section 2 of the Voting Rights Act, the Constitution’s Equal Protection Clause, or the Twenty-Fourth Amendment, it should have deferred to the district court given the finding of intentional racial intent. There is no question that voting laws passed with a racially discriminatory purpose can violate both the Fourteenth and Fifteenth Amendments. Further, factual findings of trial courts, such as the district court’s finding of racially discriminatory purpose, are entitled to considerable deference unless they are clearly erroneous. The Fifth Circuit not only failed to reject the trial court’s factual finding on this point as clearly erroneous—it refused to examine the record on the question when deciding to stay the trial court’s injunction.

The Fifth Circuit also failed to meaningfully consider the irreparable harm to the parties or the public interest aside from application of the *Purcell* principle. The trial court’s factual finding that up to 600,000 Texans lacked the right kind of identification and could not easily receive it would be a factual finding entitled to deference unless clearly erroneous. This large risk of disenfranchisement would

\textsuperscript{126} Id. at 10 (Ginsburg, J., dissenting).

\textsuperscript{127} See *Veasey v. Perry*, 769 F.3d 890, 892-95 (5th Cir. 2014).

\textsuperscript{128} The Fifth Circuit held that the state would be irreparably harmed if it could not enforce its laws. Id. at 895. It then said that the individual voter plaintiffs “may be harmed” by the stay, but then in a footnote backpedaled: “The State contends that no individual voter plaintiffs would actually be harmed by a stay. But, at this time, we decline to decide the fact-intensive question of which individual voter plaintiffs would be harmed.” Id. at 896 & n.4. The failure to engage with the facts makes the balancing the court purported to engage in meaningless.


\textsuperscript{130} Id. at 703-07.
have to be balanced against the State’s interest in preventing voter fraud. And here, once again, the Court of Appeals did not address, much less find clearly erroneous, the district court’s factual finding that there was no significant evidence of impersonation fraud to support Texas’ voter identification law and that claims of fraud were a pretext for unconstitutional discrimination.

Faced with such a record, the Supreme Court in the Texas case should have sided with Justice Ginsburg’s dissent and put Texas’ voter identification law on hold until the Fifth Circuit (and potentially the Supreme Court) could fully review the factual findings and legal conclusions the district court made after a full trial on the merits. Leaving the decision to hang solely on the Purcell principle risked the disenfranchisement of voters without good reason and violated the Court’s own stated standards for determining whether to vacate a stay imposed by a court of appeals.

IV. GIVING REASONS (AFTER THE FACT) IN EMERGENCY (ELECTION) CASES

Whether or not the Supreme Court in reviewing emergency election cases is going to rein in the Purcell principle in order to apply the Court’s more general standards for granting or denying emergency relief, the Court should give lower courts and the public a fuller explanation for its actions. An explanation could come weeks or months after the Court issues an emergency order in the form of a separate opinion or set of opinions, much like the practice of some state supreme courts in dealing with emergency election litigation. State supreme courts, federal district courts, and federal courts of appeal have followed this practice.

131. See, e.g., Malnar v. Joice, 337 P.3d 43, 44 (Ariz. 2014) (“We previously issued an order affirming the superior court’s removal of Elizabeth Joice’s name from the 2014 general election ballot for a vacant term on the Peoria Unified School District Governing Board. This opinion explains our reasoning.”).

132. For example, Judge O’Malley of the Northern District of Ohio wrote:

After careful consideration, while, for reasons that will be explained in detail in the Court’s forthcoming memorandum opinion in this matter, the Court ultimately rejects both parties’ legal theories, it orders implementation of one of the Board’s alternative remedies: limited voting. The Court issues this summary order now to accommodate the concerns expressed by the Board of Elections and to provide the parties with guidance as to how to prepare for this fall’s upcoming Board elections. The Court will explain the full rationale for reaching this result in the opinion that will issue shortly.


133. See, e.g., Citizens United v. Gessler, 773 F.3d 200, 202 n.1 (10th Cir. 2014) (“We held oral argument on October 7 and issued an interim order on October 14. This opinion explains the basis of that order and does not consider events occurring after October 14.”); Voting for Am., Inc. v. Andrade, 488 F. App’x 890, 891 (5th Cir. 2012) (“On September 6,
There is even Supreme Court precedent for doing so. In 1942, the Supreme Court considered habeas corpus petitions involving the detention of German citizens during World War II. In *Ex Parte Quirin*, the Court issued an order in the case, following it up a few months later with an explanatory opinion. But the Court has not followed that practice, either in *Bush v. Gore* or in the 2014 election cases, when the press of time made an immediate decision, but not full opinion, necessary.

It is possible that many of the criticisms of the logic and argument of *Bush v. Gore* could have been avoided if the Court had more time to work on the opinion. Justice Sandra Day O’Connor, in the *Bush v. Gore* majority, later told journalist Jan Crawford Greenburg: “I don’t think what emerged in the last opinion was the Court’s best effort. It was operating under a very short time frame, to say the least. Given more time, I think we probably would’ve done better.” Similarly, Justice Kennedy, also in the majority, told Greenburg, “The problem with *Bush v. Gore* was that it came so fast, it had to be decided so fast.”

The benefits of giving reasons are many. Reasons will help lower courts use the right standards in election cases, rather than having to try to read tea leaves from unexplained Court orders. Following the Court’s normal procedural regularity in election cases will bolster the legitimacy of the Court in the eyes of the public, something especially important in controversial cases, such as election cases. Following usual and articulated rules may also discipline Justices into deciding similar cases alike, regardless of the identity of the parties.

Giving reasons imposes three significant costs as well. First, it imposes time costs on the Justices, who often have to put aside their work on the Court’s normal caseload to deal with these emergency

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2012, we entered an order granting Appellant Texas Secretary of State Hope Andrade’s Emergency Motion to Stay the district court’s Order (as modified) granting in part a preliminary injunction against the enforcement of certain Texas statutes and stating that reasons would be assigned later. Those reasons follow.”.

134. 317 U.S. 1 (1942) (per curiam).

135. Id. at 20 (“On July 31, 1942, after hearing argument of counsel and after full consideration of all questions raised, this Court affirmed the orders of the District Court and denied petitioner’s applications for leave to file petitions for habeas corpus. By per curiam opinion we announced the decision of the Court, and that the full opinion in the cases would be prepared and filed with the Clerk.”) (citation omitted).


137. Id.


139. See Baude, *supra* note 27, at 9-15 (noting the benefits of procedural regularity and legitimacy in Court decision-making).
motions in the first place. However, if the Court could work on these cases when not up against pressing deadlines, it could issue an opinion with reasons even months after a decision.

Second, giving reasons could cause the Court to decide issues it would rather avoid or would prefer to resolve in another case with a better-developed factual record. This is a genuine concern. Having the Court decide the full scope of section 2 of the Voting Rights Act in vote denial cases based on the relatively spare record in some of these cases could lead the Court to make poor decisions which it could avoid in reviewing a more fully formed case. The Court can deal with this problem in a few ways: asking for supplemental briefing, remanding for additional fact-finding, or issuing an opinion that limits the Court’s precedential holding, explaining that the Court may view the legal issue differently when presented more fully in a subsequent case.

Finally, forcing the Court to give reasons may make it more difficult for the Court to reach prudential decisions of compromise in these cases. As noted, both Purcell and Wheaton might be viewed as cases in which the Court wanted to preserve the status quo and put issues off for another time. Further, Justices Breyer and Kagan might not have (publicly) dissented in the North Carolina case in hopes that such restraint could induce the Chief Justice and Justice Kennedy not to dissent (or publicly dissent) in the Wisconsin case. This kind of tacit compromise or horse trading is, of course, speculation. But if such prudential/political considerations are going into how the Court decides some of these controversial, high profile cases, reason-giving could act as a deterrent. If Justices Breyer and Kagan have to explain their votes in the North Carolina case, they may change how they vote.

While these are real costs, they are ultimately outweighed by the duty of the Court to explain its actions in a democracy and the potential that reason-giving will lead the Court to make more consistent decisions and bolster the Court’s legitimacy. We vest the Court with great power over everything from elections to abortion, gay marriage and health care. Every important issue comes before the Court, and it is often the last word in how these cases are decided. The Court owes us, and itself, explanations when it takes important actions that broadly affect U.S. life and liberty and the strength of American democracy.

V. Conclusion

The Purcell principle is an important one which should be considered any time a court is asked to intervene close to an election: courts should weigh the risk of voter confusion and the burdens on election administrators when courts make changes to election rules close to an election.

Purcell should not be a stand-alone principle, but the Supreme Court’s silence in the 2014 election cases threatens to make it one. Instead, the Court should clarify that the Purcell principle is part of the public interest factor which courts should consider along with likelihood of success on the merits, relative hardship to the parties, and appropriate deference to lower courts in deciding whether to grant a stay or other emergency relief in an election case. Had the Court properly applied its usual test in the 2014 election cases, it would have blocked Texas’ voter identification law from being used in the 2014 election, as Justice Ginsburg urged in her dissent. The Court perhaps would have reached a different conclusion in the North Carolina voting case as well.

Finally, the Court should issue opinions, even months after the fact, explaining its reasoning in the election cases. Such opinions will increase the Court’s legitimacy in deciding controversial election issues and could discipline the Court to apply consistent legal standards to requests for emergency relief.
RACE, SHELBY COUNTY, AND THE VOTER INFORMATION VERIFICATION ACT IN NORTH CAROLINA*

MICHAEL C. HERRON** & DANIEL A. SMITH***

ABSTRACT

Shortly after the Supreme Court in Shelby County v. Holder struck down section 4(b) of the Voting Rights Act (VRA), the State of North Carolina enacted an omnibus piece of election-reform legislation known as the Voter Information Verification Act (VIVA). Prior to Shelby, portions of North Carolina were covered jurisdictions per the VRA’s sections 4 and 5—meaning that they had to seek federal preclearance for changes to their election procedures—and this motivates our assessment of whether VIVA’s many alterations to North Carolina’s election procedures are race-neutral. We show that in presidential elections in North Carolina black early voters have cast their ballots disproportionately in the first week of early voting, which was eliminated by VIVA; that blacks disproportionately have registered to vote during early voting and in the immediate run-up to Election Day, something VIVA now prohibits; that registered voters in the state who lack two VIVA-acceptable forms of voter identification, driver’s licenses and non-operator identification cards, are disproportionately black; and that preregistered sixteen and seventeen year old voters in North Carolina, a category of registrants that VIVA prohibits, are disproportionately black. These results illustrate how VIVA will have a disparate effect on black voters in North Carolina.

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I. INTRODUCTION

In the final week of its 2012–2013 Term, the United States Supreme Court in Shelby County v. Holder1 struck down as unconstitu-

* The authors thank Michael P. McDonald (University of Florida) for providing two North Carolina voter files, and Shengzhi Wang (University of Vermont College of Law), Matthew Price (University of Florida College of Law) and Caitlin Ostroff (University of Florida) for their excellent editorial assistance.

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1. 133 S. Ct. 2612 (2013).
tional section 4(b) of the Voting Rights Act (VRA). Historically a key objective of the VRA has been preventing retrogression in racial and language minority voting rights, and the now-defunct section 4(b) contributed to this goal by defining a coverage formula that identified jurisdictions in the United States requiring federal preclearance before changing their election laws and procedures. By extension, the majority’s decision undermined section 5 of the Act, which specifies preclearance procedures and heretofore required all or parts of fifteen states to receive preclearance before making any changes to their election procedures.

The Court issued Shelby on June 25, 2013. Shortly thereafter the North Carolina state legislature passed an omnibus elections bill, House Bill 589, which was signed into law by Republican Governor Pat McCrory on August 12, 2013. Among its many alterations to the electoral environment in North Carolina, the Voter Information Verification Act, known colloquially as VIVA, shortened from seventeen to ten days the state’s early voting period; eliminated same-day voter registration during early voting; created a photo identification requirement for casting a ballot in-person but with special dispensation for voters over the age of seventy; and, limited the preregistration of sixteen and seventeen year olds to those turning eighteen by Election Day. Because 40 of North Carolina’s 100 counties had been covered by section 5 of the VRA, pre-Shelby these election law changes would have necessitated preclearance with the federal government so as to ensure that they did not lead to “retrogression in the position of racial minorities with respect to their effec-

2. See 42 U.S.C. § 1973b(b) (2012), invalidated by Shelby County v. Holder, 133 S. Ct. 2612, 2631 (2013) (“[Congress’s] failure to [update the coverage formula] leaves us today with no choice but to declare § 4(b) unconstitutional. The formula in that section can no longer be used as a basis for subjecting jurisdictions to preclearance.”).


5. VIVA’s photo identification requirement is not slated to go into effect until 2016. In addition to the special dispensation made for registered voters over the age of seventy, VIVA also makes exceptions to its identification requirements for those with religious objections to photographic identification and to those who prior to an election were victims of a natural disaster. See Voter Information Verification Act § 2.1.

tive exercise of the electoral franchise.” 7 Post-Shelby, however, no such preclearance requirement for North Carolina exists.

VIVA has been lauded by supporters for its focus on protecting the integrity of voting processes in North Carolina and criticized by others who view it as a piece of legislation designed to suppress votes, in particular votes of eligible black residents of North Carolina. Viewed in this light, VIVA exemplifies the contemporary—and increasingly partisan—debate in the United States over voting rights and the sometimes caustic struggle between those advocating for relatively liberal ballot access laws and those who urge vigilance in the face of allegations of election fraud. 8 The issue of race is entwined in this struggle, and in light of this, what follows is an analysis of North Carolina’s electoral environment, one that focuses on the intersection of VIVA and race. Our attention here is specifically directed at race—as opposed to, say, political party affiliation—because of this construct’s position in the VRA and the recent decision in Shelby, not to mention the legacy of racial discrimination in American electoral history. 9 Broadly speaking, our objective is assessing whether VIVA will have differential effects on the two major racial groups, blacks and whites, in North Carolina. According to 2012 estimates from the United States Census, these two groups constitute over ninety-three percent of North Carolina residents; in particular, the Census reports that roughly seventy-two percent of North Carolina residents are monoracial white and twenty-two percent, monoracial black. 10

The scope of this study is the past three General Elections in North Carolina—those that occurred in 2008, 2010, and 2012—in addition to the past two off-year elections—those in 2009 and 2011. In light of this paper’s stated objective of assessing whether VIVA will have differential effects across racial groups in North Carolina, our analysis of these five elections considers whether black and white early voters in North Carolina have traditionally cast their ballots on similar days during North Carolina’s early voting period; whether blacks and whites in North Carolina tend to differ in their propensities to register to vote immediately prior to voting early; whether registered voters in North Carolina over the age of seventy

are disproportionately black or white; and, whether black and white voters will be differentially affected by VIVA’s rules regarding voter identification. As will be made clear when we discuss VIVA in greater detail, we investigate these race-based questions because of the specific changes that VIVA has wrought on North Carolina election procedures.

The evidence we offer implies that VIVA will have a disparate effect on black voters in North Carolina and is thus not race-neutral. We show, for example, that blacks in the state often vote relatively early in the first week of what historically was an approximately seventeen-day early voting period, a week that VIVA eliminated when it reduced North Carolina’s early voting period to ten days; that in two of the three most recent General Elections in North Carolina, blacks disproportionately registered on early voting days that VIVA has eliminated; that blacks are disproportionately represented among registered voters in North Carolina who lack two of the seemingly standard forms of photo identification that VIVA deems acceptable; that a special dispensation regarding photo identification requirements for older voters is a greater benefit to whites than to blacks; and, that prior to VIVA’s eliminating preregistration in North Carolina for all sixteen and some seventeen year olds, preregistered voters were disproportionately black.

In the next Part of this Article we describe VIVA’s political context, situating it in the post-Shelby County v. Holder landscape. After discussing the legislative history of VIVA and some of its particulars, we turn to the data used in our analysis of five recent North Carolina elections. Next we present results on the role of race in North Carolina early voting, registration timing, access to voter identification, and preregistration. We end this Article with some concluding thoughts.

II. ELECTORAL REFORM IN THE SHADOW OF SHELBY COUNTY v. HOLDER

The origins of VIVA predate by several months the Supreme Court’s decision in Shelby County v. Holder. Nonetheless, the context surrounding this relatively recent North Carolina state law is now part of the aftermath of what appears to be one of the most momentous Supreme Court decisions in the area of voting rights since the 1960s.

A. The Voting Rights Act and Origins of Shelby

The VRA was originally passed by Congress in 1965 and signed into law by then-President Lyndon B. Johnson. The objective of the Act was elimination of voting discrimination, and the VRA established
extensive federal oversight of election administration. The VRA has many facets, but the particular aspects of this law that concern us here are its sections dealing with preclearance. In the introduction we noted that section 4(b) of the VRA provides a coverage formula that specifies the jurisdictions in the United States subject prior to Shelby to federal preclearance, i.e., that needed permission to modify their election procedures prior to implementing them. Section 4(b)'s formula includes indicators as to whether a given voting jurisdiction mandated a literacy “test or device” as a requirement for registering to vote as of November 1, 1964 or had registration or turnout rates of less than fifty percent of voting age population in 1964.\textsuperscript{11} Section 5 of the VRA describes how preclearance is implemented and thus leans heavily on section 4(b). Beyond sections 4 and 5, section 2 of the VRA prohibits everywhere in the United States the dilution or denial of voting rights on the basis of race and language minority status.\textsuperscript{12} In contrast to sections 4 and 5 and their emphasis on preclearing changes to election laws before they are promulgated, the VRA's section 2 places the burden of proof on those affected by ostensibly problematic election protocol changes.\textsuperscript{13}

Pre-Shelby, all election law and protocol changes that affected covered jurisdictions—i.e., those characterized as such by the VRA's section 4(b)—were reviewed by the United States Department of Justice or the federal courts in order to determine if they had retrogressive effects on racial, ethnic, or language minorities. Between 2006, when Congress last reauthorized the VRA, and the spring of 2013, the Department of Justice used its preclearance authority to block many election law alterations that it determined would have discriminatory effects. Prior to the 2012 General Election, for example, the Department of Justice challenged and prevented restrictive photo identification laws from being implemented in Alabama, Mississippi, South Carolina, and Texas,\textsuperscript{14} and it successfully forced Florida to modify a mid-2011 law that placed new restrictions on voter registration drives by third party organizations.\textsuperscript{15}

\begin{itemize}
  \item \textsuperscript{11} \textit{See}, e.g., \textit{Section 4 of the Voting Rights Act}, U.S. DEP'T JUST., \url{http://www.justice.gov/crt/about/vot/misc/sec_4.php} (last updated Aug. 8, 2015).
  \item \textsuperscript{12} \textit{See} 42 U.S.C. § 1973 (2012).
  \item \textsuperscript{13} \textit{See id.} § 1973(b).
\end{itemize}
Shelby struck down the VRA’s section 4(b) on account of ostensible problems with the preclearance coverage formula, thus rendering section 5 of the VRA effectively toothless. As a result of this case, changes to voter registration procedures, new requirements for voter identification, and alterations to early voting hours, inter alia, in previously covered or partially covered states no longer must be vetted by the federal government before taking effect. According to Chief Justice Roberts’s majority opinion, the VRA’s antiquated preclearance formula was “based on 40-year-old facts having no logical relation to the present day.”16 Some scholars who historically have been critical of preclearance were pleased with Shelby, with vice-chair of the United States Commission on Civil Rights, Abigail Thernstrom, arguing that, “[t]he court’s ruling Tuesday will benefit black America.”17 Similarly, former United States Department of Justice official, Hans von Spakovsky, stated that the Court “effectively threw out the preclearance requirements because they were based on 40-year old data,” and in so doing, “foreclosed what seems to be one of the favorite pastimes of [Department of Justice] Voting Section lawyers—pretending it is still 1965.”18

Others, even some who have historically been generally sympathetic with the goals of the VRA, concurred with Roberts’ opinion that Congress had neglected its duty—most recently in 2006, when it reauthorized the VRA—to modernize the Act’s coverage criteria. Noting that “the [VRA] was pivotal in bringing black Americans to the broad currents of political life,” Issacharoff nonetheless concedes that the Court’s “unromantic constitutional ruling” in Shelby reveals that “the race discrimination structure of section 5 could not be justified in light of the increasing distance between the prohibitions and the distinct practices of racial exclusion that lie at the heart of the Voting Rights Act.”19 Grofman writes similarly, arguing that, “the data used for the [section 4 trigger of section 5] were not just stale, they were incredibly stale.”20 Still, as Kimball points out, recent literature on ballot access shows that voting discrimination in the United States is

hardly a thing of the past notwithstanding the raw voter turnout figures cited in the Shelby majority opinion as evidence of a lack thereof.\textsuperscript{21}

Reactions from the voting rights community to the Shelby decision were predictably harsh. Congressional Representative John Lewis (D-Ga), who was alongside President Johnson in 1965 when he signed the VRA into law, excoriated the Supreme Court’s decision:

When the Supreme Court made the decision, I almost cried. I almost shed some tears . . . . I kept saying to myself, “I wish somehow the members of the Supreme Court—especially the five that voted to put a dagger in the heart and soul of the Voting Rights Act—could walk in our shoes.” \textsuperscript{22}

Voting rights groups quickly took aim at the decision, with Advancement Project, for example, issuing a statement expressing “disappoint[ment] that the Supreme Court has taken the extreme act of at least temporarily suspending the nation’s strongest civil rights protection,” and arguing that “[a]mple evidence shows that prior Section 4 formula—which enabled Section 5 to block more than 1,500 discriminatory voting laws from going into effect since its inception, including five last year—is still a critical necessity, and that the formula for those covered states was clearly appropriate.”\textsuperscript{23} The Campaign Legal Center, a nonpartisan public advocacy group specializing in elections, also decried Shelby, saying:

The Roberts Court proved again that it will not be deterred by Supreme Court precedent, the realities on the ground in our nation; nor will it defer to Congress even when the legislative branch is granted clear authority by the Constitution to remedy our nation’s long history of discrimination against racial and language minorities.\textsuperscript{24}

The NAACP Legal Defense and Educational Fund, which defended the VRA in Shelby, called the Court’s decision “extraordinary judicial overreach,” which has “left millions of minority voters without the mechanism that has allowed them to stop voting discrimination

\textsuperscript{21} David C. Kimball, \textit{ Judges Are Not Social Scientists (Yet)}, 12 \textit{ELECTION L.J.} 324, 324-25 (2013).


\textsuperscript{24} Ryan J. Reilly, Mike Sacks & Sabrina Siddiqui, Voting Rights Act Section 4 Struck Down by Supreme Court, HUFFINGTON POST (June 25, 2013, 10:19 PM), http://www.huffingtonpost.com/2013/06/25/voting-rights-act-supreme-court_n_3429810.html.
before it occurs.” 25 Elisabeth MacNamara, President of the League of Women Voters, said the Court “erased fundamental protections against racial discrimination in voting that have been effective for more than 40 years.” 26

B. The Aftermath of Shelby

In the wake of Shelby, a debate among voting rights and election law scholars started over the future of the VRA’s sections 4 and 5. Some legal scholars have argued that race-based criteria for preclearance remain defensible. Gilda Daniels, for example, asserts that Congress should expand section 5’s preemptive preclearance power “to protect citizens from discriminatory voting laws.” 27 Others, though, have proposed new, arguably race-neutral criteria for preclearance. Chris Elmendorf and Doug Spencer suggest that an alternative requirement for federal preclearance turn on the fraction of residents in a state who hold negative stereotypes of minorities, 28 drawing on the history of litigation under section 2 of the VRA, Bernie Grofman suggests a new trigger mechanism for federal preclearance, namely targeting jurisdictions that have had “multiple section 2 cases brought against them” or those that “have repeatedly been found in violation” of retrogressive changes under section 5. 29 Bruce Cain and Spencer Overton suggest a greater use of the VRA’s section 3 “bail-in provision” in light of the concern that Congress in the near future is unlikely to craft more extensive franchise protections. 30 Alternatively, Janai Nelson argues that the courts should adhere to a more narrow construction of disparate impact claims under section 2 (as amended by Congress in 1982), specifically that statistical analyses of vote dilution should look not only at the racial impact “but also [at] the racial context in which this evidence is situated,” or what she dubs the “causal context” that defines disparate vote deni-


Finally, Rick Hasen takes a broader view, arguing that since race and party are tightly intertwined, federal courts should ensure that the rights of voters remain protected from maneuvers that could be interpreted as having harmful effects on the grounds of either party or race. Sam Bagenstos labels this approach “universalist” since it seeks to “provide uniform protections to everyone” as opposed to, say, a particular racial group.

Concomitant with the post-Shelby debate over the future of pre-clearance and possible trigger mechanisms for federal oversight of state-level and local election procedures, election law changes across many states are underway in various forms. Mississippi, Texas, and Virginia, for example, have begun implementing voter identification requirements that prior to Shelby could have faced extensive federal scrutiny. In response to the Texas voter identification law, the federal Department of Justice has under section 2 of the VRA filed suit against the voter identification law known as Senate Bill 14, requesting that federal courts enjoin key sections of this bill and make Texas subject to the type of pre-clearance that it faced pre-Shelby. Other states—Arizona and Kansas, the former previously a section 4 jurisdiction—have embarked on dual-registration systems, requiring proof of citizenship for voters wishing to cast their ballots in state elections. Note that the Supreme Court ruled in Arizona v. Inter Tribal Council of Arizona that states cannot require proof of citizenship to vote in federal elections. Dale Ho, Director of the ACLU’s Voting Rights Project, notes that dual registration systems “were set up after Reconstruction alongside poll taxes, literacy tests and all the other devices that were used to disenfranchise African-American voters.” In Ohio legislative efforts are currently underway as of the writing of this paper not only to eliminate a week from early voting but also, as in North Carolina, to eliminate the so-called “Golden Week.”

32. See Hasen, supra note 8, at 61-62.
Week” that has permitted eligible citizens of Ohio to register and vote on the same day.\textsuperscript{39} Even before 
\textit{Shelby}, many states in the past several years have created new voter identification rules and passed restrictions on absentee and early voting, and Keith Bentele and Erin O’Brien, as well as Will Hicks and his coauthors, argue that this behavior follows a well-worn tradition in the United States of using ballot access laws for partisan purposes.\textsuperscript{40}

C. \textit{North Carolina’s Voter Information and Verification Act}

The original version of VIVA—called House Bill 589—was filed in the North Carolina House on April 4, 2013, and at that time this proposed legislation was essentially a bill aimed at establishing a photo identification requirement for in-person voting in North Carolina. The early 2013 version of House Bill 589, for example, did not alter the length of the state’s early voting period.\textsuperscript{41} The North Carolina House passed (81 votes in favor, 36 opposed) House Bill 589 on April 24, 2013;\textsuperscript{42} the North Carolina Senate received the legislation on the subsequent April 25, and following that date, legislative action on this bill ceased until late July 2013.

On July 23, 2013, a committee substitute for House Bill 589 was adopted in the North Carolina Senate, and with respect to the original bill, this substitute narrowed the types of permitted forms of voter photo identification, cut the number of early voting days in North Carolina by a week, eliminated same day registration and voting during early voting, and made other changes to the North Carolina electoral law.\textsuperscript{43} Regarding narrowing the acceptable forms of voter photo identification, for example, an employee identification card was ac-


ceptable under the original House Bill 589 but not under the substitute; moreover, expired forms of photo identification were acceptable under the former as long as date of expiry was fewer than ten years in the past. Notwithstanding the additional restrictions called for in the substitute House Bill 589, this piece of legislation passed (33 in favor, 14 opposed) the North Carolina Senate on July 25, 2013, and was sent immediately thereafter to the House, passing the lower chamber several hours later (73 in favor, 41 opposed), at 10:39 p.m. House Bill 589 was signed into law by North Carolina Governor Pat McCrory thus producing what is now known as VIVA.

The passage of VIVA has engendered an acrimonious dispute between the Act’s supporters, who describe the new legislation as protecting the integrity of North Carolina’s election procedures, and its critics, who see VIVA as a bill designed to suppress votes. Particularly notable about the current dispute in North Carolina is the question of whether the Court’s abandonment of section 5 federal pre-clearance is a harbinger of new attempts to insert race into debates about voting rights and ballot access.

Indeed, critics of VIVA have alleged that the Act’s cut in North Carolina’s early voting period might have differential effects on black voters in the state. North Carolina Attorney General, Democrat Roy Cooper, whose job responsibilities include enforcing VIVA, claims the new law threatens “fifty years of progress” in the state and has said as well that “[a] lot of bad public policy was lumped into this bill at the last minute.” And upon passage of VIVA, nine-term Democratic state Senator Ellie Kinnaird resigned in protest, saying that the law was designed “to deny people their right to vote.” Nonetheless, supporters of VIVA argue that the bill protects the right to vote for all eligible North Carolinians and, in addition, brings North Carolina

47. Roy Cooper Is Right to Object to Laws That Ill-serve the Public, ROY COOPER (Nov. 9, 2013), 2013 WLNR 28264734.
into alignment with a majority of other states that do not allow voters to register to vote and then vote on the same day. Upon signing it into law, Governor McCrory said in a press release, “I am proud to sign [VIVA] into law. Common practices like boarding an airplane and purchasing Sudafed require photo ID and we should expect nothing less for the protection of our right to vote.”

Senate President Pro Tem Phil Berger argued similarly, saying that “[VIVA] is a common sense measure to address concerns that a lot of people have about voting, about making sure that when people vote, they are who they say they are.”

As of this Article’s writing VIVA continues to face multiple legal challenges. On September 30, 2013, the federal Department of Justice filed a lawsuit in federal district court alleging that parts of VIVA violate section 2 of the VRA insofar as they “would have the result of denying or abridging the right to vote on account of race, color, or membership in a language minority group.” The lawsuit specifically comments on VIVA’s decrease in early voting hours and its elimination of same-day voter registration as well as aspects of VIVA that deal with provisional ballots and voter identification. The Department of Justice’s lawsuit came on the heels of two other federal cases, both filed on August 12, 2013. In one of these federal suits, the North Carolina State Conference of the NAACP and other plaintiffs claim VIVA violates section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution. In the second, League of Women Voters and others challenge VIVA, alleging the law would result in “the denial or abridgement of the right of African Americans in North Carolina to vote in contravention of Section

49. Press Release, Patrick McCrory, Governor of N.C., Governor McCrory Signs Popular Voter ID into Law (Aug. 12, 2013), https://votesmart.org/public-statement/803704/governor-mccrory-signs-popular-voter-id-into-law#.VeyBYZ1Viko. The press release also notes that 37 states do not allow same-day registration followed immediately by voting. Id. (“This new law also aligns North Carolina with the majority of states (37) that do not allow a person to register and vote on the same day.”).


2 of the Voting Rights Act.” Beyond these three federal lawsuits, the League of Women Voters of North Carolina and various other plaintiffs have challenged VIVA in state court, arguing that the law’s requirement pertaining to photo identification “imposes a [sic] unconstitutional property requirement in violation of Article I, § 10 [of the North Carolina state constitution] by requiring voters to possess not only an acceptable photo ID, but also the documents necessary to obtain the photo ID and the resources necessary to procure those documents.”

VIVA has many facets, and our analysis here focuses on what appear to be the most significant aspects of the Act. These include the changes VIVA made to the North Carolina early voting period (shortening it from seventeen days to ten); the elimination of same day voter registration; the creation of a photo identification requirement for voters albeit with a special dispensation for voters at least seventy years old; and, the elimination of preregistration of eligible sixteen and seventeen year olds unless they turn eighteen before an upcoming election. The existence of aspects of VIVA that we do not address should not be taken as an endorsement of the claim that these aspects are race-neutral or indeed neutral in any other fashion. Indeed, as Jonathan Wand and his coauthors and Laurin Frisina and her coauthors illustrate, seemingly anomalous or innocuous changes to electoral protocols can have serious consequences for elections.

As a follow-up to a remark we made in the introduction, we emphasize here that we are not interested in this Article in whether VIVA may or may not have partisan effects in North Carolina. Insofar as race is often correlated with political preferences, any conclusions we draw about differential effects of VIVA across racial groups will almost by construction have partisan implications as well. More-


over, the partisan implications of election-reform efforts presumably weigh heavily on office-motivated politicians. Still, we avoid the matter of partisanship because this construct is not protected by the VRA, and we leave for future research the question of whether VIVA’s changes to voting laws in North Carolina could alter the partisan balance in the state.

III. NORTH CAROLINA REGISTRATION AND VOTING DATA

Our assessment of the extent to which VIVA has differential effects across racial groups in North Carolina is based on examining historical patterns in North Carolina elections. We have noted above, for example, that VIVA altered the length of North Carolina’s early voting period, and this motivates our upcoming analysis of the types of voters in North Carolina who historically have tended to vote early. Such an analysis allows us to determine the types of voters who will be most affected by VIVA’s shortening of the North Carolina early voting period.

We consider here five elections, in particular those that took place in 2008, 2009, 2010, 2011, and 2012. This collection of elections provides us with variance in several ways. Of these five elections, three were general—2008, 2010, and 2012—and two were off-year—2009 and 2011. Moreover, of the general elections, two were presidential—2008 and 2012—and the third was the 2010 midterm election that lacked a presidential contest.

We draw on three different data sources when analyzing our five elections of interest, and one key source is the North Carolina statewide voter file. Most of our analysis relies on a version of this file downloaded from the North Carolina State Board of Elections (SBOE) on September 5, 2013. We call this file the September 2013 voter file. To a limited extent, we also use copies of the North Carolina voter file that to the best of our knowledge were created in February 2009 and February 2011. We use these latter two files only when assessing the racial composition of the North Carolina registered voter pool as of February 2009 and February 2011, respectively, and below we make it clear when these two files are invoked.57

The September 2013 North Carolina voter file contains a list of registered voters in North Carolina.58 It also contains names of previously registered voters who as of September 2013 were no longer registered in North Carolina because, for example, they had moved out of the state or had died. For both currently or previously registered voters in North Carolina, the September 2013 voter file contains

57. Michael McDonald of George Mason University provided these files to us.

58. To the best of our knowledge, the September 2013, voter file lists North Carolina registered voters as of the date that the file was created.
basic demographics (e.g., age, gender, and race), registration dates, and so forth. North Carolina voter files also include history information that describes for each registered North Carolina voter whether, and if so how, he or she participated in various elections. Such history information does not include actual vote choices, of course.\textsuperscript{59}

As a consistency check on our September 2013 voter file consider Table 1. For the General Elections of 2008, 2010, and 2012, this table lists official turnout as characterized by the North Carolina SBOE, turnout based on counts in our voter file, and associated coverage percentages.\textsuperscript{60} The three percentages in Table 1 are all very close to 100, and the very small discrepancies in the table may reflect provisional ballots and minor data errors.

<table>
<thead>
<tr>
<th>Election</th>
<th>Official Turnout</th>
<th>Voter File Turnout</th>
<th>Coverage %</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008 General</td>
<td>4,354,052</td>
<td>4,347,938</td>
<td>99.86</td>
</tr>
<tr>
<td>2010 General</td>
<td>2,700,393</td>
<td>2,699,143</td>
<td>99.95</td>
</tr>
<tr>
<td>2012 General</td>
<td>4,542,488</td>
<td>4,540,838</td>
<td>99.96</td>
</tr>
</tbody>
</table>

\textit{Note: Table 1 reports general election participation counts from the September 2013 voter file, ignoring voters whose participation methods are listed as “elig-nv” and “abs-nv”. To the best of our knowledge, voters with these classifications did not cast valid ballots. Percentages are listed to four significant digits.}

North Carolina voter files contain fields that describe the registration statuses of each registered voter in the state. When a registered voter moves out of North Carolina or moves across counties within the state, said voter’s record is marked as “removed.” Despite the use of this word, a so-called removed record is not eliminated from the voter file; rather, it is simply marked as removed. If prior to September 2013, for example, a North Carolina registered voter moved from one county in the state to another, and in the process changed her county of registration, she has two records in the voter file, one corresponding to her initial county of registration and a second record cor-

\textsuperscript{59} The term “voter file” is a generic one that applies across states. Voter files provide snapshots of electorates at given moments in time. The September 2013 North Carolina voter file actually consists of two separate files. One file contains voter demographics and related variables, and the other file contains voter participation codes. Both files are on file with the authors. Together these files constitute one instance of the North Carolina voter file.

\textsuperscript{60} Voter Turnout, N.C. STATE BOARD OF ELECTIONS, http://ncsbe.azurewebsites.net/voter-turnout (last visited Mar. 8, 2016) (official statewide turnout for North Carolina elections). Per a phone conversation on January 8, 2014 with George McCue of the North Carolina SBOE, the overall turnout numbers on this website do not include provisional ballots that were not counted.
responding to her destination county. In addition, a North Carolina registered voter’s status may change to “denied” if a county establishes that the voter “is not qualified to vote based on age, citizenship, residence or conviction of a felony.”61 For example, our September 2013 voter file contains 7,345,422 individual-level records, and there were 6,465,982 registered voters whose status as of the date when the file was created was neither “denied” nor “removed.” These voters constitute the registered voter pool in North Carolina as of September 2013. Associated with the approximately 7.3 million records in the voter file are 28,422,881 participation records; each participation record describes how a given registered voter participated in an election.

Beyond voter files, the North Carolina SBOE creates for general and off-year elections what are called absentee files, and in September 2013 we downloaded absentee files for the 2008, 2009, 2010, 2011, and 2012 elections. So-called absentee files constitute our second data source, and an absentee file for a given election lists the North Carolina voters who voted early and absentee.62 In North Carolina early voting is known as “one-stop” absentee voting, and this contrasts with what in the state is called absentee voting by mail. The latter form of voting is what is traditionally known simply as absentee voting. To keep matters clear, henceforth we refer to one-stop absentee voting as early voting and absentee voting by mail as simply absentee voting.

Table 2 describes three North Carolina registered voter pools and five early voting electorates. The registered voter pools reflect the collection of registered voters in North Carolina as of a given date, and the early voting electorates are associated with individual elections. Here we use our complete set of three voter files so that we have three snapshots of the North Carolina registered voter pool at three different times. The counts in Table 2 are disaggregated by race—in particular, using the categories of black and white—as these two racial groups are the largest two such groups in North Carolina. For example, as of February 2009, blacks and whites comprised approximately 94.89% of all registered voters in North Carolina.63

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63. Our five absentee files, one per each election in 2008 through 2012, contain a small number of voters whose recorded dates of early voting lie outside of official North Carolina statewide early voting periods. These voters do not appear in Table 2, and they are not part of the analysis in this paper.
Table 2: Basic Counts from North Carolina Voter Files and Absentee Files

<table>
<thead>
<tr>
<th>Voter Type</th>
<th>Total</th>
<th>Black</th>
<th>White</th>
<th>Percent Black</th>
<th>Percent White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reg. Feb. 2009</td>
<td>6,154,625</td>
<td>1,330,188</td>
<td>4,509,917</td>
<td>21.61</td>
<td>73.28</td>
</tr>
<tr>
<td>Reg. Feb. 2011</td>
<td>6,107,325</td>
<td>1,321,338</td>
<td>4,460,138</td>
<td>21.64</td>
<td>73.03</td>
</tr>
<tr>
<td>Reg. Sept. 2013</td>
<td>6,465,982</td>
<td>1,452,855</td>
<td>4,583,342</td>
<td>22.47</td>
<td>70.98</td>
</tr>
<tr>
<td>Early 2008</td>
<td>2,419,206</td>
<td>688,080</td>
<td>1,624,920</td>
<td>28.44</td>
<td>67.17</td>
</tr>
<tr>
<td>Early 2009</td>
<td>85,496</td>
<td>19,103</td>
<td>64,393</td>
<td>22.34</td>
<td>75.17</td>
</tr>
<tr>
<td>Early 2010</td>
<td>909,122</td>
<td>195,605</td>
<td>683,517</td>
<td>21.52</td>
<td>75.17</td>
</tr>
<tr>
<td>Early 2011</td>
<td>82,195</td>
<td>23,218</td>
<td>58,977</td>
<td>28.25</td>
<td>68.69</td>
</tr>
<tr>
<td>Early 2012</td>
<td>2,567,555</td>
<td>743,026</td>
<td>1,824,529</td>
<td>28.84</td>
<td>65.74</td>
</tr>
</tbody>
</table>

Note: “Reg.” indicates registered voter. Registered voter counts and percentages are based on February 2009, February 2011, and September 2013 voter files, ignoring all records flagged as removed or denied. Early voting electorates are based on North Carolina SBOE absentee files, and early voters who have dates of voting outside of official North Carolina early voting periods are ignored. Percentages are reported to four significant figures.

We will come back to this point shortly, but Table 2 shows that early voters in North Carolina tend to be disproportionately black compared to the overall pool of registered voters in the state. One can readily see this in Table 2 by comparing percent black of the five early voting electorates with the various black percentages across the table’s three registered voter pools. An exception to this occurred in the 2010 General Election, as the black early voting percentage was slightly lower than the black percentage of the February 2011 registered voter pool.

Another implication of Table 2 is that early voting in North Carolina is a frequently used method of electoral participation. For example, over 2.5 million North Carolina residents voted early in the 2012 General Election. The magnitude of this number in conjunction with the magnitudes of early voting counts for the other elections in Table 2 bring into relief one reason that VIVA’s changes to North Carolina’s early voting period have been so controversial.

Our third and final data source consists of two lists of registered voters who lack driver’s licenses and a form of identification called a non-operator identification card. These two forms of identification are managed by the North Carolina Department of Motor Vehicles (DMV) and are permissible forms of voter identification as specified by VIVA. Our lists of registered voters who lack these two types of identification were created by the North Carolina SBOE and are described in two public reports, the first of which was released on January 7, 2013, and is titled “2013 SBOE-DMV ID Analysis” and the second of which
was released on April 17, 2013, and is titled “April 2013 SBOE-DMV ID Analysis.” These two reports detail how the SBOE attempted to determine which registered voters in North Carolina lack driver’s licenses and non-operator identification cards, and as described in the reports, the SBOE merged a voter file with a DMV-supplied list of individuals who have these forms of identification. Voter file names that could not be matched with names in the DMV list are assumed to lack driver’s licenses and non-operator identification cards, and the implication is that these individuals face relatively higher risks of not having the types of identification necessary to vote. The January list of so-called unmatched registered voters (i.e., registered voters who appear to have neither a driver’s license nor a non-operator identification card) contains 612,955 names and the April list, 318,643 names. These numbers differ roughly by an order of magnitude, and the discrepancy between them reflects the fact that the SBOE used a different merging algorithm in April 2013 than it had originally.64

IV. RACIAL TRENDS IN EARLY VOTING

We begin our assessment of the extent to which VIVA will have differential effects across racial groups in North Carolina with an analysis of early voting in the state in the general and off-year elections of 2008 through 2012. Prior to VIVA’s enactment, the early voting period in North Carolina started three Thursdays before a Tuesday Election Day. This yielded an early voting period that could extend up to seventeen days, but in some years past this period contained fewer days because of a lack of early voting on what would have been the first Sunday of early voting.

Figure 1 displays for our five elections of interest early voting counts broken down by racial group. There are five panels in the figure, and the horizontal axis in each panel list days on which early

64. The January 2013 unmatched registered voter list, the April 2013 list, and an accompanying January report are on file with the authors. See also BARTLETT, supra note 61.

We checked whether the two unmatched voter lists contain any duplicate records where duplicate records are those with common county and county-level voter identification numbers; they do not. One issue regarding dates, though, is worth noting. The registration date field in the January file (it is called registr_dt) contains four-digit years so that, for example, 1911 can be distinguished from 2011; we checked whether any registration dates in this file were after January 2, 2013, and none was. That is consistent with the North Carolina SBOE report that describes the January file as drawing on individuals who were registered as of January 1, 2013. The registration date field for the April 2013 unmatched voter file contains two-digit years, and this leads to ambiguity between, say, 1950 and 2050. According to the North Carolina SBOE, the April file is based on registrants as of March 25, 2013; thus, a registrant with an ambiguous registration year, one that would lead to a registration post-March 25, 2013, is assumed to have a registration year in the twentieth century.
voting took place; not all horizontal axes have the same number of dates, and this reflects the occasional lack of Saturday and/or Sunday voting in an initial weekend of early voting. The arrangement of the panels in Figure 1 incorporates the fact that the elections of 2008, 2010, and 2012 were general elections whereas those in 2009 and 2011 were off-year elections. Within these two groupings the vertical axes are identical across the panels in Figure 1.
Figure 1: Daily Early Voting Totals by Race

- (a) 2008
- (b) 2009
- (c) 2010
- (d) 2011
- (e) 2012
The raw numbers in Figure 1 show that early voting in North Carolina is more heavily used in general elections than in off-year elections. This reflects the fact that the number of overall voters in 2009 and 2011, 508,372 and 495,296, respectively, was low compared to, say, the 2012 General Election, in which official turnout was 4,542,488 voters. See Table 3 for these numbers. The 2010 General Election was a midterm as opposed to a presidential election, and early voting counts in this year were noticeably lower than in 2008 and 2012. This is not an artifact of early voting: overall turnout in midterm elections is typically much lower than in presidential elections, and we should not be surprised to see lower early voting turnout in 2010 than in 2008 and 2012.

Notwithstanding differences in overall turnout, the panels in Figure 1 make it clear that early voting in North Carolina is used by thousands of voters, many hundreds of thousands in high-turnout elections like those that took place in 2008 and 2012. The point of this is simply to note that early voting in North Carolina is not a fringe phenomenon and that any changes to the state’s early voting laws have the potential to affect thousands of voters. We mentioned this earlier, and to get some perspective on the magnitudes of the counts in Figure 1, consider the aforementioned Table 3. This table lists overall election turnout in North Carolina for our five elections of interest, and in 2008 and 2012 early voting turnout constituted more than half of overall voter turnout. In contrast, early voters were approximately one-third of all voters in 2010 and around sixteen percent of all voters in 2009 and 2011.

**Table 3: Overall and Early Voting Turnout**

<table>
<thead>
<tr>
<th>Election</th>
<th>Overall Turnout</th>
<th>Early Voting Turnout</th>
<th>Percent Early</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>4,353,739</td>
<td>2,419,206</td>
<td>55.57</td>
</tr>
<tr>
<td>2009</td>
<td>508,372</td>
<td>85,496</td>
<td>16.82</td>
</tr>
<tr>
<td>2010</td>
<td>2,700,383</td>
<td>909,122</td>
<td>33.37</td>
</tr>
<tr>
<td>2011</td>
<td>495,296</td>
<td>82,195</td>
<td>16.60</td>
</tr>
<tr>
<td>2012</td>
<td>4,542,488</td>
<td>2,567,555</td>
<td>56.52</td>
</tr>
</tbody>
</table>

*Note: Percentages are reported to four significant figures.*

The five panels in Figure 1 report daily counts of early voters, and we can use these panels to understand patterns in temporal variability of early voting in North Carolina. To this end, several patterns

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are evident in the figure. First, in all five elections pictured in the figure, there were disproportionately fewer early voters on weekends than on weekdays; this holds for both black and white early voters. Second, within weekends themselves, Sundays saw fewer early voters than Saturdays, again for both black and white voters. Third, on almost every day of early voting, more whites than blacks voted early; this is consistent with the fact that there are more whites than blacks in North Carolina, and this was evident in the aforementioned Table 2. Fourth, Figure 1 shows that, weekends notwithstanding, North Carolina early voters tend to vote in the second half of the state’s early voting period; however, the matter of first versus second week of early voting (broadly construed insofar as North Carolina does not have exactly a two-week early voting period) is not constant across racial groups. Namely, the white-black gap in early voting turnout appears to increase as the early voting period progresses.

Figure 2: Daily White Black Differences in Early Voting Counts

(a) 2008 (b) 2009

(c) 2010 (d) 2011
This latter point is particularly noteworthy in light of VIVA's elimination of the first week of early voting in North Carolina. More details on the white-black early voting gap are reported in Figure 2, which plots white-black differences in early voting counts from the General Elections of 2008 through 2012. To be precise, the differences in Figure 2 are computed by subtracting black early voting counts in Figure 1 from corresponding white counts. When a difference on a particular day is relatively large and positive, then many whites compared to blacks early voted on that day. A white minus black early voting difference that is negative connotes a day on which more blacks cast their ballots early compared to whites.

Temporarily ignoring the evident weekend effects, what is clear in Figure 2 is that the five pictured white-black difference sequences in early voting turnout increase in time. In other words, early voting blacks tend to cast their ballots earlier than do early voting whites. Why this phenomenon obtains is beyond the scope of this study, and it would be difficult to address this matter with voter file data alone. Regardless, Figure 2 documents that the two largest racial groups in North Carolina have historically voted at different times during the past early voting periods in the state.

Weekends break up the patterns in Figure 2, but even here we see evidence of a changing white-black early voting gap. Comparing (when possible) the second Saturday of early voting to the first Saturday of early voting or the second Sunday of early voting to the first Sunday of

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66. One explanation may lie in mobilization efforts carried out by groups such as Democracy North Carolina and the North Carolina NAACP, who have worked with African American congregations as well as the General Baptist State Convention and other churches, to get out the vote as part of an early voting “Souls to the Polls” Project. See Souls to the Polls, DEMOCRACY N.C., http://nc-democracy.org/get-involved/souls-to-the-polls (last visited Mar. 8, 2016).
Early voting shows that the white-black early voting gap is greater in second weekend early voting compared to first weekend early voting.

Figure 3: Racial Composition of Early Voting Electorates

(a) 2008

(b) 2009

(c) 2010

(d) 2011

(e) 2012
This is consistent with the idea that black early voters in North Carolina tend to vote earlier in the allotted period than white early voters. Herron and Smith find evidence of similar weekend early voting effects in Florida in the 2008 and 2012 General Elections.67

Another perspective on the difference between black and white early voting rates in North Carolina can be gleaned by considering the fraction of a day’s early voting electorate that was black (similarly, white) and then comparing this fraction to the fraction of blacks (similarly, whites) in a corresponding registered voter pool. With this in mind, for our five elections of interest Figure 3 plots for each early voting day the composition of the early voting electorate that is black and the composition that is white. On each early voting day these compositions sum to a number close to one because there are North Carolina early voters in all five of our elections of interest who were neither black nor white. The panels in Figure 3 contain dashed horizontal lines that indicate the fraction of the North Carolina registered voter pool that was black and white based on an appropriate voter file. The dashed lines reflect the black and white registered voter percentages in Table 2.68

Several things are apparent in Figure 3. First, in presidential election years—2008 and 2012—the early voting electorate in North Carolina was disproportionately black on every day of early voting. In Figures 3(a) and 3(c), that is, every black dot lies above its corresponding dashed line and every white dot below its dashed line. In the 2010 General Election, which was a general election yet did not feature a presidential contest, this pattern does not hold. In 2010, whites were disproportionately represented among early voters up until the end of the early voting period, when blacks became the disproportionately represented group.69

Second, the presence of weekend effects in Figure 3 is evident: the early voting electorate in North Carolina is disproportionately black on weekends compared to the registered voter pool in North Carolina. Third, in the presidential election years of 2008 and 2012, the black fraction of the early voting electorate gradually decreased over the course of the early voting period. There were only 17 days in the 2008

68. Table 2 shows that within the North Carolina registered voter pool, the black fraction increased slightly in 2013. This is incorporated in the placement of the dashed line in Figure 3(c), although visually speaking the height of this line is very similar to the heights of the dashed lines in Figures 3(a) and 3(b).
69. We computed difference-in-proportion z-statistics for each black percentage in Figure 4(a), 4(b), and 4(c). All the z-statistics—those that are positive because the black percentage of early voters lies above a dotted line and in addition those that are negative—are significantly different than zero at conventional confidence levels.
and 2012 early voting periods, of which five days were weekends, and thus we compare in Table 4 fraction black on the first day of early voting with fraction black on the last non-weekend day of early voting. The table shows that the first weekday-last weekday drop in fraction black of the early voting electorate was statistically significant at conventional confidence levels in four of our elections studied, with negative drops in 2008 and 2012 (presidential years) and the opposite in 2010 (midterm election).

Table 4: Fraction Black at Beginning and End of Early Voting Period

<table>
<thead>
<tr>
<th>Election</th>
<th>First Thursday</th>
<th>Last Friday</th>
<th>Difference</th>
<th>z-statistic</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>0.3611</td>
<td>0.2492</td>
<td>0.1120</td>
<td>69.83</td>
</tr>
<tr>
<td>2009</td>
<td>0.2316</td>
<td>0.2463</td>
<td>-0.01463</td>
<td>1.877</td>
</tr>
<tr>
<td>2010</td>
<td>0.1683</td>
<td>0.2510</td>
<td>-0.08277</td>
<td>32.83</td>
</tr>
<tr>
<td>2011</td>
<td>0.2503</td>
<td>0.2815</td>
<td>-0.03117</td>
<td>3.888</td>
</tr>
<tr>
<td>2012</td>
<td>0.3703</td>
<td>0.2518</td>
<td>0.1186</td>
<td>82.01</td>
</tr>
</tbody>
</table>

Note: Results are reported to four significant figures.

Fourth and finally, the dashed lines in the five panels of Figure 3 are notable insofar as they show that black early voters in 2008 and 2012 were overrepresented compared to blacks in the North Carolina voter pool and that white early voters were underrepresented. This pattern of black and white over and under representation obtains on every early voting day in 2012 and has been found in other contexts as well.\footnote{See, e.g., Michael C. Herron & Daniel A. Smith, Souls to the Polls: Early Voting in Florida in the Shadow of House Bill 1355, 11 Election L.J. 331, 343 (2012).}

V. RACE AND TIMING OF VOTER REGISTRATION

We earlier noted that VIVA altered the voter registration rules in North Carolina. Prior to this legislation’s enactment, eligible North Carolina residents could register to vote during early voting and even on Election Day itself; Election Day registrants were not allowed to vote on the day they registered, however. Under VIVA, registration and subsequent voting during North Carolina’s early voting period—what is often known as “Same Day Registration”—is no longer
permitted, and eligible residents in the state who want to register to vote in a General Election must register no later than twenty-five days prior to Election Day.

Are VIVA’s changes to voter registration protocols in North Carolina race-neutral? Our initial look at this question considers VIVA’s elimination of the opportunity for eligible North Carolina residents to register to vote in the twenty-five days prior to and including Election Day. For the General Elections in 2008, 2010, and 2012, Table 5 describes the total number (see the “All” row in the table) of North Carolina voter registrations in the year before the election as well as the total number of registrations in the twenty-five-day window beforehand. Table 5 also breaks down these registrations into black and white categories; for each election, it reports the percentages of a given registration pool that these two racial groups constituted.

One notable implication of Table 5 is easily summarized: before the elections of 2008-2012, black voter registrations were disproportionately represented in the twenty-five-day period before Election Day. For example, before the 2012 General Election, black voters constituted approximately 28.74% of all registrations in the year prior to Election Day in 2012; in the twenty-five-day period before this day, however, black registrations made up around 30.35%. The black-white registration gaps present in Table 5 all have the same direction, implying that blacks register more frequently in the periods immediately before elections.

For all three elections in Table 5, we carried out difference-in-proportion tests between fraction black of the registration pool in the twenty-five days before an election and fraction black in the 340 days prior to the beginning of the window that starts twenty-five days before an election. For example, according to our voter files, in the period before the 2012 General Election, there were 173,923 total registrations in North Carolina, of which fraction black was approximately 0.3035; these two numbers are in Table 5. In the 340 days prior to the twenty-five-day window, there were 637,129 voter registrations in North Carolina, of which fraction black was approximately 0.2830. The difference between these two proportions is approximately 0.0205, and this difference has a z-statistic that is approximately 16.8, i.e., the difference is statistically significant at conventional confidence levels. In all five elections covered in Table 5, we find statistically significant differences between black registration rates twenty-five days before an election and the preceding 340-day window (calculations available from the authors), and we thus conclude from Table 5 that the black voter registration rate is not constant in the year prior to an election and in fact increases in the twenty-five-day window prior to Election Day.
Table 5: Voter Registrations Before General Elections

<table>
<thead>
<tr>
<th>Election</th>
<th>Group</th>
<th>1 Year Prior</th>
<th>25 Days Prior</th>
<th>1 Year Prior</th>
<th>25 Days Prior</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>All</td>
<td>881,831</td>
<td>177,103</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>275,153</td>
<td>58,652</td>
<td>31.20</td>
<td>33.12</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>503,150</td>
<td>95,398</td>
<td>57.06</td>
<td>53.87</td>
</tr>
<tr>
<td>2009</td>
<td>All</td>
<td>194,089</td>
<td>14,707</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>38,002</td>
<td>3,072</td>
<td>19.58</td>
<td>20.89</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>13,791</td>
<td>10,404</td>
<td>71.06</td>
<td>70.74</td>
</tr>
<tr>
<td>2010</td>
<td>All</td>
<td>263,731</td>
<td>46,475</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>52,940</td>
<td>11,291</td>
<td>20.07</td>
<td>24.29</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>187,075</td>
<td>29,126</td>
<td>70.93</td>
<td>62.67</td>
</tr>
<tr>
<td>2011</td>
<td>All</td>
<td>242,905</td>
<td>21,773</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>54,304</td>
<td>5,209</td>
<td>22.24</td>
<td>23.92</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>167,625</td>
<td>14,378</td>
<td>69.01</td>
<td>66.04</td>
</tr>
<tr>
<td>2012</td>
<td>All</td>
<td>811,052</td>
<td>173,923</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td></td>
<td>Black</td>
<td>233,072</td>
<td>52,790</td>
<td>28.74</td>
<td>30.35</td>
</tr>
<tr>
<td></td>
<td>White</td>
<td>463,733</td>
<td>90,958</td>
<td>57.18</td>
<td>52.30</td>
</tr>
</tbody>
</table>

Note: The percentage columns in the table refer to the fraction of a registration cohort that a particular racial group comprises. Percentages are reported to four significant figures.

The language of VIVA focuses attention on the twenty-five-day period before an election, but our registration data allow us to compare daily black and white registration rates. For both blacks and whites and for each election of interest, we calculate using the September 2013 voter file the number of registrations on each day in a fifty-one-day window up to and including Election Day itself. Then, for each day we calculate the racial composition of the day’s registration pool by dividing the number of blacks who registered on that day by the number of that day’s registrations; this yields a daily time series of black registration compositions. We do the same for whites, thus generating a daily series of white registration compositions. We then plot our black and white sequences in Figure 4, and this figure contains five panels, each of which is associated with an election in North Carolina. The orientation of the panels in Figure 4 is identical to that seen earlier; the various dots in the panels denote race-based registration compositions, and the sizes of the dots are proportional to the overall number of registrations. Each panel in Figure 4 also contains two dashed lines, and these lines reflect the fractions of black and white registrants who registered in North Carolina in the year before a given Election Day.
Consider Figure 4(a), which describes trends in registrations that occurred before the 2008 General Election. The 2008 early voting period was seventeen days long, and this period is particularly notable because, pre-VIVA, eligible North Carolina residents could register to vote during early voting and then cast a ballot. Figure 4(a) shows that on most early voting days in 2008, black registrations were disproportionately overrepresented and white registrations, underrepresented. This conclusion follows from the fact that the black-colored dots in Figure 4(a) are for the most part above the dashed black line and the grey dots, below the grey dashed line. We observe similar phenomena in the General Elections of 2010 and 2012, where the black dots in Figures 4(b) and 4(c) are above the corresponding dashed black lines and grey dots, below the grey lines. With respect to the off-year elections in 2009 and 2011, the patterns are more mixed, particularly in 2009, but on average, as shown in Table 5, registrations close to Election Day were disproportionately black.

**Figure 4: Daily Race Based Compositions of North Carolina Registrants**

(a) 2008  
(b) 2009  
(c) 2010  
(d) 2011
VI. RACE AND AVAILABILITY OF VOTER PHOTO IDENTIFICATION

Our next look at VIVA considers the matter of voter photo identification. This subject is the focus of a variety of existing research projects, and here we contribute to the literature a brief analysis of the availability of identification to currently registered North Carolina residents.

Prior to the passage of VIVA, North Carolina did not have a voter identification requirement. However, VIVA mandates that starting in 2016 all in-person voters in North Carolina must show photo identification prior to casting a ballot, and VIVA contains a list of identification forms that are acceptable for this purpose. This list includes the following eight types of identification: North Carolina driver’s license; non-operator identification card; United States passport; United States military identification; Veterans Identification card; tribal enrollment card recognized by the United States; tribal enrollment card.

Note: Each dot represents a day’s worth of voter registration for a racial group. Dot sizes are proportional to the number of registrations, and the two dots for each day in the figure do not in general sum to one because there are racial groups in North Carolina beyond black and white.

recognized by the State of North Carolina; and, driver’s license or non-operator identification card issued by Washington, D.C., or a state other than North Carolina as long as the date of a voter’s registration was within ninety days of an election.\(^\text{72}\) In considering our objective of assessing the extent to which VIVA is race-neutral, it is natural to examine rates of identification ownership by racial group in North Carolina.

To the best of our knowledge, there are no publicly available lists of which residents of North Carolina (not to mention which registered voters in North Carolina) have passports, military identification forms, veterans identification forms, tribal enrollment forms, or driver’s licenses issued by states other than North Carolina. However, the North Carolina SBOE has created lists of registered voters in the state who do not appear to have North Carolina driver’s licenses or non-operator identification cards, and we rely on these lists when analyzing rates of identification ownership among North Carolina registered voters.

We discussed earlier when introducing our data sources the SBOE’s attempts to determine rates of voter identification ownership,\(^\text{73}\) and here it suffices to note that during the first half of 2013, the SBOE attempted to match names on a voter file with names of North Carolina residents who hold driver’s licenses or non-operator identification cards; recall that these two forms of identification are managed by the North Carolina DMV. The SBOE carried out such matching exercises multiple times, and it published matching reports three times, once in January 2013, once in March 2013, and once in April 2013. Each matching exercise produced a list of what are called unmatched registered voters. To be clear, these registered voters are individuals who are registered to vote but appear not to have a driver’s license or a non-operator identification card. The lists do not contain any voters whose status is “denied” or “removed.”

In what follows we analyze unmatched registered voter lists produced by the SBOE’s January and April matching exercises. These were the first and last (as of this paper’s writing) exercises, and the March list contains fewer names than the January list but more names than the April list. The January and April unmatched voter lists are publicly available, and they differ in the criteria used to determine whether a match exists between a given registered voter and an individual whose name appears on a list of North Carolina residents who have, say, driver’s licenses. For example, consider a registered voter in North Carolina whose first name, last name, and driv-

\(^{72}\) See Voter Information Verification Act, ch. 381, § 2.1, 2013 N.C. Sess. Laws 1505, 1506-07, for complete details on these eight forms of identification.

\(^{73}\) See supra pp. 478-79.
er’s license number on record with the SBOE exactly match the first name, last name, and license number, respectively, associated with a driver’s license issued in North Carolina. The April 2013 matching exercise would presume that said registered voter was issued a driver’s license in North Carolina.

The example above is arguably not particularly complicated because it uses exact matches in ostensibly important fields (name and driver’s license number) to link a registered voter in North Carolina with a driver’s license. Indeed, perhaps the primary dilemma in matching records across lists of individuals is determining the tightness of criteria for asserting the existence of a match. To illustrate this point, the April matching exercise carried out by the North Carolina SBOE also assumes that a match exists between a registered voter and a given driver’s license if the voter and license share exact first names, last names, and dates of birth; if they share exact first names, last names, and zip codes; or if the two first names sound similar (this is determined by an algorithm which assesses similarity in names based on sound), the last names match exactly, and dates of birth match exactly.

The January matching exercise used criteria that were much tighter than those used in the April exercise. In its April report, however, the SBOE writes as follows: “With [the] April 2013 analysis, the SBOE is [sic] expanded its matching criteria to allow for additional variation in voters’ names and data entry errors on driver license number, social security number or date of birth in either of the databases.”74 The April report provides 29 criteria such that if any criterion is satisfied, a match is said to exist between a registered voter in North Carolina and a driver’s license or non-operator identification card issued in the state.75

The top portion of Table 6 (“Active and inactive registered voters”) contains a black-white racial breakdown for the January and April unmatched registered voter lists. Since the latter exercise had looser matching requirements, by construction it produced fewer unmatched registered voters.

74. BARTLETT, supra note 61, at 5.
75. Id. at 4-5.
Recall from Table 2 that blacks constituted approximately twenty-two percent of registered voters in North Carolina as of September 2013. With this in mind, the implication of the top portion of Table 6 is straightforward: black registered voters were disproportionately represented among registered voters with neither driver’s licenses nor non-operator identifications. This conclusion holds regardless of whether one uses the relatively tight January criteria for matching or the looser April criteria.

Earlier we noted that the North Carolina SBOE sometimes classifies registered voters as denied or removed, indicating that such voters are not eligible to vote. Other registered voters are classified as “active,” indicating for the most part that they are regular participants in North Carolina elections, and still another category of registered voters is known as “inactive.” An inactive registrant is legally registered and can vote, but his or her status indicates that a North Carolina county elections office has concerns about a valid address for said voter. In particular, a voter who has not had contact with a county elections office for two General Elections cycles and who did not respond to a mailed contact request is placed on inactive status. We mention the existence of active and inactive status designations because one might be concerned that the January and April lists of unmatched voters are confounded by the presence of many inactive registrants among the unmatched individuals in the top portion of Table 6; perhaps these individuals tend to participate infrequently in all parts of social and political life, i.e., voting, having a driver’s license, and so forth. To see if such inactivity confounds our unmatched registered voter results, consider the lower portion of Table 6 (“Excluding Inactive Voters”).

**Table 6: Unmatched Registered Voters**

<table>
<thead>
<tr>
<th></th>
<th>Total</th>
<th>Black</th>
<th>White</th>
<th>% Black</th>
<th>%White</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Active and Inactive Registered Voters</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jan.</td>
<td>612,955</td>
<td>191,104</td>
<td>348,141</td>
<td>31.18</td>
<td>56.80</td>
</tr>
<tr>
<td>Apr.</td>
<td>318,643</td>
<td>107,681</td>
<td>172,613</td>
<td>33.79</td>
<td>54.17</td>
</tr>
<tr>
<td><strong>Excluding Inactive Voters</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jan.</td>
<td>506,763</td>
<td>158,118</td>
<td>287,093</td>
<td>31.20</td>
<td>56.65</td>
</tr>
<tr>
<td>Apr.</td>
<td>255,160</td>
<td>87,721</td>
<td>137,429</td>
<td>34.38</td>
<td>53.86</td>
</tr>
</tbody>
</table>

If we exclude inactive voters, the fraction of black North Carolina registrants that lacks driver's licenses and non-operator identification cards increases, albeit very slightly, i.e., from approximately 33.79% in April 2013 to 34.38%. These two percentages are qualitatively practically identical, and thus Table 6 shows that the overrepresentation of black registrants among registrants who lack driver's licenses and non-operator identification cards is not a function of an overrepresentation of inactive registered voters among unmatched registered voters.

We now consider whether, and if so how, unmatched registered voters from the aforementioned January and April lists participated in the 2012 General Election. It is theoretically possible that all of these individuals did not vote in this election, and it is also theoretically possible that these individuals tend to vote absentee, which in principle could alleviate the concern that they lack some forms of VIVA-acceptable identification. According to VIVA, applications for absentee ballots require “[o]ne or more of the following in the order of preference”: a North Carolina driver's license number; a non-operator identification card number; and the last four digits of an applicant’s social security number.77 We cannot assess how an absentee ballot request containing only a social security number would be handled by a county elections official in North Carolina. But, it nonetheless appears that voters may be able to participate actively in North Carolina elections without providing photo identification if they vote absentee.78

With this in mind, we merged the January and April lists of unmatched voters with our September 2013 voter file. This file contains records of who voted in the 2012 General Election, and results for this merge are in Table 7. An unmatched voter who has a record in the September voter file but no voting method for the 2012 General Election is assumed to have abstained from voting in this election.79

---


79. To merge the September 2013 voter file and its 2012 General Election participation codes with an unmatched voter list, we compared county voter identification numbers, county names, and North Carolina voter identification numbers. If these three fields matched across records in the September file and an unmatched voter list, then we treated an unmatched voter as having a 2012 General Election participation code. The January unmatched voter file contains 7641 individuals who registered on or after Election Day in 2012 (November 6) and the April file contains 8916 such individuals. These individuals are not part of the 2012 General Election analysis in Table 7. Also not part of that table are one January unmatched voter and three April unmatched voters who have invalid registration fields in their respective unmatched voter files.
Table 7 addresses two questions. First, do the January and April unmatched voter lists consist predominantly of non-voters? The answer here is no. While the 2012 General Election abstention rates—approximately forty-seven percent and approximately fifty-six percent—for our two sets of unmatched voters are greater than the then North Carolina abstention rate—approximately thirty-one percent—in November 2012, many tens of thousands of unmatched voters participated in the 2012 General Election.

Second, we noted that VIVA’s voter identification requirements for absentee voting may be less stringent than those associated with in-person early or in-person Election Day voting. Regardless of one’s interpretation of VIVA’s language regarding absentee identification, Table 7 shows that unmatched voters are not heavy users of absentee voting. Rather, they are heavy users of both forms of in-person voting noted here. Thus, potential leniency in voter identification requirements as they pertain to absentee voting will not alleviate the identification problem that is implied by Table 7.

Table 7: Participation in the 2012 General Election by Matching Status

<table>
<thead>
<tr>
<th>Group</th>
<th>Election Day</th>
<th>Early</th>
<th>Absentee</th>
<th>Abstain</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan.</td>
<td>107,826</td>
<td>165,452</td>
<td>15,074</td>
<td>282,505</td>
</tr>
<tr>
<td></td>
<td>(17.81)</td>
<td>(27.33)</td>
<td>(2.490)</td>
<td>(46.67)</td>
</tr>
<tr>
<td>Apr.</td>
<td>47,475</td>
<td>79,183</td>
<td>7,770</td>
<td>171,880</td>
</tr>
<tr>
<td></td>
<td>(15.33)</td>
<td>(25.57)</td>
<td>(2.509)</td>
<td>(55.50)</td>
</tr>
<tr>
<td>All</td>
<td>1,721,587</td>
<td>2,556,145</td>
<td>218,469</td>
<td>2,098,292</td>
</tr>
<tr>
<td></td>
<td>(25.93)</td>
<td>(38.50)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Report counts and percentages are based on the total numbers of January and April unmatched voters, ignoring those who registered on or after November 6, 2012. Percentages are reported to four significant figures and do not sum to 100 because not all voting methods are listed in the table. The table is based on voters whose participation codes are listed in the September 2013 voter file as “In-Person,” “ABS-1STOP,” and “ABS-MAIL.” The January unmatched group of registrants includes 30,683 (approximately 5% of the list) individuals whose voter registration numbers and counties do not appear in the September 2013 voter file; the comparable April list count of unmatched voters who do not appear in the September voter file is 1554 (approximately 0.5% of the list). To calculate the abstention fraction for all registered voters, we use the official number of registered voters (6,639,131) in North Carolina as of the 2012 General Election.

Our finding that registered voters identified by the North Carolina DMV as not having driver’s licenses or non-operator identification cards are disproportionately black is consistent with other studies.
that consider race and voter identification. For example, drawing on survey data from Indiana, Matt Barreto and his colleagues find that blacks and those of lower socio-economic status are disproportionately likely to lack valid forms of identification, and Trey Hood and Chuck Bullock find that minorities registered to vote in Georgia are less likely than whites to have a required government-issued photo ID. Our analysis extends these results to North Carolina, and it complements the literature’s survey-based findings on the relationship between voter identification possession and race.

VII. RACE, VOTER IDENTIFICATION, AND THE SEVENTY-YEAR SPECIAL DISPENSATION

We have thus far shown that black registrants in North Carolina are disproportionately represented among registered voters in the state who lack driver’s licenses and non-operator identification forms. VIVA, however, provides a limited age-related exemption to its identification requirements, and this exemption reads as follows: “[A]ny voter having attained the age of 70 years at the time [the voter presents a form of identification] at [a] voting place shall be permitted to present an expired form of [an acceptable type] that was unexpired on the voter’s 70th birthday.” In addition, for registered voters at least seventy years old as well as for legally blind, homeless, and certain classes of registered voters who are unable to obtain a driver’s license, VIVA waives the fee for a special voter identification card.

Might VIVA’s special treatment of older registered voters ameliorate the overrepresentation of blacks among North Carolina registrants who lack some types of VIVA-acceptable identification? Or, in contrast, does the seventy-year dispensation exacerbate the racial imbalance that we have discussed above? One way to address these questions is to compare the black and white fractions of North Carolina registered voters who are at least seventy years old. Of course there are in North Carolina more white registered voters who are at least seventy years old compared to black registered voters of this age, but this is simply a reflection of the fact that there are more

80. See Barreto et al., supra note 71, at 113.
83. § 3.1, 2013 N.C. Sess. Laws at 1510.
whites than blacks in the state. Thus, we consider here whether the composition of the seventy-years-plus registered voter pool is similar to the composition of the North Carolina registered voter pool in general.\footnote{See infra Table 8. Note that this table uses all three of the voter files discussed earlier.}

\begin{table}[h]
\centering
\caption{Registered Voters and Registered Older Voters in North Carolina}
\begin{tabular}{llllll}
\hline
Date & Total at least 70 & \% Black & \% Black at least 70 & \% White & \% White at least 70 \\
\hline
\textit{All Registered Voters} & & & & & \\
February 2009 & 732,864 & 21.61 & 15.05 & 73.28 & 83.02 \\
February 2011 & 768,513 & 21.64 & 15.14 & 73.03 & 82.69 \\
September 2013 & 832,767 & 22.47 & 15.33 & 70.98 & 81.99 \\
\hline
\textit{Excluding Inactive Voters} & & & & & \\
February 2009 & 704,340 & 21.61 & 14.95 & 73.28 & 83.11 \\
February 2011 & 730,897 & 21.64 & 15.15 & 73.03 & 82.70 \\
September 2013 & 784,289 & 22.47 & 15.26 & 70.98 & 82.11 \\
\hline
\end{tabular}
\end{table}

\textit{Note: Table 8 is based on three voter files, each of which is associated with one of the dates in the table. The counts in the table ignore all records flagged in a voter file as removed or denied, and they also ignore records that have ages greater than 100 years. Percentages are reported to four significant figures.}

The top portion of Table 8 ("All registered voters") describes the composition of three North Carolina registered voter pools, one per each voter file used here. Note that each of the three registered voter pools summarized in Table 8 includes over 700,000 individuals who are at least seventy years of age. Insofar as there were approximately 6.4 million registered voters in North Carolina as of September 2013,\footnote{See supra Table 2.} VIVA’s exemption for older voters affects, as of September 2013, approximately thirteen percent of all registered voters in North Carolina.\footnote{Our North Carolina voter files contain a number of voters whose recorded ages do not appear meaningful. For example, the September 2013 file includes 10,416 registered voters whose age is listed as 113 years; the explanation for this group of registrants lies in the fact that “[North Carolina] voters who registered prior to the implementation of the [North Carolina] statewide voter registration database system and for whom the county board of elections had no record of their full date of birth, were given a date of birth in the [registration] system of 01/01/1900.” See Bartlett, supra note 61, at 7 (footnote omitted). The September 2013 voter file also includes one registrant whose listed age is 137 and one with a reported age of 158. Since the counts in Table 8 are based on a maximum age of 100, none of these problematic ages confounds the numbers in the table.}
Table 8 compares the composition of the North Carolina registered voter pool with the composition of this pool restricted to registrants of at least seventy years of age. We can make three such comparisons of this nature, one for each of our voter files, and the results of the comparisons are straightforward: whites are disproportionately represented among registered voters who are at least seventy years old. For example, in February 2009 the North Carolina registered voter pool was approximately 73.28% white. However, among registered voters who were at least seventy years old, the North Carolina registered voter pool was approximately 83.02% white.

It seems intuitively plausible that older registrants in North Carolina are more likely to have an inactive status than younger registrants, and in theory this could confound the associations described in Table 8 between age and race. Perhaps the overabundance of white registrants in the top portion of the table includes primarily inactive voters, in which case one might argue that the size of such a group is not particularly noteworthy. With this in mind, the lower portion of Table 8 (“Excluding inactive voters”) reports results about age and race, this time excluding officially inactive registered voters. The racial percentages in the lower part of the table are not identical to those in the top half, but they are nonetheless qualitatively very similar. Indeed, the implications of both sections of Table 8 are identical: whites are overrepresented, and blacks underrepresented, among registered voters in North Carolina who are at least seventy years of age.

Figure 5 presents another look at the distribution of age among registered North Carolina voters. The figure contains three panels, one corresponding to each of the voter files considered here, and each panel describes the distribution of age among black and among white registrants. In particular, for ages 17 to 100 the black points in the three panels of Figure 5 describe the fraction of all black registered voters who are of a given age; the grey-colored points describe the same thing but for white registered voters. The sum of the heights of the black points (and similarly the white points) in each panel is one. Finally, each panel in Figure 5 contains a dashed vertical line at seventy years, and this reflects VIVA’s seventy-year age dispensation.

The three panels in Figure 5 are not appreciably different, and this is not particularly surprising. It would be somewhat peculiar if, say, the distribution of age across North Carolina registered voters had changed dramatically between 2009 and 2013.

Figures 5(a)-5(c) show the following: Among black registrants, there are more relatively younger voters than older voters. This is evident in the heights of the black dots that correspond to lower ages, say, ages under forty. Among white registrants, though, one observes the opposite pattern, namely, that their older registrants are more
numerous than younger ones. Average ages follow a similar pattern. In September 2013, for example, the average age among black registrants was approximately 44.76 ($s \approx 17.26$), and the corresponding white registrant average, approximately 49.55 ($s \approx 18.03$). This pattern—white registrants in North Carolina being on average older than black registrants—obtained in February 2009 and in February 2011 as well.

In sum, the composition of registered voters in North Carolina who are at least seventy years of age is disproportionately white, and there is also a greater proportion of white registered voters who are seventy years of age and older compared to black registered voters. We thus find that VIVA’s photo identification dispensation for older, registered voters will likely only exacerbate the disparity across racial groups we have identified with respect to driver’s licenses and non-operator forms of identification. This dispensation is not race-neutral as it effectively lowers the cost of in-person voting for a larger proportion of white registered voters than black registered voters.

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87. These averages are based on registrants whose ages are reported to be between 16 and 100 years. The black and white averages are significantly different at conventional confidence levels.

88. The results are available from the authors.
Figure 5: Racial Composition of Registered Voter Pool

(a) February 2009

(b) February 2011

(c) September 2013
VIII. RACE AND YOUTH PREREGISTRATION

Related to the matter of registered voters age seventy and older is the question of very young registrants. Pre-VIVA, North Carolina allowed preregistration of sixteen and seventeen year olds, but VIVA has changed this.\textsuperscript{89} Namely, under this new law no one can register to vote in North Carolina who will not be eighteen years old on the date of the next General Election.\textsuperscript{90} It is thus natural to consider whether preregistrants in North Carolina are representative of registered voters in the state, and we now turn to this issue.\textsuperscript{91}

\begin{table}[h]
\centering
\begin{tabular}{ l c l }
\hline
Group & Count & Percent \\
\hline
Black & 1,778 & 26.94 \\
White & 3,880 & 58.79 \\
\hline
\end{tabular}
\caption{Racial Composition of Preregistrants Sixteen and Seventeen Years of Age}
\end{table}

Note: Table 9 is based on 6,601 preregistrants, ignoring those listed as denied or removed as of September 2013. Percentages are reported to four significant figures and do not sum to 100 because of the presence of other racial groups in North Carolina.

North Carolina voter files do not contain birth dates. They do, however, contain an age field, and Table 9 contains the racial breakdown of North Carolina preregistrants who are listed as sixteen or seventeen years old as of September 2013. The table ignores all preregistrants whose status is removed or denied, and it includes 6,601 total preregistrants.\textsuperscript{92} The table does not have separate sections for active and inactive preregistrants because all preregistrations aged sixteen and seventeen are listed as active in the September 2013 voter file.

We saw in Table 2 that blacks constituted approximately twenty-two percent of the North Carolina registered voter pool as of September 2013. In contrast, Table 9 reveals that blacks constituted approximately twenty-seven percent of all preregistrants as of September

\textsuperscript{89} VIVA was implemented in stages, and the part of the law dealing with preregistration became effective on September 1, 2013. Section 12.1.(j) of the bill states: “This section [on preregistration] becomes effective September 1, 2013. All voter preregistrations completed and received by the State Board prior to that date shall be processed and those voters registered, as appropriate.” Voter Information Verification Act, ch. 381, § 12.1.(j), 2013 N.C. Sess. Laws 1505, 1534.

\textsuperscript{90} N.C. GEN. STAT. § 163-82.4(d) (2014) (stating that those that will not be “18 years of age on or before election day” may not submit a preregistration form).

\textsuperscript{91} The literature on preregistration is not large and in general does not disaggregate registration rates down by race. See, e.g., Michael P. McDonald & Matthew Thornburg, Registering the Youth Through Voter Preregistration, 13 J. LEGIS. & PUB. POL’Y 551 (2010).

\textsuperscript{92} The September voter file contains five individuals whose listed age is under sixteen. We ignored these five preregistrants.
2013, indicating that sixteen and seventeen year-old preregistration was used prior to VIVA disproportionately by blacks. The elimination of preregistration, except for those who will be old enough to vote in an upcoming election, is thus another feature of VIVA that will have disparate effects across the two main racial groups in North Carolina.

IX. CONCLUSION

With the passage in August 2013 of the Voter Information Verification Act, popularly known as VIVA, North Carolina altered its electoral laws in many ways. Among other things, VIVA shortened the early voting period in North Carolina; eliminated the opportunity for eligible residents of North Carolina to register to vote in the days immediately prior to an election; imposed a photo identification requirement for in-person voting; and, eliminated youth preregistration except for those who will be eligible to vote in the next election. Had these changes taken place before the Supreme Court ruled in Shelby County v. Holder that section 4(b) of the Voting Rights Act is unconstitutional, they would have triggered federal oversight because 40 of North Carolina’s 100 counties were subject pre-Shelby to preclearance. As a result of the Shelby decision, though, in late summer 2013 the United States Department of Justice had no grounds to preclear VIVA.

Our study indicates that VIVA will have several disparate effects on black voters in North Carolina. Specifically, we find that in presidential elections the state’s black early voters have traditionally cast their ballots disproportionately often in the first week of early voting, a week eliminated by VIVA; that blacks disproportionately have registered to vote during North Carolina’s early voting period and in the run-up to Election Day, something now prohibited by VIVA; that VIVA’s photo identification provision falls disproportionately on registered blacks in North Carolina; that the special identification dispensation for voters who are at least seventy years old disproportionately benefits white voters; and that prior to the implementation of VIVA, young African Americans were disproportionately more likely than whites to take advantage of preregistration. Although subsequent analyses of the 2014 General Election will certainly provide some clues regarding the extent of the disparate impact under VIVA, the law is likely to have its greatest effect on African American voter registration and turnout in the 2016 presidential election. Until then, our research—which draws entirely on public data from the State of North Carolina—reveals how this omnibus legislation affects the political participation of blacks and whites differently.
THE NINETEENTH AMENDMENT ENFORCEMENT POWER (BUT FIRST, WHICH ONE IS THE NINETEENTH AMENDMENT, AGAIN?)

STEVE KOLBERT*

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The history of voting rights in the United States has primarily centered on the struggle to enfranchise African-Americans\(^1\)—first after the Civil War, then in the Jim Crow South, and even today in the midst of “the Voting Wars.”\(^2\) Accordingly, most voting rights legislation, litigation, and literature have focused on race-based barriers to the ballot and on using Fourteenth and Fifteenth Amendment-based tools to break those barriers.\(^3\) This race-centered focus neglects a substantial population that may face its own barriers to the ballot: women.

This neglect is particularly curious, given that an entire constitutional amendment deals exclusively with protecting “[t]he right of citizens of the United States to vote [from] deni[al] or abridg[ment] . . . on account of sex.”\(^4\) Yet, no legislation and barely any litigation have arisen as a result of the Nineteenth Amendment.\(^5\)

1. See, e.g., GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICA DEMOCRACY (2013); see also 111 CONG. REC. 5058-61 (1965) (statement of President Lyndon B. Johnson) (urging Congress to pass the Voting Rights Act); id. at 5061-63 (same).


4. U.S. CONST, amend. XIX.

5. For two examples of Nineteenth Amendment litigation, see Breedlove v. Suttles, 302 U.S. 277 (1937), and Ball v. Brown, 450 F. Supp. 4 (N.D. Ohio 1977). If there were Nineteenth Amendment enforcement legislation, it would be codified in subtitle I of title 52 of the United States Code, which concerns “Voting Rights.” See 52 U.S.C. §§ 10101-10702
One legal encyclopedia spends a mere sixty-nine words on the Nineteenth Amendment. On the rare occasion that scholarly literature discusses the Nineteenth Amendment in depth, authors seem preoccupied with the provision’s impact on areas other than voting. The Nineteenth Amendment receives so little attention, scholars joke about it. The prevailing understanding of the Nineteenth Amendment is that it merely requires that women be permitted to vote—no more, no less—and is therefore not an appropriate subject for scholarly attention.

This inattention from legislators, litigators, and legal scholars is all the more curious today, when voting rights enjoy mainstream attention not seen since the Civil Rights Movement. In the past few years, a nationwide wave of new state laws and procedures has burdened the right to vote. Today, women face a variety of obstacles to voting that may disproportionately impact voters on the basis of sex.

Despite the Nineteenth Amendment’s existence for nearly a century and the recent popular and scholarly attention to voting


7. See, e.g., Akhil Reed Amar, Women and the Constitution, 18 HARV. J.L. & PUB. POL’Y 465, 472 (1995) (noting women’s right to serve on juries); Jennifer K. Brown, The Nineteenth Amendment and Women’s Equality, 102 YALE L.J. 2175, 2175 (1993) (recognizing the Nineteenth Amendment as “an affirmation of women’s constitutional equality”). Scholars have argued that the Nineteenth Amendment impacts sex classifications more generally, see Steven G. Calabresi & Julia T. Rickert, Originalism and Sex Discrimination, 90 TEX. L. REV. 1, 66-96 (2011), that it guarantees women the right to serve on juries, see Amar, supra, that it provides a constitutional justification for Congress to pass the Violence Against Women Act, Reva B. Siegel, She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family, 115 HARV. L. REV. 947, 1022-44 (2002); Sarah B. Lawsky, Note, A Nineteenth Amendment Defense of the Violence Against Women Act, 109 YALE L.J. 783 (2000), that it “should be recognized as an affirmation of women’s constitutional equality,” Brown, supra, or that it “established the total equality of women with men,” W. William Hodes, Women and the Constitution: Some Legal History and a New Approach to the Nineteenth Amendment, 25 RUTGERS L. REV. 26, 50 (1970). One scholar even curiously claimed that “the 19th amendment [sic] really had very little to do with the vote.” Hodes, supra.

8. See Erik M. Jensen, 16th Century 19th Amendment Jurisprudence, 4 GREEN BAG 2d 465, 465 (2001). The article, in its entirety, reads, “Consistent with my research on another previously unstudied area of the law, I have determined that there were no cases construing the Nineteenth Amendment in the sixteenth century.” Id. (footnote omitted).

9. See, e.g., JoEllen Lind, Dominance and Democracy: The Legacy of Woman Suffrage for the Voting Right, 5 UCLA WOMEN’S L.J. 103, 191 (1994) (“With the passage of the Nineteenth Amendment, women’s right to vote became part of the constitutional framework . . . .”).

rights, the Nineteenth Amendment has not received any serious treatment or consideration as a tool to protect voting rights. This Article fills that gap by offering a discussion of the history and purpose of the Nineteenth Amendment, and its application to modern-day voting restrictions.

Part II will examine the need for Nineteenth Amendment enforcement legislation by exploring modern restrictions on voting that may affect voters disproportionately on the basis of sex. Part III will explore the background against which the Nineteenth Amendment was proposed and ratified. Part IV will explore the legal and legislative history of the Nineteenth Amendment in a novel way—with an eye toward the provision’s application to voting rights—in an attempt to discern what the framers of the Amendment would expect it to mean today. Part V considers the constitutionality of possible enforcement legislation and demonstrates how Nineteenth Amendment litigation to defend voting rights could remedy the restrictions on voting mentioned earlier. Part VI will conclude with a recommendation for action under the Nineteenth Amendment and explain the practical benefits and disadvantages of using the Nineteenth Amendment to protect voting rights.

II. VOTING RIGHTS UNDER ATTACK: THE NEED FOR NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION AND LITIGATION

In recent years, states across the country have engaged in an extraordinary effort to make it harder to register to vote, to cast a ballot, and to have that vote counted.11 Between 2010 and mid-2015, twenty-one states imposed over thirty separate restrictions on the franchise.12 Much of the attention in the media has focused on the disproportionate effect of these laws on racial minority voters, student voters, elderly voters, lower-income voters, and Democratic-leaning voters.13 Scholarship has maintained a similar


focus.14 Until recently,15 however, the extent to which these restrictions on voting may disproportionately affect women had gone largely unnoticed.

A. Voter ID Laws

Voter ID laws are one such type of voting restriction that may disproportionately impact women. Generally, and with limited exceptions,16 voter ID laws bar any voter from casting a ballot unless the voter provides the precinct official with documentary proof of the voter’s identity.17 For a voter whose name appears differently on his or her voter registration record and identifying document, this discrepancy could present additional burdens—as in Texas, where


15. A local Texas television outlet reported that poll workers temporarily blocked a Texas state court judge from voting—on the grounds that her maiden name listed on her driver’s license did not match her full name as listed in the voter registration records—until she signed an affidavit affirming her identity. See Voter ID Law May Cause Problems for Women Using Maiden Names, KIII-TV (Oct. 22, 2013, 7:02 PM), http://www.kiitv.com/story/23761660/voter-id-law-may-cause-problems-for-women-using-maiden-names. Following that story, a surge of national media attention focused on the effect that voter ID laws may have on women. See, e.g., Wade Goodwyn, Texas’ Voter ID Law Creates a Problem for Some Women, NAT’L PUB. RADIO (Oct. 30, 2013, 4:40 PM), http://www.npr.org/2013/10/30/241891800/texas-voter-id-law-creates-a-problem-for-some-women; Martha T. Moore, State Voter ID Laws Snare Women with Name Changes, USA TODAY (Oct. 30, 2013, 7:05 PM), http://www.usatoday.com/story/news/politics/2013/10/30/voter-id-laws-name-changes/3315971. My research has not revealed any corresponding increase in scholarship, legislation, or litigation.


the voter must complete additional paperwork—or even prevent the voter from casting a ballot altogether. Voters lacking any appropriate form of ID may likewise be unable to cast a ballot.

Even in jurisdictions that bar a voter from casting a ballot due to a non-match or lack of an approved ID, the voter retains the ability to cast a provisional ballot—a ballot separated from the normal ballots and counted later only if the election authority can determine that the provisional voter is, in fact, eligible to vote. However, there is anecdotal evidence that poll workers improperly turn away voters with questionable voting eligibility, rather than offering them the opportunity to vote by provisional ballot, as required. Even for voters who are able to vote by provisional ballot, they generally must still obtain the required identifying document and provide it to the election authority within a set time period.

No serious student of election law disputes that at-the-polls voter-impersonation fraud—the type of misconduct that voter ID laws target—is a pernicious problem when it occurs; the relevant question

18. TEX. ELEC. CODE ANN. § 63.001(c) (West 2012). This is the provision that sparked national media attention over the impact on women of voting restrictions. See, e.g., Goodwyn, supra note 15; Moore, supra note 15.

19. See, e.g., Wis. STAT. § 6.79(3)(b) (2015) (“[I]f the name appearing on the [identification] document presented [by the voter] does not conform to the name on the poll list . . . the elector shall not be permitted to vote . . . .”). Not every jurisdiction has statutory or regulatory guidance on how to treat discrepancies between the name on the voter’s identifying documents and the voter’s registration record, forcing election administrators to make their own decision about how to handle name discrepancies. For instance, despite the text of the Wisconsin statute cited above, Wisconsin’s voter ID brochure states (without citing any legal authority) that minor discrepancies between the first name listed on a voter’s ID and the first name listed in the voter’s registration record will not bar the voter from casting a ballot. See Brochure, Wis. Gov’t Accountability Bd., Bring It to the Ballot (Oct. 7, 2015), http://www.gab.wi.gov/sites/default/files/publication/137/_2015_brochure_forbring_it_website_color_pdf_54021.pdf (“So, Richards who go by Rich and Susans with IDs that say Sue can relax.”). The ad hoc nature of these decisions by state and local election administrators across the country makes it difficult to assess the procedures in this area.


22. See ELECTORAL DYSFUNCTION at 38:00 (Trio Pictures 2012). The film shows a training session in which poll workers role-play an example of how to politely handle a voter who comes to vote without possessing the required identification or who is not on the voter rolls for that location. Id. The portions of the training shown in the film make no mention of offering the voter a provisional ballot. Id.

In my experience as an election administrator, poll worker recruitment and training were among the most vexing challenges an election administration office faced.

23. See, e.g., IND. CODE § 3-11.7-5-2.5(a)-(b) (2015). Less onerous provisional ballot requirements also exist. For instance, Rhode Island’s voter ID law requires election officials to count a provisional ballot so long as the signature accompanying the provisional ballot matches the signature in the voter’s registration record. See 17 R.I. GEN. LAWS § 17-19-24.3 (2015).
is whether the minimal risk posed by at-the-polls voter-impersonation fraud justifies the burden imposed by these laws. Women voters may be more likely to encounter these burdens than men, considering that the vast majority of women change their name following marriage, while only a small minority of men do the same. While the data are so far insufficient to draw broad conclusions, the early evidence suggests this may be the case: the plaintiffs’ expert witness in the litigation over Pennsylvania’s voter ID law concluded that “[a]mong eligible [Pennsylvania] voters, women are less likely to possess a valid, non-expired photo ID with [their] name substantially conforming than their male counterparts,” in part because of the “higher likelihood of women lacking an ID with an exact name match to the voter rolls due to marriage.” An empirical study of Indiana’s voter ID law concluded that “some disfranchisement occurs and, to the extent that disfranchisement occurs, this research suggests that women are disproportionately disfranchised.”

Data also suggests that transgender voters are especially likely to lack the required documentation: in a national survey of transgender individuals, 40% reported lacking a driver’s license reflecting their current gender, 74% reported lacking an updated passport, and 27% reported “that they had no identity documents or records that list their correct gender.” A voter whose outward appearance suggests


25. See Elizabeth F. Emens, Changing Name Changing: Framing Rules and the Future of Marital Names, 74 U. CHI. L. REV. 761, 785-89 (2007). For heterosexual couples, Professor Emens reports that “[t]he vast majority of women who marry men change their names to Mrs. His Name, while very few men change their names at all when they marry,” and that “only 10 percent of married women in the U.S. have as their last name their own birthname or any name other than their husband’s birthname.” Id. at 785. For gay and lesbian couples, Professor Emens explains that the limited data available show that “[six] percent share some or all of their last names, suggesting that one or both partners changed his or her name,” and that lesbian couples (seven percent) are more likely to share names than gay couples (four percent). Id. at 789.

26. See E-mail from Justin Levitt, Assoc. Professor of Law, Loyola Univ. Sch. of Law, to author (Aug. 28, 2013, 9:29 PM) (on file with author).


that the voter is of a different sex than that shown on the voter’s ID may face problems under a broad voter ID law that, for instance, requires polling place officials to be able to verify a voter’s identity from the ID the voter provides.31

Even where a voter already possesses an acceptable ID under his or her prior name, the burdens of obtaining an updated ID may cause the voter difficulty, especially when the legal requirements for obtaining the documents are so burdensome as to make it extraordinarily difficult for some people (and impossible for others) to qualify for the IDs, when the government offices which distribute the IDs are so far away as to require a 200- to 250-mile round-trip, when the law is improperly administered by a front-line civil servant, or when the government limits the days on which the ID-issuing offices are open.32

The burden of obtaining additional or corrected documentation is likely to affect women in three ways.33 First, because women assume a disproportionate share of the household work and childcare burdens,34 these distance and complexity concerns may be more


32. See, e.g., Texas v. Holder, 888 F. Supp. 2d 113, 139-41 (D.D.C. 2012) (three-judge court) (explaining that in some cases, the nearest government office providing acceptable identifying documents could be 100–125 miles away, necessitating a 200–250 mile round trip, and that public transportation was essentially unavailable), vacated, 133 S. Ct. 2886 (2013); Applewhite, 54 A.3d at 3-4 (explaining that the process for obtaining a voting ID “is a rigorous one” which requires applicants to submit four different types of documents, and quoting testimony from the government official responsible for distributing the IDs, “at the end of the day there will be people who will not be able to qualify for” the voting ID); Ansley Haman, 96-Year-Old Chattanooga Resident Denied Voting ID, CHATTANOOGA TIMES FREE PRESS (Oct. 5, 2011), http://www.timesfreepress.com/news/2011/oct/05/marriage-certificate-required-bureaucrat-tells; Brian Lyman, Alabama Will Reopen Closed DMV Offices in Black Counties, GOVERNING (Oct. 20, 2015), http://www.governing.com/topics/politics/drivers-license-offices-will-reopen-on-limited-basis.html.

33. There is some dispute about the number of voters actually affected by voter ID laws. Compare Don Palmer, Heritage Found., Backgrounder No. 3068, Faulty Data Fuel Challenges to Voter ID Laws 9 (2016), http://www.heritage.org/research/reports/2016/01/faulty-data-fuel-challenges-to-voter-id-laws (arguing that voter ID laws affect only a small percentage of voters), with Jennifer L. Clark, Separating Fact from Fiction on Voter ID Statistics, BRENNAN CTR. FOR JUST. (Nov. 25, 2014), http://www.brennancenter.org/blog/separating-fact-fiction-voter-id-statistics (arguing that voter ID laws affect a much larger segment of the electorate). The key here is the degree to which women are disproportionately affected, not the absolute number of voters affected.

34. See, e.g., Naomi Cahn, The Power of Caretaking, 12 YALE J.L. & FEMINISM 177, 181-82 (2000) (“Upon marriage or cohabitation, the average woman increases her household work by 4.2 hours, while the average man decreases his household work by 3.6 hours. Studies of the amount of time that men and women spend in parenting consistently show that women perform more childcare than men, although the data are somewhat conflicting on just how large the differential actually is.”) (footnote omitted); Andrew B. Coan, Is There A Constitutional Right to Select the Genes of One’s Offspring?, 63 HASTINGS L.J. 233, 258 (2011) (“[W]omen as a group shoulder a grossly disproportionate share of
onerous for women than men. Second, as previously discussed, because married women change their name more frequently than married men,\(^{35}\) women may have to face the burden of obtaining additional or corrected documentation more often. Finally, problems of economic inequality are particularly likely to plague women.\(^{36}\) Across all occupations, women earn only 81.2% of what men earn (and in some white-collar professions, less than two-thirds).\(^{37}\) A full-time working woman earns only 77 cents for every dollar her male counterpart earns, resulting in $11,084 less in median earnings every year.\(^{38}\) Women (16.3%) are also more likely than men (13.6%) to live in poverty.\(^{39}\) As the three-judge preclearance court recognized in the context of reviewing Texas’s voter ID law, “[s]ignificantly, these burdens [imposed by the voter ID law] will fall most heavily on the poor,”\(^{40}\) which means the monetary burden of obtaining qualifying documents may disproportionately impact women.\(^{41}\)

Additionally, the burdens of obtaining corrected identifying documents may fall particularly hard on transgender voters.\(^{42}\) Texas, for instance “enacted a voter ID law that . . . is the most stringent in the country.”\(^{43}\) There, transgender voters seeking to update the sex listed on their driver license must obtain a court order reflecting the child-care responsibilities . . . .”); Nancy E. Dowd, Fatherhood and Equality: Reconfiguring Masculinities, 45 SUFFOLK U. L. REV. 1047, 1053-54 (2012) (”[S]eventy-one percent of mothers provided care on a daily basis as compared to fifty-four percent of fathers, but mothers provided nearly three times the care of fathers, measured by time. Men spend less time in sole charge of children, of the time that they do provide care. Even when both parents are employed full time, mothers do twice the amount of housework.”) (footnotes omitted).

35. See Emens, supra note 25, at 785.

36. See Jill C. Engle, Promoting the General Welfare: Legal Reform to Lift Women and Children in the United States Out of Poverty, 16 J. GENDER RACE & JUST. 1, 5-9 (2013) (surveying the available data on the degree of economic inequality between the women and men).


41. Cf. id. at 140-41 (finding that “[i]n Texas, however, the poor are disproportionately racial minorities,” and that therefore “it is virtually certain that these burdens will disproportionately affect racial minorities”).

42. See Dean Spade, Documenting Gender, 59 HASTINGS L.J. 731, 759-75 (2008) (documenting the barriers transgender individuals face to obtaining official recognition of their sex transition).

43. Holder, 888 F. Supp. 2d at 144.
voter’s transition. As if the burden of obtaining a court order was insufficient, Texas courts have created barriers to judicial recognition of sex changes.

Litigation challenging these laws has had limited success. Lawsuits under section 2 of the Voting Rights Act have been hit-or-miss. Lawsuits under section 5 of the Voting Rights Act had some success until the Supreme Court gutted the provision. Suits bringing constitutional claims have not fared well. State court lawsuits have had mixed results.

B. Documentary-Proof-of-Citizenship Requirements

Documentary-proof-of-citizenship laws may also disproportionately impact women. Enacted in Alabama, Arizona, Georgia, Kansas, and

44. See 37 TEX. ADMIN. CODE § 15.24(2)(C) (2015) (requiring an “original or certified copy of court order with name and date of birth (DOB) indicating an official change of . . . gender”). If the voter has already managed to document his or her transition on certain federal documents, like a passport, military identification, or naturalization certificate, the voter need not obtain the court order. See id. § 15.24(1).

45. See Littleton v. Prange, 9 S.W.3d 223 (Tex. Ct. App. 1999) (finding that a post-operative male-to-female transsexual woman was nonetheless still a male as a matter of law, notwithstanding an earlier judicial order amending her birth certificate to reflect her post-transition sex).


Tennessee, these laws bar voter registration applicants from registering unless the applicant proves, with adequate documentation, his or her U.S. citizenship. Although the Supreme Court blocked Arizona from enforcing its proof-of-citizenship requirement against certain voters, Kansas and Arizona both took advantage of a federalism loophole in the Court’s decision and began to implement a two-tier system of voter registration.

Applicants who comply with the documentary-proof-of-citizenship requirement may vote in all elections, but applicants who merely swear to their citizenship under penalty of perjury, without providing any supporting documentation, may vote only in federal elections. After a state court lawsuit blocked Kansas’ two-tier voter registration program, the executive director of the Election Assistance Commission (without action by the Commission itself) authorized the


51. See Inter Tribal Council of Ariz., 133 S. Ct. at 2260 (“We hold that 42 U.S.C. § 1973gg–4 precludes Arizona from requiring a Federal Form applicant to submit information beyond that required by the form itself.”). The Supreme Court based its decision on Congress’s power under the Elections Clause to regulate federal elections. See id. at 2253-54; see also U.S. Const. art. I, § 4, cl. 1. The “loophole” is that, because Congress’s Elections Clause power extends only to federal elections, Congress cannot force Arizona or Kansas to “accept and use,” 52 U.S.C. § 20505(a)(1), the Federal Form in a voter registration system that applies only to non-federal elections.

In addition, Arizona and Kansas jointly filed a lawsuit bringing administrative law claims to achieve what their constitutional claims failed to accomplish before the Supreme Court. See Kobach v. U.S. Election Asst. Comm’n, 772 F. 3d 1183, 1188-89 (10th Cir. 2014). Had Arizona and Kansas prevailed, the lawsuit would have obviated the need for the two-tier voter registration system and allowed both states to implement the documentary-proof-of-citizenship requirement with respect to all voters. However, the Tenth Circuit rejected the two states’ claims. Id. at 1199.


implementation of proof-of-citizenship laws, obviating the federal law barriers that had previously prevented the state proof-of-citizenship laws from taking effect.\textsuperscript{54} Voting rights groups filed suit to halt the executive director’s action, but the proof-of-citizenship laws may remain in effect while the litigation remains pending.\textsuperscript{55}

No one doubts the importance of ensuring that only eligible voters participate at the ballot box.\textsuperscript{56} The issue with proof-of-citizenship laws concerns the means states use to reach that goal. For instance, the documentary-proof-of-citizenship requirement in Kansas, combined with ineffective administrative implementation, have already caused major havoc for voters in that state. In September 2013, the law had barred over 15,000 voter registration applicants from registering to vote.\textsuperscript{57} That number rose to over 22,000 by October 2014.\textsuperscript{58} By September 2015, the law prevented over 36,000 would-be voters from registering to vote, and Kansas election officials began to purge these voters from the state’s list.\textsuperscript{59} The effect of these documentary-proof-of-citizenship laws may fall disproportionately on women. According to a 2006 study by the Brennan Center for Justice, 7\% of U.S. citizens lack ready access to citizenship documents, but “only 48\% of voting-age women with ready access to their U.S. birth certificates have a birth certificate with [their] current legal name—and only 66\% of voting-age women with ready access to any proof of citizenship have a document with [their] current legal name.”\textsuperscript{60}

\begin{itemize}
\item\textsuperscript{56} See Richard L. Hasen, Op-Ed, When It Comes to Election Law, Red America and Blue America Are Not at All Alike, L.A. TIMES (Oct. 20, 2015, 5:00 AM), http://www.latimes.com/opinion/op-ed/la-oe-1020-hasen-red-blue-election-law-20151020-story.html (“All eligible voters, and only eligible voters, should have the right to easily register and cast a ballot that will be accurately counted.”).
\item\textsuperscript{58} See Peggy Lowe, Will Voting Problems Give Kansas an Election Night Limbo?, KCUR 89.3 (Oct. 31, 2014), http://kcour.org/post/will-voting-problems-give-kansas-election-night-limbo.
\end{itemize}
Because women are disproportionately unlikely to have access to these documents, they will have to obtain them, which may disproportionately burden women for the same reasons as the requirement that women must obtain voter ID documents.

C. Improper Voter Registration Database Maintenance Practices

Improper voter registration list maintenance may also disproportionately impact women. List maintenance is the act of removing ineligible voters from the voter registration rolls because the voter died, moved from the jurisdiction, was convicted of a felony, lacks U.S. citizenship, or has otherwise become ineligible. The National Voter Registration Act mandates that election officials perform list maintenance to remove ineligible voters from the registration rolls, but it also “provides procedures and standards . . . to assure that voters’ names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction . . . .” The Help America Vote Act requires states to match the names of voters on the voter registration rolls with other databases in order to verify voter registration applicants’ identity but leaves to states how to treat non-matches. Done properly, voter registration list maintenance is an ordinary and necessary element of proper election administration. Problems arise when election officials conduct their purges poorly. Often, the source of the problem is bad data.

Perhaps the most famous case of controversial voter purging is Florida’s pre-2000 effort to remove ineligible felons from the voter registration rolls because the voter died, moved from the jurisdiction, was convicted of a felony, lacks U.S. citizenship, or has otherwise become ineligible. The National Voter Registration Act mandates that election officials perform list maintenance to remove ineligible voters from the registration rolls, but it also “provides procedures and standards . . . to assure that voters’ names are maintained on the rolls so long as they remain eligible to vote in their current jurisdiction . . . .” The Help America Vote Act requires states to match the names of voters on the voter registration rolls with other databases in order to verify voter registration applicants’ identity but leaves to states how to treat non-matches. Done properly, voter registration list maintenance is an ordinary and necessary element of proper election administration. Problems arise when election officials conduct their purges poorly. Often, the source of the problem is bad data.

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Florida election officials contracted with a data clearinghouse to compile a list of individuals with felony convictions, but officials specifically requested that the contractor make the list broader than necessary. In an e-mail to the contractor, an official from the Department of State wrote, “[o]bviously, we want to capture more names that possibly aren’t matches and let the supervisors make a final determination rather than exclude certain matches altogether.” Election officials used the overbroad list to remove voters from the registration rolls. In its investigation, U.S. Commission on Civil Rights determined, “As a result [of the improperly administered purge], many Floridians were erroneously removed from the voter lists.” Journalists put the number of improperly purged voters anywhere between 1100 and 20,000.

Notwithstanding the negative publicity over its pre-2000 felon purge, Florida continued to engage in controversial voter registration list maintenance practices. In 2005, the Florida Legislature enacted a statute barring individuals from registering to vote unless the state could verify either (1) that the applicant’s name and driver’s license number (or non-driver identification number) provided on the voter registration application matched the information in the state’s driver’s license database, or (2) the last four digits of a social security number listed on the applicant’s voter registration application matched the information in the Social Security Administration’s database. After litigation temporarily barred the state from enforcing its matching requirement, the Legislature amended the statute to permit registration of applicants who offered supplemental evidence of their identity in the event of a non-match. Subsequent litigation failed to block the amended statute.

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67. See generally U.S. COMM’N ON CIVIL RIGHTS, supra note 66.

68. Id. (emphasis added) (quoting E-mail from Emmett “Bucky” Mitchell, Ass’t Gen. Counsel, Florida Dep’t of State, to DBT Online (Mar. 23, 1999)).

69. See id.

70. Id.


74. See Fla. STAT. § 97.053(6) (2007) (providing that in the event of a non-match, “the voter must provide evidence to the supervisor sufficient to verify the authenticity of the
Other states implemented similar database matching requirements, with mixed results. For instance, Georgia administratively implemented a program similar to Florida’s, which flagged more than 4200 voters by the time litigation temporarily halted the program; yet, the program remains in force today. When the Washington Legislature enacted a similar statutory matching requirement, a court enjoined its enforcement. The Legislature subsequently amended the statute to allow voters to submit supplemental evidence of their identity in the event of a non-match. In one unique case, a private plaintiff unsuccessfully sued to force the Ohio Secretary of State to implement such a program.

Florida, however, remains ground zero for controversy over voter registration list maintenance practices. Just prior to the 2012 presidential election, Florida began a purge of suspected non-citizen voters. After initially suggesting that there were over 182,000 illegally registered non-citizens, the Department of State later pared that number down to 2600, and eventually to 198 suspected non-citizen voters—out of over 12 million total registered active voters in the state. Critics of the purge process, noting that the list of number provided on the application. If the voter provides the necessary evidence, the supervisor shall place the voter’s name on the registration rolls”). The Legislature also made minor changes in 2008, just days prior to a hearing in the litigation over the provision. See FLA. STAT. § 97.053(6) (2008).


77. Holder, 748 F. Supp. 2d 16, 19 (2010) (order granting dismissal); see also Response to Plaintiff’s and Defendant’s Joint Motion to Dismiss by Defendant-Intervenors at 3, Georgia v. Holder, 748 F. Supp. 2d 16 (2010) (noting the peculiar circumstances surrounding the Department of Justice’s decision to reverse its earlier determination by granting administrative preclearance after the filing of this litigation).


suspected non-citizen voters included a decorated World War II veteran and an active duty Navy Captain (both United States citizens), charged that the lists of non-citizens were hopelessly inaccurate and filed lawsuits to enjoin the program, with varying degrees of success. After the Supreme Court invalidated a key part of the Voting Rights Act the following summer, the Secretary of State resumed the program. Although the Florida Department of State began using a new immigration database from the U.S. Department of Homeland Security to check for non-citizens, this did not blunt criticism: opponents pointed out that the database was not designed for checking the citizenship status of registered voters and that even the Department of Homeland Security warned that its database was not a foolproof way to verify citizenship status. Eventually, the Secretary of State suspended the program.

Florida is not the only state to face controversy over improper voter registration purges, though. Within the past few years alone,

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Florida, Fla. Dep’t of St., http://election.dos.state.fl.us/NVRA/history.asp (last updated Sept. 30, 2015) (showing 12,038,571 active registered voters in 2012).


Colorado, Iowa, Indiana, Ohio, Puerto Rico, Texas, and Virginia have all faced criticism and, in some cases, litigation over their list maintenance procedures.\textsuperscript{87}

Women may disproportionately bear the burden of improper voter registration purges. Because the vast majority of women change their name following marriage,\textsuperscript{88} women are particularly vulnerable to problems related to database-matching: a database that lists a woman under her maiden name may report a non-match against the woman’s married name in the voter registration database (or an outdated voter registration record may not match up with an updated driver’s license or social security database). Former counsel for the plaintiffs in the Florida litigation reports that “yes, there were problems for married women who hadn’t changed their name on Social Security or DMV information (we know this to be true from anecdotes collected for litigation) . . . .”\textsuperscript{89}

Along similar lines, consider the likelihood that among the millions of voters in a state’s voter registration database, a surprisingly large number are likely to share both a name and other identifying variables (like a date of birth) with another voter (the


\textsuperscript{88} See Emens, supra note 25, at 785, 789.

\textsuperscript{89} E-mail from Justin Levitt, Assoc. Professor of Law, Loyola Univ. Sch. of Law, to Author (Aug. 28, 2013, 9:29 PM) (on file with author). Professor Levitt also cautioned that “there were enough other problems for men (‘James’ for ‘Jim,’ typos, compound names like Jean-Jacques) that there wasn’t a clear overall disparity,” id., but this is irrelevant to the question of whether database matching programs “den[y] or abridge[]” “[t]he right . . . to vote” of married women who change their names “on account of sex,” U.S. CONST. amend. XIX. Even if men also face name-related database matching burdens to a greater extent than women, this would not negate the fact that database matching programs may burden women’s right to vote on the basis of post-marriage name-changing, which is an action predominantly undertaken by women, not men.
“birthday problem”). When states conduct list maintenance using database matching, this leads to a surprising number of false positive matches, which could lead to a voter’s erroneous removal from the voter rolls if they share a name and birthdate with a felon, non-citizen, deceased individual, or other ineligible voter. Because women are more likely to change their name following marriage, more women than men may be subject to the birthdate problem twice: once under their maiden name and once under their married name.

D. Cutbacks in Access: Early Voting, Election Day Registration, Third-Party Voter Registration Groups

States have long enacted a host of measures to make voting easier and more convenient. Lately, however, states have been repealing these popular measures in an effort to make voting more difficult; these cutbacks may have an acute impact on women. States’ actions have included reducing the availability of early voting, eliminating Election Day registration, and placing restrictions on third-party voter registration groups.

Of all the states to make voting more difficult, perhaps most controversial is North Carolina: in 2013, its General Assembly passed a law that managed to make voting more difficult on all three fronts—cutting the early voting period (while allowing for the same number of hours of early voting to be spread over the fewer number of days), eliminating a same-day registration provision that enabled voters to register and vote on the same day during the early voting period, and placing restrictions on third-party voter registration organizations. Other states, however, have imposed less comprehensive restrictions.

1. Early Voting

First, consider early voting. Early voting is a procedure by which a voter, in the days leading up to Election Day, may appear in person at election officials’ office or another designated location to cast a

91. See id.
92. See Emens, supra note 25, at 785, 789.
93. See Voter Information Verification Act, ch. 381, 2013 N.C. Sess. Laws 1505 (codified in scattered sections of Chapter 163, N.C. GEN. STAT. (2014)). While litigation against the changes remains ongoing, a preliminary injunction is in effect to ensure the continued operation of same-day registration. But it does not apply to the early voting reductions nor the restrictions on third-party registration groups. See League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 236, 248 (4th Cir. 2014).
ballot.\textsuperscript{94} Thirty-two states and the District of Columbia allow some form of early voting for all voters, for any reason.\textsuperscript{95} Beyond the benefits that early voting provides election administrators, early voting also makes voting more accessible to voters.\textsuperscript{96}

Recently, some states have cut back on early voting. In 2011, Florida enacted a controversial law to reduce by nearly half the number of early voting days.\textsuperscript{97} A study of the law’s effects determined that “it very well could negatively impact turnout among Democratic, minority, younger[,] occasional, and first-time voters in the Sunshine State.”\textsuperscript{98} Litigation to stop the cutback yielded mixed results.\textsuperscript{99} After long lines at Florida polling places became a national story in the subsequent presidential election, the Legislature reinstated the full amount of early voting previously available.\textsuperscript{100} In 2012, a series of bizarre events led the Ohio General Assembly to enact, essentially by accident, an early voting regime which cut early voting hours, except for military voters.\textsuperscript{101} Litigation proceeding on a unique \textit{Bush v. Gore} equal protection theory succeeded in opening up the full early voting availability to all voters.\textsuperscript{102} In 2013, Ohio’s General Assembly again reduced the days available for early voting.\textsuperscript{103} Litigation to block the
cuts settled, restoring some of the early voting period.\textsuperscript{104} Following the settlement, a different set of plaintiffs brought separate litigation, which is currently pending.\textsuperscript{105}

2. Election Day Registration

Second, consider Election Day registration. Most states require voters to file their voter registration application a certain number of days in advance of the election;\textsuperscript{106} voters who fail to do so may not vote in that election. Advance registration requirements impose a barrier to voting.\textsuperscript{107} Some states, however, allow voters to register to vote on Election Day itself,\textsuperscript{108} which eliminates the barrier by ensuring that any registration problems can be corrected by simply re-registering at the polls on Election Day.

Despite the benefits, the Maine Legislature repealed its Election Day registration regime, only to have voters reject the repeal in a referendum, reinstating Election Day registration.\textsuperscript{109} The Montana Legislature twice attempted to repeal that state’s Election Day registration law, only to face vetoes by two different governors.\textsuperscript{110} The Montana Legislature also authorized a referendum on the subject, but voters overwhelmingly chose to retain Election Day registration.\textsuperscript{111} Ohio’s General Assembly eliminated the week of early voting during which voters could simultaneously register to vote and cast a ballot.\textsuperscript{112} Litigation to block the removal settled without


\textsuperscript{106} See, e.g., FLA. STAT. § 97.055 (2015) (29 days); TEX. ELEC. CODE ANN. § 13.143 (West 2015) (30 days).

\textsuperscript{107} See \textsc{Wendy Weiser et al., Brennan Ctr. for Justice, Voter Registration Modernization: Policy Summary} 3-7 (2009). In the author’s experience as an election administrator, the single greatest category of election-day calls for assistance concerned voters with registration problems.

\textsuperscript{108} See, e.g., MINN. STAT. § 201.061(3) (2015); WIS. STAT. § 6.55 (2015).

\textsuperscript{109} See ME. REV. STAT. ANN. tit. 21A, § 122(4-A) (2011), \textit{repealed by} People’s Veto (Nov. 8, 2011).


\textsuperscript{111} See S.B. 405, 63d Leg., Reg. Sess. § 2 (Mont., as enrolled Apr. 22, 2013); Damon Daniels, \textit{Montana Voters Keep Same-Day Registration}, DEMOS: POLICYSHOP (Nov. 7, 2014), http://www.demos.org/blog/11/7/14/mt-voters-keep-same-day-registration.

\textsuperscript{112} See OHIO REV. CODE ANN. § 3509.01(B)(2), (3) (LexisNexis 2014).
restoring the period of same-day registration.113 Following the settlement, a different set of plaintiffs also brought separate litigation, which is currently pending.114 Wisconsin also cut its state’s early voting period.115 Litigation to restore the cuts is ongoing.116

3. Third-Party Voter Registration Organizations

Finally, consider third-party voter registration organizations. The National Voter Registration Act requires that states accept written voter registration applications by applicants not physically present at the office of election officials.117 As a result, many organizations will send volunteers or staff into the community to find eligible but unregistered voters, offer them an opportunity to fill out an application, and mail in the application on the voter’s behalf.

Some states, however, impose restrictions on these groups. Three separate times over half a decade Florida enacted stringent requirements for these groups, backed by fines and penalties, only to have courts enjoin each law.118 In 2011, Texas enacted its own restrictions on third-party voter registration organizations, but litigants were less successful at seeking to overturn them.119 In 2005, New Mexico enacted similarly tough restrictions, which later litigation also failed to strike down.120 Plaintiffs had better luck in


115. See WIS. STAT. § 6.86(1)(b) (2011) (limiting early voting to a twelve-day period that begins on the third Monday preceding an election and ends on the Friday before Election Day).


Ohio, where they successfully attacked a 2006 statute restricting third-party voter registration drives.\textsuperscript{121} Georgia plaintiffs also obtained injunctive relief against an administrative practice that imposed similar burdens on third-party voter registration organizations.\textsuperscript{122}

4. The Effect on Women of Cutbacks in Access

Cutbacks in early voting, eliminating same-day registration, and restricting third-party voter registration organizations can burden all voters but may especially burden women voters. Because women carry a disproportionate share of the childcare burden in the United States,\textsuperscript{123} women may have a particular need for the flexibility these accessibility provisions afford voters.

A third-party voter registration drive at the school of a woman’s child might be the difference between that woman turning in her voter registration form before the deadline, or not. Expanded early voting might be the difference between a woman voting or not, because the following day she may be too busy with a sick daughter to wait in a polling place line. Same-day registration could be the difference for a woman who has only a half-hour to vote before she has to pick up her son from school and cannot remain at the polling place to sort out her registration problem.

E. Barriers to the Ballot: What It All Means

As the above discussion illustrates, a host of legislative and administrative matters present barriers to the ballot.\textsuperscript{124} Many of

\begin{footnotesize}
\begin{enumerate}
\item See Ohio Rev. Code Ann. §§ 3503.14(A), 3503.19(B)(2)(b)-(c), 3503.29(C), 3599.11(B)(2)(a), 3599.11(C)(2) (2008), 
preliminary injunction granted, Project Vote v. Blackwell, 455 F. Supp. 2d 694, 709 (N.D. Ohio 2006); see also Project Vote v. Blackwell, 
motion for partial summary judgment).
\item See Charles H. Wesley Educ. Found. v. Cox, 408 F.3d 1349, 1351, 1356 (11th Cir. 
2005).
\item See, e.g., Cahn, supra note 34, at 181-82; Coan, supra note 34, at 258; Dowd, supra 
note 34, at 1053-54.
\item The barriers mentioned above are hardly the only recent restrictions imposed on 
voting. For instance, the above discussion does not mention efforts to make voting more 
difficult for students. See, e.g., Campus Vote Project, Fair Elections Legal Network, 
College Students and Voting: A Campus Vote Project Perspective 5-9 (2013), 
DRAFT.pdf. The gender gap in higher education enrollment is not as pronounced as in 
other areas: “In college, over half of both undergraduate (55 percent) and graduate 
students (57 percent) were women. Combining undergraduate and graduate levels, women 
made up 53 percent of all college students in 2011 . . . ." Jessica Davis & Kurt Bauman, 
U.S. Census Bureau, No. P20-571, School Enrollment in the United States: 2011, at 
13 (2013), http://www.census.gov/prod/2013pubs/p20-571.pdf. It is harder to draw the 
conclusion that attacks on student voting are restrictions “on account of sex,” U.S. Const. 
amend. XIX, than it is to draw a similar conclusion about restrictions that burden those
\end{enumerate}
\end{footnotesize}
these barriers may impact women significantly more than men. The question then is what, if anything, can the Nineteenth Amendment do to help?

III. LEGAL HISTORY OF WOMAN SUFFRAGE LEADING TO THE NINETEENTH AMENDMENT

When trying to determine the scope of the Nineteenth Amendment’s power to fight restrictions on voting, it is appropriate to review the history leading to the proposal and ratification of the Amendment.

A. Early American History: New Jersey

Some early American women were, in fact, entitled to vote: New Jersey’s Constitution of 1776 did not restrict the franchise on account of sex. Women, in fact, voted in New Jersey until 1807. That year, the Legislature barred women from voting, ostensibly justifying its decision on the questionable ground of fighting voter fraud. In an eerie foreshadowing of today’s voting restrictions, voter fraud without financial resources, or those with childcare responsibilities, or those who change their name—all of which are categories which contain significantly more women than men.


126. Siegel, supra note 7, at 967-68 (arguing that a proper interpretation of the Nineteenth Amendment must include a review of the history leading to its enactment).


129. See Supplement to an Act to Regulate the Election of Members of the Legislative Council and General Assembly, Sheriffs and Coroners in New Jersey, November 1807, 1807 N.J. Laws 14; see also Lewis, supra note 128, at 1029-33.

130. See Keyssar, supra note 11 (“The [modern restrictive voting] laws seem tailored to guarantee the integrity of elections than to achieve a partisan purpose . . . .”); see also HASEN, supra note 2, at 41-73 (detailing the cottage industry of individuals who peddle less than compelling claims of voter fraud to defend restrictions on voting).
may have been merely a pretext for disenfranchising women because the Legislature did not like the way in which women were voting.\textsuperscript{131}

\textbf{B. Reconstruction Era and the Civil War Amendments}

During Reconstruction, woman suffrage suffered a setback when Congress considered a constitutional amendment designed to secure the rights, including the right to vote, of newly-freed slaves. Despite the vigorous campaigning of woman suffrage supporters, Congress proposed a Fourteenth Amendment that protected the voting rights of only \textit{male} voters.\textsuperscript{132} Suffragists fared no better when Congress proposed the Fifteenth Amendment, which prohibited restrictions on suffrage on account of race, but made no mention of sex.\textsuperscript{133}

In a last gasp effort at constitutional protection, woman suffrage advocates unsuccessfully attempted to obtain their own constitutional amendment, specifically guaranteeing for women the right to vote.\textsuperscript{134} As an alternative, advocates lobbied Congress to pass ordinary legislation, purporting to enforce the Privileges and Immunities Clause of the Fourteenth Amendment, that would require states to enfranchise women.\textsuperscript{135} Members of Congress, who once embraced a broad notion of suffrage and of congressional power to protect the right to vote, now rejected requests for legislation on the grounds that protecting the voting rights of women was beyond the power of Congress.\textsuperscript{136}

\textsuperscript{131} See Carrie Chapman Catt & Nettie Rogers Shuler, Woman Suffrage and Politics: The Inner Story of the Suffrage Movement 9 (2005); Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 141 (rev. ed. 2009); Irwin N. Gertzog, Female Suffrage in New Jersey, 1790-1807, 10 Women & Pol. 47, 56 (1990). But see Lewis, supra note 128, at 1933-34 (suggesting that the real motivation may have been a genuine conviction concerning women’s competence to vote, rather than a politically motivated concern about election outcomes).

\textsuperscript{132} See U.S. Const. amend. XIV, § 2, XV. Woman suffrage advocates lobbyists tirelessly to ensure the Reconstruction Amendments explicitly enfranchised women—or at least used only gender-neutral language when enfranchising former slaves—but were unable to overcome the political concerns of supporters in Congress who feared that the inclusion of woman suffrage would jeopardize black suffrage. See Catt & Shuler, supra note 131, at 49-52; Keyssar, supra note 131, at 143-44; Lind, supra note 9, at 162, 164-65; Siegel, supra note 7, at 968-69, n.58.

\textsuperscript{133} See U.S. Const. amend. XV; Catt & Shuler, supra note 131, at 67-72; Keyssar, supra note 131, at 145; Siegel, supra note 7, at 969-70.


\textsuperscript{135} See Jules Lobel, Losers, Fools & Prophets: Justice as Struggle, 80 Cornell L. Rev. 1331, 1366 (1995); Siegel, supra note 7, at 972-73; Winkler, supra note 134, at 1479, 1484, 1499.

\textsuperscript{136} See Siegel, supra note 7, at 973; Winkler, supra note 134, at 1489-91, 1502.
C. Minor v. Happersett\textsuperscript{137} and the “New Departure”

Having failed before Congress, woman suffrage advocates turned to the courts. Notwithstanding the explicit mention of “male” voters in Section 3, suffragists argued that the Privileges and Immunities Clause in Section 1 of the Fourteenth Amendment included voting as one of the protected “privileges and immunities.”\textsuperscript{138} Section 1 contained no explicit limitation on the basis of sex, the argument went, so women were entitled to vote.\textsuperscript{139} Suffragists titled this theory the “New Departure.”\textsuperscript{140}

Although the criminal prosecution of noted suffragist Susan B. Anthony for illegally voting may be the most famous New Departure case,\textsuperscript{141} the case to reach the Supreme Court was Minor v. Happersett.\textsuperscript{142} Virginia Minor, the founder of the New Departure movement, applied for voter registration in her home state of Missouri.\textsuperscript{143} The registrar rejected her application on the grounds that she was a woman and that Missouri law limited the franchise to men.\textsuperscript{144} Minor sued the registrar, but she lost in both the trial court and the Missouri Supreme Court.\textsuperscript{145} In the United States Supreme Court, Minor advanced the standard New Departure arguments.\textsuperscript{146} In a unanimous opinion, the Court rejected Minor’s claim.\textsuperscript{147}

\textsuperscript{137} 88 U.S. 162 (21 Wall.) (1874), superseded by U.S. Const. amend. XIX.
\textsuperscript{138} See Siegel, supra note 7, at 971-72; Winkler, supra note 134, at 1475-76, 1480-83, 1485-87.
\textsuperscript{139} See Keyssar, supra note 131, at 145-46; Lobel, supra note 135, at 1365. Although the Privileges and Immunities Clause was the primary constitutional provision on which the New Departure relied, the theory invoked other constitutional clauses as well. See Siegel, supra note 7, at 972 n.66.
\textsuperscript{140} See Lobel, supra note 115, at 1365; Siegel, supra note 7, at 971.
\textsuperscript{142} 88 U.S. (21 Wall.) 162 (1874), superseded by U.S. Const. amend. XIX. The Anthony and Minor cases were not the only New Departure test cases: “Overall, 150 women attempted to vote in ten states and the District of Columbia during 1871 and 1872.” Winkler, supra note 134, at 1493. Usually, the local registrar denied the woman’s voter registration application, so the woman would sue the registrar. Catt & Shuler, supra note 131, at 92; Lobel, supra note 135, at 1368; Winkler, supra note 134, at 1492.
\textsuperscript{143} Minor, 88 U.S. (21 Wall.) at 163. For an examination of Minor’s role in the suffrage movement, see Winkler, supra note 134, at 1475-76.
\textsuperscript{144} Minor, 88 U.S. (21 Wall.) at 163-64.
\textsuperscript{145} See Minor v. Happersett, 53 Mo. 58, 65 (1873), aff’d, 88 U.S. (21 Wall.) at 178.
\textsuperscript{146} Minor, 88 U.S. (21 Wall.) at 164.
\textsuperscript{147} See id. at 178. Incredibly, the Court rejected Minor’s claim even though Missouri sent no counsel to defend the decision below. See id. at 174 (“No opposing counsel”).
First, the Court agreed that Minor was a citizen of the United States. Women, the Court held, had always been citizens from the founding of the Republic and did not need Section 1 of the Fourteenth Amendment to stake a claim to citizenship:

The [F]ourteenth [A]mendment did not affect the citizenship of women any more than it did of men. In this particular, therefore, the rights of Mrs. Minor do not depend upon the [A]mendment. She has always been a citizen from her birth, and entitled to all the privileges and immunities of citizenship.

The Court, however, rejected Minor’s claim that voting was one of the “privileges and immunities” guaranteed to citizens. The Court explained:

For nearly ninety years the people have acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage.

The Constitution of the United States does not confer the right of suffrage upon any one, and . . . the constitutions and laws of the several States which commit that important trust to men alone are not necessarily void . . .

Although the Court rejected the New Departure theory, the justices expressed no opinion on the merits of woman suffrage, explaining that such a policy question was not within the judiciary’s purview. Taking the Court’s disclaimer as a suggestion, some suffrage advocates embarked on state-by-state campaigns to convince states and localities to enfranchise women. But others nonetheless brought their fight back to Congress, where they lobbied once again for a constitutional amendment.

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148. U.S. CONST. amend. XIV, § 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.”).
150. Id. at 170.
151. Id. at 170-78. The Court also rejected claims that the denial of woman suffrage violated the Guarantee Clause, U.S. CONST. art IV, § 4, the Bill of Attainder Clause, id. art. I, § 9, cl. 3, and the Due Process Clause, id. amend. V. Minor, 88 U.S. (21 Wall.) at 175-76.
152. Minor, 88 U.S. (21 Wall.) at 177-78.
153. Id. at 178.
154. See CATT & SHULER, supra note 131, at 107-31, 160-226; KEYSSAR, supra note 131, at 149.
155. See CATT & SHULER, supra note 131, at 227-49; KEYSSAR, supra note 131, at 149.
D. The Pre-Nineteenth Amendment History: What It All Means

The key events in the pre-Nineteenth Amendment history—New Jersey’s withdrawal of suffrage from women on dubious grounds of voter fraud, the Fourteenth and Fifteenth Amendments’ protection of voting rights for men only, the refusal of Congress to enact Fourteenth Amendment enforcement legislation to protect women’s right to vote, and Minor v. Happersett’s holding that the Privileges and Immunities Clause does not protect voting—collectively tell a story in which voting rights are subject to the whims of individual states, entitled to only minimal protection from the federal government. The Nineteenth Amendment, as a constitutional rejection of that history,\(^{156}\) constitutes more than just a requirement that states remove the word “male” from their list of voter qualifications.

Rather, the rejection of this pre-amendment history suggests that the Nineteenth Amendment constitutes a significant source of constitutional authority for the defense of voting rights in general against restrictions or barriers that discriminate on the basis of sex. The extent of that power—whether that power is sufficient to combat modern-day barriers to the ballot—is illustrated both by the Nineteenth Amendment’s legislative history and by inferences from the jurisprudence of the era concerning the enforcement clauses in other constitutional provisions.

\(^{156}\) To illustrate how the Nineteenth Amendment was a rejection of the pre-Amendment constitutional history, consider that, in their pleas for a constitutional amendment to enfranchise women, suffrage advocates never truly gave up on their New Departure theory, despite their total defeat in the Supreme Court. See Siegel, supra note 7, at 975. Indeed, a report of the Senate Committee on Woman Suffrage specifically mentioned New Jersey’s 1807 revocation of the franchise from women, and said, “History is largely an account of man’s struggle for freedom, and from the beginning of the human race, down to the present time, its tendency has been toward liberty—mankind reaching out for freedom and immeasurably attaining it.” S. Rep. No. 63-64, at 8 (1913); see also id. at 7 (noting “marked changes in political and social conditions in the U.S.”).
IV. HOW ITS FRAMERS UNDERSTOOD THE NINETEENTH AMENDMENT

In 1919, woman suffrage advocates finally succeeded: both chambers in the Sixty-Sixth Congress voted by the necessary two-thirds majority to propose a woman suffrage constitutional amendment to the states. Just over a year later, the necessary three-fourths of state legislatures ratified the Nineteenth Amendment.

A. Legislative Procedure Surrounding House Joint Resolution 1

The most peculiar fact about the legislative history of the Nineteenth Amendment is how little history there is: members of Congress went to great lengths to hurry the consideration of the joint resolution which eventually became the Nineteenth Amendment. Neither chamber held any hearings, nor took any testimony; the House published a report of only forty-four words while the Senate issued no published report at all. Unique parliamentary maneuvers—what one opponent called “parliamentary cleverness” and another called “revolutionary tactics . . . in order to railroad a piece of legislation through”—deviated from standard practice with the goal of speeding consideration of the joint resolution. In the House, woman suffrage supporters used the rare “Calendar

157. This Part discusses only the legislative history of Congress proposing the Nineteenth Amendment. State legislatures of the time generally did not maintain verbatim transcripts of proceedings akin to the Congressional Record; they merely maintained journals of proceedings, which offer the reader procedural details but not the substance of the discussion. Cf. Eric S. Fish, Note, The Twenty-Sixth Amendment Enforcement Power, 121 YALE L.J. 1168, 1203 n.160 (2012) (encountering similar problems concerning state legislatures’ debates over the ratification of the Twenty-Sixth Amendment). An authoritative secondary source published shortly after ratification, however, suggests that the ratification debates in the state legislatures were substantially similar to the debates in Congress. See CATT & SHULER, supra note 131, at 343-63, 371-80, 387-413, 422-61.

158. See H.R.J. Res. 1, 66th Cong. (1919); see also 58 CONG. REC. 635 (recording passage of H.R.J. Res. 1 in the Senate on June 4, 1919, by a vote of 56-25); id. at 93-94 (recording passage of H.R.J. Res. 1 in the House on May 21, 1919, by a vote of 304-90).

159. See Certification of the Adoption of the Nineteenth Amendment to the Constitution, 41 Stat. 1823 (1920).

160. See H.R.J. Res. 1.

161. See H.R. REP. NO. 66-1 (1919). The report reads, in its entirety, “The Committee on Woman Suffrage, to which was referred the resolution (H.R.J. Res. 1) proposing an amendment to the Constitution extending the right of suffrage to women, after consideration, report the said resolution back to the House with a recommendation that it do pass.” Id. The Senate’s Committee on Woman Suffrage merely reported the joint resolution without a published report. See 58 CONG. REC. 348 (1919).


163. Id. at 228 (statement of Sen. Underwood); see also id. (statement of Sen. Oscar Underwood) (“revolutionary methods”).
"Wednesday" provision to bypass the Rules Committee and obtain swift consideration of the joint resolution. In the Senate, woman suffrage supporters unsuccessfully attempted an innovative use of the motion to discharge a committee to bring the matter to the floor sooner, scaring opponents into allowing the joint resolution to reach the floor without delay. A mere eighteen days into the Sixty-Sixth Congress's version of H. Res. 215, 65th Cong. (1918) (providing for immediate consideration of H.R.J. Res. 200, its referral (Wednesday), Representative James Mann of Illinois, the Chairman of the Committee and the chief sponsor of House Joint Resolution 1, used the “Calendar Wednesday” provision to call up the joint resolution for immediate consideration. See id. at 78; see also RULES OF THE U.S. HOUSE OF REPRESENTATIVES, 66th Cong., Rule XXIV, cl. 7 (1919) [hereinafter HOUSE RULES] (providing for the Calendar Wednesday procedure), reprinted in H. R. Doc. No. 66-1019, at 393-94 (1921).

Under normal practice not followed in this instance, a legislative item reported by any House committee makes an additional stop at the Rules Committee. The Rules Committee examines the item anew, and proposes a privileged resolution which would order the House to consider the underlying legislative item under debate rules unique to the item. The House makes frequent use of this procedure because consideration of the Rules Committee’s proposed resolution is a privileged question, which means the resolution gets immediate consideration over other business then pending. See HOUSE RULES, Rule XI, cl. 56, reprinted in H. R. Doc. No. 66-1019, at 309-10. When the House passes the Rules Committee’s resolution, the House is bound by the resolution’s terms, which usually dictate that the underlying legislative item itself now receives immediate consideration over other business then pending and also dictate special debate rules for that consideration. See, e.g., H. Res. 215, 65th Cong. (1918) (providing for immediate consideration of H.R.J. Res. 200, the 65th Congress’s version of a constitutional amendment proposing woman suffrage); 56 CONG. REC. 762, 770 (1918) (using H. Res. 215 in the 65th Congress to manage debate on H.R.J. Res. 200).

Under the Calendar Wednesday procedure, however, a committee may obtain immediate consideration of a reported item on the House Calendar, without the necessity of going through the Rules Committee, but may do so only on a Wednesday. See HOUSE RULES, supra, Rule XXIV, cl. 7, reprinted in H. R. Doc. No. 66-109, at 393-94.

By immediately considering House Joint Resolution 1 in committee, reporting it favorably, and immediately placing it on the House Calendar before Wednesday, Representative Mann was able to use the Calendar Wednesday provision to bypass the Committee on Rules and bring the joint resolution to the floor immediately. Had Representative Mann waited even another day to report the joint resolution, it would not have been eligible for the Calendar Wednesday procedure until the following Wednesday, by which time other committees might have reported their own measures which would also be eligible for the Calendar Wednesday procedure.

Another unique benefit of the Calendar Wednesday procedure was that it limited debate, see id. at Rule XV, cl. 6(b), preventing members from using debate as a means of blocking a vote. As a result, the House voted that same day by the necessary two-thirds majority to propose the joint resolution to the states as a constitutional amendment. See 58 CONG. REC. 93-94 (1919) (passing H.J. Res. 1 in the House by vote of 304-90).

Immediately upon receiving the joint resolution from the House, Senator Hiram Johnson unsuccessfully attempted to place the joint resolution on the calendar without the necessity of committee consideration. See 58 CONG. REC. 128 (1919). The Vice President referred the joint resolution to the Senate Committee on Woman Suffrage. See 58 CONG. REC. 128 (1919). Senator Wesley Jones then immediately entered a motion to discharge the Committee from consideration of House Joint Resolution 1. See id. at 129. Pursuant to the
Congress, large majorities in both chambers had passed a sweeping change to the Constitution, resulting in the single biggest one-time enfranchisement of any group of individuals in the history of the United States.\textsuperscript{166} Congress is not known for its swift action in the normal course of legislating, and for the typically slow-moving institution to have moved with such speed on such an important issue seems curious, to put it mildly.

Congress apparently moved with such speed because previous Congresses built up a significant record over the course of previous decades. The first vote on a woman suffrage constitutional amendment came in the Senate in 1887.\textsuperscript{167} Congress had been holding and publishing hearings on the subject of a woman suffrage constitutional amendment since at least 1892 in the House and 1878

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\textsuperscript{166} See \textit{58 Cong. Rec.} 1, 5 (1919) (beginning of Sixty-Sixth Congress on May 19, 1919); \textit{id.} at 93-94 (recording passage of H.J. Res. 1 in the House on May 21, 1919, by a vote of 304-90); \textit{id.} at 635 (recording passage of H.J. Res. 1 in the Senate on June 4, 1919, by a vote of 56-25). For a discussion of how radical a change the Nineteenth Amendment made in the electorate, see AKHIL REED AMAR, \textit{AMERICA’S CONSTITUTION: A BIOGRAPHY} 419 (2005). But see KEYSSAR, supra note 131, at 175-77 (stating that the enfranchisement of women did not dramatically affect politics).

\textsuperscript{167} See 18 \textit{Cong. Rec.} 1002-03 (1887) (failing to pass S. Res. 5 in the Senate by a vote of 26-34).
in the Senate. Congressional committees had issued reports on a potential woman suffrage constitutional amendment since 1883 in the House and 1878 in the Senate. Just months earlier, the Sixty-Fifth Congress narrowly missed the necessary two-thirds majority to propose the woman suffrage constitutional amendment to the states. When suffrage opponents asked supporters about the absence of hearings and reports on the subject in the Sixty-Sixth Congress, supporters replied that “hearings have been had on this resolution for more than [fifty] years” and that “[h]earings have been repeatedly held by committees of both House and Senate on this question in the past.” Relying on the record built in previous Congresses, the Sixty-Sixth Congress felt no need to study the merits or consequences of a woman suffrage constitutional amendment.

For interpretive purposes, this means that debates, reports, hearings, and other legislative materials from previous Congresses can be just as useful as would be materials from the Sixty-Sixth Congress, which actually passed the Nineteenth Amendment. But the notion raises problems: is it proper to use the materials of a previous Congress to interpret a constitutional provision, when that Congress failed to pass (or even worse, voted down) a joint resolution proposing that provision? The reverse question also raises problems: is it proper to ignore the record developed by previous Congresses when the Sixty-Sixth Congress clearly relied on that record? Although some scholars use the entire half-century history of congressional efforts on woman suffrage, an intermediate position

168. See Hearing of the Woman Suffrage Association: Hearing Before the H. Comm. on the Judiciary, 52d Cong. (1892); Arguments in Behalf of a Sixteenth Amendment to the Constitution of the United States: Hearing Before the S. Comm. on Privileges and Elections, 45th Cong. (1878). These are the first published hearings; Congress held unpublished hearings preceding these.


170. See 57 CONG. REC. 3062 (1919) (showing that, on reconsideration, H.R.J. Res. 200 did not achieve the necessary two-thirds majority in the Senate, failing by a vote of 55-29); 56 CONG. REC. 10,987-88 (showing that, on the initial vote, H.R.J. Res. 200 did not achieve the necessary two-thirds majority in the Senate, failing by a vote of 53-31); 56 CONG. REC. 810 (1918) (showing that H.R.J. Res. 200 passed in the House by the necessary two-thirds majority with a vote of 274-136).


172. See id. at 557 (statement of Sen. James Watson).

173. Notably, state legislatures also moved with incredible speed to ratify the Nineteenth Amendment. Many legislative sessions had already concluded by the time Congress passed House Joint Resolution 1, so these states had to call their legislatures into special session in order to ratify the Amendment. See CATT & SHULER, supra note 131, at 343-63. In under fourteen months, the necessary three-fourths of state legislatures ratified the Nineteenth Amendment. See Amendment to the Constitution, 1920, 41 Stat. 1823, 1823 (1920) (certifying ratification by three-fourths of the state legislatures on Aug. 26, 1920).

174. See, e.g., Siegel, supra note 7, at 948 (interpreting the Nineteenth Amendment in light of over a half-century of hearings, reports, and debates).
is more appropriate: legislative history from a previous Congress is useful only if the members of Congress producing the statements or other materials also sat in the Sixty-Sixth Congress. This limiting principle ensures that activity from prior Congresses might be plausibly ascribed to the Sixty-Sixth Congress.

B. Enfranchising Women: The Nineteenth Amendment’s Primary Purpose

Having decided what materials are fair game to consider when attempting to discern Congress’s intent in proposing the Nineteenth Amendment, the next question is what exactly does the Nineteenth Amendment do? Absent enforcement legislation, how far does the Nineteenth Amendment itself reach into the states’ election machinery?

1. Judicial Interpretation of the Nineteenth Amendment

Given the circumstances of the case, one can forgive the Supreme Court for taking a cramped view of that question in Breedlove v. Suttles—the only case in which the Court has applied the Nineteenth Amendment.175 In Breedlove, the Court held that the Nineteenth Amendment does not prohibit the denial of the right to vote for failure to pay a poll tax with an exemption for female non-voters.176 Nearly 100 years after its ratification, the following 201 words are the only judicial application of the Nineteenth Amendment the Court has ever offered:

The Nineteenth Amendment, adopted in 1920, declares: “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 sex.” It applies to men and women alike and by its own force supersedes inconsistent measures, whether federal or state. Its purpose is not to regulate the levy or collection of taxes. The construction for which appellant contends would make the [A]mendment a limitation upon the power to tax. The payment of poll taxes as a prerequisite to voting is a familiar and reasonable regulation long enforced in many states and for more than a century in Georgia. That measure reasonably may be deemed essential to that form of levy. Imposition without enforcement would be futile. Power to

175. 302 U.S. 277 (1937). The Court technically also applied the Nineteenth Amendment in Leser v. Garnett, 258 U.S. 130 (1922). In that case, the Supreme Court rejected a claim to remove two women from the voter rolls because although the state constitution limited suffrage to men, the operation of the Nineteenth Amendment forbid the state from enforcing its “men only” voter qualification. Id. at 135-36. The main question in that case was not, however, the operation of the Nineteenth Amendment, but rather whether it had validly become part of the Constitution. Id. at 136.

176. See 302 U.S. at 283-84.
levy and power to collect are equally necessary. And, by the exaction of payment before registration, the right to vote is neither denied nor abridged on account of sex. It is fanciful to suggest that the Georgia law is a mere disguise under which to deny or abridge the right of men to vote on account of their sex. The challenged enactment is not repugnant to the Nineteenth Amendment.\footnote{177}{Id. (footnote omitted) (citations omitted). Curiously, the Court cited Minor \textit{v. Happersett} for the proposition that the Nineteenth Amendment should be interpreted narrowly. \textit{See id.} at 283 (citing Minor \textit{v. Happersett}, 88 U.S. (21 Wall.) 162, 170 (1874)).}

The challenged poll tax exemption applied differently to men and women; only female \textit{non-voters} were eligible for the exemption—that is, in order to be eligible for the exemption, women had to give up their right to vote.\footnote{178}{\textit{See GA. CODE} § 92-108 (1933).} \textit{No voters} were exempt from the poll tax on account of sex; the statute operated equally to deny both nonpaying men’s and nonpaying women’s rights to vote. \textit{Breedlove} therefore stands for the unremarkable proposition that “the right to vote is neither denied nor abridged on account of sex”\footnote{179}{\textit{Breedlove}, 302 U.S. at 284.} by a voting restriction unless that restriction in some way impacts voters of one sex differently from voters of another sex.\footnote{180}{\textit{See id.} at 283-84.}

\textit{Breedlove} does contain some dicta suggesting that the Nineteenth Amendment’s reach is somewhat limited: that the provision’s “purpose is not to regulate the levy or collection of taxes” and that the Nineteenth Amendment is not “a limitation upon the power to tax.”\footnote{181}{\textit{Id.} at 283.} Modern readers should give these statements little credence: less than three decades after \textit{Breedlove}, both the Supreme Court and a constitutional amendment would repudiate poll taxes,\footnote{182}{\textit{See U.S. CONST. amend. XXIV; Harper v. Va. Bd. of Elections}, 383 U.S. 663, 666 (1966).} overruling \textit{Breedlove}’s equal protection holding and casting doubt on that case’s cramped view of the Nineteenth Amendment’s reach.

\textit{Breedlove}, then, offers little in the way of interpretive guidance. Because the Court’s Nineteenth Amendment jurisprudence is nearly non-existent, the legislative history of House Joint Resolution 1 might offer more insight.

\section*{2. Legislative History}

Had the \textit{Breedlove} Court surveyed the legislative history of the Nineteenth Amendment, the Court probably would have found little to either buttress or rebut its dicta concerning the Amendment’s limited reach. Congress primarily thought that the Nineteenth Amendment would override state voter qualifications in order to
make women eligible to vote and gave less consideration to whether the provision would alter the procedures governing state election regimes.

For instance, the descriptive clause of House Joint Resolution 1 described the measure as “[p]roposing an amendment to the Constitution extending the right of suffrage to women.” The forty-four word report of the House Committee on Woman Suffrage used identical language. Similarly, the more developed committee reports published by earlier Congresses opined on the wisdom of whether women should vote at all, not how to stop gender-based barriers like the poll tax at issue in Breedlove. Testimony in the hearings of previous Congresses centered on the grant or complete denial of, not lesser restrictions on, the right to vote. Much of the debate in both the House and the Senate maintained a similar focus.

3. In Pari Materia: Fifteenth Amendment Jurisprudence

That ambiguous legislative history is consistent with the state of Fifteenth Amendment jurisprudence as it stood at the time of the Sixty-Sixth Congress. Congress modeled the Nineteenth Amendment after the Fifteenth, and the language of the two amendments is nearly identical. The identical language suggests that the two amendments should be interpreted in pari materia. Because

183. See H.R.J. Res. 1, 66th Cong. (1919) (enacted at 41 Stat. 362 (1919)).
188. The amendments are identical except for the replacement of the words “race, color, or previous condition of servitude” with the word “sex.” Compare U.S. CONST. amend. XIX, with U.S. CONST. amend XV.
189. See Akhil Reed Amar, Intratextualism, 112 HARV. L. REV. 747, 789 (1999) (arguing that the phrase “the right of citizens of the United States to vote” in several constitutional amendments should be interpreted in pari materia with one another); Franita Tolson, Reinventing Sovereignty?: Federalism as a Constraint on the Voting Rights Act, 65 VAND. L. REV. 1195, 1198 n.12 (2012) (arguing that the interpretation of the Elections Clause is informed by the interpretation of the Fourteenth and Fifteenth Amendments, and vice versa); see also Fish, supra note 157, at 1171, 1177-78 (arguing that the Twenty-Sixth Amendment’s Enforcement Clause should be read in pari materia with the identical enforcement clauses in other constitutional provisions).
Congress is presumed to be aware of the state of Fifteenth Amendment jurisprudence at the time it proposed the Nineteenth Amendment to the states, the handful of Fifteenth Amendment decisions decided as of 1919 is instructive in interpreting the Nineteenth Amendment.

First, in *Neal v. Delaware*, the Court held that the Fifteenth Amendment effectively excised the word “white” from all state voter qualifications, and did so automatically, without any necessary enforcement legislation from Congress. The Court found that states need not actually remove the offending language; so long as the states were not taking affirmative steps to enforce the unconstitutional requirement, the Court would not presume that the states were actually following their state constitution to the detriment of the Fifteenth Amendment.

Next, in *Elk v. Wilkins*, the Court noted that the Fifteenth Amendment, by its terms, applied only to “citizen[s] of the United States.” Having ruled that a Native American voter was not a “citizen of the United States” under the Fourteenth Amendment, the Court found that the would-be voter was not entitled to the protections of the Fifteenth Amendment.

Later, in *James v. Bowman*, the Court invalidated the indictment of a man prosecuted for bribing several black voters to refrain from voting. The Court held that the Fifteenth Amendment does not reach all improper election activity—like the bribery at issue here—simply because its victims were black; the unlawful conduct had to occur because of the race, color, or previous condition of servitude of the voters.

Finally, in *Guinn v. United States*, the Court invalidated a state constitutional provision limiting suffrage only to those individuals who passed a literacy test, unless either the individual or his ancestor was eligible to vote prior to January 1, 1866 (i.e., before the

191. 103 U.S. 370, 389-90 (1880).
192. Id. at 391-93. The Court went on to hold, however, that the defendant made out a prima facie case that black voters had been excluded from this jury selection pool in violation of the Fourteenth Amendment and overturned the conviction until the lower courts had heard evidence on that claim. Id. at 393-98.
194. Id.
196. Id. at 139.
adoption of the Fourteenth and Fifteenth Amendments). The Court held that although the so-called “grandfather clause” did not explicitly make race or color a condition of voting, the clause clearly had that effect: only white voters would be eligible to vote before the enactment of the Fourteenth and Fifteenth Amendments, and so only white voters or their (also white) descendants could vote under the challenged regime without passing the literacy test. The Court also held that because the only possible purpose of such a clause could be to circumvent the constitutional prohibition against discrimination in voting on the basis of race or color, the grandfather clause could not stand.

To summarize, the Fifteenth Amendment (1) operated to automatically invalidate explicit race- or color-based voter qualifications; (2) protected only United States citizens and even then did not protect them from activity not motivated by race or color; and (3) reached non-explicit discrimination in voting on the basis of race or color, at least where the race- or color-based motivation was remarkably obvious. In short, the decisions did not deal with the sort of lesser restrictions prevalent today.

4. Summarizing the Nineteenth Amendment's Primary Purpose

Taken together, the legislative history of the Nineteenth Amendment combined with the state of Fifteenth Amendment jurisprudence support the conclusion that the Nineteenth Amendment was primarily concerned with striking the word “male”

197. 238 U.S. 347, 354-58 (1915); see also Myers v. Anderson, 238 U.S. 368, 377-82 (1915) (reaching an identical result concerning another state’s grandfather clause).
199. Id. The Court also invalidated the literacy test, not because it also violated either the Fourteenth or Fifteenth Amendments, but because the literacy test was so intertwined with the grandfather clause as part of the entire voter qualification regime that one part could not stand without the other. Id. at 365-67.
200. In addition to these four cases, this Article addresses cases concerning the Fifteenth Amendment’s enforcement authority, infra, Section IV.C. For an analysis of relevant lower court cases, see JOHN MARRY MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT 97-126 (1909). Two other pre-1919 Fifteenth Amendment cases in the Supreme Court shed only minimal light on the constitutional provision. In McPherson v. Blacker, the Supreme Court held, without substantial discussion, that a particular change in the way a state appointed its presidential electors did not violate the Fifteenth Amendment. McPherson v. Blacker, 146 U.S. 1, 37-38 (1892).
In Giles v. Harris and Giles v. Teasley, the Court held that it was powerless to decide a Fifteenth Amendment claim brought by a black voter against his local board of registrars for refusing to add him to the voter rolls on account of his race. Giles v. Teasley, 193 U.S. 146, 164 (1904) (“Giles II”); Giles v. Harris, 189 U.S. 475, 488 (1903) (“Giles I”). Giles I and Giles II are mostly notable not for what they say about the Fifteenth Amendment, but for what they say historically about the Court’s willingness to fight the disenfranchisement of black voters in the South. See SAMUEL ISSACHAROFF, ET AL., THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 96-107 (4th ed. 2012).
from those state laws that governed voter qualifications but shed little light on whether the Amendment itself—absent enforcement legislation—would combat lesser restrictions on voting that discriminated on account of sex.

C. The Enforcement Clause and Sex-Based Barriers to the Ballot

It is not surprising that debates in Congress centered on enfranchising women rather than potentially combating post-enfranchisement hurdles women might face in order to vote. No one opposed woman suffrage out of a sex-based animus towards women in the way that many opposed black suffrage out of a race-based animus towards blacks. Even members opposed to woman suffrage grounded their opposition in a reverence for women. Congress hardly expected that, should three-quarters of the state legislatures ratify the Nineteenth Amendment, the states remaining opposed to woman suffrage would respond with state-sponsored restrictions that, while gender-neutral on their face, nonetheless cut more heavily against women than men—as states had done for decades with black voters. Although House Joint Resolution 1 included an enforcement clause identical to that found in other constitutional amendments, Congress had no reason to expect to have to use it.

Yet Congress was not entirely unaware of the prospect that women might face barriers even after a constitutional amendment granted women the franchise. One report of the Senate Committee on Woman Suffrage stated that “ballot box . . . regulations [should be]
designed to protect the voter and guarantee the freedom of elections” and explained that if women are entitled to vote, “her right is equivalent to that of man, and like man, she should have [that right] unhampered by any restriction that is not common to both.” Although these barriers were not Congress’s primary focus, the legislative history gives some clues about how the Sixty-Sixth Congress would view its power to address such barriers, if they did arise.

1. Legislative History of the Enforcement Clause

First, Congress understood that the power conferred on the legislative branch by the Nineteenth Amendment’s Enforcement Clause was enormous. One member in the House noted that under the authority of the proposed amendment, states should soon expect to “find Federal supervisors and inspectors attending all our elections, and perhaps Federal appointees holding all our elections under this provision.” Another explained that the Enforcement Clause “gives to Congress the full, absolute, unrestricted, and exclusive power to ‘enforce this article,’ . . . ‘[b]y appropriate legislation.’ . . . [The Enforcement Clause] invests Congress with complete power to carry [the Amendment] into effect by the enactment of [appropriate] legislation . . . .” One Senator suggested that the Enforcement Clause would entitle Congress “to put [certain states] under Federal control as to elections.” The minority views put forth in the report of the House Committee on Woman Suffrage argued against proposing the suffrage amendment to the states precisely because it would work a fundamental shift in the power over elections from the states to Congress.

Even more important than the views of individual members, the entire Senate is on record concerning the enforcement power. Prior to final passage of the joint resolution, the Senate considered an amendment that would have re-written the Enforcement Clause to read, “[T]hat the several States shall have the authority to enforce this article by necessary legislation, but if any State shall enforce or enact any legislation in conflict therewith, then Congress shall not be

205. Id. at 4.
206. 58 CONG. REC. 82 (1919) (statement of Rep. Rufus Hardy). He continued, “Even now, if and when Congress shall pass laws to enforce the [F]ifteenth and this proposed [A]mendment, the Federal Government will or may control not only all our elections for Federal offices, but every State, county, and municipal election.” Id.
207. Id. at 90 (statement of Rep. Frank Clark).
208. Id. at 563 (statement of Sen. William Borah).
excluded from enacting appropriate legislation to enforce it."210 By rejecting the amendment by greater than a three-to-one margin, the Senate reaffirmed both (1) that Congress alone, not the states with a congressional backup, would be the constitutional entity charged with enforcing the Nineteenth Amendment and (2) that the more flexible adjective “appropriate,” rather than the stricter term “necessary,” was the relevant standard that enforcement legislation had to meet.211 Both chambers took similar action in the previous Congress as well: the Senate tabled a proposed amendment which would have removed the words “or by any State” from the text of the joint resolution; when a member proposed removing the enforcement clause from the joint resolution, the House took no action to overturn a point of order striking the proposal.212

Finally, after ratification, members of Congress proposed legislation pursuant to their enforcement power, suggesting how members of Congress who proposed the Nineteenth Amendment viewed the scope of their enforcement authority under the Amendment.213 True to the statements made in debate over the Nineteenth Amendment, the legislation assumed significant authority. Although each piece of legislation enforced requirements no broader than the literal terms of the Nineteenth Amendment’s prohibition, each did so by intruding not into elections for federal office, but into elections for the “State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision.”214 Second, each piece of legislation essentially federalized state election administrators by making the legislation apply to

every person who shall be required by law to assess, enroll, or register citizens of the United States or to perform any other duty in order that such citizens may be qualified to vote; and every person who shall be required by law to receive or count the ballots

211. See id. (recording a 19-62 vote to reject the amendment).
212. See 56 CONG. REC. 10,986-87 (1918) (showing a 50-33 vote in the Senate to table the amendment ); id. at 810 (showing that the House took no action to overturn the point of order).
213. See S. 4739, 66th Cong. (1920); H.R. 15018, 66th Cong. (1920); S. 4323, 66th Cong. (1920). Enacted legislation that implements the will of the entire Congress would obviously be more probative than introduced legislation that expresses only the wishes of its sponsors. However, because ratification came over a year after Congress proposed the suffrage amendment to the states, the Sixty-Sixth Congress did not have time to consider and pass Nineteenth Amendment enforcement legislation after ratification. Introduced-but-not-enacted legislation is an incomplete but nonetheless probative substitute.
214. S. 4739 § 1; H.R. 15018 § 1; S. 4323 § 1.
of voters or to perform any other duty as an officer of any election or to certify the result of any election.\(^{215}\)

Third, the legislation backed up its requirements with both criminal sanctions and an authorization for courts to monitor compliance with the legislation: Congress authorized any state court to issue mandamus to bring state officials into compliance upon petition of any aggrieved citizen and authorized federal courts to issue similar writs of mandamus upon petition by the United States.\(^{216}\) Finally, the legislation would have outright repealed “[a]ll laws or parts of laws in conflict with this Act,” which would include not only state law provisions restricting voter qualifications to male voters but also state law provisions which might have hampered enforcement of the legislation.\(^{217}\)

2. In Pari Materia I: Lessons from Prohibition

The now-repealed Eighteenth Amendment contained an enforcement clause nearly identical to the Enforcement Clause in the Nineteenth Amendment, strongly suggesting that the two enforcement clauses be read *in pari materia*.\(^{218}\) The Eighteenth Amendment was proposed by the Congress immediately preceding the one that proposed the Nineteenth Amendment, and the two Congresses shared many of the same members.\(^{219}\) Additionally, the Sixty-Sixth Congress passed Eighteenth Amendment enforcement

\(^{215}\) S. 4739 § 2; H.R. 15018 § 2; S. 4323 § 2.

\(^{216}\) S. 4739 §§ 3, 4; H.R. 15018 §§ 3, 4; S. 4323 §§ 3, 4.

\(^{217}\) S. 4739 § 5; H.R. 15018 § 5; S. 4323 § 5. The most obvious example of a law “in conflict with this Act” might be a state law restricting state courts’ authority to issue writs of mandamus, but one could imagine the provision applying to laws mandating that registration officials only receive applications for registration inside a males-only private membership club.

This is not as far-fetched as it sounds. Although election administrators now generally have offices inside government buildings, this has not always been the case: when Susan B. Anthony illegally registered to vote in the 1872 federal election, she did so at a local barber shop because that was where the Board of Registry was then housed. See Winkler, *supra* note 134, at 1506.

\(^{218}\) The only difference is that the Eighteenth Amendment gave concurrent enforcement power to both the states and to Congress; the Nineteenth Amendment assigned enforcement authority to Congress alone. *Compare* U.S. CONST. amend XVIII, *repealed by* U.S. CONST. amend. XXI, § 1, *with* U.S. CONST. amend. XIX. For arguments that similar constitutional provisions should be read *in pari materia*, see Amar, *supra* note 189, at 789; Fish, *supra* note 157, at 1171, 1177-78; Tolson, *supra* note 189, at 1198 n.12.

\(^{219}\) See S.J. Res. 17, 65th Cong., 40 Stat. 1050 (1917) (proposing the Eighteenth Amendment to the states), *Compare* 58 CONG. REC. 3-4 (1919) (listing Senators of the Sixty-Sixth Congress), and id. at 5-7 (listing Representatives of the Sixty-Sixth Congress), *with* 55 CONG. REC. 101 (1917) (listing Senators of the Sixty-Fifth Congress), and id. at 105-106 (listing Representatives of the Sixty-Fifth Congress).
legislation—the National Prohibition Act\footnote{220}{Pub. L. No. 66-66, 41 Stat. 305, 305 (1919) (repealed 1935) (commonly known as the “Volstead Act”).}—making the legislation an excellent case study for what the Sixty-Sixth Congress thought of the scope of its enforcement clause authority.\footnote{221}{Cf. Franita Tolson, The Constitutional Structure of Voting Rights Enforcement, 89 WASH. L. REV. 379, 422-25 (2014) (arguing that the interpretation of constitutional amendments is informed by analyzing legislation enacted (1) pursuant to the constitutional authority granted by those amendments and (2) shortly after the ratification of those amendments).}

The Eighteenth Amendment prohibited only “the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes.”\footnote{222}{U.S. CONST. amend XVIII, \textit{repealed by} U.S. CONST. amend XXI, § 1.} Congress, however, enacted a significantly broader statutory prohibition. First, Congress regulated not only the commercial activities prohibited by the Eighteenth Amendment but also other activities not within the Amendment’s ambit: simple possession and non-commercial bartering involving liquor, fraud involving the shipment of liquor, advertising involving liquor, possession or use of the means for manufacturing liquor (whether or not actually used for that purposes).\footnote{223}{§§ 3, 10-19, 41 Stat. at 308, 312-13.} Second, Congress applied the prohibition not only to intoxicating liquors prohibited by the Eighteenth Amendment but to non-intoxicating liquors, and it imposed a strict regulatory regime on alcohol not used for beverage purposes.\footnote{224}{See \textit{id}. § 1, at 307-08 (defining “liquor” and “intoxicating liquor” as having greater than 0.5% alcohol whether or not actually intoxicating); \textit{id}. §§ 4-13, at 309-12 (creating the regulatory regime).} Third, Congress provided for the investigation and prosecution of violations in federal court.\footnote{225}{\textit{Id}. §§ 1-9, at 305-11.} Finally, Congress created a private right of action against persons who helped an intoxicated person procure liquor, if that intoxicated person harmed the plaintiff in some way as a result of being intoxicated.\footnote{226}{\textit{Id}. § 20, at 313.}

The reports of each chamber’s respective Committee on the Judiciary explain the scope of Congress’s enforcement clause authority and why the National Prohibition Act constituted “appropriate legislation” under that clause.\footnote{227}{H.R. REP. NO. 66-91, at 4 (1919); S. REP. NO. 66-151, at 12 (1919).} In the House, the Committee on the Judiciary explained that courts must uphold legislation passed under the Enforcement Clause unless “Congress could have no reason to believe that its provisions are either
necessary or appropriate for carrying such power into execution” and specifically cited recent Supreme Court cases upholding congressional legislation if that legislation had “any reasonable relation to the object sought.” In the Senate, the Committee on the Judiciary explained that Congress’s power under the Enforcement Clause “carries with it the power to enact any law having a reasonable relation to the end sought by the original authorized act” and specifically stated that “[t]he purpose of the legislation and difficulties attendant upon its enforcement are vital factors in determining what is appropriate legislation, such as authorized by the [Enforcement Clause].”

After enactment, the Supreme Court upheld a variety of these provisions. In contrast to today’s Court, which frequently limits the scope of legislation in order to avoid potential constitutional difficulties, the Court had no problem interpreting the National Prohibition Act broadly to effectuate its purpose. Most importantly, the Court upheld Congress’s view as to the standard governing review of legislation passed pursuant to the Enforcement Clause:

[W]here the means adopted by Congress are not prohibited and are calculated to effect the object intrusted [sic] to it, this Court may not inquire into the degree of their necessity; as this would be to pass the line which circumscribes the judicial department and to tread upon legislative ground. Nor may it enquire [sic] as to the wisdom of the legislation. What it may consider is whether that which has been done by Congress has gone beyond the constitutional limits upon its legislative discretion.

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228. H.R. REP. NO. 66-91, at 4. The Committee also asserted Congress’s “right to define the power conferred upon it by the Constitution.” Id.

229. Id. at 6.

230. S. REP. NO. 66-151, at 12 (1919); see also id. (citing Supreme Court cases to this effect).

231. See Nat’l Prohibition Cases, 253 U.S. 350, 387-88 (1920) (“While recognizing that there are limits beyond which Congress cannot go in treating beverages as within its power of enforcement, we think those limits are not transcendened by the [broad definition of ‘liquor’].”); accord Vigliotti v. Pennsylvania, 258 U.S. 403, 408-09 (1922) (reaching an identical conclusion concerning an identical state law).


It is clear that Congress, under its express power to enforce by appropriate legislation the prohibition of traffic in intoxicating liquors for beverage purposes, may adopt any eligible and appropriate means to make that prohibition effective. The possible abuse of a power is not an argument against its existence.\textsuperscript{234}

In short, the Sixty-Sixth Congress believed that (1) it had nearly plenary authority under the Eighteenth Amendment Enforcement Clause and that (2) its enforcement legislation was entitled to substantial deference from the judiciary. Later, the United States Supreme Court agreed on both counts. The Sixty-Sixth Congress likely intended to vest itself with similar authority and similar discretion under the Nineteenth Amendment Enforcement Clause.

3. In Pari Materia II: Lessons from Fifteenth Amendment Jurisprudence

Although scholars sometimes characterize the early Fifteenth Amendment enforcement clause jurisprudence as “play[ing] a pivotal role in invalidating national efforts to insure [sic] full citizenship to black citizens” and characterize the decisions as having “struck down and eviscerated various federal protections of black voting rights,”\textsuperscript{235} it is not clear that such a characterization is warranted.

It is true that the cases struck down much of Congress’s early Fifteenth Amendment enforcement legislation. In United States v. Reese, the Court invalidated an enforcement statute as overbroad, because it penalized an election official for improperly refusing to allow a black voter to cast a ballot without requiring that official action be taken on account of race, color, or previous condition of servitude.\textsuperscript{236} However, the Court also held that Congress may protect rights emanating from the Constitution, like the Fifteenth Amendment right against racial discrimination in voting—the implication being that a statute with a hook into race or color would withstand judicial scrutiny.\textsuperscript{237}

\textsuperscript{234} James Everard’s Breweries v. Day, 265 U.S. 545, 559-60 (1924) (internal citations omitted); accord Lambert v. Yellowley, 272 U.S. 581, 593-97 (1926) (relying on James Everard’s Breweries to reach an identical result); Selzman v. United States, 268 U.S. 466, 468-69 (1925) (“The power of the [f]ederal [g]overnment, granted by the Eighteenth Amendment . . . carries with it power to enact any legislative measures reasonably adapted to promote the [Eighteenth Amendment’s] purpose.”).

\textsuperscript{235} Issacharoff et al., supra note 200, at 97.

\textsuperscript{236} 92 U.S. 214, 219-22 (1875).

\textsuperscript{237} Id. at 217-18; see also James v. Bowman, 190 U.S. 127, 139 (1903) (invalidating an indictment against a man for bribing several black voters to refrain from voting on the ground that the indictment did not actually allege that the defendant bribed the black voters on account of their race or color).
A similar case, *United States v. Cruikshank*, arose out of a criminal prosecution of over a hundred individuals involved in the Colfax Massacre for their violent attempt to prevent black voters from casting ballots.\(^{238}\) The Court held that while voting was not a right guaranteed by the Constitution (citing *Minor v. Happersett*), the right against race- or color-based discrimination in voting was guaranteed by the Fifteenth Amendment and thus under *Reese* constituted a proper subject of congressional enforcement legislation.\(^{239}\) The Court nonetheless struck the indictment because although the Justices “may [have] suspect[ed] that race was the cause of the hostility[,] . . . it [wa]s not so averred” in the indictment and thus lacked the necessary Fifteenth Amendment connection.\(^{240}\)

The tide began to turn in *Ex Parte Yarbrough*, in which several individuals challenged their criminal convictions for violently attacking a black voter to prevent him from voting in a federal election.\(^{241}\) Distinguishing its earlier opinions in both *Minor* and *Reese*, the Court found that (1) not only was the right to vote free from race- or color-based discrimination a right protected by the Constitution which Congress had the power to protect but that (2) in operation, the Fifteenth Amendment might combine with the remaining non-discriminatory provisions of state law to affirmatively grant an individual the right to vote and that Congress could protect that right as well.\(^{242}\) The Court explained:

> While it is quite true . . . that [the Fifteenth Amendment] gives no affirmative right to the colored [sic] man to vote, . . . it is easy to see that under some circumstances it may operate as the immediate source of a right to vote. In all cases where . . . the words ‘white man’ [exist] as a qualification for voting, [the Fifteenth Amendment] did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word *white*, and thus left him in the enjoyment of the same right as white persons. . . . In such cases this fifteenth article of amendment does, *proprio vigore*, substantially confer on the negro [sic] the right to vote, and Congress has the power to protect and enforce that right.\(^{243}\)

\(^{238}\) *92 U.S. 542, 544-46 (1875)*; *id. at 560* (Clifford, J., dissenting) (mentioning the number of individuals involved at each stage of the litigation); ISSACHAROFF ET AL., supra note 200, at 97 (noting the case’s connection with the Colfax Massacre).

\(^{239}\) *Cruikshank*, 92 U.S. at 551-56; *see also* United States v. Harris, 106 U.S. 629, 637 (1883) (holding that a criminal statute could not be sustained under the Fifteenth Amendment, because there was no connection to the right to vote free from discrimination on account of race, color, or previous condition of servitude).

\(^{240}\) *Cruikshank*, 92 U.S. at 556; *see also* Harris, 106 U.S. at 637.

\(^{241}\) 110 U.S. 651, 652-57 (1884).

\(^{242}\) *Id. at 664-67* (distinguishing *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874), and *United States v. Reese*, 92 U.S. 214 (1875)).

\(^{243}\) *Id. at 665* (citation omitted).
No case held that enforcement legislation had to be coextensive with the prohibition contained in the Fifteenth Amendment itself—meaning no decision held that enforcement legislation was limited to determining the venue for cases charging violations of the Amendment, or to setting the penalties for Amendment violations. The cases merely required some connection, some hook, into race- or color-based discrimination. The Sixty-Sixth Congress understood this; it believed that its power to draft enforcement legislation was broad and that it had discretion to construct long chains connecting enforcement legislation to the constitutional prohibition.

4. The Scope of Congress’s Enforcement Clause Authority

The legislative history of the Nineteenth Amendment’s Enforcement Clause, the enactment of Eighteenth Amendment enforcement legislation, and the state of then-existing Fifteenth Amendment jurisprudence all shed light on the scope of congressional power under the Nineteenth Amendment’s Enforcement Clause. All three of these sources of law support the conclusion that the Sixty-Sixth Congress would have (1) thought it had extraordinary power to combat the voting restrictions that proliferate today and (2) expected that courts would substantially defer to Congress’s determination about the appropriateness of its enforcement legislation.


245. The Bowman Court also held that enforcement legislation could not attack non-governmental activity. See id. Voting rights advocates have identified some private groups as being threats to the franchise. See generally Liz Kennedy et al., Demos & Common Cause, Bullies at the Ballot Box: Protecting the Freedom to Vote Against Wrongful Challenges and Intimidation (2012), http://www.demos.org/sites/default/files/publications/BulliesAtTheBallotBox-Final.pdf. However, these groups are nowhere near equivalent to the violent Ku Klux Klan of the late 1800s. Additionally, none of the threats to voting identified in Part II of this Article are private actions. Accordingly, this Article need not articulate a position on whether Congress adopted Bowman’s “state action” limitation into the Nineteenth Amendment’s Enforcement Clause. See Bowman, 190 U.S. at 136-39.

D. Types of Restrictions the Sixty-Sixth Congress Might Target

The breadth of Congress’s enforcement power, however, provides little insight into what types of restrictions the Sixty-Sixth Congress might have targeted, if it could have foreseen them. Although the legislative history on this matter is sparse—again, because Congress did not expect states to resist the Nineteenth Amendment’s mandate—the legislative history suggests Congress would have viewed several of the restrictions identified in Part II as onerous enough to warrant a legislative response.

1. Partisan and Ideological Motivations

One unsurprising concern motivating Congress was the political fortunes of individual members and their allies. Both Democrats and Republicans hoped to benefit electorally from the votes of newly enfranchised women. One member in the House spoke at length about the women elected to office on the strength of women voters in suffrage states.247 Another boldly predicted that newly enfranchised women would side with one party over the other.248 A third proclaimed, “No party in the future which hopes to win will ever name a man for President who opposes [woman suffrage].”249 In the Senate, two senators predicted that enforcement legislation would be forthcoming specifically because of the political effects of ensuring women’s right to vote.250 Debate over the joint resolution in the Sixty-Fifth Congress also stressed the electoral benefits of enfranchising women.251

In a prior Congress, the Senate Committee on Woman Suffrage heard testimony that Congress could expect “women will take sides in party affairs, just as men do, and align themselves with one [political] organization or another.”252 The Committee heard testimony that some women had, in fact, already aligned with one party or another and that their tactics were having an effect on

248. See id. at 91 (statement of Rep. Frank Clark).
249. See id. at 8834 (1919) (statement of Rep. Rufus Hardy).
250. See id. at 564 (statement of Sen. William Borah); id. at 627 (statement of Sen. James Reed).
251. See 56 Cong. Rec. 764 (1918) (statement of Rep. James Cantrill) (explaining that he planned to vote for the joint resolution because women’s votes had voted for members of his party in the 1916 election); id. at 10,979 (statement of Sen. Irvine Lenroot) (arguing that enfranchising women will help members of one particular party).
252. See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage, 65th Cong. 14 (1917) (testimony of Sen. John B. Kendrick). The Senator’s testimony also made clear that he believed women would “put principle above partisanship [sic] and patriotism above patronage.” Id.
election results. The Committee also heard testimony that other women were politically independent and that their votes were up for grabs. The House Committee on Woman Suffrage and its Committee on the Judiciary heard similar testimony concerning the political availability of women’s votes. One witness even testified that “[m]ore than 8,000,000 women will vote in the presidential election in 1920 and there can not [sic] be any doubt . . . that the present party in power has everything to gain and nothing to lose in putting [the woman suffrage amendment] through before the 1918 elections.”

Even where members did not speak of the advantage to be gained by an expanded electorate explicitly in terms of partisanship, members nonetheless spoke in positive terms of the effects women voters would have on election results. One report of the House Committee on Woman Suffrage explained that women’s “influence upon politics and society in general has been a positive and not a negative force” and specifically stated that women-as-voters have “strengthen[ed] the demand for good laws governing home conditions and care of children.” A member in the House, from a suffrage state, explained that when women voted and campaigned for a particular issue, it was “usually of an improving and reformatory character.” The Senate Committee on Woman Suffrage heard testimony that allowing women to vote was necessary in order protect certain types of desirable laws. A Senator from a suffrage state argued before that Committee that “in the last few years, through [women’s] vote and influence, [the Senator’s state] has

253. See id. at 29 (testimony of Sen. John B. Kendrick); id. at 47 (testimony of Rheta Childe Dorr); Woman Suffrage: Hearings on S.J. Res. 1 and S.J. Res. 2 Before the S. Comm. on Woman Suffrage, 64th Cong. 66 (1916) (testimony of A.J. George, Exec. Sec’y of the Cong. Comm., Nat’l Ass’n Opposed to Woman Suffrage).

254. See Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage, 63d Cong. 44 (1918) (statement of Rep. Burton L. French); id. at 84 (testimony of Helen H. Gardener).

255. See Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200, Before the H. Comm. on Woman Suffrage, 65th Cong. 51 (1918) (testimony of Maude Wood Park) (pointing out that both major parties have devoted substantial resources to recruiting women voters in the suffrage states); Woman Suffrage: Hearings Before the H. Comm. on the Judiciary, Serial No. 11, pts. 2 & 3, 64th Cong. 48 (1916) (testimony of Helen Todd) (arguing that newly enfranchised women would reward with votes the party which proposed the suffrage amendment).


secured more progressive and more humane legislation . . . . This, I am sure, has been largely because women have decided to take these things into their own hands and to reckon with them. 260 In written testimony submitted at one hearing of the House Committee on Woman Suffrage, a witness argued that a host of legislative achievements in one state was due, in part, to the grant of suffrage to women some years earlier. 261 Essentially, these members argued that Congress must enfranchise women so that women can vote for candidates with whom the members agreed and so that those candidates can pass legislation that matches the members’ ideological perspective—partisanship by another name.

In other words, Congress was not merely trying to enfranchise women in theory and then move on to other matters. Rather, it was deeply in members’ political interest to see that women actually registered, actually voted, and that their votes actually counted. If modern-day barriers to the ballot would impede women’s ability to vote, especially where there was evidence that those restrictions were at least partly motivated by opposition to the choices women voters were making at the ballot box, the Sixty-Sixth Congress would have felt justified in using its enforcement power to tear down the obstacles to voting women faced.

2. War Effort and Women as Full Members of Society

Political concerns were not members’ only interest. One commonly mentioned reason for members who supported the joint resolution was that women had earned the vote through their activities in support of the nation’s war effort in World War I. 262 Although women did not fight, they did provide vital support efforts. One member in the House expressed support for women’s “service to the nation in times of both peace and war” and explained that “[t]he magnificent, efficient, and patriotic stand taken by the women of the United States during the Great War has proven” women’s entitlement to suffrage. 263 Another member explained that society must grant women the vote, especially after it “praised [women] in every activity

260.  Id. at 13 (testimony of Sen. John B. Kendrick).
261.  See Extending the Right of Suffrage to Women: Hearings on H.R.J. Res. 200 Before the H. Comm. on Woman Suffrage, 65th Cong. 327 (1918) (reprinting Seward A. Simons, A Survey of the Results of Woman Suffrage in California (1917)).
connected with the Great War. From the hospital to the firing line[,] every work of mercy and healing has been woman’s.” 264 A third member argued on the House floor:

In the work of the Red Cross—the great mother of the world—in the hospitals and trenches on the battle fields of Flanders and France, and in all the tasks that lie at the very heart of civilization, women have displayed a patriotism and heroism born of devotion, sacrifice, and service . . . .

Prior Congresses shared that sentiment. In the Sixty-Fifth Congress, Senators also defended woman suffrage as something women earned through their war effort, or even that woman suffrage was necessary for the proper prosecution of the war. 266 A report of the Senate Committee on Woman Suffrage noted, “She has . . . manufactured his ammunition, . . . operated his machines, bound up his wounds, buried his dead, and has been his comrade in arms upon the firing line.” 267 A report of the House Committee on Woman Suffrage similarly remarked, “[T]he services of the women in the munition factories, the railways, the shipyards, the offices of administration, have first amazed men and then filled them with admiration and gratitude.” 268 Committee hearings were practically overwhelmed with testimony concerning the contributions of women

264.  Id. at 8834 (statement of Rep. Rufus Hardy). Earlier in his speech, the same member asked, “[I]f the man bears the musket and the woman bears and nurses the man, whose burden is the heavier?” Id. at 8833; accord 57 CONG. REC. 3055-56 (1919) (statement of Sen. William Calder) (noting women’s service as nurses on the front lines); id. at 3061 (statement of Sen. Gay) (arguing that women’s service in war justifies the extension of suffrage to women).

265. 58 CONG. REC. S3 (1919) (statement of Rep. Adolphus Nelson); see also id. at 84 (statement of Rep. John MacCrate) (“Everywhere you went during the past two years you saw women in uniform. You saw them in the Salvation Army, the Red Cross, the Knights of Columbus, the Young Men’s Christian Association, Young Men’s Hebrew Association, and other allied war activities. . . . [T]he women who maintained equal industrial and agricultural burdens and high moral burdens to win the war are entitled to the franchise.”).

266.  See 56 CONG. REC. 10,977 (1918) (statement of Sen. Albert Cummins); id. at 10,979 (statement of Sen. Irvine Lenroot).

267.  S. REP. NO. 64-35, at 2 (1916). The report continued, “Man has become conscious of her powerful cooperation in war; he will soon recognize the justice of her demand to share his burden in public affairs in times of peace.” Id. at 2-3.

to the war effort.\textsuperscript{269} Even the President, Woodrow Wilson, spoke directly on the Senate floor, arguing that woman suffrage was necessary as a war measure.\textsuperscript{270}

Beyond women’s efforts to support the United States in wartime, members were recognizing that women were becoming members of society in their own right and therefore deserved the ballot. One member in the House responded to arguments that women’s place was in the home, not the polling place, by asking, “[H]ow about woman [sic] in the public-school room? How about woman [sic] in the Sunday-school room? How about woman [sic] in the Red Cross? How about woman [sic] in the Salvation Army? Are they not proper activities for our mothers, wives, and daughters?”\textsuperscript{271} Another member explained women’s new role in society: “I can remember . . . when our women rarely left home except to go to church. That time is past.”\textsuperscript{272} A member from a suffrage state discussed women elected to office in his state: some had been school teachers, one had been a real estate developer, another a journalist, and yet another a physician; all, the member said, were a boon to the lawmaking process.\textsuperscript{273}

Congress was proud of women’s new role in society—especially, but not limited to, women’s role in the war effort—and sought to reward them with the franchise. Having granted them the vote, Congress did not expect that states would enact voting restrictions that would burden women precisely because of the new responsibilities that women had undertaken—that is, Congress would not have wanted women to have to choose between making time to navigate hurdles to voting on the one hand and making time to fulfill their responsibilities in society on the other hand. To the extent that restrictions on voting required women to make such a choice, the Sixty-Sixth Congress would have felt justified in enacting enforcement legislation to break down those barriers.

\begin{footnotesize}
\textsuperscript{269} See, e.g., Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the H. Comm. on Woman Suffrage, 65th Cong. 235-36 (1918) (testimony of Maud Wood Park, Cong. Chairman, Nat’l Am. Woman Suffrage Ass’n); id. at 165-67 (testimony of Maud Younger); \textit{Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage}, 65th Cong. 40-45 (1917) (testimony of Mary Ritter Beard, Member, Nat’l Advisory Council of Woman’s Party Last Year); id. at 36-37 (testimony of Carrie Chapman Catt).
\textsuperscript{270} See 56 CONG. REC. 10,928-29 (1918), reprinted in S. DOC. 65-284 (1918).
\textsuperscript{271} 58 CONG. REC. 8832 (1919) (statement of Rep. Israel Foster).
\textsuperscript{272} Id. at 8834 (statement of Rep. Rufus Hardy).
\textsuperscript{273} See id. at 87 (statement of Rep. William Vaile).
\end{footnotesize}
3. Women as Caretakers

Though Congress certainly respected and hoped to encourage women’s new role in society, Congress also respected women’s more traditional role as mothers and as caretakers of children and cited that role as another reason for enfranchising women.

One member in the House specifically praised women because “she nurses her own little children.” Another member from a suffrage state justified his support for woman suffrage by stating that in his state, “it is not unusual to see a young matron wheel a baby carriage to the polling place and leave it in a shady place outside while she goes in to vote” and suggesting that this had a positive effect on the voting process itself. Yet another argued that mothers, in particular, had earned the vote by bearing the dangers of childbirth, just as male soldiers earned the vote by facing the dangers of the battlefield.

In the debate in the Sixty-Fifth Congress, one Senator argued that if mothers could vote and were more involved in politics, it would better enable them to train their children in civic responsibility. Another Senator asked rhetorically, “Who shall deny the privilege to his mother to participate in the affairs of government?”

Committee reports from earlier Congresses also defended suffrage as a right mothers qua mothers had earned. In 1918, the House Committee on Woman Suffrage observed that in suffrage states, “by strengthening the demand for good laws governing home conditions and care of children, mothers have been enabled to do their work in the world to better effect.” The 1913 report of the Senate Committee on Woman Suffrage incorporated a letter from woman suffrage advocates, which stated:

We desire these rights in order to raise in dignity and power the mothers of this Nation . . . and the welfare of this Nation is not promoted by denying to the mothers of the nation the elemental right of suffrage which is essential, not only to protect their own

275. Id. at 8834 (statement of Rep. Rufus Hardy).
276. Id. at 8832 (statement of Rep. Henry Osborne).
279. See id. at 10,945 (statement of Sen. James Phelan).
rights of life, liberty, property, and pursuit of happiness, but to protect their children, whom they have so loved, from the treacherous pitfalls that line the pathway of life.\textsuperscript{281}

Members heard extensive testimony concerning the contributions of mothers to society. At a hearing before a Senate committee, one witness testified that, were it not for mothers caring for America’s soldiers, the nation would never have succeeded in its military battles.\textsuperscript{282} Another argued that the poor economic conditions in Germany were partially attributable to the fact that mothers had to work in munitions factories for substandard wages and did not earn enough money to afford proper nutrition for their children; the witness argued that access to the ballot would enable these women to improve these conditions through law.\textsuperscript{283} A witness from a suffrage state testified, “[Women’s] education as housekeepers, home makers, and mothers has proved a valuable contribution in voting on questions of public welfare.”\textsuperscript{284} In a hearing before a House committee, one woman relayed the powerful story of a nurse in a hospital on the front lines: “[D]uring the daytime the wounded were so cheerful, so brave, so gay, and so debonair, there was not a word of complaint, but during the long watches of the night, when self-restraint was gone, she had learned one word in seven different languages, and that word was ‘Mother.’”\textsuperscript{285} Tellingly, a letter from the mother of six children inserted into the record of one hearing stated that while she desired suffrage, her duties as a caregiver for her children left her no time to help campaign for women’s right to vote.\textsuperscript{286} Several witnesses testified that voting was necessary because women might influence the laws to create better conditions for childcare.\textsuperscript{287}

Even as it embraced the new role of women in society, Congress hoped to protect mothers and their role as caregivers to their

\footnotesize{\textsuperscript{281} S. REP. NO. 63-64, at 8 (1913).}
\footnotesize{\textsuperscript{282} See Woman Suffrage: Hearing on S.J. Res. 2 Before the S. Comm. on Woman Suffrage, 65th Cong. 40-45 (1917) (testimony of Mary Ritter Beard, Member, Nat’l Advisory Council of Woman’s Party Last Year).}
\footnotesize{\textsuperscript{283} Id. at 50-51 (testimony of Madeline Z. Doty, Correspondent of the New York Tribune).}
\footnotesize{\textsuperscript{284} Woman Suffrage: Hearings on S.J. Res. 1 Before the S. Comm. on Woman Suffrage, 63d Cong. 72 (1913) (testimony of Elizabeth Kent).}
\footnotesize{\textsuperscript{285} Extending the Right of Suffrage to Women: Hearings on H.J. Res. 200 Before the H. Comm. on Woman Suffrage, 65th Cong. 26 (1918) (testimony of Mrs. Henry Ware Allen (witness’s name not given)).}
\footnotesize{\textsuperscript{286} Id. at 100 (letter from Mrs. H.C. Davis).}
\footnotesize{\textsuperscript{287} See Woman Suffrage: Hearings Before the H. Comm. on the Judiciary, Serial No. 11, pt. 5, 65th Cong. 178-79 (1917) (testimony of Mrs. Donald R. Hooker); Woman Suffrage: Hearings Before the H. Comm. on the Judiciary, Serial No. 11, pt. 2, 64th Cong. 23 (1915) (testimony of Mrs. Harriet Stokes Thompson).}
children. Had Congress foreseen that ostensibly gender-neutral restrictions on voting would disproportionately fall on mothers with childcare responsibilities, Congress would undoubtedly have opposed such restrictions and felt justified using its enforcement power to ensure women did not have to choose between childcare on one hand and access to the ballot on the other.

E. Summarizing the Contemporary Understanding of the Nineteenth Amendment

Students of the legislative history of the Nineteenth Amendment can draw three conclusions. First, the Sixty-Sixth Congress did not expect states to put up barriers in an attempt to prevent women from voting after ratification of the Nineteenth Amendment. Second, if the Sixty-Sixth Congress had foreseen the barriers in place today, it would have been particularly concerned about the barriers that keep women from voting for political reasons, the barriers that make voting increasingly difficult for women who choose to work outside the home instead of assuming a role that revolves around the home, and the barriers that make it harder for women with childcare responsibilities to vote. Finally, the Sixty-Sixth Congress viewed its Nineteenth Amendment enforcement power to be extremely broad and expected that Nineteenth Amendment enforcement legislation would receive extraordinary deference from the judiciary.

V. NINETEENTH AMENDMENT ENFORCEMENT LEGISLATION TO COMBAT TODAY’S RESTRICTIONS ON VOTING

Faced with increasingly restrictive voting laws and procedures yet having such broad power to enforce voting rights against restrictions that discriminate on account of sex, what should Congress do with its Nineteenth Amendment enforcement authority? If Congress did pass legislation, would courts uphold the exercise of its authority?

A. The Appropriate Standard of Review

Although the Sixty-Sixth Congress expected that its broad authority to enact Nineteenth Amendment enforcement legislation would be subject to judicial review only under a rational relationship test, the modern Court has invented the more demanding “congruence and proportionality” test to review Fourteenth

288. See, e.g., M’Culloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819) (“Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.”) (emphasis added) (demonstrating the great deference Congress receives under the rational relationship test).
Amendment enforcement legislation. While it is not clear if the Court would ignore the wishes of the Sixty-Sixth Congress and apply the congruence-and-proportionality test to enforcement legislation enacted under the Nineteenth Amendment, the following analysis shows how Nineteenth Amendment enforcement legislation meets even this more demanding test.

1. The Right at Issue: The Right to Vote Free from Discrimination on Account of Sex

The initial inquiry in a congruence-and-proportionality analysis is to determine the scope of the right Congress seeks to enforce with its prophylactic legislation. For the Nineteenth Amendment, that right is phrased in the negative: “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 sex.”

As previously discussed, the primary thrust of the Nineteenth Amendment was to excise the word “male” from state voter qualifications, although it also applied to non-explicit discrimination in voting on account of sex where the discrimination was obvious.

Modern day Fifteenth Amendment jurisprudence has expanded that reach to all intentional discrimination in voting on account of race or color (whether or not the discrimination was as unusually obvious as in Guinn v. United States). Actions that may have the effect of denying the right to vote on the basis of race or color are therefore consistent with the Fifteenth Amendment if they lack a discriminatory purpose.

289. See City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

290. The standard is not even clear for the Fifteenth Amendment’s Enforcement Clause, which has received a great deal of recent judicial attention. See Nw. Austin Mun. Util. Dist. No. 1 v. Holder, 557 U.S. 193, 204 (2009) (refusing to decide whether the standard for review of Fifteenth Amendment enforcement legislation is congruence and proportionality or rational means); see also Richard Hasen, The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race, SCOTUSBLOG (June 25, 2013, 7:10 PM), http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race (observing that the Court failed to address an open question about the proper standard of judicial review for Congress’s Fifteenth Amendment enforcement power).


293. See discussion supra Section IV.B.

The following analysis will assume the Nineteenth Amendment follows suit, such that the right at issue, at least in part, is the right to vote free from intentional discrimination based on sex. However, its legislative history also shows that the Nineteenth Amendment targets more than intentional discrimination. As discussed earlier, the Sixty-Sixth Congress would also have been concerned about restrictions affecting women that are politically motivated, restrictions that burden women who take an active role outside the home, and restrictions that burden women on account of their childcare responsibilities—whether or not the restrictions intentionally target women.

2. The Legislative Record: A “History and Pattern” of Constitutional Violations

After determining the right at issue, the next step is to inquire whether Congress had evidence of a pattern of constitutional violations. But not all evidence is created equal: courts will not uphold a congressional infringement on state sovereignty unless there is a certain quality and quantity of evidence.

First, the evidence must detail a pattern of actual, specific violations of the Constitution which Congress sought to remedy or prevent. Evidence of wrongful conduct is not directly probative if that wrongful conduct does not actually violate the Constitution. Further, the evidence must be relatively recent at the time of the enactment. Additionally, Congress must collect more than a token


297. See supra Section IV.D.

298. But see THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal . . . .”).


300. See Coleman, 132 S. Ct. at 1337 (rejecting a statutory provision aimed at self-care leave policies with a disparate impact on women, because those policies are not likely to be unconstitutional); Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 82-86 (2000) (refusing to credit most instances of age discrimination because only irrational age discrimination violates the Constitution); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 641-46 (1999) (noting that a state deprives a patent holder of property when it infringes on a patent, but that deprivation only becomes a constitutional violation if effected without due process—i.e., without other state-level remedies).

301. See City of Boerne v. Flores, 521 U.S. 507, 530 (1997) (striking down a statute in part because the “legislative record lacks examples of modern instances of” constitutional
amount of evidence of constitutional violations. Finally, the evidence must demonstrate that the targeted jurisdiction—not some other entity—is guilty of the violations.

Notably, the Court has explicitly ignored evidence of constitutional violations committed by local governments. But the prophylactic enforcement legislation under review at the time (an abrogation of state sovereign immunity) did not apply to local governments (because they do not enjoy sovereign immunity in the first instance). Accordingly, “[i]t would make no sense to consider constitutional violations [by local governments], as well as by the States themselves.” In the context of Nineteenth Amendment enforcement legislation, however, it seems clear that the record of local governments is relevant, since they, too, would be subject to the legislation.

That said, provided Congress develops a legislative record in accord with the aforementioned requirements, courts must defer to Congress’s determination. Indeed, the Supreme Court has gone out of its way to read the legislative record in a light most favorable to Congress, finding all reasonable inferences that might be drawn from the record to weigh in Congress’s favor.

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302. See Coleman, 132 S. Ct. at 1336-37 ("The few fleeting references to how self-care leave is inseparable from family-care leave fall short of what is required . . . . These isolated sentences clipped from floor debates and testimony are stated as conclusions, unsupported by evidence or findings . . . .") (citations and internal quotation marks omitted); Bd. of Trustees v. Garrett, 531 U.S. 356, 369-370 (2001) (finding minimal evidence of unconstitutional disability-based discrimination by states); Kimel, 528 U.S. at 89-90 (finding minimal evidence of unconstitutional age-based discrimination by states); Coll. Sav. Bank, 527 U.S. at 640-41 (finding almost no evidence of patent infringement by states); Boerne, 521 U.S. at 530-31 (finding no evidence of religious discrimination by state and local governments); cf. Lane, 541 U.S. at 528 (upholding a statute “[g]iven the sheer volume of evidence demonstrating the nature and extent of unconstitutional conduct); Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 735 (2003) (upholding a statute because “the States’ record of unconstitutional” conduct is “weighty enough to justify” legislation).

303. See Garrett, 531 U.S. at 368-72 (ignoring disability discrimination by local governments and private actors); Kimel, 528 U.S. at 90-91 (ignoring age discrimination by the private sector).

304. See Garrett, 531 U.S. at 368-69.


309. See Lane, 541 U.S. at 524-28 (crediting a wide variety of sources); Nev. Dep’t of Human Res. v. Hibbs, 538 U.S. 721, 729-35 (2003) (making a series of inferences geared towards enhancing the strength of the legislative record); see also Lane, 541 U.S. at 528-29 n.17 (noting the weak state of the legislative record in Hibbs, which nonetheless was still sufficient to uphold the statute at issue there).
Specifically with regard to Nineteenth Amendment enforcement legislation, the Court should be particularly deferential to the record if the evidence amassed by Congress shows that the restrictions run counter to the Sixty-Sixth Congress’s concerns about restrictions that are politically motivated, restrictions that burden women who take an active role outside the home, and restrictions that burden women on account of their childcare responsibilities.\textsuperscript{310} This is so even if those restrictions do not amount to intentional discrimination on account of sex. The Court has shown a willingness in congruence-and-proportionality cases to enlarge pre-existing definitions of what constitutes a constitutional violation for purposes of determining whether a sufficient record of constitutional violations exists. In \textit{Nevada Department of Human Resources v. Hibbs},\textsuperscript{311} for example, the Court for the first time “recognize[d] that laws regulating pregnant women can enforce unconstitutional sex stereotypes.”\textsuperscript{312} The expansion in \textit{Hibbs} dovetails with the Sixty-Sixth Congress’s concerns about the certain types of voting restrictions discussed in Section IV.D. Therefore, the Court should have no trouble similarly taking an expansive view of what constitutes a Nineteenth Amendment violation for purposes of determining the sufficiency of a record of violations.

3. \textit{The Appropriateness of the Remedy: Congruence and Proportionality}

Finally, courts must look at the remedy to judge whether it is congruent and proportional to the constitutional violation Congress seeks to enforce.\textsuperscript{313} There is no set formula for whether a remedy is appropriately tailored to the particular wrong it targets; rather, the congruence-and-proportionality test is something of a sliding scale, allowing for more powerful remedies for greater harms while allowing only less powerful remedies for lesser harms.\textsuperscript{314}

In analyzing a remedy for congruence and proportionality, courts will examine the scope of the legislation and the swath of state

\textsuperscript{310} See supra Section IV.D (reviewing Congress’s concerns over these three items).

\textsuperscript{311} 538 U.S. 721, 728-37 (2003).

\textsuperscript{312} Reva B. Siegel, \textit{You’ve Come a Long Way, Baby: Rehnquist’s New Approach to Pregnancy Discrimination in Hibbs}, 58 STAN. L. REV. 1871, 1886 (2006) (“Hibbs is the first Supreme Court equal protection decision to recognize that laws regulating pregnant women can enforce unconstitutional sex stereotypes.”); see also id. at 1886-91 (discussing the expanded scope of what constitutes unconstitutional sex discrimination under \textit{Hibbs}).

\textsuperscript{313} See \textit{Boerne}, 521 U.S. at 520 (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

\textsuperscript{314} See id. at 530 (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”).
conduct it affects, as well as statutory limits on the legislation's reach. In addition to examining the breadth of affected state conduct, courts will inquire into the depth of the law's intrusion into state sovereignty. Beyond the sovereignty costs, courts will consider the practical cost in state resources necessary to shoulder the increased burden imposed by the remedy. Courts will also canvass alternative remedies to examine their availability and effectiveness. The final step is to weigh all these factors against the significance of the harm Congress seeks to remedy.

B. Proposing Nineteenth Amendment Enforcement Legislation

Congress should enact Nineteenth Amendment enforcement legislation—a Nineteenth Amendment Voting Rights Act, or “VRA-19”—to address each of the barriers to the ballot addressed in Part II of this Article. Whether or not such a VRA-19 would also include the “traditional” remedies of the Voting Rights Act of 1965—a private right of action, observers, examiners, preclearance, etc.—a VRA-19


316. See Tennessee v. Lane, 541 U.S. 509, 531-32 (2004) (noting with approval substantive limits on a statute’s application); Hibbs, 538 U.S. at 738-40 (noting with approval substantive limits on both the statute’s reach and application); Coll. Sav. Bank, 527 U.S. at 646-47 (noting with disapproval that the statute applied to a wide range of cases with virtually no limits); Boerne, 521 U.S. at 533 (surveying limits on the Voting Rights Act); cf. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 86-88 (2000) (finding that the statute’s limits are too narrow to save it).

317. See Bd. of Trustees v. Garrett, 531 U.S. 356, 372-73 (2001) (observing that the statute prohibits a significantly greater set of conduct than is actually unconstitutional); Kimel, 528 U.S. at 86-88 (same); Boerne, 521 U.S. at 533-34 (noting that the statute’s strict test would easily invalidate most challenged state action).

318. See Coll. Sav. Bank, 527 U.S. at 646 (declaring that the statute will “subject[] States to this expansive liability”); Boerne, 521 U.S. at 534 (noting the statute will increase state litigation costs).

319. See Lane, 541 U.S. at 531 (finding that the problem Congress sought to address “has persisted despite several legislative efforts to remedy” it); Hibbs, 538 U.S. at 737 (noting that earlier, weaker legislation was ineffective); cf. Coleman v. Court of Appeals of Md., 132 S. Ct. 1327, 1335 (2012) (“It follows that abrogating the States’ immunity from suits for damages for failure to give self-care leave is not a congruent and proportional remedy if the existing state leave policies would have sufficed.”); Coll. Sav. Bank, 527 U.S. at 643-45 (observing that state court remedies were available even if federal court remedies were not).

320. See Lane, 541 U.S. at 533-34 (upholding the statute as it applies to cases involving a fundamental right); Boerne, 521 U.S. at 530 (“Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one.”).
with provisions specifically tailored to address particular types of voting restrictions would meet the demanding congruence-and-proportionality test.

The first prong of the congruence-and-proportionality analysis—that Congress must develop a record of unconstitutional discrimination in voting on the basis of sex—is sufficiently similar for each of the restrictions on the franchise discussed above that a single discussion covers the entire group. First, as illustrated in Part II, these obstacles to voting are becoming more and more widespread. The proliferation of these barriers is a recent phenomenon and illustrates that the obstacles to voting may amount to more than mere token instances of restrictions on voting. Second, the discussion in Part II illustrates that these restrictions may have a disproportionate impact on the basis of sex—usually against women, but in some cases against men; however, either is sufficient, given the gender-neutral application of the Nineteenth Amendment. Third, states—not some other party—are generally the entities responsible for the restrictions and are therefore proper targets for enforcement legislation.

The more difficult question is whether these restrictions amount to voting discrimination on account of sex. They very well may. Part II already established that these restrictions may have a discriminatory impact on the basis of sex. The next relevant question becomes whether that impact is intentional. First, these restrictions are usually justified on the basis of preventing voter fraud. But there is little evidence that the type of fraud targeted occurs often enough to warrant the restrictions. Occasionally, advocates of these

321. See Breedlove v. Suttles, 302 U.S. 277, 283 (1937) ("The Nineteenth Amendment . . . applies to men and women alike . . . .").

322. See Joshua A. Douglas, (Mis)Trusting States to Run Elections, 92 WASH. U. L. REV. 553, 594 (2015) ("Many states, emboldened by the Court’s lax review of election regulations, have passed stringent, partisan-based election administration rules in recent years.").


324. See, e.g., Exhaustive Database of Voter Fraud Cases Turns up Scant Evidence That It Happens, NEWS21 (Aug. 12, 2012, 10:41 AM), http://votingrights.news21.com/article/election-fraud-explainer; Jocelyn Friedrich Benson, Voter Fraud or Voter Defrauded? Highlighting an Inconsistent Consideration of Election Fraud, 44 HARV. C.R.-C.L. L. REV. 1, 7 (2009) ("There is little empirical or systemic evidence to support the contention that voter-initiated fraud is widespread, be it ineligible voters seeking to vote or eligible voters casting multiple ballots in several locations.").

Although the rarity of voter fraud suggests that security and integrity concerns do not justify overly intrusive burdens on the right to vote, this does not mean that security and integrity are wholly unimportant. To the contrary, "improv[ing] the security and integrity of our elections" is "critically important," especially "[a]s the country once again prepares to elect a president." Hans A. von Spakovsky, Protecting the Integrity of the Election Process,
restrictions also justify their support as a cost-saving measure; however, it is not clear those justifications hold up to scrutiny either. For some, these less-than-compelling justifications may result from sincerely held but mistaken beliefs. For others, these ostensibly legitimate justifications, like fraud prevention or cost savings, may be a pretext for furthering partisan interests by imposing obstacles to the franchise that affect mostly one’s political opponents. Because women are more likely to register as members of and vote for the nominees of one party, political opponents of that party may be likely to intentionally target women with barriers to the ballot. While a more complete analysis is beyond the scope of this Article, Congress could easily use its power to conduct hearings, take testimony, and issue subpoenas, to determine the extent to which these restrictions are intentionally aimed at women, for political reasons or otherwise.

Even if Congress could not conclude that these restrictions constitute intentional discrimination, it could nonetheless find that these laws impact women’s scheduling flexibility—for instance, because women would be forced to spend time obtaining additional documentation or filling out additional paperwork (in the case of voter ID or proof-of-citizenship laws, or the elimination of same-day registration), or because women would have fewer opportunities to register or vote (in the case of early voting cutbacks and restrictions on third-party voter registration organizations). This impact, especially where the impact is severe, could force women to choose between their work or childcare obligations on one hand and their right to participate in democracy on the other. Viewed in light of the Sixty-Sixth Congress’s concerns about women’s active role outside the home and women’s ability to care for their children, Congress


325. See, e.g., KASDAN, supra note 94, at 8 (discussing whether or not early voting increases or decreases costs).


could reasonably conclude that for purposes of building a record to justify enforcement legislation, these ostensibly gender-neutral burdens would constitute voting discrimination on account of sex.

However and wherever Congress builds a record, once it does so, the next question in a congruence and proportionality analysis is whether the provisions of the enforcement legislation it enacts—the remedies—are congruent and proportional to the right Congress seeks to protect.

1. **Voter ID Laws**

Congressional legislation responding to voter ID laws might take one of several forms. A VRA-19 might prohibit these laws altogether. More likely, however, is that enforcement legislation would regulate voter ID laws in some way. Call these regulations “Title I” of the VRA-19.

To solve the name-matching problem, legislation should impose a non-materiality principle\(^{328}\) on state voter ID laws—that is, if the individual’s name on the ID and name in the voter registration rolls do not match, but the difference is not substantial, states must permit the individual to vote without any extra burdens.

To address the problem of differential rates of ID possession as well as the financial burdens to obtaining an ID, a VRA-19 should require states to provide the option of documenting voters’ identity at the polling place at the state’s expense, by having polling place officials photograph the voter and upload the photograph to a state database. Polling place officials could review this database in lieu of an ID in subsequent elections, using Internet-connected tablet computers. Known in election administration circles as “electronic poll books,” election officials in both Nevada and Minnesota have already proposed similar systems.\(^{329}\)

These proposed VRA-19 voter ID provisions would be congruent and proportional to the violations Congress seeks to remedy. Title I would affect only a limited scope of state conduct—voter ID laws—and only to a limited extent. The proposals would impose minimal burdens on a state’s sovereignty—indeed, the electronic poll book proposal merely requires additional activity to accompany state’s voter ID rules. The proposals do not prohibit voter ID laws

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altogether—laws that are normally within the state’s sovereign authority to enact (provided the voter ID laws do not violate some other provision of federal law, like the Fifteenth Amendment or the Voting Rights Act). The cost of the electronic poll book proposal can reach $10 to $20 million, but it pales in comparison to the overall cost of administering elections. States could also entirely avoid the costs of the electronic poll books by repealing their voter ID laws in the first place. Courts would be hard-pressed to find less intrusive measures that accomplish the same goal; indeed, Title I rejects the more intrusive measure of banning voter ID laws entirely. Voting rights advocates have tried other measures to block voter ID laws, but they have not had sustained success, bolstering the conclusion that Title I is acceptable.

Weighing all those relatively minimal intrusions against the incredible importance of the right to vote free from discrimination on account of sex, VRA-19’s Title I would pass the congruence-and-proportionality test.

2. Documentary-Proof-of-Citizenship Requirements

“Title II” of a VRA-19 might respond to documentary-proof-of-citizenship laws by reversing the burden of proof of citizenship, creating a rebuttable presumption that the applicant who certifies his or her citizenship under oath is, in fact, a citizen. The state would have to accept a voter’s affirmation under oath of his or her citizenship, unless the state can bring forth contrary evidence of non-citizenship.

Alternatively (or in addition), Title II might permit a state to reject a voter registration application for lack of documentary proof of citizenship only if the state itself has thoroughly investigated the applicant’s citizenship and found that the applicant is not a United States citizen. Such a provision might also include a requirement that state voter registration forms include an option for the applicant to authorize the state to act as the applicant’s agent (and a corresponding requirement that other states and the federal government accept this delegation of authority) in procuring documentary proof of citizenship (like a birth certificate or certificate of naturalization). This would still allow states to insist on documentary proof of citizenship but would place on the state, not the voter, the burden of obtaining updated documents.

These remedies would be congruent and proportional to the violations. Title II would only affect a small swath of state
conduct—only documentary-proof-of-citizenship laws. With regard to the sovereignty intrusion, the Supreme Court has recently suggested that “it would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications,” suggesting that the sovereignty intrusion of such a law might be significant. However, Title II would not prevent states “from obtaining the information necessary to enforce its voter qualifications”; rather, it would merely require that states go about obtaining that information in a different way, a significantly lesser intrusion on the state’s sovereignty. The actual cost of a system described in Title II—where the government must seek out proof of citizenship, not the applicant—is unclear, but intergovernmental cooperation will lead to distributed costs and greater efficiency than if individual voters each had to track down these documents on their own. Additionally, states can avoid the cost entirely by merely accepting a voter’s sworn certification of United States citizenship. Title II is less intrusive than other possible remedies, like an outright ban on requiring documentary proof of citizenship. Even less intrusive remedies—like the National Voter Registration Act provision for a “federal form”—are insufficient, because they reach only federal elections and because they are vulnerable to attack in the administrative realm.

Balancing the importance of the right to vote free from discrimination on account of sex against the minimal intrusion at issue, Title II would withstand review under the congruence-and-proportionality standard.

3. Improper Voter Registration Database Maintenance Practices

“Title III” of a VRA-19 could address voter registration database management and list-matching practices by prohibiting states from taking adverse action against a voter or registration applicant solely on the basis of database list-matching, without some additional corroborating evidence. States might be able to fulfill this requirement by, for example, contacting the affected voter before taking any action or by obtaining corroborating information from another source. In the case of deceased voters, for instance, a state might learn that a voter had passed away from the Social Security Administration’s Death Index, and confirm the death in a newspaper obituary or by the non-response of the voter to a written inquiry. For

333. Id.
335. See supra Section II.B (discussing the controversy over the EAC executive director’s unilateral action to amend the federal form instructions).
non-citizen voters, a state might discover a voter's non-citizenship from a federal immigration database and confirm the non-citizenship status by checking the voter's response to a jury selection form's question about citizenship.

Like Titles I and II before it, Title III would constitute a congruent and proportional remedy as well. Voter registration database management procedures regulate only a small swath of state conduct. Additionally, Title III imposes only minimal burdens on a state's sovereignty, because a state still controls its voter registration database; it merely has to comply with some additional requirements before taking action. Such a program would impose financial costs on states, but these costs are likely to constitute only a fraction of the overall cost of administering an election. Additionally, these costs are likely to decrease as inter-governmental cooperation allows states to better share data and eases the proposed corroboration requirement. Moreover, Title III's procedural safeguards are less burdensome than requiring states to submit to a federally run voter registration system, and even less burdensome than a requirement that states follow North Dakota's example\textsuperscript{336} and do away with voter registration entirely. Finally, the alternative remedies described in Part II that Congress has attempted under the National Voter Registration Act and the Help America Vote Act, have proven unworkable and have resulted in significant litigation.\textsuperscript{337}

Compared to the minimal burdens that Title III imposes, the right to vote free from discrimination on account of sex is sufficiently weighty to justify the regulation of state voter registration database management practices.


A hypothetical VRA-19 might include Titles IV through VI to address matters that increase the level of administrative hoops through which a voter must jump in order to cast a ballot: cutbacks in early voting and the revocation of Election Day registration. Title IV could set national standards requiring states to engage in a certain amount of early voting. Title V might require states to offer some variant of Election Day registration. Title VI could set national standards for third-party voter registration organizations so as to


\textsuperscript{337} See discussion supra Section II.C (discussing litigation over voter registration list maintenance practices).
preempt state restrictions. Each provision should contain an administrative procedure to allow states to request deviations from these national standards where the state shows a sufficient need.

By overruling state policy choices to the contrary, titles IV through VI would create the largest intrusions into state sovereignty of any of the VRA-19 proposals. Proposed Titles I to III, concerning voter ID, documentary-proof-of-citizenship, and voter registration database management, all allow states to continue their policy choices; they merely require the state to make some extra effort in order to maintain those procedures. Contrast those proposals with Titles IV through VI, which would outright overrule state policy choices, making the sovereignty intrusion more significant. This deeper intrusion into sovereignty, however, is still limited in scope—each proposal applies only to a narrow provision of election procedure. Additionally, the administrative “escape hatch” would decrease the burden on state sovereignty by allowing states to revert to their policy choices if they show a compelling justification.

Financial cost is only a potential issue with early voting, and even then, it’s not clear whether early voting might save more resources than it requires in expenditures.338 Election Day registration cannot increase costs—the cost to process a voter registration form is the same whether done on Election Day or prior to election. Any cost increase from more lenient, mandatory rules concerning third-party voter registration organizations—presumably attributable to the state having to process a greater number of voter registration applications because the third-party organizations are able to reach a greater number of potential voters—is likely to be minimal, given the small cost of processing each individual application. In fact, more lenient rules concerning third-party voter registration groups may save money, because states would no longer have to enforce more significant restrictions.

Other remedies, like litigation under the National Voter Registration Act, the Voting Rights Act, or constitutional provisions, as well as popular referenda, have had only mixed success stopping these specific cutbacks in convenience.339 Additionally, each provision affects only one portion of state election activity.

Although Titles IV through VI make for a closer call given their larger intrusion into state sovereignty, all other factors weigh in favor of Congress’s discretion to order these procedures. Especially

338. See KASDAN, supra note 94, at 8 (discussing whether or not early voting increases or decreases costs).

339. See discussion supra Section II.D (discussing litigation and other efforts to reverse (1) cutbacks in early voting, (2) repeal of Election Day registration, and (3) restrictions on third-party registration groups).
when balanced against the very weighty Nineteenth Amendment right at issue here, titles IV through VI all constitute congruent and proportional remedies.

VI. CONCLUSION

The Voting Wars are ongoing. States have erected a host of barriers to the ballot, many of which burden women voters significantly more than men. Using the Nineteenth Amendment, however, Congress could help swing the momentum back towards the side of voting rights. In passing the Nineteenth Amendment, the Sixty-Sixth Congress (1) rejected decades of history in which voting rights failed to achieve constitutional respect and (2) gave Congress a significant, broad new power to enforce the voting rights of newly enfranchised women. Using that power, Congress has the authority to enact Nineteenth Amendment enforcement legislation that will tackle a host of barriers to the ballot, consistent with the Sixty-Sixth Congress’s stance that women, once enfranchised, not face lesser barriers that would keep them from exercising their right to vote in practice.

Congress not only has the authority to do so, but it must do so. States are getting more aggressive with their efforts to restrict the franchise. Some states are even attempting to avoid the reach of Congress’s traditional means of enforcing voting rights—the Elections Clause, which applies only to federal elections—by creating federal and non-federal elections systems, so as to put many of their attacks on voting beyond the Elections Clause’s reach. Other states may follow. Congress must act.

During the debate in the Sixty-Sixth Congress over the Nineteenth Amendment, Representative Israel M. Foster of Ohio said, “It is a woman’s right to be allowed to help select the officers and help make the laws under which she shall live as an American citizen. Our children and our children’s children will wonder with amazement why we so seriously debated this great act of simple justice.” Representative Foster was right: today, we are that generation, and we do “wonder with amazement why” the Nineteenth Amendment was so controversial. If Congress acts pursuant to its Nineteenth Amendment power to enforce the right to vote free from sex-based discrimination, succeeding generations may say the same about the proliferation of barriers to the ballot.

341. See Berman, supra note 52; Santos & Eligon, supra note 52.
QUICK AND DIRTY:
THE NEW MISREADING OF THE VOTING RIGHTS ACT

JUSTIN LEVITT

ABSTRACT

The role of race in the apportionment of political power is one of the thorniest problems at the heart of American democracy, and reappears with dogged consistency on the docket of the Supreme Court. Most recently, the Court resolved a case from Alabama involving the Voting Rights Act and the appropriate use of race in redistricting. But though the Court correctly decided the narrow issue before it, the litigation posture of the case hid the fact that Alabama is part of a disturbing pattern. Jurisdictions like Alabama have been applying not the Voting Rights Act, but a ham-handed cartoon of the Voting Rights Act—substituting blunt numerical demographic targets for the searching examination of local political conditions that the statute actually demands.

This short and timely Article is the first to survey the ways in which multiple jurisdictions in this redistricting cycle have substituted a rough sketch of the Voting Rights Act for the real thing. It argues that while the actual statute is tailored and nuanced, appropriately calibrated for a millennial approach to race relations, the demographic shorthand has at its heart a profound and pernicious racial essentialism. Replacing the real statute with the imagined one has a detrimental policy impact—but perhaps more sinister, it also creates unnecessary constitutional danger for the Voting Rights Act as a whole. Courts must see the cartoon for what it is.

I. INTRODUCTION

The Voting Rights Act is often hailed as the most successful civil rights statute in American history. It helped provide meaningful access to the ballot for tens of millions of minority citizens who had previously been entirely shut out of the process. Through its application to redistricting, it then helped translate those ballots into mean-
meaningful allocations of political power. Last year, fifty-year retrospectives were in full bloom. The fire hoses and church bombings of 1960s Birmingham were inevitably juxtaposed with the successful passage of the Voting Rights Act. With respect to race relations in the United States, these are evocative referents for some of our collective worst and some of our collective best.

At the same time, the sepia images of film and print and collective memory do a serious disservice to the continuing vitality of the statute. Yes, the Voting Rights Act was designed to be a powerful tool to combat the most ham-handed Bull Connor racism. But it was also designed to be, and has become, so much more than that.

In reality, the Voting Rights Act is profoundly millennial in its sophisticated approach to race relations, with rich layers of multifaceted and anti-essentialist nuance. Decades of congressional and judicial tinkering have refined the law,1 particularly as applied to the drawing of electoral districts and the resulting apportionment of political power. And now, when properly applied, the statute threads a narrow needle: it demands race-conscious remedies for race-based harm, but refuses to indulge racial presumptions along the way. That is, the statute recognizes the reality that people of similar racial or ethnic background sometimes have common political interests and that they sometimes face common political threats based on that background—but it steadfastly refuses to assume that they do.

Liability under the Voting Rights Act is rigorously responsive to pragmatic local context, political culture, and electoral cleavages among both minority and majority populations; the presence or absence of vote dilution is relentlessly subject to proof or refutation with real data.2 Any remedies that the Act may require are similarly grounded in the facts on the ground. Under some local conditions, the Voting Rights Act has a profound impact on electoral decisions; under others, it demands only a little; under still others, it demands nothing at all. And the obligations imposed by the Voting Rights Act may be substantively different from town to town in central Texas, south

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2. Sometimes, voting patterns are vigorously polarized by race in areas with troubling signs of past or present discrimination, and the Act asks that districts be drawn to preserve or establish real political opportunity for minority communities. Sometimes, patterns of polarization break down, and minority citizens do not have common objectives—or have common objectives but find success achieving those objectives in the regular tussle of politics, without specifically designed districts. In the latter scenarios, the Act allows those politics to flourish as is.
Texas, and west Texas— or in Florida or Arizona or North Carolina or Wisconsin— because the statutory scheme understands that minority citizens are different, and inhabit different political environments, from town to town. The Voting Rights Act acknowledges attention to race and at the same time defiantly fights racial essentialism. This is the very model of a statutory scheme built for a 21st-century conception of race, ethnicity, and political voice.

And yet, there has emerged a troublesome tendency to understand the Voting Rights Act through the lens of a revisionist retrograde stereotype, treating the Act as if it demanded “safe” “black districts” and “Latino districts” wherever there are substantial minority populations. This approach, particularly notable in the redistricting of this decennial cycle, is as blunt and blunderbuss as the real statute is subtle and tailored. It inheres in the perception that the Act is a blunt mandate to tally and bundle minority voters into districts pegged at talismanic target percentages. That is, it treats the Act as a demographic imperative—a “racial entitlement”—deaf to local political conditions. It turns the Act from a refined and sophisticated piece of federal legislation into a cartoon.

In several jurisdictions this cycle, entities drawing district lines— often but not always state legislators, and often but not always in regions with the most troublesome history of race relations— have substituted this shorthand version of the Voting Rights Act for the real thing. In some circumstances, the jurisdictions’ reliance on crude demographic targets over-concentrates real minority political power;


Previously, Justice Scalia had used the phrase to critique substantive government benefits allocated based solely on membership in a racial group. See Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment). The mistaken conclusion that the Voting Rights Act allocates political districts in similar fashion has a stubbornly robust pedigree. See, e.g., Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1282 (2015) (Thomas, J., dissenting) (claiming that the Court’s interpretation of the Voting Rights Act has “created a system that forces States to segregate voters into districts based on the color of their skin”); S. REP. NO. 97-417, at 100-01 (1982) (additional views of Sen. Hatch) (describing section 2 of the Act as creating, in effect, “the right to have established racially homogenous districts to ensure proportional representation through the election of specific numbers of Black, Hispanic, Indian, Aleutian, and Asian-American officeholders”).
in other circumstances, it under-concentrates real minority political power. In still other circumstances, the real political effects are unclear, because the lure of the demographic assumption means that nobody has bothered to examine the real political effects. But in every circumstance, the notion that it is possible to rely on a few census statistics to guarantee compliance with the obligations of the Voting Rights Act betrays the central statutory insight. By assuming that functional political cleavages can be measured purely by percentage of citizen voting-age population, the troublesome approach imposes racial stereotypes on a statute designed to combat them.

The misreading has severe constitutional overtones. Though many of the current Justices have serious misgivings about government attention to race, the Court has also repeatedly acknowledged that we are not yet “post-racial,” and that holistic and nuanced consideration of race may still be an appropriate means to confront real racial injustice. In stark contrast to that vision, the simplistic demographic cartoon of the Voting Rights Act represents a conception of race consciousness that has repeatedly earned the Court’s most emphatic ire.

Legislative action in the most recent redistricting cycle has now squarely presented the suspect misreading of the Voting Rights Act for judicial review. Several states purportedly sought to comply with the Act when they redrew legislative district lines in 2011. Yet their version of compliance appears premised purely on demographic percentages—and thus, on demographic stereotype. In several of these states, the legislative action was challenged in litigation. Redistricting cases like these are often procedural oddities: when brought in federal court, they are normally heard by a specially designated trial

6. Sometimes these effects appear intentional, and sometimes they represent collateral damage.


8. See Parents Involved, 551 U.S. at 726-28 (plurality opinion) (critiquing a school district’s attempt to mirror its district’s demographic composition, purely for demographics’ sake); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 499-503 (1989) (critiquing a city’s attempt to grant contracts to minority-owned businesses based on blunt numerical targets stemming from demographic assumptions).
panel—and if appealed, they proceed directly to the Supreme Court.\footnote{9} Moreover, in contrast to the Court’s discretion to hear or (far more frequently) reject petitions for writs of certiorari, the Supreme Court has an obligation to rule on each of these direct appeals.\footnote{10} One has already been before the Court.\footnote{11} Others are coming.\footnote{12} And the litigation posture of the cases does not render obvious the shared misreading of the Act that connects them.

The cases’ journey to the Court is both a threat and an opportunity. Two years ago, when the Court confronted reality and cartoon with respect to the Voting Rights Act, it chose cartoon. In 2013, in \textit{Shelby County v. Holder},\footnote{13} the Court purported to address a portion of the Act placing particular jurisdictions under a special preclearance regime requiring federal review of electoral changes.\footnote{14} Ostensibly, the Court reviewed Congress’s judgment about which jurisdictions should be subject to the special preclearance procedure, and which should not. But in reality, the Court ruled on the validity of a simulacrum of the statutory provision, a popular image of the law rather than the actual law on the books.\footnote{15}

The new cases involve more of the substantive content of the Act, and a blunt approach to compliance with more pervasive consequences. If the Court again buys the ham-handed stereotype, the Act as a whole might be in jeopardy.

Early indications are refreshingly promising. Last Term, the Court’s decision in \textit{Alabama Legislative Black Caucus v. Alabama} seemed to cast cartoon aside.\footnote{16} The case involved a portion of the Voting Rights Act prohibiting practices in certain areas that decrease racial and language minorities’ ability to elect their preferred candidates of choice.\footnote{17} Alabama defended its district lines by claiming that the maintenance of specific existing demographic percentages was

\footnotesize{9. The procedure calls for a three-judge trial court, composed of two federal trial judges and one federal appellate judge; decisions are then appealed directly to the Supreme Court, without an intermediate appeal or a petition for certiorari. 28 U.S.C. §§ 1253, 2284 (2012).
17. \textit{Id.} at 1262-63.
necessary to satisfy the Act. The Court, reflecting the Act’s nuanced distinction between demographic aggregation and political efficacy, disagreed. Justice Kennedy, the lone Justice in the majority of both 2013 and 2015 cases, appears to have refocused on reality.

Yet the path forward is not yet secure. The case above concerned a portion of the Voting Rights Act that is no longer in place. That is, the 2015 Alabama case involved the means by which 2011 Alabama legislators complied with a statutory provision invalidated in 2013 by a different case out of Alabama. Plaintiffs chose to litigate their case as confined to one now-defunct statutory provision in one state, and it may be similarly tempting for the Court to cabin its ruling in the cases to come. It is not clear whether the Court believed it was confronting an anomaly of primarily historical significance. On the other hand, the Court may recognize that the approach of the Alabama legislators is connected to an ongoing approach in several other states, and connected specifically by the common reliance on a Voting Rights Act that does not exist. If the Court focuses on the actual legislation at hand, it should be able to distinguish the real statute’s approach from that of its fictionalized retrograde cousin. Proper focus on local nuance and meaningful political power—as precedent demands—can restore the Voting Rights Act to a vehicle for fighting both racial discrimination and racial essentialism.

This Article proceeds in three sections. Part I explains the Voting Rights Act and its constitutional context: the way that the real statute is designed to function. Part II then investigates the strange prominence in recent redistricting of a cartoon version of the Act that ignores the tailored nuance built into the statute. Part IV explains why the simulacrum is not merely wrong, but also dangerous: it may yield guidance for decision-makers that is more administrable, but it does so only at the cost of constitutionally impermissible essentialist assumptions. These shortcuts are both unlawful and unnecessary.

II. THE CONSTITUTION AND THE VOTING RIGHTS ACT

The Supreme Court has interpreted the Constitution’s Fourteenth Amendment to prevent government from treating people differently primarily based on their race without an especially good reason. In

18. Id. at 1267, 1271; see also Brief for Appellees at 7, Ala. Legislative Black Caucus, 135 S. Ct. 1257 (Nos. 13-895, 13-1138), 2014 WL 5202058, at *7 (“As a strategy to comply with Section 5, the drafters [of the 2011 district plan] decided to avoid reducing the black population of preexisting majority-black districts where possible.”).


20. See infra Part II, for a more complete description of the different portions of the Voting Rights Act, including section 5 of the Act, which was at issue in both Alabama Legislative Black Caucus and Shelby County.

1993, the Court made clear that this approach applied to certain forms of redistricting as well. More specifically, when race is the predominant and overriding reason for drawing either a plan as a whole or a particular district within that plan, that use of race must be narrowly tailored to a compelling government interest. The final caveat is important, but too often forgotten: a predominant focus on race in the drawing of districts is constitutionally suspect, not constitutionally invalid. The difference between the two depends on a state’s good reason and nuanced execution: on ensuring that, as with other suspect classifications, a state is proceeding based on real need and not overbroad generalization or stereotype.

In that precise space sits the Voting Rights Act. The Voting Rights Act of 1965, long lauded as perhaps the most successful example of American civil rights legislation, is the signature product of Congress’s enumerated power to enforce the Fourteenth and Fifteenth Amendments. Though the Court has never directly held that compliance with the VRA is a sufficient reason for a state to take direct action on the basis of race, a parade of Justices have opined or presumed that it suffices.

The privileged position of the Voting Rights Act is sensible. In two different provisions with substantial impact on redistricting, the VRA seeks to remedy past intentional discrimination and prevent present subordination where the risks of new or continued intentional discrimination are greatest.

A. Section 5

The higher-profile provision is based on section 5 of the Act. It established a regime of preclearance, under which jurisdictions of particular concern may not enforce any election-related change unless permitted to do so either by a federal court or by the U.S.

25. For a more thorough explanation of the Voting Rights Act’s substantive provisions and its interaction with the Constitution, see Justin Levitt, Democracy on the High Wire: Citizen Commission Implementation of the Voting Rights Act, 46 U.C. Davis L. Rev. 1041, 1047-69 (2013); Levitt, supra note 5, at 170-73.
Department of Justice.\textsuperscript{28} In the 2011 cycle of redistricting, this regime primarily applied to those jurisdictions where racial discrimination caused radically low democratic participation in the 1960s and 1970s and which had failed in the intervening years to demonstrate a record of minority engagement sufficiently improved to “bail out” of coverage.\textsuperscript{29} Preclearance also governed jurisdictions that had been “bailed in” to coverage by a federal court, after a specific finding of intentional discrimination.\textsuperscript{30} That is, the hallmark of the preclearance regime is that it applied only to jurisdictions with an insufficiently attenuated connection to intentional discrimination.

The primary means by which jurisdictions were covered was a statutory provision with a sunset provision.\textsuperscript{31} Congress renewed coverage most recently in 2006,\textsuperscript{32} but in 2013, the Supreme Court

\textsuperscript{28} Technically, a jurisdiction subject to a preclearance requirement may seek a declaratory judgment from the federal court or may seek administrative preclearance from the Department of Justice. For jurisdictions choosing the administrative path, a decision is considered to be precleared if the Department of Justice fails to object within sixty days from the date of a complete submission. 52 U.S.C. § 10304(a) (Supp. II 2014). Any jurisdiction may seek a judicial declaratory judgment, whether the Department of Justice has objected or not. \textit{Id.}


struck down the 2006 coverage renewal, finding it to be insufficiently attuned to current conditions. Yet even without congressional action establishing a new coverage formula, the nature of the preclearance standard remains of continuing interest and relevance for three reasons. First, districts that were drawn in 2011 pursuant to preclearance are only lawful, today, if they did not unduly depend on race—and that assessment is predicated on a proper interpretation of what the Voting Rights Act then required. Second, the potential for judicial bail-in—with several cases pending, for states and for municipalities—means that future districts may well be held to the standard of the preclearance regime once again. And third, the nuanced and non-essentialist nature of the substantive criteria for preclearance reflects the nuanced and non-essentialist nature of the Voting Rights Act as a whole.

Preclearance rests on two substantive standards. First, jurisdictions have to prove that an electoral change was not motivated by the intent to discriminate. Second, jurisdictions have to prove that an electoral change would not have the effect of denying or abridging the right to vote on account of race or language minority status. This latter effects-based standard has been interpreted by the Supreme Court to mean that a proposed election-related change may not be precleared if it leaves a community of minority voters worse off with respect to their “effective exercise of the electoral franchise” than they had been under the prior policy. The standard is known as “retrogression.”

At the start of the 2011 redistricting cycle, there were several ambiguities in the retrogression standard. They persisted in part because redistricting is generally decennial, judicial preclearance is a rarity, and the combination gives courts few opportunities to

34. See supra note 30.
35. The current standards are also those that governed the 2011 redistricting cycle.
36. 52 U.S.C. § 10304(a), (c) (Supp. II 2014).
37. Id. § 10304(a).
38. Beer v. United States, 425 U.S. 130, 141 (1976). In truth, it is a misnomer to refer to this prong of the retrogression inquiry as a standard that is purely effects-based. The preclearance requirement is only imposed in jurisdictions with a lingering, unrefuted connection to intentional discrimination. So the “effects” prong of section 5 is really an inquiry into the effect of an electoral change only in the context of a history of intentional discrimination that continues to impact the present.
39. Id.
construe the governing statute. For purposes of this Article, two ambiguities are most significant. Both relate to a statutory “clarification” made by Congress in 2006.

Three years earlier, in a case known as Georgia v. Ashcroft, the Supreme Court had construed section 5 in a way permitting covered jurisdictions to trade minority voters’ control of a few districts for minority influence over, but not control of, a larger area. Congress responded by amending the statute to specify that any change diminishing—on account of race or language minority status—the ability of a community to elect their preferred candidates of choice would amount to an unlawful abridgement. The amendment made it clear that a covered jurisdiction could not take a district in which a minority community had the demonstrated ability to elect their preferred candidates of choice and reconfigure the district in such a way as to remove that ability. Under the 2006 amendment, a minority community in a polarized region with the ability to elect candidates of choice in three districts would be the victim of retrogression if redistricting left that community with the ability to elect candidates in only two districts thereafter.

That statutory clarification left (at least) two ambiguities. First, the statute does not expressly state whether a diminution in the ability to elect is to be measured within a particular district, as well as in the total number of districts yielding reliable minority electoral power. If a minority community in a covered jurisdiction has the reliable ability to elect candidates of choice within a given district by overwhelming margins, might the statute bar any plan reducing the likely margin of victory in that district, even if the plan leaves the minority community still reliably in control of the election outcome?

On its face, the statute does not appear to provide a clear answer. But understanding the text as a reaction to Georgia v. Ashcroft provides a clue. In that case, the Court discussed two different ways of preserving a minority community’s ability to elect candidates of choice. One involves a “certain number of ‘safe’ districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice,” and one involves “a greater number of districts in

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40. See Levitt, supra note 25, at 1063. Indeed, thirty-eight years after the enactment of a provision prohibiting diminishment of the effective exercise of the electoral franchise, the Court explained that “we have never determined the meaning of ‘effective exercise of the electoral franchise.’” Georgia v. Ashcroft, 539 U.S. 461, 479 (2003).
41. 539 U.S. at 461.
42. Id. at 481-84.
43. 52 U.S.C. § 10304(b) (Supp. II 2014).
which it is likely—although perhaps not quite as likely as under the benchmark plan—that minority voters will be able to elect candidates of their choice.”45 The Court distinguished both of those options from two other indicia of electoral success: drawing influence districts, “where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process,”46 and maintaining leadership positions within the legislature for representatives of districts with large minority communities, without an opportunity for the minority voters to exercise meaningful electoral control.47 The Court characterized these influence districts and positions of legislative leadership as alternative means of assessing electoral power, factors “in addition to the comparative ability of a minority group to elect a candidate of its choice.”48

By focusing its 2006 statutory amendment on a community’s ability to elect, Congress manifested its intent to prevent these third and fourth options from supplanting the first two: drawing influence districts or maintaining leadership positions for particular representatives is not a permissible substitute for districts in which the minority community could reliably elect candidates of choice.49 But because either of the Court’s first two options preserve the community’s ability to elect candidates of choice, it appears that either would satisfy the retrogression inquiry Congress established—and that jurisdictions might plausibly choose between them without retrogressing. As long as a minority community with a reliable ability to elect candidates of choice in a district retains that reliable ability, the better reading of the statute is that there is no retrogression, even if the community’s precise electoral strength within the district varies.50 In guidance published for the 2011 redistricting cycle, the Department of Justice agreed.51 And in 2015, the Supreme Court concurred.52

45. Ashcroft, 539 U.S. at 480. The Court made clear that “[s]ection 5 does not dictate that a State must pick one of these methods of redistricting over another.” Id.
46. Id. at 482.
47. Id. at 483-84.
48. Id. at 482 (emphasis added).
49. See Persily, supra note 44, at 236.
50. This result, further, is in keeping with the Act’s contextual approach to electoral power. The alternative conceives of retrogression as requiring the maintenance of a specific margin of victory within a given district. Such a standard could lead perversely both to reduced minority electoral power and reduced opportunities to break down historical polarization patterns, as overpacked “safe” districts locked in by the statute leach minority voters from surrounding areas.
51. See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7471 (Feb. 9, 2011) (“In analyzing redistricting plans, the Department will follow the congressional directive of ensuring that the ability of such citizens to elect
A second ambiguity has not been clarified either by the Department of Justice or the Court. The statute is written in one direction: as noted above, in direct response to Georgia v. Ashcroft, it specifies that diminishing a minority community’s ability to elect candidates of choice in a covered jurisdiction is to be considered unlawful retrogression. The statute does not state, however, that this is the only conduct that may constitute retrogression. It may well be that a diminution in the effective exercise of the franchise even without an impairment of a pre-existing ability to elect is also retrogressive.

Even with unresolved issues like those above, what is not ambiguous is the relentlessly pragmatic approach of a proper retrogression inquiry. The 2006 amendments to the Voting Rights Act did not overturn the Supreme Court’s understanding that assessing the effective exercise of the electoral franchise—and those policies that could diminish it—is an exercise focused on real political power and not merely simplistic math. That is true whether the inquiry depends on an ability to elect candidates of choice, or the effective exercise of the franchise absent that ability. Retrogression is highly dependent on local circumstances and context, including comparative levels of voter registration, turnout, and polarization. “No single statistic provides courts with a shortcut to determine whether a voting change retrogresses from the benchmark.” The tally of voting-age citizens within a district by race or language minority status does not alone reveal whether the community has suffered a meaningful diminution in the effective exercise of the franchise.

their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.”)

54. See Levitt, supra note 25, at 1062; cf. Persily, supra note 44, at 243-45 (discussing this possibility, but imagining it as a diminution in a partial “ability to elect,” or a relative “ability to elect” that does not amount to the realistic ability to elect a candidate in a district). The Department of Justice’s position on this ambiguity is itself ambiguous. The Department has said that, given a pre-existing ability to elect, it “will follow the congressional directive of ensuring that the ability of such citizens to elect their preferred candidates of choice is protected. That ability to elect either exists or it does not in any particular circumstance.” See Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7471. This affirmation does not indicate whether the Department believes that there may be a statutorily cognizable diminution in the effective exercise of the franchise even when a district had not previously allowed racial or language minorities the ability to elect candidates of choice.
55. See Persily, supra note 44, at 242.
57. Cf. In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 626-27 (Fla. 2012) (construing the Florida state constitution’s retrogression provision and concluding that “[b]ecause a minority group’s ability to elect a candidate of choice depends upon more than just population figures, we reject any argument that the minority population percentage in each district as of 2002 is somehow fixed to an absolute number
The courts’ focus on the pragmatic impact of a change on the ground in assessing retrogression is entirely consistent with the long-time approach of the Department of Justice. DOJ Guidance on retrogression in the redistricting context had consistently emphasized the nuanced, contextual assessment of changes to the functional exercise of the franchise:

In determining whether the ability to elect exists in the benchmark plan and whether it continues in the proposed plan, the Attorney General does not rely on any predetermined or fixed demographic percentages at any point in the assessment. Rather, in the Department’s view, this determination requires a functional analysis of the electoral behavior within the particular jurisdiction or election district. As noted above, census data alone may not provide sufficient indicia of electoral behavior to make the requisite determination. Circumstances, such as differing rates of electoral participation within discrete portions of a population, may impact . . . the ability of voters to elect candidates of choice, even if the overall demographic data show no significant change.

A federal court noted that this guidance, promulgated in 2011, is in this respect “consistent with the guidance DOJ has been issuing to assess retrogressive effect for the past two decades.”

This is all in keeping with the preclearance regime’s careful avoidance of racial essentialism and stereotype. In establishing the jurisdictions to be covered by the preclearance requirement, the statute provided a mechanism for bailout and bail-in, so that jurisdictions that no longer warranted especially close review could be dropped from the regime and those where a closer look was justified could be added. And in establishing the conditions for retrogression—the conditions warranting a substantive objection if there is no indication that a given change was enacted with impermissible intent—the statute demands review of whether and how minority communities actually effectuate electoral power, locality by locality. Relying on census data to determine retrogression would require as-

under Florida’s minority protection provision. To hold otherwise would run the risk of permitting the Legislature to engage in racial gerrymandering to avoid diminishment.”).

58. The vast majority of changes in covered jurisdictions were reviewed by the DOJ and not the courts, and so for the life of the Voting Rights Act, the DOJ had been primarily responsible for evaluating retrogression.

59. Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. at 7471; see also id. at 7471-72 (reviewing additional factors).

The DOJ guidance, itself based upon a judicial demand for nuance and context, has in turn been cited approvingly by the courts. See, e.g., Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1272 (2015).


61. 52 U.S.C. §§ 10302(c), 10303(a) (Supp. II 2014).
sumptions about the voting patterns of racial or ethnic groups based on nothing other than those voters’ race or ethnicity. The courts and the administrative agency tasked with preventing retrogression make no such assumptions, and do not indulge them when made by jurisdictions drawing the lines.

B. Section 2

The other provision of the Voting Rights Act with primary impact on redistricting is commonly known as “section 2,” and it shares the same nuanced, functional approach and aversion to essentialism. Section 2 applies nationwide, preventing the inequitable dilution of minority communities’ voting power where alternative districts might otherwise allow minorities to maintain an effective opportunity to elect candidates of choice.\(^62\) That is, where section 5 measures dilution by looking to changes from past practice, section 2 measures dilution against hypothetical alternatives.

Section 2 establishes a threshold to test where district lines might be responsible for depriving a minority community of the equal opportunity for electoral success. To invoke the statute, minority communities must be sufficiently large and sufficiently cohesive to provide a meaningful opportunity to elect candidates, and the remainder of the surrounding electorate must be sufficiently polarized to consistently defeat minority voters in the area.\(^63\) The first component tests whether minorities would have meaningful opportunity if the lines were appropriately drawn;\(^64\) the second tests whether minorities would be deprived of that opportunity if the lines were drawn without solicitude.\(^65\)

Still, not every lost opportunity amounts to a violation of section 2: the statute further instructs that dilution is to be tested in “the totality of circumstances.”\(^66\) Courts have consistently analyzed this totality through the lens of the “Senate factors”: factors listed in the Senate Judiciary report accompanying the amendment of the Voting Rights Act in 1982.\(^67\) These Senate factors include elements like a history of official discrimination in voting or in other areas that affect the voting process, or troublesome signs of current discriminatory

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63. Collectively, these threshold elements are known as “Gingles conditions,” after the case establishing them. Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986).

64. Id. at 50.

65. See id. at 51.


attitudes. In general, they amount to “danger signs” of enhanced risk that either intentional discrimination on the basis of race or language minority status, or the legacy of such discrimination, is interacting with the placement of districts to fuel the deprivation of minority opportunity.

This test for liability is designed to render equitable opportunity for minority communities without indulging in essentialism. A racial or ethnic minority’s electoral (and geographic or sociocultural) coher-

68. Gingles, 478 U.S. at 44-45. In addition to the Senate factors, courts will also consider in the totality of circumstances the degree to which minority communities have achieved rough proportionality of control jurisdiction-wide. League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 437 (2006); Johnson v. De Grandy, 512 U.S. 997, 1013-15 (1994); Gingles, 478 U.S. at 77 (opinion of Brennan, J.). While lack of proportionality is not generally a reason to find liability, proportionality may be a reason to deny it: courts have been reluctant to find that minority voters are denied equal electoral opportunity when those voters reliably control districts “in substantial proportion to the minority’s share of voting-age population.” De Grandy, 512 U.S. at 1013.

69. Section 2, as we know it, is also the product of a disagreement between Congress and the Supreme Court. In 1980, the Court construed then-existing text of section 2 to precisely mirror constitutional prohibitions on racial discrimination, preventing the drawing of district lines only upon sufficient proof of discriminatory intent. City of Mobile v. Bolden, 446 U.S. 55, 60-61 (1980) (plurality opinion). This set a rather high evidentiary bar, and when Congress amended the Voting Rights Act in 1982, it clearly intended to afford relief from dilutive practices without requiring plaintiffs to offer the same degree of proof present in a constitutional claim of discriminatory intent. See Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131 (1982) (changing “No . . . 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” to “No . . . procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color,” and defining the violation in terms of the totality of circumstances) (emphasis added); see also S. REP. No. 97-417, at 27 (“The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation.”).

As a consequence, section 2 as amended has often been referred to as an “effects test” or a “results test.” See Gingles, 478 U.S. at 35. Like the identification of section 5 retrogression as an “effects test,” see supra note 38, the section 2 shorthand is an unfortunate misnomer, see United States v. Blaine Cty., 363 F.3d 897, 909 (9th Cir. 2004), because it may imply that section 2 prohibits practices with merely a disparate impact on minority voters. Section 2 has not been construed in such a manner. See Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997). Instead, and based largely on the demand for an examination of the totality of the circumstances in order to find dilution, courts have generally insisted on some sort of tie to intentional discrimination, past or present, or the enhanced risk of such discrimination. See Christopher S. Elmendorf & Douglas M. Spencer, Administering Section 2 of the Voting Rights Act After Shelby County, 115 COLUM. L. REV. 2143, 2163-68 (2015) (reviewing courts’ varying interpretations of the totality of circumstances and concluding that though courts may differ in the particulars, all seem to require some sort of tie to intentional discrimination).

70. See League of United Latin Am. Citizens, 548 U.S. at 435 (“We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests of these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes. The mathematical possibility of a racial bloc does not make a district compact.”).
sion must be proven, not assumed. A racial or ethnic majority’s cohesion must be proven, not assumed. The consistent tendency of the majority to defeat candidates preferred by the minority in the absence of appropriate race-conscious relief must be proven, not assumed. The presence of enhanced risk that intentional discrimination has played a role in rendering opportunity unequal must be proven, not assumed. All of these factors must be proven in the context of local politics, without importing assumptions from national trends. Demographics alone—numerical tallies of voting-age citizens of a particular race or ethnicity—are insufficient to establish any one of these elements, much less the conditions for overall liability. As with section 5, section 2 resists back-of-the-envelope demographic simplification. The establishment of a violation depends

71. See, e.g., Miller v. Johnson, 515 U.S. 900, 920 (1995) (emphasizing that a jurisdiction may not ‘assume[] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls’ . . . .” (quoting Shaw v. Reno, 509 U.S. 630, 647 (1993))).

72. See id.

73. See, e.g., Kareem U. Crayton, Sword, Shield, and Compass: The Uses and Misuses of Racially Polarized Voting Studies in Voting Rights Enforcement, 64 RUTGERS L. REV. 973, 989 (2012) (noting that the threshold Gingles conditions “call for evidence that race largely drives election choices and outcomes in the challenged jurisdiction”) (emphasis added); see also Gingles, 478 U.S. at 50-51 (listing the Gingles conditions).

74. See Gingles, 478 U.S. at 79.


76. The final clause of section 2—which I call the “proportionality proviso”—represents yet another way in which the statute stands against racial essentialism. The final sentence states that in establishing vote dilution based on the totality of the circumstances,

[the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population. 52 U.S.C. § 10301(b) (Supp. II 2014).

This clause is apparently much misunderstood. Some Justices have apparently believed it to mean that section 2 of the Voting Rights Act does not establish a right of minority citizens to proportional representation of their interests. See, e.g., Holder v. Hall, 512 U.S. 874, 927 (1994) (Thomas, J., concurring in the judgment); id. at 956 (Ginsburg, J., dissenting); Gingles, 478 U.S. at 84 (O’Connor, J., concurring in the judgment). But,

[b]y its terms, this language addresses the number of minorities elected to office, not the number of districts in which minorities constitute a voting majority. These two things are not synonymous, and it would be an affront to our constitutional traditions to treat them as such. The assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter.


That is, the actual text of the proportionality proviso is less a strike against proportionality than a strike against essentialism. Congress did not wish to indulge the
“upon a searching practical evaluation of the ‘past and present reality,’ ”77 connected to “ ‘an intensely local appraisal of the design and impact’ of the contested electoral mechanisms.”78 “No single statistic provides courts with a shortcut to determine whether a set of single-member districts unlawfully dilutes minority voting strength.”79

Indeed, demographic shortcuts are authorized in only one aspect of section 2: the requirement, as a condition of proving dilution under an unfavorable districting scheme, that plaintiffs show that cohesive minorities form a sufficiently large portion of a district-sized population to exercise control if the lines were favorably drawn.80 For years, groups of minority citizens had argued that they had functional political control of a district-sized population even without comprising at least 50% of that population, and the Court had repeatedly assumed without deciding that such control might suffice in meeting the threshold condition.81 In 2009, the Court confronted the issue directly, and a plurality determined in Bartlett v. Strickland that section 2 is unavailable to a minority community comprising less than 50% of a district-sized electorate.82

The decision was premised in part on one theoretical approach to dilution. The plurality reasoned that dilution of a minority community’s opportunity to elect candidates on account of race or language minority status had to be assessed based on the potential power of the minority community alone.83 It was premised in part on a desire to improve the judicial administration of cases,84 and in part on a perceived need to limit the potential circumstances in which jurisdictions devoted primary attention to considerations of race.85

It is crucial to recognize, however, that Bartlett’s 50.1% threshold affects only the predicate conditions for plaintiffs seeking section 2

unwarranted assumption that an equal opportunity for cohesive groups of minority citizens would yield a proportional number of minority legislators, or that the lack of the former could be proven by the lack of the latter, when minority voters might well prefer candidates of different races.

78. Id. (quoting Rogers v. Lodge, 458 U.S. 613, 622 (1982)).
80. This is generally known as a piece of the first “Gingles condition.” See Gingles, 478 U.S. at 50-51.
82. Id. at 18-19.
83. Id. at 15.
84. Id. at 17-18.
85. Id. at 21-22 (noting that a contrary interpretation “would result in a substantial increase in the number of mandatory districts drawn with race as the ‘predominant factor motivating the legislature’s decision.’ ” (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995))).
relief and attempting to establish liability. The Court did not determine that the same demographic shorthand was appropriate for constructing a remedy once vote dilution is established, or for a state to use as an automatic rule in drawing districts to preempt section 2 concerns.

A remedial rule pegging districts drawn to satisfy section 2 at a 50.1% minority electorate may seem a mirror image of Bartlett—but it is actually not an equivalent. That is because the strict demographic threshold in Bartlett adopts a preference for administrability, but only when doing so entails no essentialism by the state. Put differently, a rule requiring 50.1% for liability purposes does not depend on assuming that minority or majority community members all have the same political interests. From the government jurisdiction’s perspective, the 50.1% demographic threshold merely alerts decision-makers that they should inquire further into the need to consider race: it signals a potential issue. And from the perspective of minority communities, the 50.1% threshold cuts off some otherwise valid claims that minority communities have been deprived of control. A 50.1% threshold, as one component of an initial screen for viable cases, serves a signaling and gatekeeping function. But after Bartlett, liability under the Voting Rights Act still depends on the local electoral nuances of minority engagement, just as it did before.86 There remains no tolerance for essentialist assumptions in establishing a valid claim.

The same cannot be said for a presumptive 50.1% majority-minority remedy (or worse, drawing districts at 50.1% to preempt section 2 concerns, without any attention to whether liability is plausible). Section 2 liability depends on evidence that a minority community has been inequitably deprived of an effective opportunity to elect candidates of choice. Consequently, a remedy must ensure that the electoral laws give that minority community a meaningfully effective opportunity to elect its preferred representatives. Creating such an opportunity, by drawing districts or otherwise, may involve state action based primarily on race, which demands contextualized nuance and precision: real facts about real political patterns. The Court has recognized this need, acknowledging that “it may be possible for a citizen voting-age majority to lack real electoral opportunity.”87 Conversely, it may be possible for a demographic minority in a jurisdiction with modest crossover voting to have real electoral opportunity. Assuming that a 50% minority district provides an effective remedy—or, from a preemptive point of view, assuming that a 50% minority district is necessary to do the job—involves state action engaging essentialist assumptions about how minority and majority

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86. See id. at 39-40 (Souter, J., dissenting).
electors will vote based on race or language minority status alone. 88 The Voting Rights Act is designed to avoid, not impose, such shorthand.

III. DEMOGRAPHIC DETERMINISM AND RACIAL ESSENTIALISM IN THIS REDISTRICTING CYCLE

The analysis above reveals that the Voting Rights Act sets a performance standard, not a design standard. 89 Under certain conditions (and only under those conditions), it demands districts that actually function to grant or protect political power, and not merely districts that evidence a rigid set of features ticked off of a checklist. This focus on actual function is what makes the statute not only constitutionally viable but appropriately malleable for different contexts in different spaces and times.

In this redistricting cycle, several jurisdictions seem to have cast aside the Voting Rights Act’s careful tailoring to local political conditions and aversion to racial essentialism. Instead, these jurisdictions seem to have relied on ham-handed demographic targets—a belief, real or professed, that the Voting Rights Act simply requires hitting a predetermined percentage of minorities in a predetermined number of districts. These jurisdictions deliberately sought to maintain supermajority quotas of minority voting-age or citizen voting-age population ostensibly to avoid retrogression, or to peg districts at a 50% minority-voter threshold ostensibly to satisfy section 2, without the searching local electoral analysis required to determine if those targets were statutorily necessary or sufficient. According to this cartoon version of compliance, all a redistricting entity needed to know was that District A had to be 72% black in 2011 because it was 72% black in 2010 or 2001, or that District B needed to be 50% Latino because a lot of Latinos lived in the area. 90 That shorthand gloss on the Voting Rights Act’s obligations may represent a view pervasive in the social circles of legislators and their consultants, but it does not do justice to the design of the statute on the books.

88. Indeed, a district pegged at 50% based on demographics alone assumes either that the minority and majority electorates are perfectly cohesive—that, for example, black or Latino citizens universally vote for one type of candidate, whites for another—or that they are not cohesive to exactly the same degree. Real analysis of electoral patterns may confirm or refute these suppositions: the point is only that the suppositions cannot stand on their own.

89. See generally, e.g., Cary Coglianese et al., Performance-Based Regulation: Prospects and Limitations in Health, Safety, and Environmental Protection, 55 ADMIN. L. REV. 705, 709 (2003) (clarifying the difference).

A. Alabama

In Alabama, the state’s wooden reliance on demographics when purportedly attempting to satisfy its obligations under the Voting Rights Act was most visible in the context of preclearance and section 5. As the federal court that reviewed the state’s most recent redistricting noted, those drawing the lines did so with the design to ensure, as a preclearance strategy, that “the new majority-black districts should reflect as closely as possible the percentage of black voters in the existing majority-black districts as of the 2010 Census.”91 That is, when redrawing the lines, the state attempted to “maintain roughly the same black population percentage in existing majority-minority districts.”92 Simple percentages—which the Supreme Court framed as “mechanical racial targets”93 and which the trial court’s dissenting judge characterized as a “district-specific racial quota”94—were repeatedly equated with the population’s ability to elect.95

91. Ala. Legislative Black Caucus v. Alabama, 989 F. Supp. 2d 1227, 1247 (M.D. Ala. 2013) (three-judge court); see also id. at 1276 (“[T]he Committee tried to match the percentages of the total black population in majority-black districts to the percentages in the 2001 districts based on the 2010 Census numbers.”); id. at 1297 (“To avoid a potential violation of section 5 of the Voting Rights Act, [the map-drawing consultant] also added enough contiguous black populations to maintain the same relative percentages of black populations in the majority-black districts.”); id. at 1310 (“The Legislature preserved, where feasible, the existing majority-black districts and maintained the relative percentages of black voters in those majority-black districts. . . . Using the 2010 Census data, the percentages of the black voting-age populations in the majority-black districts under the Acts remain relatively constant when compared to the 2001 plans.”).

92. Ala. Legislative Black Caucus v. Alabama, 135 S. Ct. 1257, 1263 (2015); see also id. at 1271.

93. Id. at 1267.

94. Ala. Legislative Black Caucus, 989 F. Supp. 2d at 1314 (Thompson, J., dissenting).

95. The trial court’s dissent quotes the deposition of one of the co-chairs of the Redistricting Committee, focusing rigidly on total population as the (sole) measure of retrogression within a district:

Q. So you did not want the total population of African–Americans to drop in [SD 23]?
A. That’s correct.

Q. Okay. And if that population dropped a percentage, in your opinion that would have been retrogression?
A. Yes, sir.

Q. So if—and I’m not saying these are the numbers, but I’m just saying if Senator Sanders’ district had been 65 percent African–American, if it dropped to 62 percent African–American in total population, then that would have been retrogression to you?
A. In my opinion, yes.

Q. And so that’s what you were trying to prevent?
It is therefore no surprise that lines were moved (and precincts split) accordingly, to capture minority voters that could meet the targets. There was no mention of any legislative investigation of cohesion or political efficacy to conclude that the percentages targeted were in fact necessary to abide by Voting Rights Act requirements. There was no attempt, that is, to discern whether maintaining demographic consistency was necessary to maintain political efficacy.96

This appears to be consistent with past practice, if not legal obligation: the federal trial court reviewing Alabama’s 2012 redistricting noted that “[i]n 2001, the Democrat-controlled Legislature repopulated the majority-black districts by shifting thousands of black people into those districts to maintain the same relative percentages of the black population in those districts.”97 Indeed, the court’s frequent and prominent citation of allegedly similar behavior welcomed by the litigation plaintiffs ten years earlier, in a different partisan direction, implies that two legal wrongs can make a right.98 In truth, the presence of unjustified dependence on demographics in an earlier cycle does not provide a legal safe harbor for unjustified dependence on demographics now.

The Supreme Court thought the redistricting controversy in Alabama to be one of the rare direct appeals worth oral argument time.99 Its ruling, issued in March 2015, sharply corrected the court below—and, by extension, the state’s essentialist practice.100 The Court distinguished the Act’s nuanced consideration of race from its cartoon counterpart, though without describing the alternatives as such:

In our view, however, [a holding permitting the redrawing based on consideration of percentages alone] rests upon a misperception of the law. Section 5, which covered particular States and certain

96. Id. at 1324 (Thompson, J., dissenting).

97. The trial court majority, it appears, made the same mistake. See id. at 1310 (“[T]he Alabama Legislature correctly concluded . . . that it could not significantly reduce the percentages of black voters in the majority-black districts because to do so would be to diminish black voters’ ability to elect their preferred candidates.”).

98. There was some evidence that two African-American incumbents requested, during the redistricting process, that their districts be drawn with at least 62% African-American population. Id. at 1246. But there is little indication that the requests were made because a 62% African-American population threshold is necessary in those areas, in light of local mobilization and political cleavages, to afford an equal ability for the minority community to elect candidates of choice—rather than because a 62% African-American population would amount to comfortable political safety for the incumbents.

99. Id. at 1242 (emphasis added).

100. See, e.g., id. at 1301-02; id. at 1302 (“We refuse to apply a double standard that requires the Legislature to follow one set of rules for redistricting when Democrats control the Legislature and another set of rules when Republicans control it.”).
other jurisdictions, does not require a covered jurisdiction to maintain a particular numerical minority percentage. It requires the jurisdiction to maintain a minority’s ability to elect a preferred candidate of choice.101

Though the Court’s result was entirely consistent with the account of the Voting Rights Act developed above, it offered little theory explaining the outcome. The Court rested instead on section 5’s textual touchstone of the “ability to elect” and Department of Justice guidelines interpreting this text in a similar fashion.102 The text alone makes the Court’s decision correct, but not inevitable. A deeper theory is needed to explain why the Court’s approach is superior to the alternatives. As the analysis above reveals, the Court’s choice to construe section 5 as it did is faithful not only to the statutory text but also to the non-essentialist thrust of section 5 as a whole—and to the constitutional commands that give it life.

Indeed, though the Court made no mention of jurisdictions beyond Alabama or statutory provisions beyond section 5, its firm ratification of a retrogression standard embracing a nuanced view of the Voting Rights Act has implications for other states and other battles still working their way through the courts. The remainder of this Part briefly reviews some of the other states replicating, in different contexts, the same mistaken dependence on simple demographics that afflicted Alabama’s misreading of the Voting Rights Act.

B. California

In some states, those drawing the lines relied exclusively on demographics to assess Voting Rights Act compliance despite the contrary warnings of counsel.103 In California, however, where a new independent citizens’ commission was tasked with drawing congressional and state legislative lines, counsel seems to have provoked the exclusive emphasis on demographics.104 This position of legal advisor was so important that initiative proponents embedded in the governing statute a requirement that at least one counsel to the commission be chosen based on “demonstrated extensive experience and expertise

101. Id. at 1272.

102. See supra text accompanying notes 59-60; see also Ala. Legislative Black Caucus, 135 S. Ct. at 1272-73. The Court ominously mentioned that “Alabama’s mechanical interpretation of § 5 can raise serious constitutional concerns,” but did so without any further elaboration. Id. at 1273.

103. See, e.g., infra text accompanying notes 133-42 (discussing the redrawing of district lines in Texas in spite of contrary legal advice).

104. Some commissioners apparently sought to consider more pragmatic indicators of minority communities’ voting power, but it is unclear whether those commissioners ever received the data necessary to make relevant informed decisions. Levitt, supra note 25, at 1091.
in implementation and enforcement of the federal Voting Rights Act of 1965.” And yet, at least in meetings open to the public, the counsel selected consistently assessed minority populations’ electoral opportunities in purely demographic terms, against the prevailing interpretation of the Department of Justice.

C. Florida

Florida’s state constitution contains provisions, newly enacted in 2010, that mirror the substantive protections of the Voting Rights Act: “[D]istricts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice[,]” The Florida Supreme Court has construed these provisions to provide the same functional protections for electoral power—dependent not merely on demographics, but on real political circumstances on the ground—as their federal counterparts.

In practice, part of Florida’s process appeared to live up to this standard, and part did not. The Florida Supreme Court praised the state House for its attention to factors beyond demographics alone in designing districts to preserve minority political opportunities.

105. CAL. GOV’T CODE § 8253(a)(5) (West, Westlaw through Ch. 291 of 2015 Reg. Sess.).

106. See, e.g., Transcript at 21, Full Comm’n Line-Drawing Meeting (Cal. Citizens Redistricting Comm’n, June 1, 2011), http://wedrawthelines.ca.gov/downloads/transcripts/201106/transcripts_20110601_sacto_vol1.pdf (“If I understand the question correctly, it is -- better to restate it, it would be is there a percentage population that is lower than what is needed to have an ability to elect, so that effectively you don’t need to worry about a reduction in that percentage in a new district? So, first, I want to clarify that the term “ability to elect” is a term of art in Voting Rights Act cases, and it really references a 50 percent plus majority.”); id. at 26 (“So, the easy choice is always maintain the percentages of the benchmark district because then, essentially, your job has been done.”); Transcript at 12-14, Citizens Redistricting Comm’n (Cal. Citizens Redistricting Comm’n, May 27, 2011), http://wedrawthelines.ca.gov/downloads/transcripts/201105/transcripts_20110527_nridge.pdf (“Now, you need to know that the phrase ‘ability to elect’ is a term of art. And it essentially refers to the condition where you have a majority, so 50 plus percent that can elect. Because if you do, then at least theoretically you can elect candidates of your choice. . . . And then in particular, if there’s a situation where the C.V.A.P., the citizen voting age population, exceeds 50 percent or might exceed 50 percent, then I think we need to take extra care to make sure that whatever the new district is meets that same level, the -- of the ability to elect.”).

107. FLA. CONST. art. III, §§ 20(a), 21(a).

108. See In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 625-26 (Fla. 2012).

109. Id. at 645. At least, the Florida Supreme Court offered this praise in the context of the limited record before it; the court’s review was limited to a thirty-day period. Id. at 598. In particular, the court placed more emphasis on the sufficiency of the record to evaluate claims of retrogression—and of the state House’s attention to factors beyond demographics alone in the context of retrogression—than in the context of the state’s provision mirroring section 2 of the federal Voting Rights Act. See id. at 645.
Senate did not fare as well. The court specifically noted that the Senate appeared to rely on demographics and disclaimed any interest in further information, despite DOJ guidance to the contrary; it approached the drawing of state Senate districts ostensibly to ensure that new districts did not diminish the ability of minorities to elect representatives of their choice, “without reference to election results or voter-registration and political party data.” That is, the state Senate ostensibly drew districts to preserve minority political power with information about headcount, but without information about the real components of minority political power.\footnote{110}

The court rejected the state Senate’s efforts, finding that the legislature could have drawn several districts in a manner more consistent with other constitutional requirements, where so doing would have retained the same \textit{functional} minority political efficacy despite a different demographic composition.\footnote{112} Looking past the legislature’s essentialist shorthand, the court found opportunities for better legal compliance.\footnote{113}

\footnote{110. \textit{Id.} at 656.}

\footnote{111. It appears that the legislature also adopted the flawed demographic approach when drawing congressional districts. For example, the state’s submission seeking preclearance for its congressional districts asserted that the new districts produced no retrogression, but the state cited only demographic information for this conclusion. \textit{See Fl. Senate, Submission Under Section 5 of the Voting Rights Act 9-11 (2012), http://www.flsenate.gov/UserContent/Session/Redistricting/20120312Preclearance/Request%20for%20Preclearance/Submission%20Memorandum%20-%20Congress.pdf. Moreover, courts later determined that legislators made the decision to “push” the black voting-age population of at least one district over 50%, ostensibly to comply with the Voting Rights Act, even though no increase was necessary to afford black voters a reasonable opportunity to elect candidates of choice. League of Women Voters of Fla. v. Detzner, 172 So. 3d 363, 384-85, 403-05 (Fla. 2015); \textit{see also} League of Women Voters of Fla. v. Detzner, 179 So. 3d 258, 282-83, 285 (Fla. 2015) (noting the persistent absence of functional evaluation of minority political power in the legislature’s proposed remedial plan after initial congressional districts were invalidated).}

\footnote{112. \textit{In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d at 666-79.}}

\footnote{113. That said, the Florida Supreme Court appeared to use a shorthand of its own that may be equally impermissible. The court seemed to equate districts granting an African-American community the ability to elect its candidates of choice with districts that appeared to provide a reliable opportunity for Democratic candidates to win an election after a Democratic primary in which the majority of registered Democrats were black. \textit{See id. at 666-69; cf. League of Women Voters of Fla., 179 So. 3d at 272 (similarly analyzing the performance of congressional districts using demographics and party registration); League of Women Voters of Fla., 172 So. 3d at 404-05 (same). Political data in the affected regions of Florida may demonstrate that the African-American communities in question are politically cohesive and that such districts in fact provide the relevant African-American communities with the ability to elect their candidates of choice—but the federal Voting Rights Act does not permit the \textit{assumption} that they do, and it is likely that Florida’s constitutional provisions would similarly not permit such assumptions. After the court’s decision, Florida redrew its state Senate districts, which were later struck based on partisanship exceeding state constitutional limits; a separate action invalidated several of the state’s congressional districts for the same reason. \textit{See Stipulation and Consent Judgment at 1, League of Women Voters of Fla. v. Detzner,}}
D. North Carolina\textsuperscript{114}

North Carolina is certainly no stranger to undue racial stereotyping in the redistricting context: it gave rise to the \textit{Shaw v. Reno}\textsuperscript{115} line of cases establishing the constitutional cause of action for the unjustified predominant use of race in drawing district lines,\textsuperscript{116} and a decade of litigation that followed. The Supreme Court firmly instructed the legislators of North Carolina—and legislators elsewhere around the country—that the Equal Protection Clause did not permit districts built predominantly in order to achieve racial targets, if such districts were not actually necessary to achieve a sufficiently compelling state interest.\textsuperscript{117}

This cycle’s redistricting seems to indicate that North Carolina needs a reminder. Despite the \textit{Shaw} Court’s emphatic statement that the conditions for section 2 liability “never can be assumed,”\textsuperscript{118} the 2011 North Carolina legislature appears to have built majority-minority districts once again on demographics with embedded assumptions about how they translate to political alignment. Per a state court reviewing the legislature’s plan: “[T]he General Assembly acknowledges that it intended to create as many VRA districts as needed to achieve a ‘roughly proportionate’ number of Senate, House, and Congressional districts as compared to the Black population in North Carolina,” and that “it set about to draw each of these VRA districts so as to include at least 50% Total Black Voting Age Population.”\textsuperscript{119} Indeed, additional evidence indicated that the consultant


\textsuperscript{115}. 509 U.S. 630 (1993).

\textsuperscript{116}. \textit{Id.} at 642.

\textsuperscript{117}. \textit{Id.} at 653-57.

\textsuperscript{118}. \textit{Id.} at 653.

serving as the “chief architect” of the redistricting plans was told to “draw a 50% plus one district wherever in the state there is a sufficiently compact black population to do so.”

It is true that evidence at trial revealed that the legislature had considered electoral patterns to some degree in its conclusion that polarized voting persisted in North Carolina. But there was no evidence that the legislature attempted to discern whether hitting a 50% demographic target would be necessary (in any district, much less each of them) to provide an equitable opportunity for minority voters to elect candidates of choice. That is, there was no evidence that existing district structures were failing to allow minority voters an equal opportunity to elect candidates of choice, and that it was therefore necessary to move minority voters into districts to meet a 50% magic number. The legislature, with permission from the state Supreme Court, seemed to conflate the blunt demographic threshold required for private plaintiffs to lodge a claim under section 2 of the Voting Rights Act with the nuanced functional inquiry required by the Act for state action predicated on race. That is, the legislature set a target number of districts based on the state’s proportion of African-American population and determined that it would pack each of those target districts at least half-full of African-American adults, without ever determining for each district if local electoral patterns created the statutory responsibility to hit the predetermined racial target. Demographics, and demographics alone, apparently drove the placement of the lines.

E. South Carolina

The evidence of pervasive demographic determinism is less clear in South Carolina than in some of the other states evaluated in this Article, but there are nevertheless disturbing indications of an overly blunt approach to the Voting Rights Act. Before redistricting, Afri-

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120. Dickson, 766 S.E.2d at 263 (Beasley, J., concurring in part and dissenting in part) (internal quotation marks omitted); see also Crayton, supra note 73, at 992.
121. Dickson, 766 S.E.2d at 250-52 (majority opinion).
122. Id. at 253-54.
123. See supra text accompanying notes 80-87.
can-American Representative Mia McLeod\textsuperscript{125} represented a district in which about 35\% of the electorate was African American.\textsuperscript{126} In the course of the redistricting process, and without any pertinent request from her (or, presumably, from constituents of whom she was aware), she was apparently told that the chairman of the relevant legislative subcommittee was “working to get your BVAP (black voting age population) up in your District, but we’ve got to tweak it some more to get it just right.”\textsuperscript{127} She was apparently later told that “the lawyers” were advising legislators that increasing the BVAP of the district was required.\textsuperscript{128} The district was eventually drawn with a 52\% African-American voting age population, without any political or electoral analysis indicating that minority candidates of choice would regularly be defeated in a district that was less packed.\textsuperscript{129}

This lawyers’ advice was clarified in South Carolina’s legal filings, responding to an assertion of impermissible racial gerrymandering. The Speaker of the South Carolina House of Representatives claimed that it was “legally necessary for the General Assembly to create majority-minority districts” in areas “when the Gingles conditions were present”\textsuperscript{130}—that “anything less” than a “numerical majority of the protected racial group . . . will not satisfy the mandate of Gingles.”\textsuperscript{131} And the lawyers apparently believed that these conditions involved “whether a minority group can form a majority in a single-member district; whether the minority group is politically cohesive; and whether there is racial bloc voting.”\textsuperscript{132} That is, wherever there were large pockets of African-American voters, if there was any degree of racial polarization, the state sought to pack voters into districts that were at least 50\% minority—without any attention to whether the candidates of choice of the minority community already had an equal

\textsuperscript{125} Representative McLeod was then known by her married name: Mia Butler Garrick. \textit{See} Dawn Hinshaw, \textit{Richland Lawmaker Not Afraid to Stir the Pot}, \textit{STATE} (Dec. 16, 2012).

\textsuperscript{126} Affidavit of the Hon. Mia Butler Garrick at ¶ 2, \textit{Backus v. South Carolina}, No. 3:11-CV-03120 (D.S.C. Feb. 22, 2012), Doc. 147. I am not aware of a specific finding presented in the case that Rep. McLeod either has been or has not been the candidate of choice of her African-American electorate.

\textsuperscript{127} Id. ¶ 8.

\textsuperscript{128} Id. ¶ 9.

\textsuperscript{129} Id. ¶ 10. Additional testimony claimed that the legislative committee refused to draw any district that had a black voting-age population reduced from its benchmark, no matter whether the functional ability to elect remained constant. \textit{See} Ex. B, Rep. Bakari Sellers Trial Transcript at 26, 29-32, Motion for Relief from a Judgment and Order, \textit{Backus v. South Carolina}, No. 3:11-CV-03120 (D.S.C. Aug. 29, 2013), Doc. 223-3.


\textsuperscript{131} Id. at 7.

\textsuperscript{132} Id. at 9.
opportunity to win elections. Accordingly, demographic thresholds prevailed without any analysis of the political conditions indicating either dilution or its absence.

F. Texas

Texas drew districts in 2011 that are still the subject of litigation five years later, despite intervening 2012 plans governing elections going forward. The 2011 plans present vivid examples of demographic determinism. Despite contrary legal advice that map drawers had received from nonpartisan staff, the architects of the Texas plans apparently considered their legal responsibilities complete, for purposes of preclearance under the Voting Rights Act, if they merely maintained “demographic numbers of protected districts at their benchmark levels.”

In 2011, Texas went to court seeking an order of preclearance, contending that its district plans were neither retrogressive nor constructed with discriminatory intent. In the litigation, the State maintained the demographically deterministic position. Given a benchmark plan with a certain number of “districts in which Blacks make up forty percent of the voting-age population” or a certain number of districts in which “Hispanics make up fifty percent of the citizen voting-age population,” Texas claimed that a new plan maintaining the same number of districts with the same demographic criteria would necessarily be non-retrogressive, without any need to

133. See Perez v. Texas, No. 5:11-CV-00360 (W.D. Tex.).
134. In 2012, with preclearance tied up in litigation, a federal court in Texas issued interim maps governing the 2012 elections. Perez v. Texas, 970 F. Supp. 2d 593, 597 (W.D. Tex. 2013) (three-judge court). In 2013, the legislature then passed new plans largely following these interim lines drawn by the court. Id. at 598.

Yet the 2011 plans remain relevant. For example, if they were predicated upon discriminatory intent, in violation of the Fourteenth Amendment, a federal court may order Texas “bailed in” to a renewed preclearance requirement under the Voting Rights Act. 52 U.S.C. § 10302(c) (Supp. II 2014); see also Perez, 970 F. Supp. 2d at 601-03 (explaining the relevance of evidence with respect to the intent behind maps passed in 2011, for claims pending after new maps had been put in place).


136. See id. (quotation omitted); see also id. at 232. It appears that the Texas map drawers considered as “demographic factors” not merely race and ethnicity, citizenship, and age, but also registration status. Id. at 203-04, 207, 232 (noting the consideration of the proportion of registered voters with Hispanic surnames). The drawers did not apparently consider other political history—including turnout, levels of cohesion and polarization, the size of districts and access to funds, or other factors—to be relevant to any responsibilities under the Voting Rights Act.

know more about the affected population.\textsuperscript{138} That is, Texas claimed that the only necessary measurement of an effect on minority voters’ ability to elect candidates of choice is a basic headcount.

While Texas’s legal claim was that the Voting Rights Act requires only cursory maintenance of a demographic plateau, the actions of those in charge of the redistricting effort show that they were amply aware that factors other than demographics are integral to a minority community’s “ability . . . to elect their preferred candidates of choice.”\textsuperscript{139} The three-judge D.C. district court adjudicating the State’s preclearance submission found that

\begin{quote}
[\text{\ldots} \text{the mapdrawers consciously replaced many of the district’s active Hispanic voters with low-turnout Hispanic voters in an effort to strengthen the voting power of CD 23’s Anglo citizens. In other words, they sought to reduce Hispanic voters’ ability to elect without making it look like anything in CD 23 had changed. See, e.g.,Defs.’ Ex. 304 (email from Eric Opiela, counsel to Texas House Speaker Joe Straus, to mapdrawer Gerardo Interiano in November 2010 urging Interiano to find a metric to “help pull the district’s Total Hispanic Pop[ulation] and Hispanic CVAPs up to majority status, but leave the Spanish Surname [Registered Voter] and [turnout numbers] the lowest,” which would be “especially valuable in shoring up [CD 23 incumbent] Canseco,” [who was not the preferred candidate of the Hispanic voters in the area] \ldots \text{We also received an abundance of evidence that Texas, in fact, followed this course by using various techniques to maintain the semblance of Hispanic voting power in the district while decreasing its effectiveness. \ldots Texas’s protestations that the district has remained functionally identical are weakened first by the mapdrawers’ admissions that they tried to reduce the effectiveness of the Hispanic vote and then, more powerful by evidence that they did.}^\textsuperscript{140}\text{\ldots}]
\end{quote}


\textsuperscript{139} 52 U.S.C. § 10304(d) (Supp. II 2014).

\textsuperscript{140} Texas, 887 F. Supp. 2d at 155-56 (second, third, fourth, and fifth alteration in original).

This tactic recalls one of the most notorious maps of the 1981 redistricting cycle: the Georgia plan that mildly increased the African-American voting-age population of Georgia’s lone majority-minority congressional district, while ensuring that the district retained a substantial Anglo majority of registered voters so that it would be unlikely to perform as a meaningful opportunity district for the African-American electorate. See Busbee v. Smith, 549 F. Supp. 494, 498-99 (D.D.C. 1982). The purported architect of the plan, the chair of Georgia’s House redistricting committee, explained his decisions in part by proclaiming, “I don’t want to draw nigger districts.” Id. at 501.
The D.C. court rejected the Texas methodology, starkly critiquing the reliance on demographic data alone.\footnote{Texas, 831 F. Supp. 2d at 260 ("We find that a simple voting-age population analysis cannot accurately measure minorities' ability to elect and, therefore, that Texas misjudged which districts offer its minority citizens the ability to elect their preferred candidates in both its benchmark and proposed Plans."); id. at 262 ("[P]opulation demographics alone will not fully reveal whether minority citizens' ability to elect is or will be present in a voting district. Demographics alone cannot identify all districts where the effective exercise of the electoral franchise by minority citizens is present or may be diminished under a proposed plan within the meaning of Section 5.").} Indeed, the court emphasized that

[s]everal districts in the proposed plans show that population statistics alone rarely gauge the strength of minority voting power with accuracy. For example, . . . Congressional District 23 and House District 117 were selectively drawn to include areas with high minority populations but low voter turnout, while excluding high minority, high turnout areas. Such districts might pass a retrogression analysis under Texas's population demographics test . . . even though they were engineered to decrease minority voting power.\footnote{Texas v. United States, 133 S. Ct. 2885 (2013) (mem.); see also Memorandum and Order at 1, Texas v. United States, No. 1:11-CV-01303 (D.D.C. Dec. 3, 2013), Doc. 255, http://redistricting.lls.edu/files/TX/20131203%20preclear%20dismiss.pdf.}

After the Supreme Court invalidated the coverage formula driving the Voting Rights Act’s preclearance regime, the D.C. court’s preclearance findings above were formally vacated.\footnote{As described supra note 134, the legislature’s approach in 2011 remains a live issue in litigation ongoing at the time of this Article’s publication; the intent to discriminate on the basis of race by hiding behind a pretextual demographic “obligation” could serve as the predicate for a return to a preclearance regime.} Yet even if it is no longer legally binding, the court’s discussion remains a valuable explanation of the pragmatic impact of the divide between a nuanced examination of political performance and a blunt focus on demographics.\footnote{As described supra note 134, the legislature’s approach in 2011 remains a live issue in litigation ongoing at the time of this Article’s publication; the intent to discriminate on the basis of race by hiding behind a pretextual demographic “obligation” could serve as the predicate for a return to a preclearance regime.}

G. Virginia

Virginia seems to have adopted the same approach to preclearance seen in Alabama and several other states above: the state apparently viewed as definitional retrogression any decrease in the percentage of minority voters within a district that had, as a benchmark, the ability to elect candidates of choice—whether electoral realities on the ground actually contributed to a diminished ability to elect or not. Virginia designated the Third Congressional District as a district in which minorities had the ability to elect candidates of choice. And in legal filings defending District 3 against a claim of racial gerrymandering, the state claimed that it had “more than ‘a strong basis in
evidence’ to conclude that Section 5 prohibited any reduction in District 3’s BVAP, which could diminish minority voters’ ability to elect their ‘candidates of choice’ by making a safe black district less safe.”

Indeed, it appears that the legislature acted on this belief: the author of the plan allegedly stated that he drew the challenged Third District by looking at the census data as to the current percentage of voting age African American population in [CD 3] and what that percentage would be in the proposed lines to ensure that the new lines that were drawn for [CD 3] . . . would not have less percentage of voting age African American population under the proposed lines . . . that exist under the current lines under the current Congressional District.146

It is true that a reduction in the proportion of African-American voters within a district could at some point fail to provide a community with the reliable ability to elect a candidate of choice—but that depends entirely on a functional assessment of local political engagement. The Virginia General Assembly never conducted such an analysis;147 instead, it merely equated demographics with destiny. A federal court reviewing the General Assembly’s work recognized the error, critiquing the “legislature’s use of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns,”148 and later directly echoed the Supreme Court’s Alabama decision in finding that the legislature “rel[ied] heavily upon a mechanically numerical view as to what counts as forbidden retrogression.”149 The court then found unlawful the linedrawing process driven by adher-
ence to this artificial threshold. Unsupported assumptions about a racial community’s political allegiance or efficacy do not meet constitutional muster.

The examples above do not purport to comprise a complete list of those states engaging in an unduly blunderbuss approach to Voting Rights Act compliance. Absent litigation over the issue, it is difficult to assess a state’s performance, simply because legislatures’ true considerations in drawing redistricting maps are often less than transparent.

But by the same token, the list above is also relatively confined. Many states with specific responsibilities under the Voting Rights Act are undoubtedly doing the hard work necessary under the correct approach, and some courts are admirably correcting the states that

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150. Id. at *19.

151. For example, in Arizona, a consultant advising the state’s commission on Voting Rights Act responsibilities correctly advised the commission “that determining whether a minority population had the ability to elect was a complex analysis that turned on more than just the percentage of minorities in a district.” See Harris v. Ariz. Indep. Redistricting Comm’n, 993 F. Supp. 2d 1042, 1056 (D. Ariz. 2014), probable jurisdiction noted, 135 S. Ct. 2926 (2015) (mem.). The commission accordingly considered the past electoral performance of the communities in question. See id. at 1056-57. And although there was some dispute over the accuracy of the political efficacy analysis in Louisiana, it at least appears that the legislature considered minority electoral power beyond mere demographics. That is, the legislature appears to have attempted to consider whether majority-minority districts actually offered an effective ability to elect candidates of choice, rather than merely assuming the answer. See, e.g., STATEMENT OF ANTICIPATED MINORITY IMPACT 3-4, 9-19 (2011), Louisiana Preclearance Submission for H.B. 1, att. 6, ftp://legisftp.legis.state.la.us/06%20Statement%20of%20Minority%20Impact/Minority%20Impact.pdf (noting that the legislature extensively examined electoral data).

It is important to emphasize that just as considering the wrong factors does not itself guarantee failure to abide by the substantive requirements of the Voting Rights Act, see infra text accompanying notes 153-54, considering the right factors (but in the wrong way) does not guarantee success.
get it wrong.\textsuperscript{152} The unjustifiably blunt approach to compliance with the Voting Rights Act is by no means universal. But the examples above show that it is sufficiently prevalent to be worrisome.

One final caveat is worth mentioning. The claim that the states above incorrectly went about the process of complying with the Voting Rights Act is not itself an assessment that they did not actually comply. It is entirely possible for a jurisdiction to get the analysis wrong but the answer—at least the statutory answer—right.\textsuperscript{153} A state may have misgauged the appropriate way to comply with section 5 and yet still have drawn lines that happened to avoid retrogression; a state may have incorrectly attempted to comply with section 2 and yet still have drawn lines that provide an equal opportunity for minority voters to elect candidates of choice. \textsuperscript{154} Those ques-


In two other states, courts seem to bear the primary blame for demographic shortcuts of a different, albeit related, nature. In Arkansas, the politician commission charged with drawing state legislative lines seemed to acknowledge—at least in a legal defense of the lines that it had already drawn—that local political realities and not merely demographics would be important in fulfilling its obligations under section 2 of the Voting Rights Act. See, e.g., Governor Beebe, Atty. Gen. Dustin McDaniel & the Ark. Bd. of Apportionment’s Trial Brief at 35-48, Jeffers v. Beebe, No. 2:12-CV-00016 (E.D. Ark. May 2, 2012), Doc. 75. The court reviewing that commission’s plan, however, focused on demographics, finding that any district drawn with a majority of minority voting-age citizens necessarily complied with a section 2 obligation. Jeffers v. Beebe, 895 F. Supp. 2d 920, 932 (E.D. Ark. 2012). That is, under the court’s logic, in areas with section 2 obligations, a jurisdiction need only draw a district with a minority citizen voting-age population of 50.1% or more to immunize itself from challenge. Presumably, the court’s fixation on demographics alone would refuse to find section 2 liability even for a majority-minority district intentionally drawn in light of local political realities to prevent the minority community from achieving an equal opportunity to elect candidates of choice, and actually having that effect (as in the allegations in Texas, see supra text accompanying notes 139-42).

In New Mexico, after the governor vetoed a legislative redistricting plan, the courts were tasked with drawing district lines. With elections impending, proceedings were “extremely expedited,” particularly after the trial court’s initial lines were appealed and returned on remand. Maestas v. Hall, 274 P.3d 66, 70 (N.M. 2012). One issue on appeal concerned a Hispanic population in the eastern portion of the state; the New Mexico Supreme Court considered presumptive proof of dilution established and directed the trial court to determine, on remand, “whether the relevant population is an effective Hispanic citizen voting-age population.” Id. at 74. However, on remand, the trial court “interpre[ted] the remand from the Supreme Court to require that District 63 remain as close as possible to its present configuration and that, at a minimum, the percentage of the Hispanic voting age population not be decreased.” Decision on Remand at 16, Egolf v. Duran, No. D-101-CV-2011-02942 (N.M. Dist. Ct. Feb. 27, 2012), http://redistricting.lls.edu/files/NM%20egolf%202011%20227%20remand.pdf. Only a focus on demographics alone would cause the court to equate the two distinct standards.

\textsuperscript{153} It is also possible, of course, that—as the Supreme Court noted in reviewing Alabama’s redistricting plan—“[a]sking the wrong question may well have led to the wrong answer.” Ala. Legislative Black Caucus, 135 S. Ct. at 1274.

\textsuperscript{154} For example, the Department of Justice precleared every statewide plan submitted through the administrative preclearance mechanism in this redistricting cycle.
tions are entirely different from the main argument of this Article, which is that the improper use of blunt demographics alone—whether it happens to yield a result that complies with the statutory responsibility or not—involves a misguided process fueled by a misunderstanding of the Voting Rights Act with decidedly serious constitutional implications.

IV. RATIONALES AND CONSEQUENCES

There are several potential explanations for the apparent prevalence of demographic determinism in the states above. The first is simple mistake: a real misunderstanding about what the Voting Rights Act requires. The cartoon version of the Act, demanding nothing more than matching raw demographic percentages to a readily available target, is relatively easy to grasp, and relatively easy (if incorrect) for counsel or fellow legislators to communicate. Formal or informal networks of officials tasked with redistricting may have passed along the overly simplified conception of the Act, as any law is inevitably distilled to a rough approximation by those who are not subject-matter experts. To the extent that past districts were drawn using the shorthand but not challenged on those specific grounds in the courts, the districts’ survival may have bolstered a

See Status of Statewide Redistricting Plans, U.S. DEPT OF JUSTICE, http://www.justice.gov/crt/about/vot/sec_5/statewides.php (last updated Aug. 6, 2015). The mere fact that the DOJ granted preclearance, however, does not itself indicate that the states’ approach to complying with section 5 was legally permissible—only that the result was deemed by DOJ to have hit the mark.

155. These potential explanations are not mutually exclusive; within and across states, there may well have been multiple mechanisms at work simultaneously.


In the context of Voting Rights Act compliance, this supposition provides an explanation, not an excuse. It is reasonable to expect the public to have an overly broad, overly blunt understanding of regulation. But it is also reasonable to expect the directly regulated community to be a bit more steeped in the nuances of actual regulatory requirements. That latter expectation seems even more reasonable when the directly regulated community is, as with the Voting Rights Act, largely a community of legislators professionally tasked with ostensibly understanding and issuing complex regulation. And it is even more reasonable still to expect legislators with profound expertise in elections and profound self-interest in the election process to pay more attention to the nuances of a statute that concerns electoral structures.
belief in the validity of the practice. And conceiving of racial or ethnic groups of voters as fungible tokens without engaging intra-group political variation may be a comparatively natural mode of analysis for officials used to thinking about race or ethnicity in essentialist ways.

Indeed, this explanation for the misreading demonstrates a quality of law generally: at heart, law is a system of social ordering, and it therefore is what societies decide that it is. Despite the Voting Rights Act’s constitutional foundation, statutory text, and legislative history—all of which demonstrate the need for nuance—and despite the relative consistency of administrative and judicial interpretation reaffirming that nuance, state legislators or their retained consultants in some of the states with the most troubling racial histories seem to have believed in a cartoon version of the Act, and it is not improbable that many were (and are) sincere in believing that their approach was lawful. Through informal communication networks, these officials could have readily propagated the misunderstanding to like-minded others, even “confirming” the incorrect analysis as others agreed. They might thus have formed their own form of “common law” interpretation of the Act, albeit one repeatedly rejected by the judicial branch. For substantial portions of the regulated community, the statute may have actually become nothing more than the shorthand.

It is not clear how durable this cartoon is. The Supreme Court has now decisively held that the Voting Rights Act rejects demographic determinism, with respect to one particular state and with respect to one particular retrogression provision now rendered impotent by Shelby County. But the Court’s decision in the Alabama Legislative Black Caucus case was squarely in line with the text, regulatory guidance, and ample judicial precedent that the state bodies above

157. Cf. Andrew Karch, Emerging Issues and Future Directions in State Policy Diffusion Research, 7 ST. POL. & POLY Q. 54, 60 (2007) (noting that public officials may be more likely to adopt an approach or policy perceived to have been successful elsewhere).

158. See, e.g., Daniel M. Butler et al., Ideology, Learning, and Policy Diffusion: Experimental Evidence, 60 AM. J. POL. SCI. (forthcoming 2016), http://onlinelibrary.wiley.com/doi/10.1111/ajps.12213/full (reviewing the evidence that policy understandings—or misunderstandings—may spread more readily among those who are ideologically aligned or co-partisans).

159. Cf. Elmendorf, supra note 1 (positing that the VRA is a common law statute that should be interpreted and developed jointly by Congress and the courts).

160. See Edelman & Suchman, supra note 156, at 502 (describing the interactive process of social construction that drives the practical meaning of law in action, eventually producing a “working agreement on what the law ‘is’ and what it ‘requires,’ ” which “may gradually become reified and institutionalized in formal structures and rational myths”).

161. See Ala. Legislative Black Caucus, 135 S. Ct. at 1272-74.
ignored on their way to a shorthand. Beyond Alabama and beyond section 5, the ability of the Court’s decision to correct the popular but mistaken misreading remains to be seen.

A second explanation for the prevalence of the cartoon is administrability. Building districts upon raw demographic percentages is not only easy to grasp, but comparatively easy to administer. Map drawers who understand the nuanced electoral assessment required by the Voting Rights Act may nevertheless be tempted to apply the demographic shortcut based on limited time, budget, or attention—or some combination of the three.162 Even when these pressures do not amount to lawful justification to substitute a shorthand for a statute, the pressures are nevertheless both very real and very powerful. Similarly, because cases alleging the unconstitutional use of race are difficult to prove and difficult to win,163 line drawers may believe that they are generating less litigation risk by overcorrecting, using race in an unjustifiably coarse manner to create at least the facial impression that there is no substantial Voting Rights Act liability.164 In reality, reliance on a target percentage alone remains unlawful,165 but perhaps line-drawers believe that the ham-handed approach will better prevent them from landing in court166 or that it can more easily be defended once there.

A third, and related, potential explanation may be a more strategic form of “misunderstanding.” As shown above, compliance with the

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162. Cf. Coglianese et al., supra note 89, at 712 (noting that performance standards may entail larger costs and greater uncertainty); supra text accompanying note 89 (identifying the Voting Rights Act as a performance standard rather than a design standard).


164. Cf. Edelman, supra note 156, at 1542 (positing that “[l]aws that are ambiguous, procedural in emphasis, and difficult to enforce invite symbolic responses—responses designed to create a visible commitment to law” but which may or may not mitigate the substantive wrongs the laws target).

165. Cf. Johnson v. De Grandy, 512 U.S. 997, 1019-20 (1994) (“Finally, we reject the safe harbor rule [necessarily insulating states with rough proportional control from liability under section 2 of the Voting Rights Act] because of a tendency the State would itself certainly condemn, a tendency to promote and perpetuate efforts to devise majority-minority districts even in circumstances where they may not be necessary to achieve equal political and electoral opportunity.”).

166. Thus far in the 2011 cycle, plaintiffs have filed at least 218 distinct lawsuits affecting state legislative or federal redistricting. Litigation in the 2010 Cycle, ALL ABOUT REDISTRICTING, http://redistricting.lls.edu/cases.php (last visited Apr. 1, 2016). Only eight states have (thus far) escaped litigation over their statewide districts. See id. It is likely that those states escaped litigation not because their redistricting process and resulting districts conformed to a Platonic ideal, but rather because no set of litigants with the resources to engage the courts was sufficiently outraged by the redistricting to sue. That is, while the right process may well prevent the invalidation of a district map, it is not clear that any approach to the redistricting process can reliably prevent the filing of a suit.
real statute entails extra effort; as shown below, some may find alternatives to the real statute appealing for reasons beyond resource constraint. It is possible—unlikely, but possible—that those adopting the shorthand in the course of drawing district lines did so with the hope that their misreading of the Voting Rights Act would be ratified by the courts, and thereby become law.\textsuperscript{167} Thus far, only a few courts seem to have taken the bait.\textsuperscript{168}

A fourth potential explanation is pretext for partisan or other self-regarding political gain.\textsuperscript{169} Incumbents may seek to further personal or partisan political objectives by hiding behind the public cover of the cartoon of the Voting Rights Act: claiming, in essence, that “we built these districts in this way not because we want to, but because we have to.” In some cases, an unnecessary raw demographic target may serve as the excuse to overpack a district with cohesive minority voters, well beyond the level needed to actually comply with the Act’s mandates; such a district may contribute to the “safety” of the existing representative while bleaching the perceived threat of minority voting power in neighboring areas. This was, for example, one of the concerns expressed by a state judge evaluating Florida’s most recent redistricting.\textsuperscript{170} In other cases, an unnecessary raw demographic target may serve as the excuse to draw a district that appears to be under a minority community’s control, but is actually designed to perform for an opponent. A federal court believed this sort of strategy to be the impetus for at least some districts in the 2011 Texas map—including, notably, the same District 23 struck down by the Supreme Court in 2006 \textit{for the very same reason}.\textsuperscript{171}

A final potential explanation also involves pretext for partisan political gain, but of a different and darker nature. In South Carolina, a

\textsuperscript{167} I am grateful to Joseph Doherty for the insight.


\textsuperscript{169} See, e.g., Crayton, \textit{supra} note 73, at 1008.

\textsuperscript{170} In re Senate Joint Resolution of Legislative Apportionment 1176, 83 So. 3d 597, 693 (Fla. 2012) (Perry, J., concurring) (“It concerns me that under the guise of minority protection, there is—at the very least—an appearance that the redistricting process sought to silence the very representatives of the people the Legislature indicates it is trying to protect. For example, during floor debate one such representative, Senator Arthenia Joyner, rose in opposition to the redistricting plan, stating: ‘I believe that [the reapportionment plan] was prepared in violation of Florida’s Redistricting standards. Specifically I believe the Legislature is poised to use the pretext of minority protection to advance an agenda that seeks to preserve incumbency and pack minority seats in order to benefit a particular party.’”) (alteration in original) (footnote omitted).

\textsuperscript{171} Compare Texas v. United States, 887 F. Supp. 2d 133, 155 (D.D.C. 2012), \textit{vocated on other grounds by} 133 S. Ct. 2885 (2013) (mem.), \textit{with} League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 424-25 (2006); see also \textit{id. at} 440-41 (noting the “use of race to create the facade of a Latino district” that was actually designed “to protect [incumbent] Congressman Bonilla from a constituency that was increasingly voting against him”).
state representative related the following anecdote in a sworn affidavit submitted in federal court:

As the conversation turned to redistricting, Rep. Viers told me that race was a very important part of the Republican redistricting strategy. . . . Rep. Viers said that Republicans were going to get rid of white Democrats by eliminating districts where white and black voters vote together to elect a Democrat. He said the long-term goal was a future where a voter who sees a “D” by a candidate’s name knows that the candidate is an African-American candidate. . . . Then he chuckled and said, “Well now, South Carolina will soon be black and white. Isn’t that brilliant?”

It is not necessary to subscribe to this latter view of the rationale for drawing districts based on demographics alone in order to find the practice disturbing. All of the explanations above fail to justify a practice that is intentionally discriminatory if pretextual, and unduly dependent on essentialist assumptions if not. As most courts have thus far recognized, the Voting Rights Act does not require, and the Constitution does not permit, shortcuts based solely on blunt minority population targets. Congress has demanded, and is constitutionally entitled to demand, more.

Indeed, by failing to account for real local electoral behaviors, the legislators operating on demographic assumptions are subscribing to a retrograde conception of race relations that undermines a good deal of what the Voting Rights Act was designed to accomplish. It betrays the very heart of the Act, which acknowledges that race and ethnicity are complex and nuanced concepts without fixed political consequences. Those drawing district lines based on demographic targets alone are conforming only to a dangerously essentialist cartoon. Courts—and consultants to the redistricting process who are worth their fees—should not hesitate to remind line-drawers that they should be paying more attention to the actual statute on the books.

RESIDENCY AND DEMOCRACY: DURATIONAL RESIDENCY REQUIREMENTS FROM THE FRAMERS TO THE PRESENT

EUGENE D. MAZO

ABSTRACT

After years of struggle, we no longer require property ownership, employ poll taxes, or force citizens to take literacy tests to vote. The franchise is now also open to women, African Americans, and other groups that were previously disenfranchised. However, our states still prevent citizens from voting if they fail to meet a durational residency requirement. The states also impose lengthy durational residency requirements on candidates seeking public office. This Article examines the history of America’s durational residency requirements. It looks at the debates of the framers at the Constitutional Convention, at how state durational residency requirements were broadened in response to migration in the 1800s, and at how durational residency requirements were narrowed by the federal government and the Supreme Court in the 1970s. The result left a system in which durational residency requirements impact voters and candidates differently, and in which these requirements differ at the state and federal levels. In most states, durational residency requirements for voters have been substantially curtailed, while they remain on the books for candidates. To show how this impacts politics, this Article examines several high-profile durational residency contests. It also probes whether these requirements may ever be justified in American democracy.

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* Visiting Professor, Rutgers Law School, Newark, New Jersey. M.A. Harvard; Ph.D. Oxford; J.D., Stanford. For comments, I am grateful to the participants of a conference that was hosted at the Florida State University College of Law—“The Law of Democracy at a Crossroads: Reflecting on Fifty Years of Voting Rights and the Judicial Regulation of the Political Thicket”—and especially to Professor Franita Tolson for inviting me to speak at this event on March 27-28, 2015. I also wish to thank Richard Briffault, Paul Diller, James Gardner, Richard Hasen, Michael Pitts, Andrew Verstein, and Ronald Wright for their very helpful comments and suggestions on earlier drafts. I am indebted to Maria Collins and Sam Keenan for research assistance, to Timothy Readling and Caroline Young for help with the tables and charts, and to law librarian Liz McCurry Johnson for facilitating my numerous research requests. All remaining errors are my own.
I. INTRODUCTION

In American democracy today, most historic restrictions on voting have been removed. The states no longer require their citizens to own property, pay a poll tax, or take a literary test before they can vote. The franchise has also been broadened to include women, African Americans, and other groups that were previously disenfranchised. Our country’s democratic self-image has long been firmly rooted in the belief that the United States has continually expanded suffrage for all of its citizens who desire the right to vote. As the Congressional Quarterly’s Guide to U.S. Elections explained thirty years ago, with only a touch of hyperbole, “[B]y the 200th anniversary of the nation the only remaining restrictions [on the franchise] prevented voting by the insane, convicted felons and otherwise eligible voters who were unable to meet short residence requirements.”

It is well known among scholars that many states disenfranchise the mentally unfit, those convicted of felonies, and a third group that often goes unmentioned, non-citizen aliens. The reasons these groups lack voting rights are rooted in American history. But who constitutes the group of “eligible voters” who are unable to vote because they fail to meet “short residence requirements”? It turns out that almost every state requires its new citizens to meet a short residence requirement before they can vote. Known as a durational residency requirement, the states also impose these qualifications on those who seek office. This is a phenomenon, however, that has not been adequately studied, and it remains widely under-theorized.

Geographical residency is part of democracy. Politicians are elected from geographical districts, and they represent the people of those districts in office. A United States Senator is elected to represent the people of his state. A Congressman represents the people of a particular district in that state. In turn, a citizen from a geographically bounded state votes for a Senator who will represent him, just as a resident of a geographically bounded district votes for that district’s Congressman. No one would seriously advocate for the residents of a different state or district to vote for these government officials. What is less appreciated is that a new resident of the state who wishes to vote for his preferred candidate may often not be able to do so until he first meets a durational residency requirement. This means that a citizen not only has to reside in a certain geographical district to vote for its representatives, but that he must also demonstrate his legal residence there for a certain, set period of time.

1. CONGRESSIONAL QUARTERLY, GUIDE TO U.S. ELECTIONS 324 (2d ed. 1985); see also ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES, at xx (rev. ed. 2009) (quoting the Congressional Quarterly and positing that its statement was made with hyperbole).
Durational residency requirements exist for candidates as well. After all, democracy involves not only the right to cast a free vote, but also the right to run freely for elected office. Just as voters have to satisfy certain durational residency requirements before they can cast a ballot in a given state or district, so too do politicians have to meet durational residency requirements in most states and municipalities before they can run for office. The durational residency hurdles that political candidates face, however, often look very different from those that voters encounter. The durational residency requirements for politicians are typically much longer in length, and they have not been subject to the same kinds of constitutional challenges as those for voters, other than in rare circumstances.

As a society, we take durational residency requirements for granted. Only a few scholars have ever examined durational residency requirements in any serious or systematic way. Even then, most scholars have argued against them. Preventing citizens from voting because they live in the right district but have not lived there long enough is seen as being anti-democratic, while preventing candidates who do not meet a durational residency qualification from running for office is viewed as little more than an attempt to prevent carpet-bagging. This, at least, is what the literature on durational residency requirements argues. Yet states and municipalities have not always viewed things this way. Instead, they have advanced many reasons for preserving durational residency requirements. When one scratches the surface, durational residency requirements turn out to be more complicated than they appear. They also have a long history in American jurisprudence, one that dates all the way back to the colonies.

2. For some offices, these durational residency requirements can be quite lengthy. This is particularly true for state governors. For example, Missouri and Oklahoma’s state constitutions require ten years of residency for a governor. See MO. CONST. art. IV, § 3 (Missouri); OKLA. CONST. art. VI, § 3 (Oklahoma). Other states require seven years of residency. See MASS. CONST. pt. II, ch. 2, § 1, art. II (Massachusetts); N.H. CONST. pt. II, art. XLII (New Hampshire); N.J. CONST. art. V, § 1, para. 2 (New Jersey); PA. CONST. art. IV, § 5 (Pennsylvania); TENN. CONST. art. III, § 3 (Tennessee). Three states require six years. See DEL. CONST. art. III, § 6 (Delaware); GA. CONST. art. V, § 1, para. IV (Georgia); KY. CONST. § 72 (Kentucky); see also discussion infra Section III.A.

3. See, e.g., Michael J. Pitts, Against Residency Requirements, 2015 U. CHI. LEGAL F. 341, 341 (2015) (stating that “residency requirements are one aspect of election law that does not serve the electorate and should be eliminated as a condition for obtaining and holding elected office”); Frederic S. LeClercq, Durational Residency Requirements for Public Office, 27 S.C. L. REV. 847, 914 (1976) (“Durational residency requirements for public office significantly dilute fundamental rights which deserve, and have received, judicial protection: the right to vote, the right of political association and the right to travel. Such requirements can and should be invalidated whenever they interfere with the exercise of these fundamental constitutional rights.”).

4. See, e.g., Pitts, supra note 3, at 353 (explaining how a “possible benefit of residency requirements . . . is to prevent carpet bagging”).
This Article seeks to examine America’s durational residency requirements in historical and comparative terms. In doing so, it aims to make the case that these requirements are not anti-democratic and that, in some circumstances, they are both necessary and essential for democracy. The few scholars who have examined durational residency requirements in the past have tried to argue against them, but without appreciating their place in our history. This Article seeks to blend history and modern law in a way that no one has. It argues that durational residency requirements have their place in democratic politics. Its purpose is to explain the origins of our durational residency requirements, to chronicle their history, and to probe the contours of when they may be justified in American democracy.

There are various kinds of durational residency requirements. They differ from one another in terms of their length, how they are imposed, and whom they affect. There are also different policies behind them. Perhaps the greatest distinctions among durational residency requirements concern whom they affect: voters or candidates. At one time, the durational residency requirements for voters were extensive, yet they have in recent years been severely curtailed. Meanwhile, the residency qualifications for political candidates, at least in the individual states, often remain lengthy to this day.

This Article proceeds as follows. Part II examines the history of our durational residency requirements, going all the way back to the colonies and the Constitutional Convention. Part III focuses on durational residency requirements for voters. It explains how these qualifications blossomed in the states in the 1800s before being severely narrowed by Congress and by the Supreme Court in the 1970s. Part IV turns to an examination of durational residency requirements for candidates. It highlights the mismatch that exists between the state level, where durational residency requirements persist, and the federal level, where durational residency requirements do not exist. It also examines several high-profile residency challenges, including those faced by Rahm Emanuel when he ran for mayor of Chicago, by Zephyr Teachout when she challenged Andrew Cuomo in the Democratic primary for governor of New York, and by Hillary Clinton when she ran for the Senate from New York. Part V examines the democratic justifications for durational residency requirements.

II. A HISTORY OF DURATIONAL RESIDENCY REQUIREMENTS

A. In the Colonies

The requirement that a person has to live in a state for a certain period of time before he can participate in the democratic process is so ingrained in the American psyche that most of us fail to question it. Durational residency requirements have a long history that can be
traced back to before the time of the country’s founding. Indeed, these requirements were enshrined in many of our founding documents, including in many state constitutions. They were also hotly debated by the framers at the Constitutional Convention.

For more than a decade before the framers of the Constitution met in Philadelphia, the colonies had crafted their own unique voting rules. These laws were largely shaped by the knowledge that the colonists had of how representation worked in England. The English system of democracy was initially designed to represent land. As Professor James Gardner explains, in feudal England landholders held estates under the condition that they would provide financial assistance to the crown. Only those who owned land could be summoned to Parliament for the purpose of giving their consent to being taxed by the King. As the rise of commerce expanded, the English monarchs decided that it would be in their interest to invite representatives of various town and boroughs, where merchant wealth was located, to join them in Parliament. However, the system under which Parliament represented a taxed unit of land persisted.

The English model was eventually adopted in the American colonies, where new colonial legislatures also initially allocated their seats to territorial units. In Massachusetts, the representatives who held seats in the colonial legislature represented towns; in Virginia, they represented plantations; and in South Carolina, they represented parishes. By the time of the American Revolution, the Founding Fathers were familiar with this territorial system of representation and fully accepted it. This is why only property owners, most of whom happened to be white and male, had the right to vote. Property owners were thought to have a “stake in society.” Like their English forbearers, they were considered to be committed members of the community with a vested interest in public policy, especially regarding matters of taxation. Those who owned land were thought to have sufficient independence to make their own sound judgment on matters of governance. The idea that some men were in “so mean a situation” that they “had no will of their own,” a phrase attributed to Blackstone, was heard often during the Founding Era and applied to

5. See KEYSSAR, supra note 1, at 4.
7. Id. at 67.
8. Id.
9. Id. at 68.
10. KEYSSAR, supra note 1, at 4.
11. Id. at 4-5.
12. Id. at 5.
those who did not own land. The colonists believed that the franchise should not extend to such persons. The fact that only landowners could vote was a natural consequence of this view.

During the Founding Era, suffrage was treated as a state constitutional issue. In all of the states, apart from one, the rules of voting were found in state constitutions, and not, as they would be hundreds of years later, in statutes or municipal codes. Early state constitutions were replete with durational residency requirements, not only for voting but also for seeking public office. In many of the colonies, political candidates for office had to prove that they resided in the colony for a certain number of years before they could seek election. Since the colonies were independent from one another, each sought to restrict its political community to those who held a true interest in the colony’s affairs. A clause addressing each state’s durational residency requirements was a common feature in state constitutions of the era, and it helped accomplish this goal. State durational residency requirements would later become more controversial, but early on, they were deeply rooted in the American colonial experience.

B. At the Constitutional Convention

The records and debates of the Constitutional Convention provide us with some insight into what our Founding Fathers thought of durational residency requirements. During the debates that took place in Philadelphia in 1787, three distinct justifications were advanced for why these requirements were needed. The first was to assure that candidates were knowledgeable about local matters. The second was to prevent wealthy foreign nations from sending over emissaries to the United States and having them purchase their way to public office. The third was to discourage wealthy men from neighboring states from seeking public office elsewhere after they had failed to secure election in their own state. This last practice was

13. Id. at 9.
15. See id. at 613.
16. See, e.g., A. McKinley, The Suffrage Franchise in the Thirteen English Colonies in America 135-36 (1905) (explaining that South Carolina imposed a durational residency requirement on suffrage as early as 1693).
18. Id. at 216 (George Mason of Virginia); id. at 217 (John Rutledge of South Carolina).
19. Id. at 216 (George Mason of Virginia) (“It might also happen that a rich foreign Nation, for example Great Britain, might send over her tools who might bribe their way into the Legislature for insidious purposes.”).
20. Id. at 218 (George Mason of Virginia).
known to be “the practice in the boroughs of England,” and it was part of what led to that country’s “rotten borough” system. England’s boroughs were infamous for sending representatives to Parliament from districts that had few remaining residents. These “rotten boroughs” also sometimes elected wealthy non-residents to office who secured a seat in Parliament from neighboring or even isolated districts. The Founding Fathers abhorred this practice, which they believed turned democratic representation into an illusion.

The Founding Fathers understood that durational residency requirements applied separately to candidates and voters. But their debates concerned only how these rules applied to candidates. A complicated patchwork of state suffrage rules had proliferated in the individual states by the time the framers met in Philadelphia in 1787. This patchwork, as Virginia’s delegate James Wilson explained, made it “difficult to form any uniform rule of qualifications [for voting] for all the states.” For the men who came together to write the new Constitution, voting was thought to be a state issue. Though not all of the framers held this view, many did. These men believed that questions regarding who got to vote should be left to the states, rather than dictated by the federal government.

In Philadelphia, some delegates wanted the rules for voting to be regulated by the Constitution. Other delegates insisted that this was a matter best left to the states. A compromise had to be reached between the conflicting views. In the end, the new Constitution forged a link between the suffrage rules of the states and the right to vote in federal elections by allowing only those people in each state who had met the qualifications to vote for the “most numerous Branch of the[ir] state legislature” to vote for the members of the new House of

21. Id.
22. See LeClercq, supra note 3, at 852 n.23; see also generally John Cannon, Parliamentary Reform, 1640-1832 (1972); Edward Porritt, The Unreformed House of Commons: Parliamentary Representation Before 1832 (1903).
23. See LeClercq, supra note 3, at 852 n.23 (quoting G. Campion, Parliament, 17. ENCY. BRITANNICA 316 (1958)).
24. See Keyssar, supra note 1, at 18; see also Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 82, 224-25 (1997).
25. See, e.g., 2 Records of the Federal Convention, supra note 17, at 249 (John Rutledge of South Carolina) (“observing, that the Committee [on Detail] had reported no qualifications [should be included in the Constitution for membership in Congress] because they could not agree on any among themselves”); id. (Oliver Elsworth of Connecticut) (“The different circumstances of different parts of the U.S. and the probable difference between the present and future circumstances of the whole, render it improper to have either uniform or fixed qualifications. Make them so high as to be useful in the S. States, and they will be inapplicable to the E. States. Suit them to the latter, and they will serve no purpose in the former . . . [I]t was better to leave this matter to the Legislative discretion than to attempt a provision for it in the Constitution.”).
Representatives. The U.S. House would become the only institution for which the Constitution demanded a popular electoral process of any kind. Again, this was because of the need to placate the delegates who saw voting as a state issue. Whether a durational residency requirement applied to a person voting for the member of the U.S. House would ultimately be determined by the law of his state.

However, the question of whether a political candidate seeking to become a member of the U.S. House should have to meet a durational residency requirement in the state from which he was being elected remained contested, and was hotly debated. This debate centered around how the country’s new Constitution would guarantee mobility while protecting local interests. Questions concerning how durational residency requirements applied to political candidates were often intertwined in the minds of the framers with questions concerning a candidate’s citizenship. On Wednesday, August 8, 1787, at the Constitutional Convention, George Mason of Virginia explained that he “was for opening a wide door for emigrants; but did not chuse [sic] to let foreigners and adventurers make laws for us & govern us.” For this reason, the delegates suggested that a three-year citizenship requirement should be imposed on members of the new House of Representatives. George Mason, however, proposed that a member of the House of Representatives should have to be a citizen for seven years before his election, not three years.

The seven-year citizenship requirement passed without objection, with every state but one agreeing to it. But when the next part of the clause governing the requirements of electing the members of the House of Representatives was debated—it originally stated that every member “shall be, at the time of his election, a resident of the State in which he shall be chosen”—consensus quickly broke down.

26. U.S. CONST. art. I, § 2, cl. 1 ("The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each state shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."); see also KEYSSAR, supra note 1, at 18.
27. See KEYSSAR, supra note 1, at 18.
28. See id.
29. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 17, at 213-19.
30. Id. at 216 (George Mason of Virginia).
31. Id.
32. Connecticut was the one exception. See id.
33. Id. at 216 n.3 (emphasis added). Originally the draft read:

Article IV, Sect. 2. “Every member of the House of Representatives shall be of the age of twenty five years at least; shall have been a citizen of the United States for at least three years before his election; and shall be, at the time of his election, a resident of the State to which he shall be chosen.”

See id. The three-year citizenship requirement was changed to “seven.” Id. at 216. The word resident was changed to “inhabitant” after a somewhat lengthier debate. Id. at 216-18.
Roger Sherman of Connecticut argued that the word “resident” should be substituted by the word “inhabitant.” Madison found both terms vague, but he believed that at least the latter “would not exclude persons absent occasionally for a considerable time on public or private business” from holding office. Gouverneur Morris was opposed to both terms. Imposing “[s]uch a regulation is not necessary,” Morris argued, because “[p]eople rarely chuse [sic] a nonresident.” “Resident” had a certain meaning to the framers based on their understanding of residency requirements in the states. That meaning was tied to the legal period of time a person had to live in a state.

Some delegates continued to argue that a durational residency requirement for candidates should appear in the Constitution. John Rutledge of South Carolina, for instance, urged his fellow delegates to include a provision stating “that a residence of 7 years [should] be required in the State Wherein the Member [should] be elected.” This ensured knowledgeable candidates for public office. “An emigrant from [New] England to [South Carolina] or Georgia would know little of its affairs,” Rutledge told the others, “and could not be supposed to acquire a thorough knowledge in less time.” George Mason agreed with him. “I am in favor of Residency—if you do not require it—a rich man may send down to the Districts of a state in [which] he does not reside and purchase an Election for his [Dependent],” Mason explained. “This is the practice in the boroughs of England.” Other delegates agreed with the need for a durational residency requirement, but they urged a much shorter term. Oliver Ellsworth of Connecticut thought requiring seven years of residency was too much. He suggested that one year would be sufficient, though he also stated that he had no objection to making it three years.

The arguments of those who opposed the residency requirement ultimately won out. John Mercer of Maryland argued that the durational residency requirement would discourage men who had once been inhabitants of a state, but had since moved elsewhere, from returning. He believed that such a regulation would create “greater alienship among the States than existed under the old federal sys-

34. Id. at 216.
35. Id. at 217.
36. Id. (Gouverneur Morris of Pennsylvania).
37. Id. (John Rutledge of South Carolina); id. at 225 (Notes of Rufus King of Massachusetts) (explaining that Mr. Rutledge wanted the clause to require one to be a “resident for seven years in the State where he is elected”).
38. Id. (John Rutledge of South Carolina).
39. Id. at 225 (Notes of Rufus King of New York).
40. Id. at 218 (George Mason of Virginia).
41. Id. at 217-18 (Oliver Ellsworth of Connecticut).
42. Id. at 217 (John Francis Mercer of Maryland).
tem" of the Articles of Confederation, and that it would “interweave local prejudices & State distinctions in the very Constitution which is meant to cure them.”

At the end of the day, the proposal for requiring a member of the House of Representatives to satisfy a three-year durational residency requirement in the state from which he was elected was defeated by a vote of nine to two. The proposal for a one-year durational residency requirement was also defeated, this time six to four. The view prevailed on the majority of the delegates that durational residency requirements did not belong in the federal Constitution: “[W]e are now forming a National Government,” George Read of Delaware reminded his colleagues, “and such a regulation would correspond little with the idea that we are one people.”

Similar controversies over a durational residency requirement took place the next day, on August 9, 1787, when the qualifications for serving in the United States Senate were debated. Members of the Senate were originally to be chosen by their state legislatures. (It was only 125 years later, after the Seventeenth Amendment was ratified in 1913, that U.S. Senators became popularly elected.) But not all of the framers trusted the state legislatures to select a proper candidate, and some argued that a durational residency requirement, or at least a citizenship requirement, should be imposed. After fervent debate, the delegates to the Constitutional Convention agreed that a citizenship requirement would have to be met: members of the House already had to be citizens for seven years, and a debate ensued over how long the qualification for Senators should be. Arguing against “the danger of admitting strangers into our public Councils,” Gouverneur Morris insisted on a time period of fourteen years.

43. Id. (John Francis Mercer of Maryland).

44. Id. at 219. Only Georgia and South Carolina were in favor of the three-year requirement.

45. Id. Georgia, South Carolina, New Jersey, and North Carolina voted for the one-year requirement; see also id. at 225 (Notes of Rufus King) (“[A] question was put & negatived by 8 of 11 states to insert Inhabitant for 3 yrs. – afterwards the question for One yr. before Election was negatived by 6 of 11 . . . .”); id. at 226 (Notes of James McHenry of Maryland) (“It was proposed to add to the section 'at least one year preceding his election' [but this requirement for a member of the House was] negatived.”).

46. Id. at 217 (George Read of Delaware).

47. See U.S. CONST. art. I, § 3, cl. 1 (“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years . . . .”).

48. See U.S. CONST. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . . . The Electors in each State shall have the qualifications requisite for Electors of the most numerous branch of the State legislatures.”).

49. See U.S. CONST. art. I, § 2, cl. 2 (“No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States . . . .”).

50. 2 RECORDS OF THE FEDERAL CONVENTION, supra note 17, at 235 (Gouverneur Morris of Pennsylvania).
Charles Pinkney of South Carolina seconded this motion, adding that because “the Senate is to have the power of making treaties & managing our foreign affairs, there is peculiar danger and impropriety in opening its door to those who have foreign attachments.” George Mason suggested that membership in the new Senate might even be restricted to the native-born.

During a vigorous debate, other delegates opposed these restrictions. Some, such as Oliver Ellsworth, saw them as “discouraging meritorious aliens from emigrating to this Country.” Benjamin Franklin was also against any durational residency or citizenship requirement. He tried to persuade his colleagues that the United States had many friends and allies in Europe, adding, “We found in the Course of the Revolution, that many strangers served us faithfully — and that many natives took part [against] their Country.” Franklin’s view was that when “foreigners after looking about for some other Country in which they can obtain more happiness, give a preference to ours, it is a proof of attachment which ought to excite our confidence & affection.” He saw the fourteen-year citizenship proposal as an “illiberality inserted in the Constitution.”

Edmund Randolph of Virginia similarly argued that it would be unwise to prevent immigrants from participating in the public life of their new country for a period of fourteen years. And James Wilson, who was born in Scotland, pointed to the irony that, under the proposed rules, he would not be able to hold office under the very Constitution that he had a hand in making. Wilson told his colleagues of how, when he arrived in Maryland, he found himself “from defect of residence, under certain legal incapacities, which never ceased to produce chagrin,” even when he “did not desire . . . the offices to which they related.” To be incapable of being appointed to an office in one’s country was “a circumstance grating, and mortifying.” Like Benjamin Franklin, James Madison also considered such a “restriction . . . in the Constitution unnecessary, and improper.”

51. Id. (Charles Pinkney of South Carolina).
52. Id. (George Mason of Virginia) (“Were it not that many not natives of this Country had acquired great merit during the revolution, he should be for restraining the eligibility into the Senate, to natives.”).
53. Id. (Oliver Ellsworth of Connecticut).
54. Id. at 236 (Benjamin Franklin of Pennsylvania).
55. Id. at 236-37 (Benjamin Franklin of Pennsylvania).
56. Id. at 236 (Benjamin Franklin of Pennsylvania).
57. Id. at 237 (Edmund Randolph of Virginia).
58. Id. (James Wilson of Pennsylvania).
59. Id.
60. Id. at 235 (James Madison of Virginia).
unnecessary because Congress had already been given the power to regulate the rules for naturalization. It was improper because it would give “a tincture of illiberality to the Constitution.”

The idea of a fourteen-year citizenship requirement was ultimately defeated by a vote of seven to four. Periods of thirteen and ten years, respectively, were proposed and were also defeated at the Constitutional Convention. To compromise, Edmund Randolph proposed that a period of seven years be considered, but John Rutledge countered by saying that since a period of seven years had been proposed for the House, a longer timeframe was required for the Senate, which would have more power. Randolph thus proposed a nine-year period. The motion to require Senators to be citizens for nine years passed by a vote of six to four. Less controversially, the requirement that a Senator be a “Resident” of his state when elected was replaced with the requirement that he be an “Inhabitant” of that state. This, again, was done to avoid squabbling over the eligibility for holding federal office and to defeat efforts to adopt state durational residency requirements for members of the House and Senate.

The delegates could not agree over whether to impose durational residency requirements on federal officeholders, and compromises had to be made to move forward. One of those compromises was that a durational citizenship requirement was imposed on the four elected offices listed in the Constitution: Representative, Senator, Vice President, and President. Each person who held one of these offices would be required to hold United States citizenship for a certain number of years. Although the debate over this requirement was closely tied in the minds of the framers to their debates over durational residency requirements, there were also important differences. The durational citizenship requirements that the framers wrote into the Constitution did not foreclose the possibility of an individual with political aspirations for holding federal office from moving to a new state. By contrast, a lengthy durational residency requirement would have surely put up barriers to a newcomer who was looking to run for office in a state that was not originally his own.

The framers’ decision to link national suffrage to state suffrage laws meant that durational residency requirements would be preserved for the nation’s new voters, given that these requirements al-

61. *Id.* at 235-36 (James Madison of Virginia).
62. *Id.* at 230.
63. *Id.* at 239.
64. See LeClercq, *supra* note 3, at 854.
65. See Derek Muller, *Scrutinizing Federal Electoral Qualifications*, 90 IND. L.J. 559, 563 (2015) (noting there were four elected offices listed in the Constitution: President, Vice President, Senator, and Representative).
66. *Id.* at 563-72.
ready existed in most states. Durational residency requirements would also be preserved for candidates seeking state office, but they would not apply to those seeking federal office. This early divergence between state and federal practice concerning durational residency requirements would influence the political landscape for the next two hundred years. There was only one exception to this durational residency mismatch, and it concerned the offices of the President and Vice President. The new Constitution of 1787 called for a complex system of choosing “electors” in each state, who would cast ballots to fill these two offices. The electors’ ballots were to be sent to Congress to count. The candidate who received the most ballots would become President, and the candidate with the second-most Vice President. The Constitution left it up to the legislatures of the states, however, to determine how these electors would be chosen, specifying only the number that each state was allotted. However, not everyone was eligible to be President: the Constitution designated both a citizenship and a durational residency requirement for that office.

When the delegates met on August 22, 1787, exactly two weeks after they had decided not to impose a durational residency requirement on candidates for the new Congress, they inserted language into their constitutional draft requiring that the country’s new President be “a Citizen of the United States, and shall have been an Inhabitant thereof for Twenty one years.” It is not evident from the delegates’ notes when this clause was debated. However, by September 4, when the delegates discussed how the electors’ votes would be counted, this language was changed to say that a person could not be elected to the office of President “who has not been in the whole, at least 14 years a resident within the U.S.” The framers retained this fourteen-year requirement, and the Constitution, as ratified, specified that no person could be President unless he “[has] been fourteen Years a Resident within the United States.”

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67. See Max Farrand, The Framing of the Constitution of the United States 164-69 (1913) (chronicling the debates of the framers about how the new President of the United States would be elected).
68. See U.S. CONST. art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . . .”).
69. 2 Records of the Federal Convention, supra note 17, at 367.
70. See id. at 369-79 (Journal of Mr. James Madison and Mr. James McHenry for August 22, 1787).
71. Id. at 494 (emphasis added).
72. U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen, or a Citizen of the United States, at the time of the Adoption of this Constitution, shall be eligible to the Office of President; neither shall any person be eligible to that Office who shall not have attained to the Age of thirty five Years, and been fourteen Years a Resident within the United States”) (emphasis added); see also Charles Gordon, Who Can Be President of the United States: The Unresolved Enigma, 28 Md. L. Rev. 1 (1968); Jordan Steiker, Sanford
requirement was also strengthened, so that the President now not only had to be “a Citizen of the United States,” but also could not serve unless he was actually “a natural born Citizen.”

When the Twelfth Amendment was ratified in 1804, it changed the way the electors selected the President and Vice President. That Amendment added that “no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.” This meant that the fourteen-year durational requirement for President would now apply to the office of the Vice President as well. At the federal level today, these are the only two offices for which a durational residency requirement is mandated. But this durational qualification, it is again important to note, is different from the state requirements, for it does not restrict a candidate from moving among the states or around the country.

By contrast, the Constitution does not impose a durational residency requirement for the House or Senate. It only requires that a representative for the House from any state be “an Inhabitant of that State” at the time “when elected.” A similar requirement applies to candidates for the U.S. Senate. Beyond these requirements, the Supreme Court has held that the states do not have the power to add additional qualifications for federal candidates. However, most states have the power to impose such requirements on their own state officials. As such, durational residency rules at the state and municipal level became common. Many states imposed some form of a durational residency requirement on their elected state officials, including their governors, legislators, judges, and mayors. Equally, they imposed durational residency requirements on their voters.


73. Compare 2 RECORDS OF THE FEDERAL CONVENTION, supra note 17, at 367, with id. at 494; and U.S. CONST. art. II, § 1, cl. 5 (“No Person except a natural born Citizen . . . shall be eligible to the Office of President.”) (emphasis added).

74. U.S. CONST. amend. XII.

75. See U.S. Const. art. I, § 2, cl. 2. Indeed, there have been times in American history when a candidate elected to federal office happened to be an inhabitant of another state immediately before his election. See, e.g., Tex. Democratic Party v. Benkiser, 459 F.3d 582, 589 (5th Cir. 2006) (noting one instance when an elected representative actually moved into his new state of residence two weeks before his election).

76. U.S. CONST. art. I, § 3, cl. 3 (“No person shall be a Senator . . . who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.”).

77. See, e.g., U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779 (1995) (holding that states have no power to add electoral qualifications for candidates to federal offices beyond those enumerated in the Constitution); Dillon v. Fiorina, 340 F. Supp. 729 (D.N.M. 1972) (holding additional state two-year residency requirement imposed by the state of New Mexico for a federal candidate to be unconstitutional).
C. In the States

The laws governing the right to vote, according to Professor Alexander Keyssar, were “elaborated and significantly transformed” throughout the country between 1790 and 1850.78 Many of the individual states held constitutional conventions during this time, sometimes more than once. How political power would be allocated in the young but quickly growing republic became a subject of intense debate in many state and local communities. Among other things, even the physical act of voting began to take a different shape. At the time of the founding, according to Professor Keyssar, the procedures used for voting differed “from state to state and even from town to town.”79 In some counties, voting had been an oral act. Men assembled before election judges and cast their vote when their name was called.80 In other counties, voting took place through written ballots. These were at first printed by political parties, but as abuses arose and vote rigging became more commonplace, the states eventually took over the printing of election ballots and running of elections.81

As the states began to play an increasingly dominant role in elections, new laws developed to govern these contests. Suddenly, states had to define what it meant to be a “resident” or “inhabitant,” how one satisfied this requirement, and what documents a voter had to show to prove his citizenship and residency qualifications before casting his ballot.82 The states also had to develop the administrative capacity to deal with running elections, not to mention the judicial ability to resolve election disputes. At the time of the Revolution, property ownership had nearly universally been a qualification for suffrage. But by 1790, this requirement that only freeholders could vote began being dismantled.83 Sometimes the property qualification was replaced with other economic qualifications for suffrage.84

The gradual elimination of property qualifications for voting did not mean that all economic qualifications were eliminated. Rather, as the right to vote expanded in the nineteenth century, poll taxes and other economic qualifications would be substituted, often in pernicious ways, to restrict the franchise. Still, the demise of the property qualification was significant. It meant that society no longer thought voters needed “Blackstonian independence”85 to exercise the right to

78. KEYSSAR, supra note 1, at 23.
79. Id. at 23-24.
80. Id. at 24.
81. Id.
82. Id.
83. Id.
84. Id. at 25.
85. Id.
vote, and it meant that individual states could no longer restrict the franchise to a small, select group of men. Soon people would find that they did not have to put down roots in order to vote, or at least the kind of deep roots that property ownership signified.

Out of fear that the polls would be open to a large number of vagrants and migratory individuals, the states increasingly began to turn to durational residency rules to define and control their electorates. To be sure, some states welcomed newly eligible voters, and many passed legislation making it easier for those from the poorer classes who did not own land, and who were previously disenfranchised, to vote. Yet in many states, durational residency requirements were designed to prevent migrants from voting or from influencing the composition and functioning of the government in a place where they were temporarily located and did not intend to stay. As durational residency requirements were refined by state governments, local municipalities often copied what happened in state capitals, moving to match the new state-mandated requirements.

Where state governments played with their residency rules, the tinkering depended on whether the state was in need of new workers and new labor, or whether, instead, it wanted to keep newcomers out. Delaware, Pennsylvania, South Carolina, Indiana, and Michigan shortened their durational residency requirements. Some states that were in need of more people, particularly those in the Midwest, not only relaxed their durational residency requirements but also even went as far as to extend the franchise to non-citizen aliens. By the 1830s, most state governments had rules regulating their durational residency requirements for voting. What the proper length for these rules should be was often the subject of heated debate. According to Professor Keyssar, the average length of a state durational residency requirement for a new voter was one year in the state and three to six months in his town or county. But the length also varied by region, usually depending on whether the political entity in question wanted to welcome newcomers to its borders or not.

When newcomers were desired, durational residency requirements were shortened. Extending the suffrage to new arrivals encouraged migration. Especially in the newly settled states of the Midwest, where labor was in demand, short durational residency requirements became the norm. On the other hand, in many of the states located along the eastern seaboard, where immigrants were plentiful and where they increasingly settled in urban areas with large popula-

86. Id. at 26.
87. Id. at 27.
88. Id. at 51.
89. Id. at 51-52.
tions, longer durational residency requirements became much more commonplace. Table 1, which is based on calculations originally made by Professor Keyssar, illustrates the residency requirements that existed in each state between 1870 and 1923.\footnote{Table 1 is based on information originally gathered in Alexander Keyssar, The Right to Vote: The Contested History of Democracy in the United States 346-55 tbl. A.14 (2009). Keyssar’s tables have been altered for my purposes. Table 1 provides information about the length of durational residency requirements in the states but omits other pertinent information about these requirements, such as whether the durational residency requirement was imposed constitutionally or by statute; whether categories of persons temporarily in the state, such as military personnel or students, were excluded from claiming residency; and whether voters relocating within the state who did not meet local county, municipality, or precinct requirements were still eligible to vote in their old counties, municipalities, or precincts.}

In addition to regulating the duration of their residencies, states also attempted to define who qualified to be a “resident” for purposes of voting. A number of states attempted to regulate their suffrage rules by preventing certain classes of inhabitants from qualifying for residency status entirely, regardless of their duration in the state. For instance, military personnel who happened to be locally stationed were excluded from voting by a number of the states.\footnote{Id. at 396 n.20.} Between 1850 and 1900, more than thirty states included a provision in their state constitutions that prevented voting rights from being extended to resident soldiers temporarily stationed within the state’s borders.\footnote{Id. at 346-55.} Oklahoma added this requirement to its state constitution in 1907, Michigan did so in 1908, and Arizona followed suit in 1910. The goal of these provisions was to prevent transients from influencing a community. Not until 1965, when the Supreme Court decided \textit{Carrington v. Rash}, were these provisions struck down.\footnote{Carrington v. Rash, 380 U.S. 89, 96-97 (1965) (holding that a state could not deny the right to vote to a bona fide resident merely because he is a member of the armed services).}
### Table 1: State Durational Residency Requirements for Suffrage, 1870 to 1923

<table>
<thead>
<tr>
<th>State</th>
<th>1867: 6 mos. (state), 6 mos. (county)</th>
<th>1901: 2 yrs. (state), 1 yr. (county)</th>
<th>1821: 1 yr. (state), 6 mos. (district)</th>
<th>1910: 1 yr. (state), 90 days (county), 30 days (precinct)</th>
<th>1889: 1 yr. (U.S.), 6 mos. (state), 30 days (county)</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>AL 1867: 6 mos. (state), 6 mos. (county)</td>
<td>AL 1901: 2 yrs. (state), 1 yr. (county)</td>
<td>AL 1821: 1 yr. (state), 6 mos. (district)</td>
<td>AL 1910: 1 yr. (state), 90 days (county), 30 days (precinct)</td>
<td>AL 1889: 1 yr. (U.S.), 6 mos. (state), 30 days (county)</td>
</tr>
<tr>
<td>AK</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AZ</td>
<td>AZ 1910: 1 yr. (state)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>AR</td>
<td>AR 1868: 6 mos. (state); 1874: 12 mos. (state), 6 mos. (county), 1 mo. (precinct)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>HI</td>
<td>N/A</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>ID</td>
<td>1889: 6 mos. (state), 30 days (county)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IL</td>
<td>1870: 1 yr. (state), 90 days (county), 30 days (district)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IN</td>
<td>1851: 6 mos. (state), 60 days (township), 30 days (precinct), 1 yr. (U.S.)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MA</td>
<td>1821: 1 yr. (state), 6 mos. (district)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MI</td>
<td>1850: 6 mos. (state), 20 days (town)</td>
<td>1908: 6 mos. (state), 30 days (town)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MN</td>
<td>1857: 6 mos. (state), 30 days (district)</td>
<td>1874: 3 mos. (ward)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>MS</td>
<td>1868: 6 mos. (state), 1 mo. (county)</td>
<td>1890: 2 yrs. (state), 1 yr. (district)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NC</td>
<td>1868: 1 yr. (state), 30 days (county)</td>
<td>1874: 1 yr. (state), 4 mos. (county), 30 days (district)</td>
<td>1876: 2 yrs. (state), 6 mos. (county), 4 mos. (precinct)</td>
<td>1869: 1 yr. (state), 60 days (county)</td>
<td>1876: 1 yr. (state), 6 mos. (county)</td>
</tr>
<tr>
<td>ND</td>
<td>1889: 1 yr. (state), 6 mos. (county), 90 days (precinct)</td>
<td>1923: 1 yr. (state), 90 days (county), 30 days (precinct)</td>
<td>1889: 1 yr. (state), 6 mos. (county), 90 days (precinct)</td>
<td>1895: 1 yr. (state), 4 mos. (county), 60 days (precinct)</td>
<td>1895: 1 yr. (state), 4 mos. (county), 60 days (precinct)</td>
</tr>
<tr>
<td>TN</td>
<td>1870: 1 yr. (state), 6 mos. (county)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>UT</td>
<td>1895: 1 yr. (state), 4 mos. (county), 60 days (precinct)</td>
<td></td>
<td></td>
<td></td>
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</tr>
</tbody>
</table>

**Note:** The table above represents the durational residency requirements for suffrage from 1870 to 1923, organized by state. Each entry indicates the period during which suffrage residency requirements were enforced in different years, often including specific durations for different types of residency (state, county, district, etc.).
<table>
<thead>
<tr>
<th>State</th>
<th>Year 1</th>
<th>Term 1</th>
<th>Year 2</th>
<th>Term 2</th>
<th>Year 3</th>
<th>Term 3</th>
</tr>
</thead>
<tbody>
<tr>
<td>CA</td>
<td>1849: 6 mos. (state), 30 days (county)</td>
<td>1857: 6 mos. (state), 60 days (county)</td>
<td>MO</td>
<td>1870: 1 yr. (state), 60 days (city or town)</td>
<td>1917: 1 yr. (state), 60 days (county)</td>
<td>OH</td>
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<tr>
<td>CO</td>
<td>1876: 6 mos. (state)</td>
<td>1877: 30 days (county)</td>
<td>1903: 1 yr. (state), 90 days (county), 30 days (city), 10 days (precinct)</td>
<td>KS</td>
<td>1859: 6 mos. (state), 30 days (township)</td>
<td>MT</td>
</tr>
<tr>
<td>CT</td>
<td>1845: 1 yr. (state), 6 mos. (town)</td>
<td>KY</td>
<td>1850: 2 yrs. (state), 1 yr. (county), 60 days (precinct)</td>
<td>NE</td>
<td>1866: 6 mos. (state), 20 days (county), 10 days (precinct)</td>
<td>OR</td>
</tr>
<tr>
<td>DE</td>
<td>1831: 1 yr. (state), 1 mo. (county)</td>
<td>1897: 1 yr. (state), 3 mos. (county), 30 days (district)</td>
<td>LA</td>
<td>1868: 1 yr. (state), 10 days (parish)</td>
<td>1921: 2 yrs. (state), 1 yr. (parish), 4 mos. (town), 3 mos. (precinct)</td>
<td>NV</td>
</tr>
<tr>
<td>IA</td>
<td>1894: 1 yr. (state), 30 days (county)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>KS</td>
<td>1859: 6 mos. (state), 30 days (township)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Year 1</td>
<td>Description 1</td>
<td>Year 2</td>
<td>Description 2</td>
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<tr>
<td>FL</td>
<td>1868: 1 yr. (state), 6 mos. (county)</td>
<td>ME</td>
<td>1819: 3 mos. (state)</td>
<td>NH</td>
<td>1860: 6 mos. (town)</td>
<td></td>
</tr>
<tr>
<td>RI</td>
<td>1842: 1 yr. (state), 6 mos. (town or city) if owning real estate worth $134 or more; otherwise, 2 yrs. (state), 6 mos. (town)</td>
<td>WV</td>
<td>1848: 1 yr. (state)</td>
<td>GA</td>
<td>1868: 6 mos. (state), 30 days (county)</td>
<td></td>
</tr>
<tr>
<td>GA</td>
<td>1868: 6 mos. (state), 30 days (county)</td>
<td>MD</td>
<td>1867: 1 yr. (state), 6 mos. (legislative district or county)</td>
<td>NJ</td>
<td>1844: 1 yr. (state), 5 mos. (county)</td>
<td></td>
</tr>
<tr>
<td>SC</td>
<td>1868: 1 yr. (state), 60 days (county)</td>
<td>SC</td>
<td>1895: 2 yrs. (state) (6 mos. for ministers, school teachers), 1 yr. (county), 4 mos. (precinct)</td>
<td>WV</td>
<td>1889: 1 yr. (state), 60 days (county)</td>
<td></td>
</tr>
<tr>
<td>WY</td>
<td>1889: 1 yr. (state), 60 days (county)</td>
<td>WY</td>
<td>1911: 1 yr. (state), 60 days (county), 10 days (district)</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In the 1890s, durational residency requirements were also used in the Southern states—along with poll taxes and literacy tests—to disenfranchise African Americans, whom many southern whites unfairly considered to be “nomadic.” 94 African Americans often had a harder time proving their residency and the length of their stay in a certain area, and durational residency requirements were used to discriminate against them. 95 Wherever they existed, state durational residency qualifications penalized mobility and reinforced parochial perspectives. In the South, where states had a special affection for long residency requirements, their length served “to promote [the] acquiescence of public officeholders to the status quo interests of a slave-owning . . . society.” 96 In 1875, Alabama increased the length of its state residency requirement for voting from sixth months to one year; in 1901, it increased it to two years. North Carolina increased its requirement to two years in 1876. Mississippi followed suit in 1890, South Carolina in 1895, Louisiana in 1898, and Virginia in 1902. 97

By the turn of the twentieth century, durational residency requirements were commonplace in most of the states. The prevalence of these laws suggests that they played an important role in many states. One scholar has argued that the proliferation of these requirements “reflect[ed] xenophobic tendencies” and that they were “out of spirit with the idea of [a] national union.” 98 But this view is probably extreme. Though it is hard to doubt that, in many instances, states increased the length of their durational residency requirements when they wanted to make it harder for outsiders to settle within their borders, it may also be the case that mandating a durational period of residence before giving one the vote resulted from inertia. In the meantime, county, township, district, and precinct durational residency requirements patterned themselves after the state models. American society was not especially mobile at this time, and those who picked up and moved to a different state comprised a small percentage of the country’s growing population. As such, it is likely that the lengthy durational residency requirements that existed in the 1800s reflected the negative attitude of some communities in the country toward newcomers, outsiders, and mobility.

94. See KEYSSAR, supra note 1, at 89.
95. Id. at 88-90.
96. See LeClercq, supra note 3, at 854.
98. LeClercq, supra note 3, at 855.
III. THE DEMISE OF DURATIONAL RESIDENCY REQUIREMENTS FOR VOTERS

Durational residency requirements are not a monolithic phenomenon. Both in theory and in practice, it is important to distinguish between two different types of durational residency requirements. The first is the one the framers wrestled with at the time of the Constitutional Convention: their debates concerned whether a residency requirement should be imposed on political candidates and those seeking to hold public office. The second type of durational residency requirement concerns those seeking to cast a ballot—in other words, voters. These two types of durational residency requirements are conceptually distinct and deserve to be analyzed separately.99

Most states impose durational residency requirements on both voters and political candidates, but the individuals affected, the period of duration required, and the justifications given for each of these distinct durational residency requirements differ significantly. As the democratic theorist Robert Dahl has explained, democracy involves both the freedom to vote and the freedom to run for office.100 It thus makes sense that the durational residency requirements enacted by the states would target each activity separately. For decades, lengthy durational residency requirements existed for both voters and candidates in the states. However, in the 1970s, the durational residency requirements for voters began to be extensively cut back. This Part examines what happened to the durational residency requirements that the states imposed on voters and how they were curtailed.

A. The Federal Challenge

All states had some kind of durational residency qualifications that they maintained by the 1930s and 1940s. These usually restricted voting for a new resident until the person lived in the state for one year, although there were cases where the durational period was both longer and shorter. In rural areas and in the Midwest, the residency period was often only six months. The state constitutions of Idaho, Iowa, Kansas, Nebraska, Nevada, and Oregon all required only a six-month residency for suffrage. Indiana and South Dakota also required six months of residency, although it had to be preceded by a

99. But see Bullock v. Carter, 405 U.S. 134, 143 (1972) (explaining that “the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters”).

100. See ROBERT A. DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 5 (1971). Dahl plots the freedom to vote and the freedom to run for office on a two-dimensional matrix. He calls the right to vote “the right to participate in elections and office” and right to run for office “public contestation.” Each right can be plotted on Dahl’s two-dimensional matrix on a scale from “none” to “full.” Id.
year’s residency in the United States. In many southern states and in Rhode Island, the durational requirement was two years.101

There were also important exceptions to these durational residency requirements. One important exception applied to those serving overseas. When servicemen could not be around to satisfy a durational residency requirement, absentee voting laws had to be fashioned to account for this. Before the Civil War, absentee voting was rare. As the United States became entangled in overseas conflicts, however, and men who were serving their country could not return home to vote in its elections, absentee voting became more prominent.102 During World War I, nearly three million men were sent overseas. Their absence meant these voters could not satisfy the long durational residency requirements that some of their states imposed. As a result, by 1918, nearly all of the states crafted provisions to exempt servicemen from durational residency requirements during times of war.103 The exceptions created for servicemen eventually began to be applied to other kinds of workers, including those who had to be absent from their state on official government business.104

Until World War II, durational requirements spanning months and even years continued to be an accepted prerequisite to voter registration. Multiple factors—including the limited textual support for the right to vote in the Constitution, and the relatively small levels of interstate migration—ensured that there was little opposition to these laws. However, the sharp increase in interstate travel and migration that followed World War II, combined with the Supreme Court’s interest in protecting the right to vote during the Warren Court era, soon put durational residency qualifications on the national agenda, in the crosshairs of Congress, and on court dockets.

As voting rights cases made their way to the Supreme Court in the 1960s, voting rights issues began to seep deeper into the American consciousness. The large number of citizens who were ineligible to vote because of a state’s durational residency requirement soon began to draw the public’s attention.105 To respond to public pressure,
many state legislatures adopted “return-to-vote” legislation. These laws were designed to make it easier for residents who relocated within the state’s borders to vote, often by lowering precinct or county durational residency rules or else providing a way for residents who had moved to a different county within the same state to cast a ballot in their old precincts. These rules lacked uniformity from state to state, and they also did little to solve issues facing interstate movers. Although many people during this time felt that the status of durational residency requirements for voting should remain a states’ rights issue, pressure also began mounting for Congress to enter the fray and play a much larger national role in these matters.

By the 1960s, in most states, a one-year durational residency requirement had become the norm. A survey conducted in 1962 found that a one-year residency was required by 34 states. In another twelve states, the in-state residency period was six months. In four states, it was two years. The impact of these laws on an American society that had become increasingly more mobile was starting to take its toll. In every decade since 1900, geographic mobility in the United States had steadily increased. Nonetheless, durational residency rules continued to impede voting for many of those who may have desired to exercise this right. In the early 1960s, a study commissioned by the American Heritage Foundation examined the causes of nonvoting in presidential and congressional elections. It found that of the country’s 104 million voting-age citizens in 1960, eight million were adults who had recently moved and were disqualified from voting by state, county, and precinct durational residency requirements. In 1964, according to another source, durational residency laws prevented fifteen million people from voting.

Congress soon realized that it had to take action. Under the Constitution, the states set “[t]he [t]imes, [p]laces, and [m]anner” of holding elections for federal officials. But Congress has the power, un-

107. Id. at 833.
108. See id. at 829.
109. Id.
110. See Keyssar, supra note 1, at 223 (citing The Supreme Court, 1971 Term, 86 Harv. L. Rev. 1, 107 n.21 (1972)).
111. See U.S. Const. art, I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature
under Article I, Section 4, to pass a federal law “at any time” that could alter the rules set by the states.\footnote{Id.; see also Franita Tolson, Protecting Political Participation Through the Voter Qualifications Clause of Article I, 56 B.C. L. REV. 159 (2015).} In 1970, Congress sought to regulate durational residency requirements when it passed its first amendments to the Voting Rights Act of 1965.\footnote{Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314, 316 (codified as amended at 42 U.S.C. § 1973 (2012)); see also CONGRESSIONAL QUARTERLY ALMANAC 192-93 (1971).} Aimed at ending the system of mass disenfranchisement that had kept many African Americans from the polls, particularly in the southern states, the Voting Rights Act of 1965 was one of President Lyndon Johnson’s greatest legislative achievements. The law would become so monumental that scholars would later come to view it as a “sacred symbol” of American democracy.\footnote{See Richard Pildes, What Does the Court’s Decision Mean?, 12 ELECTION L.J. 317, 317 (2013) (calling the Voting Rights Act a “sacred symbol” of American democracy); see also Eugene D. Mazo, The Voting Rights Act at 50 and the Section on Election Law at Birth: A Perspective, 14 ELECTION L.J. 282, 283-85, 287-89 (2015) (assessing the history of the Voting Rights Act on the occasion of its fiftieth anniversary).} But not all sections of the original Voting Rights Act were permanent. Given the unprecedented scope of federal power that was granted by this statute, President Johnson and Congress decided to make some of its most far-reaching provisions temporary.\footnote{See Mazo, supra note 114, at 288; see also STEVEN ANDREW LIGHT, “THE LAW IS GOOD”: THE VOTING RIGHTS ACT, REDISTRICTING, AND BLACK REGIME POLITICS, at xii (2010).}

Section 5 of the VRA, which required all of the states in the South to seek federal “preclearance” for any changes made in their voting practices or procedures, came with a sunset provision.\footnote{Mazo, supra note 114, at 288.}

In 1965, Congress had designed Section 5 to ensure that voting changes in “covered jurisdictions,” which encompassed all of the states of the Deep South, could not be implemented until a favorable determination has been made by the U.S. Attorney General or the U.S. District Court for the District of Columbia that minority voting rights were not being negatively affected. The provisions of Section 5 were enacted as temporary legislation and set to expire in five years. In 1970, however, Congress recognized the need for these special provisions to continue in force, and it moved to renew them for an additional five years. It was while holding its hearings on reauthorizing Section 5 that Congress decided to amend the Voting Rights Act in other ways as well, and one of these included adding an amendment that targeted durational residency requirements.\footnote{Voting Rights Act of 1970, Pub. L. No. 91-285, 84 Stat. 314, 316 (codified as amended at 42 U.S.C. § 1973 (2012)); see also CONGRESSIONAL QUARTERLY ALMANAC 192-93 (1971).}
Using its constitutional power to alter the rules pertaining to federal elections, Congress added a new Section 202 to the Voting Rights Act in 1970. It was aimed at regulating how the states conducted their presidential elections. So that no mistake was made as to the intent of Section 202, its very first paragraphs stated the following:

Section 202(a). The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections—

(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President;

(2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines;

. . .

(5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and

(6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections.\(^\text{118}\)

To guarantee and protect the right to vote, Congress found that it was necessary to abolish the durational residency requirement as a precondition to voting for the President and Vice President, as well as to establish nationwide standards relative to absentee registration and absentee balloting for future presidential elections.\(^\text{119}\)

Under Section 202, Congress moved to accomplish these goals in several ways. First, it prohibited individual states from imposing a durational residency requirement on any U.S. citizen who was otherwise qualified to vote in a presidential election and who wanted to register and vote for the President or Vice President of the United States.\(^\text{120}\) Second, it prohibited the states from denying a citizen the right to vote in a presidential election if that person was validly registered to vote but happened not to be physically present in his state at the time of the election.\(^\text{121}\) If the citizen was absent, the state now


\(^{119}\) Id. § 202(b).

\(^{120}\) Id. § 202(c) ("No citizen of the United States who is otherwise qualified to vote in any election for President and Vice President shall be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such election because of the failure of such citizen to comply with any durational residency requirement of such State or political subdivision . . . ").

\(^{121}\) Id. ("[N]or shall any citizen of the United States be denied the right to vote for electors for President and Vice President, or for President and Vice President, in such elections because of the failure of such citizen to be physically present in such State or political . . . ").
had to provide him with the opportunity to cast an absentee ballot to vote for the President or Vice President.\textsuperscript{122} Third, Congress mandated that the states had to allow a citizen to vote in a presidential election if he was registered to vote thirty days before the election took place.\textsuperscript{123} Finally, if the citizen moved to his new state within thirty days of a presidential election, he had to be given the right to vote by absentee ballot in his or her former state of residence.\textsuperscript{124}

In addition to extending the coverage of Section 5 the Voting Rights Act and changing the way that Americans vote for the President and Vice President with the addition of Section 202, the 1970 Amendments suspended the use of literary tests as a prerequisite to voting in all states.\textsuperscript{125} The 1970 Amendments also mandated that states lower their voting age to eighteen for all federal, state, and local elections.\textsuperscript{126} Senator Edward Kennedy of Massachusetts pushed for this last provision to be added to the 1970 Amendments, knowing that his colleagues in Congress would find it impossible to deny the right to vote to young people, many of whom were fighting and dying for their country in Vietnam.\textsuperscript{127} Although durational residency requirements presented too minor of an issue to capture the imagination of most American citizens, they did receive some attention among the constellation of voting rights issues that were on the national stage. The fact that they were presented as part of a pack-

\textsuperscript{122} \textit{Id.} § 202(d) ("[E]ach State shall provide by law for the casting of absentee ballots for the choice of electors for President and Vice President, or for President and Vice President, by all duly qualified residents of such State who may be absent from their election district or unit in such State on the day such election is held . . . .").

\textsuperscript{123} \textit{Id.} ("[E]ach State shall provide by law for the registration of other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President . . . .").

\textsuperscript{124} \textit{Id.} § 202(e).


\textsuperscript{126} Section 302 granted the right to vote at age eighteen in every primary and general election. See GARRINE P. LANEY, CONG. RESEARCH SERV., THE VOTING RIGHTS ACT OF 1965, AS AMENDED: ITS HISTORY AND CURRENT ISSUES 16 (2008), http://fpc.state.gov/documents/ organization/109556.pdf. Although the Supreme Court invalidated this provision for state and local elections, the 26th Amendment, ratified in 1971, later would guarantee the right of eighteen-year-olds to vote in all elections. See U.S. CONST. amend. XXVI.

\textsuperscript{127} See GARY MAY, BENDING TOWARD JUSTICE: THE VOTING RIGHTS ACT AND THE TRANSFORMATION OF AMERICAN DEMOCRACY 206-07 (2013) (noting how Kennedy campaigned to reduce the national voting age and quoting him as saying that “half of the deaths in Vietnam are of young Americans under twenty-one”).
age, together with the other voting rights reforms included in the 1970 Amendments, ensured they could pass through Congress.

Though voting rights occupied center stage in the American consciousness in the early 1970s, it has not always been evident to scholars why the conservative Nixon administration offered the 1970 Amendments. Professor Keyssar suggests that the new rules constituted “safe, uncontroversial means of responding to a resurgence of public concern about low electoral turnout,” and that they may have “buttressed the Republican Party’s presentation of itself as an advocate of universal suffrage.”

The new changes called for by the 1970 Amendments also could have been influenced by the shift in thinking about the nature of American society, which had become more geographically mobile after World War II. In the nineteenth century, when most of the states’ durational residency requirement were enacted, most Americans were born, raised, and spent the bulk of their lives living in a single community. By contrast, the “mobile” part of the population was comprised of unskilled workers and migrants. But, as Professor Keyssar points out, this pattern shifted in the twentieth century, with the middle and upper classes becoming much more mobile and workers becoming much less so.

President Richard Nixon had expressed doubts about the constitutionality of some of the new voting provisions that had been passed with the 1970 Amendments, especially the lowering of the voting age to eighteen. Vetoing Congress’s bill, however, was not in the cards for Nixon. Although doing so would appease the South, the prospect of limiting the franchise after a proposal had been made to expand it would have put him at odds with public opinion, not to mention many members of his own Republican Party who had voted for these changes. Thus on June 22, 1970, Nixon quietly signed the 1970 Amendments into law. At the same time, he instructed his Attorney General, John Mitchell, to challenge them in court.

Nixon’s challenge resulted in Oregon v. Mitchell, the case in which the Supreme Court considered the constitutionality of the Voting Rights Act Amendments of 1970. The Court examined whether Congress could lower the voting age, ban literacy tests, and forbid durational residency requirements from disqualifying voters, each as

128. KEYSSAR, supra note 1, at 223.
129. See id.
130. See id.
131. Id.
132. Id.
133. See MAY, supra note 127, at 208.
separate issues. The Supreme Court held it unconstitutional for Congress to lower the voting age for state elections, while it upheld its right to do so in federal elections. Justice Hugo Black found that the Elections Clause allowed Congress to regulate federal elections, though no such provision in the Constitution also allowed it to regulate the election of state officials. The Twenty-Sixth Amendment, which lowered the voting age to eighteen years of age throughout the country, including in the states, was ratified a year later, in reaction to Oregon v. Mitchell. In addition to finding that Congress could regulate the vote age for federal elections, the case also upheld Congress’s ban on literacy tests under the Fifteenth Amendment.

In finding that Congress had the power to regulate federal though not state elections, Oregon v. Mitchell was important for another reason: the case also upheld Congress’s imposition of the “30-day” registration rule on the states for presidential elections. Though there were different allegiances of Justices for other parts of the opinion, the vote finding that Congress had the power to impose a thirty-day registration deadline for federal presidential elections was eight to one. Justice Black based his reasoning on the power that Congress had to regulate federal elections under Article I, Section 4. Justice Douglas wrote separately to explain that he would uphold the requirement under Congress’s power to enforce the Fourteenth Amendment. Justices Brennan, White, and Marshall found yet other justifications for upholding this requirement, including the Privileges and Immunities Clause and the guarantee that citizens should have the right to travel freely across state lines. Only Justice Harlan dissented, arguing that none of these constitutional provisions should have been availing in this case.

After Oregon v. Mitchell upheld the 1970 Amendments and their prohibition on durational residency requirements, the states were

136. Id. at 117-18.
137. Id. at 119-24 (citing U.S. CONST. art. 1, § 4).
138. See id. at 124-29.
139. U.S. CONST. amend. XXVI (“The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age.”).
140. Oregon, 400 U.S. at 132.
141. Id. at 134.
142. See id. at 213-16 (Harlan, J., dissenting) (explaining that it is “inconceivable” that the language of the Constitution can be understood to abolish state durational residency requirements).
143. Id. at 119-24.
144. Id. at 150.
146. Id. at 213-14.
essentially forced to make a choice: they could now either shorten their durational residency requirements for electing state officials to approximately thirty days, or they could waste state resources to administer two different durational residency or registration deadlines for voting. Many states that would otherwise have preferred a period of duration longer than thirty days suddenly found it to be more trouble than it was worth to maintain one deadline for registering their citizens to vote for the U.S. President and another deadline to register the same individuals to vote for other state offices. In many states, this brought a swift end to the lengthy durational residency requirements that the states had previously imposed.

B. The Judicial Challenge

Despite the mandate that came from Congress for the states to shorten the registration period for presidential elections to thirty days, there were places where lengthy durational residency requirements for state electoral contests continued to persist. Not all states, after all, were interested in applying the 30-day registration period required for presidential elections to their state elections. Then, in the early 1970s, several cases regarding state durational residency requirements began to wind their way to the Supreme Court. These cases sought to challenge the durational residency laws of the states on constitutional grounds. Eventually, the Supreme Court’s decisions in these cases worked in tandem with the 1970 Amendments to curtail the ability and authority of the states to impose long durational residency requirements on their new voters.

The most important of these cases was Dunn v. Blumstein. Decided in 1972, this case held that Tennessee’s one-year residency requirement for voting in state elections violated the Equal Protection Clause of the Fourteenth Amendment. James Blumstein had moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University. With a view toward voting in the upcoming August and November elections, he went to register to vote on July 1, 1970. The county registrar refused to register him, however, because Tennessee law authorized the registration of only those people who were residents of the state for a year and residents of their county for three months.
Blumstein did not challenge Tennessee’s power to restrict the vote to bona fide residents of the state. Nor did Tennessee dispute that Blumstein was a bona fide resident. Rather, Tennessee insisted that in addition to being a resident, a would-be voter had to satisfy its durational residency laws. In Dunn, the Supreme Court had to determine, for the first time, what level of scrutiny to apply to state durational residency requirements. Noting that these laws penalize people who travel from one place to another, the Supreme Court explained how such laws end up dividing a state’s legitimate residents into two classes: old residents and new residents. Both classes are legitimate, from the state’s view, but the state discriminates against the latter class of people by denying them the opportunity to vote. Framing the problem in this way, the Court proceeded to analyze whether the Constitution allows this kind of discrimination.

Never had durational residency laws been viewed through the lens of discrimination. Now the Supreme Court scrutinized the fact that these laws prevented some legitimate residents from voting, thus depriving a class of citizens of “a fundamental political right, [that is] preservative of all rights.” Tennessee urged the Supreme Court to uphold its one-year durational residency requirement under the Court’s own precedents—in 1965, the Court had summarily affirmed Drueding v. Devlin, upholding a durational residency law in Maryland against a constitutional challenge. But in Dunn, the Supreme Court distinguished Drueding on the grounds that Drueding was a summary affirmance of a district court decision that was decided without the benefit of oral argument. Moreover, the sufficiency of Maryland’s durational residency law had been tested in Drueding under the standard that would typically be applied to ordinary state regulations, not under the more exacting standard that had been developed for voting rights cases in the ensuing years.

In several important voting rights cases, the Supreme Court had decided that strict scrutiny should be applied to laws that discrimi-

153. Id. at 334.
154. Id.
155. Id.
156. Id. at 334-35.
157. Id.
158. Id. at 335.
159. Id. at 336 (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964)); see also Joshua A. Douglas, Is the Right to Vote Really Fundamental?, 18 CORNELL J.L. & PUB. POL’Y 143 (2008) (explaining that although courts have always said that the right to vote is a “fundamental right,” they have sometimes applied strict scrutiny to laws that challenge that right and have at other times inconsistently applied a lower level of review).
161. Dunn, 405 U.S. at 337.
nated between different classes of a state’s citizens. In the most important of these cases, *Kramer v. Union Free School District No. 15*, 162 decided in 1969, the Supreme Court applied strict scrutiny to a state law that prevented residents from voting in the local school board if they did not own property or have children enrolled in the local schools. *Kramer* held that if a state law granted the right to vote to some citizens and denied it to others, the courts had to determine whether such exclusions were necessary “to promote a compelling state interest.” 163 In *Dunn*, the Supreme Court found that Tennessee’s residency statutes impinged on a fundamental right—the right to vote—and thus should be subject to strict scrutiny. 164 In addition, the Court found that Tennessee’s residency rules also directly impinged on a second fundamental right, “the right to travel.” 165 Having determined that strict scrutiny was mandated, the Court went on to distinguish durational residency requirements from bona fide residency requirements that ensure that voters are actually citizens of the state and county in which they register, and that “may be necessary to preserve the basic conception of a political community.” 166

Tennessee had offered two justifications for its residency qualifications. The first was to “[i]nsure [the] [p]urity of [the] [b]allot [b]ox.” 167 State officials feared that non-residents would cross state lines, falsely swear allegiance to Tennessee, and vote by fraud to sway its elections. 168 The Supreme Court dismissed this justification. 169 Residence in Tennessee was established by taking an oath, and there was no evidence that the state took any actions beyond requiring an oath to check that a person was a bona fide resident. 170 It was not clear to the Court how a longer durational residency period would prevent a corrupt non-resident from fraudulently registering and voting. 171 In addition, the Court found it difficult to justify Tennessee having two different duration periods. 172 If only a three-month period was needed to determine a person’s legitimate residency in his county, it was unclear why a one-year period was required to legitimize a voter’s resi-


165. *Id.* at 338.

166. *Id.* at 344.

167. *Id.* at 345.

168. *Id.*

169. *Id.* at 345-46.

170. *Id.* at 346.

171. *Id.*

172. *Id.* at 347.
residency in the state. The presence of two different durational requirements was illogical. Moreover, if Congress had already set the amount of time that a state had to register a new voter to cast a ballot in a federal presidential election at thirty days, with the 1970 Amendments, it was not entirely clear why a state needed more time than this to register the same person to vote in its state elections.

The second justification that Tennessee provided for its durational qualifications was to ensure a “knowledgeable voter.” Tennessee wanted to have voters who had become members of the community, were interested in matters of government, and were likely to vote intelligently. But the Supreme Court dismissed this justification as well, for again it allowed the state to discriminate against different classes of citizens based on arbitrary criteria.

In Kramer, New York had tried to prevent a childless adult from voting in a school board election because the state argued that non-parents were “less informed” about school affairs than parents were. New York wanted to limit the franchise only to voters who were “interested” in the outcome of its school board elections. The Supreme Court applied strict scrutiny and struck down the statute in question, finding that New York’s classification, which excluded non-parents from voting, prevented some people from voting who were as substantially interested in what a local school board did as those allowed to vote. Similarly, in Dunn, the Court struck down Tennessee’s durational residency requirement because Tennessee’s law proved to be a crude device for achieving the state’s goal of assuring a knowledgeable electorate. Tennessee allowed all longtime residents to vote regardless of their knowledge of the issues. At the same time, it excluded new residents who sought to educate themselves.

Ultimately, Dunn held that “30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much.” That finding suddenly threatened to place a significant burden on states to prove that their lengthy durational residency requirements were necessary and served a compelling state interest.

The very next year, however, the Court decided two related cases that seemed to extend the state durational residency period beyond

173. Id. at 347-48.
174. Id. at 345, 354-55.
175. Id. at 345.
177. Id.
178. Dunn, 405 U.S. at 357-58.
179. Id. at 359.
180. Id. at 348.
what was allowed in Dunn. In Marston v. Lewis,\textsuperscript{181} decided in 1973, the Court upheld a fifty-day durational residency requirement in Arizona. This time the Court relied on the state’s legislative judgment that this period was “necessary to achieve the State’s legitimate goals.”\textsuperscript{182} In particular, Arizona had relied on a volunteer deputy registrar system that was massive in scope and that resulted in a certain number of mistakes per registered voter, which the state needed more time to correct at each precinct.\textsuperscript{183} Another factor that was unique in Arizona was the timing of the state’s primary system. Arizonans held their primaries in the fall, and because of their work in the primary, country registrars and their staffs were often delayed in processing incoming applications to register Arizona voters for the general election.\textsuperscript{184} As such, the Court accepted Arizona’s judgment that a period of fifty days was necessary to promote the state’s important interest in obtaining accurate voter lists.\textsuperscript{185} However, Justices Marshall, Douglas, and Brennan dissented in Marston.\textsuperscript{186} They thought that a thirty-day durational period should suffice for Arizona, especially since, under the 1970 Amendments, the state already had to use it to register those voters who wanted to vote in federal presidential—but not state—elections.\textsuperscript{187}

On the same day in 1973 that Marston was handed down, the Court also decided Burns v. Fortson,\textsuperscript{188} upholding a Georgia statute that required all registrars to close their voter registration books fifty days prior to the November general election, except regarding those persons who sought to vote for the President of the United States only. Georgia offered extensive evidence to establish the need for a fifty-day registration cut-off, given the numerous requirements and vagaries of its election laws. A registration cut-off, technically, is not the same thing as a durational residency requirement, and the distinction is important to explain. A durational residency requirement applies only to new residents, while a registration cut-off deadline applies to all state residents who seek to register to vote. However, in practice, the two requirements work similarly. Still, if Dunn held that the maximum permissible durational residency requirement was thirty days, the decisions in Marston and Burns seemed to challenge that. Should the limit be set at thirty days? Fifty days? Sixty days? In Burns, the Court held that “the 50-day registration period approach-

\textsuperscript{181} 410 U.S. 679 (1973).
\textsuperscript{182} Id. at 680.
\textsuperscript{183} Id. at 681.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 680.
\textsuperscript{186} Id. at 682-85.
\textsuperscript{187} Id. at 683-84.
\textsuperscript{188} 410 U.S. 686 (1973).
es the outer constitutional limits in this area,”¹⁸⁹ but it did not state exactly what those limits were. Scholars have since suggested that the maximum period is likely somewhere between the fifty days approved in Burns and the three months struck down in Dunn.¹⁹⁰

C. The Modern Durational Residency Requirement

Ultimately, two factors led to the demise of lengthy durational residency requirements in the states—at least for voters. The first had to do with the intervention of the federal government in the form of the 1970 Amendments to the Voting Rights Act of 1965. The second had to do with the intervention of the Supreme Court. Both happened in the 1970s, on the heels of the voting rights struggles of the 1960s.

Today, given that the Supreme Court has declared lengthy residency requirements for voting in state and local elections unconstitutional, most of the states have changed or eliminated their durational residency requirements to comply with the Court’s rulings. Instead, they have implemented registration cut-off deadlines by which voters have to register. In Hawaii, the registration cut-off deadline is thirty days.¹⁹¹ In other states, such as Florida and Arizona, the cut-off is twenty-nine days.¹⁹² In Kentucky, it is twenty-eight days.¹⁹³ Another set of states requires approximately three weeks for new registrations. The time period is twenty-four days in Oklahoma;¹⁹⁴ twenty-two days in Colorado;¹⁹⁵ twenty-one days in Maryland, Maine, Oregon, Virginia, and West Virginia;¹⁹⁶ and twenty days in Kansas, Massachusetts, and Minnesota.¹⁹⁷ Other jurisdictions close their registration periods approximately two weeks before an election. In Alabama and California the period is fourteen days,¹⁹⁸ and in Iowa it is eleven days.¹⁹⁹ Connecticut requires a new voter to be registered only seven

¹⁸⁹. Id. at 687.
¹⁹⁰. See, e.g., LeClerq, supra note 3, at 862 (“The maximum constitutionally permissible durational residency requirement for voting is . . . apparently somewhere between the 3-months intrastate requirement disapproved in Dunn and the 50-day requirement approved in Marston and Burns.”).
¹⁹³. KY. REV. STAT. ANN. § 116.045(2) (West 2015).
¹⁹⁴. OKLA. STAT ANN. tit. 26, § 4-103 (West 2015).
¹⁹⁶. MD. CODE ANN., ELEC. LAW § 3-302 (LexisNexis 2015); ME. REV. STAT. ANN. tit. 21-A, § 121-A (2015); OR. REV. STAT. ANN. § 247.025 (West 2015); VA. CODE ANN. § 24.2-416 (2015); W. VA. CODE ANN. § 3-2-6 (LexisNexis 2015).
¹⁹⁷. KAN. STAT. ANN § 25-2311 (2012); MASS. GEN. LAWS ANN. ch. 51, § 26 (2015); MINN. STAT. ANN. § 201.054 (West 2015).
¹⁹⁸. ALA. CODE § 17-3-50 (2015); CAL. ELEC. CODE § 3400 (West 2015).
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<th>STATE</th>
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<tr>
<td>AL</td>
<td>No durational residency req., 14-day reg. cut-off req.</td>
<td>HI</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
<td>MA</td>
<td>No durational residency req., 20-day reg. cut-off req.</td>
<td>NM</td>
<td>No durational residency req., 28-day reg. cut-off req.</td>
<td>SD</td>
<td>No durational residency req., 15-day reg. cut-off req.</td>
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<tr>
<td>AK</td>
<td>30-day reg. cut-off req.</td>
<td>ID</td>
<td>30-day durational residency req., 25-day reg. cut-off req.</td>
<td>MI</td>
<td>30-day reg. cut-off req.</td>
<td>NY</td>
<td>30-day durational residency req.</td>
<td>TN</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
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<tr>
<td>AZ</td>
<td>29-day reg. cut-off req.</td>
<td>IL</td>
<td>30-day durational residency req., 27-day reg. cut-off req.</td>
<td>MN</td>
<td>21-day reg. cut-off req.</td>
<td>NC</td>
<td>30-day durational residency req., 25-day reg. cut-off req.</td>
<td>TX</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
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<tr>
<td>AR</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
<td>IN</td>
<td>30-day durational residency req., 29-day reg. cut-off req.</td>
<td>MS</td>
<td>30-day durational residency req., 30-day reg. cut-off req.</td>
<td>ND</td>
<td>30-day durational residency req., same-day reg.</td>
<td>UT</td>
<td>30-day durational residency req., 15-day reg. cut-off req.</td>
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<tr>
<td>CA</td>
<td>14-day reg. cut-off req.</td>
<td>IA</td>
<td>No durational residency req., 10-day reg. cut-off req.</td>
<td>MO</td>
<td>No durational residency req., 4-week reg. cut-off req.</td>
<td>OH</td>
<td>30-day durational residency req., 30-day reg. cut-off req.</td>
<td>VT</td>
<td>Reg. cut-off closes second Saturday before an election</td>
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**TABLE 2: STATE DURATIONAL RESIDENCY REQUIREMENTS AND STATE VOTER REGISTRATION CUT-OFF REQUIREMENTS FOR SUFFRAGE, 2015**
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<tbody>
<tr>
<td>CO</td>
<td>30-day durational residency req., 29-day reg. cut-off req.</td>
<td>KS</td>
<td>No durational residency req.</td>
<td>MT</td>
<td>30-day durational residency req., 30-day reg. cut-off</td>
<td>OK</td>
<td>No durational residency req., 25-day reg. cut-off req.</td>
<td>VA</td>
<td>No durational residency req., 21-day reg. cut-off req.</td>
</tr>
<tr>
<td>CT</td>
<td>No durational residency req., 14-day reg. cut-off req. by mail or 7-day in person</td>
<td>KY</td>
<td>29-day durational residency req.</td>
<td>NE</td>
<td>No durational residency req., but registration cut-off closes third Friday before an election.</td>
<td>OR</td>
<td>21-day reg. cut-off req.</td>
<td>WA</td>
<td>30-day durational residency req., 30-day reg. cut-off req.</td>
</tr>
<tr>
<td>DE</td>
<td>No durational residency req., 20-day reg. cut-off req.</td>
<td>LA</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
<td>NV</td>
<td>30-day durational residency req., 30-day reg. cut-off</td>
<td>PA</td>
<td>30-day durational residency req., 30-day reg. cut-off</td>
<td>WI</td>
<td>10-day durational residency req., 15-day reg. cut-off req.</td>
</tr>
<tr>
<td>FL</td>
<td>No durational residency req., 29-day reg. cut-off req.</td>
<td>ME</td>
<td>No durational residency req., 21-day reg. cut-off req.</td>
<td>NH</td>
<td>No durational residency req., 10-day reg. cut-off</td>
<td>RI</td>
<td>No durational residency req., 30-day reg. cut-off</td>
<td>WV</td>
<td>No durational residency req., 21-day reg. cut-off req.</td>
</tr>
<tr>
<td>GA</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
<td>MD</td>
<td>No durational residency req., 21-day reg. cut-off req.</td>
<td>NJ</td>
<td>30-day durational residency req., 20-day reg. cut-off</td>
<td>SC</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
<td>WY</td>
<td>No durational residency req., 30-day reg. cut-off req.</td>
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days before an election, and at least one state—North Dakota—uses same-day voter registration, so that a new voter could actually register to vote and cast his or her ballot on the same day. Table 2 contains a fifty-state survey of durational residency periods and registration cut-off periods in the United States as of 2015.

Two points deserve emphasis. First, some states have managed to retain registration periods that are longer than thirty days, although there are not many of them. Georgia currently requires a voter to register by the “fifth Monday . . . prior to the . . . election,” which in practice puts the registration deadline out five to six weeks. Second, it must be emphasized again that modern registration periods are not exactly the same as the durational residency qualifications that were challenged in Dunn. The justification for asking a citizen to register at least thirty days before an election is administrative efficiency. States do not set up these registration deadlines to restrict the franchise, to control their community of voters, or to create more knowledgeable voters. Today, that would be unconstitutional. Rather, they do it because that is how long it takes them to process a voter’s paperwork, verify his address, and communicate his eligibility to the municipality where the election will be held.

Finally, though state durational qualifications for voting have withered, there is another sense in which state durational residency requirements have not disappeared. Even after it became illegal for the states to apply durational residency requirements to the right to exercise one’s vote, the states continued to apply them to other areas of everyday life as a way of protecting their resources from newcomers and outsiders. Over the years, durational residency requirements have been applied to prevent newly-resident students from seeking in-state tuition; to keep new residents from using a state’s laws to file for divorce; to restrict new residents from receiving a state’s

200. CONN. GEN. STAT. ANN. § 9-23g (West 2015).
202. Calculations made by author based on a 50-state survey of state statutes. Complete dataset of these statutes is on file with the author and available upon request.
204. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 348 (1972) (noting “that 30 days appears to be an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud—and a year, or three months, too much”).
205. Id.
207. See Sosna v. Iowa, 419 U.S. 393 (1975) (upholding a one-year durational residency period in the state of Iowa for new residents to be able to file a petition for divorce); see also
welfare benefits,\textsuperscript{208} to keep a new resident from becoming a municipal employee, and to make it harder to gain admission to the bar.\textsuperscript{209} Where courts have determined that durational residency requirements impinge on a fundamental right, these requirements have been invalidated. For example, this has generally been the case when states have tried to link state benefits to a resident’s length of residency in that state.\textsuperscript{210} Some of the jurisprudence concerning these durational residency qualifications has been controversial. Yet there is one group of individuals to whom durational residency qualifications have been consistently applied less controversially: newly-resident political candidates seeking to get elected to a state office. At least at the state level, politicians generally continue to be barred by durational residency requirements, as we are about to see.

IV. THE STABILITY OF DURATIONAL RESIDENCY REQUIREMENTS FOR CANDIDATES

A different story emerges with respect to durational residency requirements for candidates. Durational residency qualifications continue to be imposed on many political office-seekers by state law and by state constitutional provisions. These requirements have been justified by the states as ensuring more informed and knowledgeable political candidates, guaranteeing the exposure of prospective candidates to voters, and assuring that a candidate running for office is a member of the political community he hopes to represent.

There have been many cases in the courts challenging durational residency requirements as they apply to candidates for office.\textsuperscript{211} But whereas durational residency requirements for voters were struck down under such challenges, courts have largely upheld the durational residency requirements for candidates. In so doing, they have drawn a sharp distinction between the right to vote and the right to

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208. See Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a California welfare statute that imposed a one-year waiting period on new state residents); Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a one-year residency period imposed by a state as a prerequisite to receiving welfare payments on the basis that this would allow a state to discriminate between different classes of state residents); see also David A. Donahue, Durational Residency Requirements for Welfare Benefits, 72 St. John’s L. Rev. 451 (1998).
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210. See, e.g., Zobel v. Williams, 457 U.S. 55 (1982) (invalidating an Alaska statute that distributed the state’s income from oil revenues among state residents based on each citizen’s length of residence within the state).
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211. See Pitts, supra note 3, at 347 n.22 (listing several such cases).
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be a candidate for office. In part, the durational residency requirements for candidates have been more difficult to challenge because they have long been enshrined in state constitutions. At the same time, it is worth noting that the situation facing candidates for federal office differs from that facing candidates for state office. At the federal level, there are no durational residency requirements for candidates to satisfy, apart from those for the President and Vice President. However, at the state level, these requirements abound. Thus, durational residency requirements for candidates differ by office.

A. At the State Level

Durational residency requirements are common for state offices, such as the office of the governor or a member of the state legislature. Candidates for governor can expect to face some of the most stringent durational residency requirements in the nation. As Table 3 indicates, Missouri and Oklahoma impose a ten-year durational residency requirement on gubernatorial candidates. A durational residency period of seven years is also not unheard of. Alabama, Alaska, Arkansas, Florida, Massachusetts, New Jersey, Pennsylvania, and Tennessee all require their candidates for governor to be a state resident for seven years before they can be elected to office. Another seventeen states set the durational residency period for governor at five years. In only a handful of states are these durational residency requirements almost entirely absent. Even in these states, a gubernatorial candidate must usually satisfy the same durational residency period as is required of a state elector or voter. Table 3, below, lists the length of the durational residency requirement for the office of the governor for every state as of 2015. In most states, these requirements are constitutionally mandated. By contrast, residency requirements for local office, such as mayor or city councilman, are often set by statutes or municipal codes. They also tend to have much shorter durational residency periods.

212. See Mo. Const. art. IV, § 3 (Missouri); Okla. Const. art. VI, § 3 (Oklahoma).

213. See Ala. Const. art. V, § 117 (Alabama); Alaska Const. art. III, § 2 (Alaska); Ark. Const. art. VI, § 5 (Arkansas); Fla. Const. art. IV, § 5 (Florida); Mass. Const. pt. II, ch. 2, § 1, art. II (Massachusetts); N.H. Const. pt. II, art. XLII (New Hampshire); N.J. Const. art. V, § 1, para. 2 (New Jersey); Pa. Const. art. IV, § 5 (Pennsylvania); Tenn. Const. art. III, § 3 (Tennessee).

214. A five-year period seems to exist in the largest plurality of the states. See, e.g., Cal. Const. art. V, § 2 (California); Haw. Const. art. V, § 1 (Hawaii); Ind. Const. art. V, § 7 (Indiana); La. Const. art. IV, § 2 (Louisiana); Me. Const. art. V, pt. I, § 4 (Maine); Miss. Const. art. V, § 117 (Mississippi); Neb. Const. art. IV, § 2 (Nebraska); N.M. Const. art. V, § 3 (New Mexico); N.Y. Const. art. IV, § 2 (New York); N.D. Const. art. V, § 4 (North Dakota); S.C. Const. art. IV, § 2 (South Carolina); Tex. Const. art. IV, § 4 (Texas); Utah Const. art. VII, § 3 (Utah); Va. Const. art. V, § 3 (Virginia); Wyo. Const. art. IV, § 2 (Wyoming).
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† = There are no formal residency qualifications for a gubernatorial candidate in the state of Kansas.
As mentioned, in some of the states—including Connecticut, Ohio, Rhode Island, Washington, and Wisconsin—the length of time that a candidate for governor has to reside in the state will be equivalent to the durational residency requirement for a voter in that state. This period will usually be around thirty days. But these exceptions are rare, and in most cases the durational residency requirement for a gubernatorial candidate is many years. Often, the long durational residency periods have been used to disqualify new challengers, especially those who have not recently lived in the state. To understand how candidate residency qualifications work, and how they have sometimes been used by politicians against their political opponents, we might examine some recent durational residency battles that have wound up in the courts. Not all state durational residency challenges concern gubernatorial candidates or candidates seeking statewide office. Many of these challenges are local in nature and arise during races to fill mayoral offices and city council seats as well.

We can compare the legal challenges brought against the candidacies of Rahm Emanuel and Zephyr Teachout on durational residency grounds. Both of these durational residency challenges attracted significant media attention when they occurred, even though the races were very different: Rahm Emanuel was running in a mayoral race to lead city hall in Chicago while Zephyr Teachout was running for the Democratic nomination to become governor of New York. We can also contrast the hurdles that Emanuel and Teachout faced in their races with those faced by Hillary Clinton in her race to become the U.S. Senator from New York in 2000. Hillary Clinton was not a New Yorker and had never lived in that state. However, unlike the state races, her qualifications could not be challenged on durational residency grounds because Clinton was running for a federal office.

1. Rahm Emanuel

Rahm Emanuel is a Democratic politician who was born and raised in Chicago. He worked in the Clinton Administration through much of the 1990s, including as Assistant to the President for Political Affairs and as a Senior Advisor to the President for Policy and Strategy. In 1998, Emanuel resigned from the Clinton


White House, returned to Chicago, and pursued a career in finance. In 2002, he ran for the U.S. House of Representatives from Chicago, after Rod Blagojevich, who represented Illinois’s 5th Congressional District, announced that he was vacating his seat to run for governor.217 Blagojevich was elected governor, and Emanuel was elected to Blagojevich’s old seat in the 5th Congressional District. Emanuel went on to represent that district in Congress from 2003 to 2009. When Barack Obama became President, Emanuel became his Chief of Staff.218 On January 2, 2009, he resigned from Congress and returned to the White House, this time to work for President Obama.219

Emanuel went to great pains to maintain his Chicago residency during his time in the White House. From the time his house was first purchased in 1998 until he became White House Chief of Staff in 2009, his family continually resided in their Chicago home,220 while Emanuel shuttled back and forth to Washington. During his first six months of work in the Obama Administration, Emanuel’s family continued to remain in their Chicago home while Emanuel rented an “in-law apartment” in the nation’s capital.221 On June 1, 2009, however, Emanuel’s family relocated to Washington. They began to receive their mail at the new house they rented in the District of Columbia.222 In the meantime, they rented out their Chicago home to another family. Emanuel’s family did leave several large household items at their Chicago home, including televisions, a piano, and a bed, in addition to books and various family heirlooms. Emanuel also continued to pay property taxes on his Chicago house, listed his Chicago address on his personal checks, and continued to list the address of his Chicago house as his official registered voting address.223 He also always maintained a valid Illinois driver’s license.

Richard M. Daley had been elected the mayor of Chicago in 1989 and re-elected on five separate occasions since. In 2010, Daley announced his plans to retire.224 Daley had been leading America’s third-largest city for twenty-one years.225 Upon learning this news,

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218. Maksym, 950 N.E.2d at 1053.
219. See id.
220. Id.
221. Id.
222. Id.
223. Id. at 1054.
225. Id.
Emanuel resigned his position at the White House and announced that he would run to become the next mayor of Chicago.\textsuperscript{226} While Emanuel’s family had remained in Chicago when Emanuel served in Congress, residing in the house that Emanuel owned, Emanuel’s spouse and children had been living in Washington, D.C. for several months by the time he announced his mayoral bid, and their Chicago home was being occupied by another family.\textsuperscript{227} When Emanuel decided to run for mayor, the rental of his Chicago home became a major issue in the legal challenge that was brought to Emanuel’s mayoral candidacy under Illinois’ durational residency qualifications.\textsuperscript{228}

Illinois maintains a durational residency requirement for mayoral elections. The Illinois Municipal Code states that a candidate for mayor has to reside in the city for at least one year preceding a mayoral contest.\textsuperscript{229} In addition, the candidate himself has to be a “qualified elector” in Illinois.\textsuperscript{230} This means that a mayoral candidate has to have been a resident of his voting district during the thirty days prior to the election.\textsuperscript{231} After Emanuel resigned his position at the White House, he immediately made plans to return to Illinois. But as his Chicago home was now occupied by tenants, who were under contract there until June 30, 2011, Emanuel decided to lease an apartment on Milwaukee Avenue, starting on October 1, 2010.\textsuperscript{232}

In November 2010, lawyer Burt Odelson filed a legal challenge to Emanuel’s mayoral candidacy on behalf of Thomas L. McMahon, a retired Chicago police officer, and Walter P. Maksym Jr., a Chicago lawyer.\textsuperscript{233} The challenge asserted that Emanuel did not meet the state’s one-year municipal durational residency requirement and that his name could not be placed on the ballot for the mayoral election to take place on February 22, 2011. McMahon and Maksym took issue with Emanuel renting out his Chicago property while he lived in Washington, claiming that Illinois law required the mayoral candi-

\textsuperscript{226} See Maksym, 950 N.E.2d at 1053.
\textsuperscript{227} Id. at 1054; Gavin J. Dow, Note, Mr. Emanuel Returns from Washington: Durational Residence Requirements and Election Litigation, 90 WASH. U. L. REV. 1515, 1526 (2013).
\textsuperscript{228} Maksym, 950 N.E.2d at 1066.
\textsuperscript{229} The relevant provision is Illinois Municipal Code § 3.1-10-5(a), which states: “A person is not eligible for an elective municipal office unless that person is a qualified elector of the municipality and has resided in the municipality at least one year next preceding the election or appointment . . . . ” 65 ILL. COMP. STAT. ANN. 5/3.1-10-5(a) (West 2016).
\textsuperscript{230} Id.; see also Maksym, 950 N.E.2d at 1056-57.
\textsuperscript{231} 65 ILL. COMP. STAT. ANN. 5/3.1-10-5(a) (West 2016).
\textsuperscript{232} Maksym, 950 N.E.2d at 1054.
date to be physically present in Chicago for one year.\textsuperscript{234} Emanuel contended that he met the requirement because he owned a home in Chicago, voted there, and always intended to return.\textsuperscript{235} He also pointed to an exception in the state’s election code that protected the residency status of persons who temporarily left “on business of the United States.”\textsuperscript{236} Emanuel argued that his years in the White House fell into this category. The challengers claimed that this exception applied only to those who left the state to serve in the military.\textsuperscript{237}

McMahon and Maksym’s complaint came before the Board of Election Commissioners of the City of Chicago, which, after holding an evidentiary hearing, dismissed it and ruled that Emanuel’s name should be included on the ballot as a mayoral candidate.\textsuperscript{238} The Board determined that Emanuel had met the qualifications of the Illinois Municipal Code.\textsuperscript{239} The Board noted, and both sides agreed, that “residence” in the Municipal Code referred to “permanent abode,” and that two elements were required to prove it: physical presence and the intent to remain permanently.\textsuperscript{240} In the Board’s view, once permanent abode was established, residence continued until it was “abandoned.”\textsuperscript{241} Emanuel’s challengers failed to establish that he had abandoned his permanent residency in the City of Chicago.\textsuperscript{242}

Emanuel’s challengers sought judicial review of the Board’s decision in the circuit court of Cook County, which affirmed the Board of Election Commissioners.\textsuperscript{243} The circuit court agreed with the Board that the relevant question in the case was whether Emanuel had abandoned his Chicago residence when he became Chief of Staff to the President of the United States.\textsuperscript{244} Finding that he had not abandoned it, the circuit court affirmed the Board’s decision.\textsuperscript{245} Emanuel’s challengers did not give up, however. They appealed the circuit court decision to the Illinois Supreme Court, which affirmed the decision.\textsuperscript{246} The Illinois Supreme Court found that Emanuel had not abandoned his Chicago residence.

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234. & Id. \\
235. & Id. \\
236. & See id. \\
237. & Id. \\
238. & Maksym v. Bd. of Election Comm’rs, 950 N.E.2d 1051, 1053 (Ill. 2011). \\
239. & Id. at 1054. \\
240. & Id. \\
241. & Id. \\
242. & Id. \\
244. & Maksym, 950 N.E.2d at 1055. \\
245. & Id. \\
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court’s decision to the Illinois Appellate Court. There they received a more favorable ruling. By a two-to-one vote, the appellate court reversed the circuit court and set aside the decision of the Board.

The Illinois Appellate Court focused on the meaning of the words “resided in” in the Illinois Municipal Code and specifically the requirement that a candidate must have “resided in the municipality at least one year next preceding the election.” It noted that the Board had used the definition of residence that was appropriate in voter qualification cases, but Emanuel’s case was a candidate qualification case. The Illinois Appellate Court was not convinced that using the same definition of residence for voter qualification contests and candidate qualification contests was appropriate. The Illinois Supreme Court had never ruled on the matter. Thus the Illinois Appellate Court determined that the phrase “resided in” in the Municipal Code did not refer to a permanent abode, but only to the place where the candidate “actually live[s]” or “actually reside[s].”

The Illinois Appellate Court’s decision of January 24, 2011 was quickly appealed to the Illinois Supreme Court, given that Chicago’s mayoral election was less than a month away. Until the appellate ruling, Emanuel had been steamrolling his challengers in the polls. Then, within days of ballots being printed and early voting starting in Chicago, it seemed as if Emanuel’s name was not going to appear on the ballot. On January 27, 2011, however, the Illinois Supreme Court reversed the Illinois Appellate Court and held that Emanuel’s name should appear after all.

When Smith, a longtime resident of Illinois, was appointed a circuit judge by the Illinois governor, an action was brought to remove him from that office on the grounds that he had not been a resident “for at least five years next preceding . . . his

248. Maksym, 942 N.E.2d at 743.
249. Id.
250. Id. at 745.
252. Id.
253. 44 Ill. 16 (1867); see also Maksym v. Bd. of Election Comm’rs, 950 N.E.2d 1051, 1059 (Ill. 2011).
appointment,” as the Illinois Constitution then required.\textsuperscript{254} His challengers asserted that Smith had moved with his family to Tennessee for eight months during the five-year durational period.

In 1847, the Illinois Supreme Court found that Smith’s time in Tennessee did not result in the abandonment of his Illinois residency. Once established, it found that “residence is lost . . . by a union of intention and acts,” which are to “be inferred from the surrounding circumstances.”\textsuperscript{255} Smith had frequently declared that his move to Tennessee was an experiment, expressed a desire to return home to Illinois upon arriving in Tennessee, declined to vote in Tennessee out of fear of losing his Illinois citizenship, refused to sell his Illinois law books because he thought he would need them when he returned to his Illinois practice, and rented out his Illinois residence instead of selling it when he left.\textsuperscript{256} Since Smith was decided, the Illinois courts had held that the question of whether a candidate abandoned his state residency was a question of intent.\textsuperscript{257} A residency was established with physical presence and intent to remain indefinitely. Once established, the test of whether it was kept became abandonment.\textsuperscript{258} Thus a person could be physically absent from his residence “for months or even years” without abandoning it.\textsuperscript{259} And whether one abandoned his residency turned on what his intent was. Since Emanuel owned a house in Illinois while living in Washington, and had always said he intended to return to Chicago, the Illinois Supreme Court found he never abandoned his residency.

After the Illinois Supreme Court’s decision, Emanuel’s name was placed on the ballot for mayor of Chicago. On February 22, 2011, he won fifty-five percent of the vote and was elected mayor. He was reelected in 2015. Emanuel’s durational residency battle attracted

\begin{itemize}
\item \textsuperscript{254} Maksym, 950 N.E.2d at 1057.
\item \textsuperscript{255} Smith, 44 Ill. at 24.
\item \textsuperscript{256} Id. at 23-24.
\item \textsuperscript{257} Illinois case law bore this out. See, e.g., People ex rel. Madigan v. Baumgartner, 823 N.E.2d 1144, 1150 (Ill. App. Ct. 2005) (“[W]here a person leaves his residence and goes to another place, even if it be another [s]tate, with an intention to return to his former abode, or with only a conditional intention of acquiring a new residence, he does not lose his former residence so long as his intention remains conditional.” (quoting Pope v. Bd. of Election Comm’rs, 18 N.E.2d 214, 216 (Ill. 1938))); Walsh v. Cty. Officers Electoral Bd., 642 N.E.2d 843, 845 (Ill. App. Ct. 1994) (whether candidate abandoned old residence in favor of new residence presents a question of intent, which is measured both by the “surrounding circumstances” and the candidate’s declarations); Dillavou v. Cty. Officers Electoral Bd., 632 N.E.2d 1127, 1131 (Ill. App. Ct. 1994) (whether candidate abandoned established residence is a question of intent, and “an absence for months, or even years, if all the while intended as a mere temporary absence for some temporary purpose, to be followed by a resumption of the former residence, will not be an abandonment’” (quoting Kreitz v. Behrensmeier, 125 Ill. 141, 195 (1888))).
\item \textsuperscript{258} Maksym, 950 N.E.2d at 1060.
\item \textsuperscript{259} Id.
\end{itemize}
widespread media coverage. This coverage launched a debate about the wisdom of durational residency requirements generally. The case generated commentary by non-lawyers and had an effect, according to Gavin Dow, a little like that which was felt in the aftermath of Bush v. Gore. Dow argues that Emanuel’s legal battle brought into sharp contrast “the inherent tension between protecting voter choice and promoting the rule of law when interpreting and enforcing a candidate qualification rule.” It also showcased some of the complexity that candidate qualification cases involve and some of the strain that they put on courts when they are required to make quick decisions in a complicated yet important area of the law on the eve of an election. As Dow rightly explains, this can throw the impartiality of the courts into question.

2. Zephyr Teachout

Like Emanuel’s race to become mayor of Chicago, Zephyr Teachout’s attempt to challenge Andrew Cuomo, a sitting governor, in New York’s Democratic primary demonstrates how durational residency requirements can be used to attack a challenger at the state level. Teachout is a law professor and a scholar of election law. Born and raised in Vermont, she went to law school at Duke University and later was admitted to the North Carolina bar. In 2004, she worked as Director for Internet Organizing for the presidential campaign of former Vermont governor Howard Dean.

In 2009, Teachout moved to New York to take a position as an assistant professor of law at Fordham University. In 2014, when the labor-backed Working Families Party of New York considered snubbing Andrew Cuomo and giving its ballot line to Teachout, the media began to focus on the previously unknown candidate. The Working Families Party ultimately chose to stick with Cuomo as its candidate,

260. See Dow, supra note 227, at 1533.
262. Id.
263. Id.
264. Id.
265. Id.
268. Weiss, slip op. at 5.
but at that point, Teachout decided that she would run for governor of New York on her own. She managed to gather more than 45,000 signatures and filed paperwork to challenge Cuomo in the Democratic primary. In response, Cuomo immediately challenged her candidacy, asserting that Teachout failed to meet the durational residency requirement of the state she wished to govern.

Like Illinois, New York maintains a durational residency requirement that candidates for the office of governor must meet. New York’s constitution requires a candidate for the office of governor to have resided within the state for a five-year period immediately preceding the election. Teachout, who moved to New York in June 2009 and announced plans to run for governor in July 2014, barely met the requirement.

Teachout’s situation differed from Rahm Emanuel’s in several important respects. Unlike Emanuel, Teachout did not own her own home. Emanuel also had a career in Illinois and an established track record there prior to serving in the Obama Administration, whereas Teachout had never lived in New York before taking up her position at Fordham Law School. To make matters more complicated, Teachout did not consistently remain in New York during the five qualifying years needed to satisfy her durational residency requirement. As an academic, she held various visiting fellowships that took her for months at a time outside of the state. Nor did Teachout always rent an apartment in New York, much less the same apartment. She changed homes often. She also stayed with friends in New York for long stretches of time without paying any rent.

In most legal disputes over a person’s residence, a distinction is made between the terms “residence” and “domicile.” Domicile refers to the place where an individual has established a permanent home, one that he or she intends to return to even if the person may be temporarily located elsewhere. Residence, on the other hand, refers to a person’s temporary, physical place of abode. However, under New York Election Law, the two terms both refer to the candidate’s

270. Id.
271. See N.Y. CONST. art. IV, § 2 (“No person shall be eligible to the office of governor or lieutenant-governor, except a citizen of the United States, of the age of not less than thirty years, and who shall have been five years next preceding the election a resident of this state.”).
273. Id.
274. See id.
275. See id.
276. See id.
permanent home. New York’s election law defines the term “residence” as “that place where a person maintains a fixed, permanent and principal home and to which he, wherever temporarily located, always intends to return.”

Two of Cuomo’s supporters, Harris Weiss and Andrew Sternlicht, filed a court petition to challenge Teachout’s candidacy for governor, arguing that Teachout did not meet the durational residency requirements set out in New York’s constitution. In New York, disputes over a candidate’s residency are generally handled by the supreme court in one of New York’s counties. As Teachout resided in Brooklyn at the time of this challenge, the supreme court—or trial court—in Brooklyn heard her case. The court noted Teachout’s peripatetic background. Though she was raised in Vermont, the court explained how Teachout had attended college in Connecticut and law school in North Carolina. She clerked for a judge on the U.S. Court of Appeals for the Third Circuit in Pennsylvania, and then returned to North Carolina to work as a death penalty lawyer, all while claiming Vermont as her official state of residence.

Once Teachout moved to New York, she resided in at least six different locations within New York City. From August to September 2009, Teachout sublet an apartment at 22 Irving Place in Manhattan. From September to November 2009, she rented an apartment at 228 West 25th Street in Manhattan. From December 2009 to March 2011, she resided with a friend at 241 East 7th Street in Manhattan. From April to October 2011, she lived in an apartment at 153 Roebling Street in Brooklyn. From November 2011 to November 2012, she resided in an apartment at 72 West 82nd Street in Manhattan. In November 2012, Teachout began to reside at 171 Washington Park in Brooklyn, and she was living there at the time of her durational residency trial, which took place on August 7-8, 2014.

Unlike Emanuel, who had always been registered to vote in Chicago, even when he lived in the District of Columbia, Teachout registered to vote in New York only about eleven months after she

278. N.Y. ELEC. LAW § 1-104 (McKinney 2016).
279. Weiss, slip op. at 1-2.
280. Miller, supra note 277.
281. Weiss, slip op. at 4.
282. Id. at 4-5.
283. Id. at 5.
284. Id. at 5-6.
moved there for the first time. And while Teachout did file tax returns in New York for the years 2009 through 2013, the challengers to her gubernatorial candidacy made an issue of how often she was absent from the state during her years as a resident. Teachout spent several summers in Vermont, one summer at the Library of Congress in Washington, D.C. working on a book, and time in Arizona working with community organizers. In 2010, she spent seven weeks in Massachusetts while she taught at Harvard, though she did not give up her New York apartment during this time and returned to it on weekends. In spring 2014, right before she decided to run for governor, Teachout spent another four months living in Washington, D.C. as a fellow of the New America Foundation. During this time, she sublet her Brooklyn apartment to someone else.

Teachout’s challengers claimed that her many absences from the state meant she did not manifest the necessary intent to make New York her domicile for purposes of satisfying New York’s Election Law, which required physical presence and intent to remain indefinitely. They also pointed out how, despite living in New York since 2009, Teachout continued to use her parent’s Vermont address on her driver’s license and car registration. She also used the Vermont address as her address on file with the North Carolina bar, and for documents she had filed with the government, such as her W-4, employee wage withholding forms, and for a form she filed with the Federal Election Commission after contributing to President Obama’s reelection campaign. The challengers also showed that Teachout had registered to vote in New York only in May 2010, almost eleven months after she arrived, though she did not vote anywhere else since.

At her trial on August 7–8, 2014, the supreme court of King’s County, in Brooklyn, ultimately ruled in Teachout’s favor. The court explained that the challengers had the burden of proving by clear and convincing evidence that Teachout had not been a resident

286. See Weiss, slip op. at 6.
287. Id. at 6-7.
288. Id. at 7.
289. Id.
290. Id. at 8.
291. Id. at 9.
293. She also filed New York state income tax returns from 2009 to 2013. Miller, supra note 277.
294. Weiss, slip op. at 12.
of New York for five years prior to the election. They failed to meet that burden.\textsuperscript{295} The court found that Teachout’s multiple apartments in New York City were “all places where she lived, ate her meals, slept, kept her personal items/clothing, furnished and/or decorated, and where she occasionally entertained.”\textsuperscript{296} Regarding the Vermont address and not applying for a New York driver’s license until May 5, 2014, the court accepted Teachout’s explanation that she maintained the Vermont address as a mail drop because it was more reliable than her apartment address, and that she, like many New Yorkers, did not drive a car while in the city.\textsuperscript{297} The court found that she continuously maintained a domicile and residence in New York. She was physically present there, and intended to remain indefinitely.

Cuomo’s campaign continued its efforts to disqualify Teachout by appealing the ruling. But an appellate court affirmed the decision of the trial court, allowing Teachout’s name to remain on the gubernatorial ballot.\textsuperscript{298} As the appeals court explained: “Although Zephyr R. Teachout has resided in several different residences within the City of New York since 2009, while maintaining close connections to her childhood domicile of Vermont, that is nothing more than an ambiguity in the residency calculus.”\textsuperscript{299}

New York’s durational residency requirement was used by Cuomo’s campaign as a political tool to undermine his opponent, and it allowed Cuomo to avoid debating Teachout on the issues. Teachout told newspapers that the residency challenge was a blatant attempt to intimidate her and sap her campaign of time and resources.\textsuperscript{300} When asked about Cuomo’s decision to appeal, Teachout pointed out how Cuomo had refused to debate her. Teachout and Tim Wu, a professor at Columbia Law School who was running for lieutenant governor, had asked Cuomo to debate them. “It’s time to take it out of the courtroom and into a debate,” Teachout told the media.\textsuperscript{301} But Cuomo, less than three weeks before the election, refused. Instead, he used the durational residency requirement to challenge Teachout’s ability to run for governor in the first place. Though Teachout’s name remained on the ballot in New York’s Democratic primary for governor, she ultimately lost that primary to Cuomo on September 9, 2014. Still, Teachout received thirty-four percent of the vote. Given her lack

\textsuperscript{295} Id. at 4, 12.
\textsuperscript{296} Id. at 6.
\textsuperscript{297} Id. at 11.
\textsuperscript{299} Id.
\textsuperscript{300} Kaplan, supra note 269.
of name recognition and lack of experience in elected politics, this result clearly demonstrated the displeasure that many Democratic primary voters had with New York’s sitting governor.

B. At the Federal Level

We have seen how durational residency requirements exist in almost all of the states. At the federal level, however, due to the unique compromise that the framers reached in 1787, the situation that political candidates face is quite different. According to the Constitution, a member of the House only has to be an “inhabitant” of the state from which he is chosen to serve “when elected.”302 There is no durational residency qualification to meet, and the term “inhabitant,” which is looser than “resident,” implies that the candidate only has to reside in the state on the day of his election. Similarly, a U.S. Senate candidate only has to be an “inhabitant” of the state from which he is chosen “when elected.”303 Whenever states have tried to add requirements, the Supreme Court has disallowed this.304 Although we would not normally expect a candidate to run for a federal office in one state when the candidate happens to reside in another, this has actually happened several times in American history. Such situations put into stark contrast the mismatch between how the durational residency regimes function at the state and federal levels.

Hillary Rodham Clinton’s race for the United States Senate in New York provides an example of what candidates for federal office can do in the absence durational residency requirements. In 1999, Senator Daniel Patrick Moynihan decided not to seek re-election from New York, announcing his decision to vacate the U.S. Senate seat that he had held since 1977. Almost immediately, longtime veterans of New York’s politics began trying to convince Hillary Clinton, who was then the wife of the sitting U.S. President, to run for Moynihan’s seat.305 Representative Charles Rangel, who had long represented Harlem in Congress, first suggested the idea at a speech he gave in Chicago. Harold Ickes, a political advisor to the Clintons, later tried to convince Hillary Clinton in person to run for Moyni-

303. Id.
han’s seat. One problem, however, was that Hillary Clinton was not from New York—in fact, she had never lived in the state.

Born in 1947 in Park Ridge, Illinois, Clinton spent the first eighteen years of her life in the suburbs of Chicago, before leaving in 1965 for college in Massachusetts, in 1969 for law school in Connecticut, and in 1974 to begin her career in Arkansas. For the next eighteen years, from 1974 until 1992, the Clintons lived in Arkansas, where they dominated the state’s political scene, as Bill Clinton first served one term as Arkansas’s attorney general and then five terms as the state’s governor. During this time, Hillary became a partner at a prominent Little Rock law firm and a high profile lawyer in the state. When Bill Clinton was elected president in 1992, the Clintons moved to Washington, D.C. They resided in the White House from 1993 to 2000.

While Hillary Clinton could legitimately claim to be the daughter of Illinois or Arkansas, her claim to New York was more tenuous—or rather, it was non-existent. Yet Clinton, both as the wife of the President and in her own right, had widespread name recognition, and she worked hard to change her image and brand herself as a New Yorker even if she had, in fact, never been one. On November 1, 1999, she and her husband bought a $1.7 million, five-bedroom, Dutch Colonial house in Chappaqua, New York, a suburb located in Westchester County. She then announced that the family would move there after Bill Clinton’s presidency ended. Hillary Clinton did not reside in this house immediately, as her official home remained in the White House. But the purchase of the Chappaqua home generated a great deal of media attention, and it allowed Hillary Clinton to begin planting New York roots, even when she was still registered to vote in Arkansas. This was the first time the Clintons had owned a house in

306. Id.
seventeen years.\textsuperscript{312} Having a home in New York gave Hillary an aura of legitimacy and allowed her to present the appearance that she was campaigning from a base in New York State.

There were three reasons why Hillary’s candidacy was ultimately successful and why she was not challenged as a carpetbagger. The first is that New Yorkers, unlike residents of other states, are especially forgiving of outsiders. Robert F. Kennedy, Jr. had already been elected to the U.S. Senate from New York as an out-of-state candidate in 1964.\textsuperscript{313} That New Yorkers were not bothered by Clinton’s out-of-state roots was shown in the polls.\textsuperscript{314} As First Lady, Clinton was considered a national figure, and being from Illinois, or Arkansas, or Washington, D.C. seemed not to make much difference to the New Yorkers who elected her to the U.S. Senate in 2000.\textsuperscript{315}

A second and more important reason for Hillary’s success was that she faced very little opposition. After not having any serious Democratic challengers in the primary, Clinton expected to face New York City’s popular mayor, Rudolph Giuliani, in the general election. Giuliani consistently attacked Clinton as a carpetbagger in the media.\textsuperscript{316} Ultimately, however, he dropped out of the race.\textsuperscript{317} His replacement, Rick Lazio, a Republican who represented New York’s 2nd Congressional District in the U.S. House, hardly had Hillary Clinton’s name recognition. Lazio proved to be a lackluster candidate.

The final reason that Hillary Clinton was successful was that she ran for a federal office. As we saw, the Constitution does not maintain a durational residency qualification for federal congressional office-seekers. The only requirement is that a Senate candidate must be an inhabitant of the state from which he is chosen “when elected.”\textsuperscript{318} Hence, while the residency issue in Hillary Clinton’s race for the Senate may have been a political issue, it could not be turned into a legal issue by her opponents. A legal challenge based on the duration of Hillary Clinton’s residency would have been frivolous. Clinton owned a house in New York on the day of the election, and on November 7, 2000, she beat Lazio with fifty-five percent of the vote.

\begin{itemize}
\item \textsuperscript{312} Id.
\item \textsuperscript{314} Id.
\item \textsuperscript{315} Hillary Clinton Elected to Senate from New York, N.Y. TIMES (Nov. 8, 2000), http://www.nytimes.com/2000/11/08/politics/08YORK.html?pagewanted=all.
\item \textsuperscript{317} Hillary Clinton Elected to Senate from New York, supra note 315.
\item \textsuperscript{318} U.S. CONST. art. I, § 3, cl. 3.
\end{itemize}
C. Comparing Candidate Residencies

The above case studies show how candidate residency requirements vary by state and by office. Residency requirements for federal legislative office do not exist. Within the states, durational residency requirements very much do exist. They differ greatly, however, depending on whether they affect statewide or municipal candidates. Within each state, municipalities will often have their own, unique durational requirements. Some of these durational residency requirements for state offices can be fairly long. In New Hampshire, for instance, a candidate has to be a resident of the state for seven years before he is eligible to run for a seat in the state senate, though only for two years if he wishes to serve in the state house.319 In both cases, the candidate must also reside in the district from which he is elected.320 Table 4 lists the durational residency requirements for each house of the state senate in all fifty states as of 2015. Table 5, which follows it, lists the duration residency requirements for the lower house of each state legislature in all fifty states.

New Hampshire’s seven-year duration residency requirement to serve in that state’s senate is the longest in the country.321 However, there are other states that also possess relatively long requirements. In Massachusetts and New York, the duration residency requirement for the state senate is five years.322 In Mississippi, New Jersey, and Pennsylvania, it is four years.323 In many other states, a durational residency of two or three years is common.324 For the lower house of the state legislature, the duration residency requirement is typically much shorter, but not universally so. In New York, it remains five years,325 while in Mississippi and Pennsylvania it is four years,326 and in a number of other states the duration requirement

321. See Table 4; see also Sununu v. Stark, 383 F. Supp. 1287, 1292-93 (D.N.H. 1974) (Campbell, J., concurring) (upholding New Hampshire’s seven-year durational residency requirement for the state senate in light of a federal constitutional challenge and noting how “[s]even years, it is true, may come close to the maximum permissible” length of a required residency); N.H. Residency Law Is Upheld by Court, TELEGRAPH (Mar. 4, 1975), https://news.google.com/newspapers?nid=2209&dat=19750304&id=4bNKAAAIBAJ&sjid=fJQMAAAAIBAJ&pg=4488,4946393&hl=en.
323. MISS. CONST. art. IV, § 42; N.J. CONST. art. IV, § 1, cl. 2; PENN. CONST. art. II, § 5.
324. See, e.g., CAL. CONST. art. IV, § 2.4(c) (California, three years); DEL. CONST. art. II, § 3 (Delaware, three years); HAW. CONST. art. III, § 6 (Hawaii, three years); KY. CONST. § 32 (Kentucky, two years); N.C. CONST. art. II, § 6 (North Carolina, two years); TENN. CONST. art. II, § 10 (Tennessee, three years); VT. CONST. ch. 2, § 15 (Vermont, two years).
326. MISS. CONST. art. IV, § 41; PENN. CONST. art. II, § 5.
<table>
<thead>
<tr>
<th>STATE</th>
<th>REQUIREMENT</th>
<th>STATE</th>
<th>REQUIREMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>3 years in state (1 year in district)</td>
<td>MT</td>
<td>1 year in state</td>
</tr>
<tr>
<td>AK</td>
<td>3 years in state (1 year in district)</td>
<td>NE</td>
<td>1 year in district</td>
</tr>
<tr>
<td>AZ</td>
<td>3 years in state (1 year in county)</td>
<td>NV</td>
<td>1 year in state</td>
</tr>
<tr>
<td>AR</td>
<td>2 years in state</td>
<td>NH</td>
<td>7 years in state</td>
</tr>
<tr>
<td>CA</td>
<td>3 years in state (1 year in district)</td>
<td>NJ</td>
<td>4 years in state</td>
</tr>
<tr>
<td>CO</td>
<td>1 year in state</td>
<td>NM</td>
<td>Must be legal resident of district</td>
</tr>
<tr>
<td>CT</td>
<td>Same as state elector</td>
<td>NY</td>
<td>5 years in state (1 year in district)</td>
</tr>
<tr>
<td>DE</td>
<td>3 years in state</td>
<td>NC</td>
<td>2 years in state (1 year in district)</td>
</tr>
<tr>
<td>FL</td>
<td>2 years in state</td>
<td>ND</td>
<td>1 year in state</td>
</tr>
<tr>
<td>GA</td>
<td>2 years in state</td>
<td>OH</td>
<td>1 year in state</td>
</tr>
<tr>
<td>HI</td>
<td>3 years in state</td>
<td>OK</td>
<td>Same as state elector</td>
</tr>
<tr>
<td>ID</td>
<td>1 year in district</td>
<td>OR</td>
<td>1 year in district</td>
</tr>
<tr>
<td>IL</td>
<td>2 years in state (1 year in district)</td>
<td>PA</td>
<td>4 years in state (1 year in district)</td>
</tr>
<tr>
<td>IN</td>
<td>2 years in the state (1 year in the district)</td>
<td>RI</td>
<td>Same as state elector</td>
</tr>
<tr>
<td>IA</td>
<td>1 year in state (60 days in district)</td>
<td>SC</td>
<td>Must be legal resident of district</td>
</tr>
<tr>
<td>KS</td>
<td>Same as state elector</td>
<td>SD</td>
<td>2 years in state</td>
</tr>
<tr>
<td>KY</td>
<td>2 years in state (1 year in district)</td>
<td>TN</td>
<td>3 years in state (1 year in district)</td>
</tr>
<tr>
<td>LA</td>
<td>2 years in state (1 year in district)</td>
<td>TX</td>
<td>5 years in state</td>
</tr>
<tr>
<td>ME</td>
<td>1 year in state (3 months in district)</td>
<td>UT</td>
<td>3 years in state (6 months in district)</td>
</tr>
<tr>
<td>MD</td>
<td>1 year in state (6 months in district)</td>
<td>VT</td>
<td>2 years in state (1 year in district)</td>
</tr>
<tr>
<td>MA</td>
<td>5 years in state</td>
<td>VA</td>
<td>Same as state elector</td>
</tr>
<tr>
<td>MI</td>
<td>Same as state elector</td>
<td>WA</td>
<td>Same as state elector</td>
</tr>
<tr>
<td>MN</td>
<td>1 year in state (6 months in district)</td>
<td>WV</td>
<td>1 year in district</td>
</tr>
<tr>
<td>MS</td>
<td>4 years in state (2 years in district)</td>
<td>WI</td>
<td>1 year in state</td>
</tr>
<tr>
<td>MO</td>
<td>3 years in state (1 year in district)</td>
<td>WY</td>
<td>1 year in district</td>
</tr>
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</table>
### TABLE 5:
STATE DURATIONAL RESIDENCY REQUIREMENTS
FOR A STATE HOUSE SEAT, 2015

<table>
<thead>
<tr>
<th>STATE</th>
<th>REQUIREMENT</th>
<th>STATE</th>
<th>REQUIREMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>3 years in state (1 year in district)</td>
<td>MT</td>
<td>1 year in state (6 months in district)</td>
</tr>
<tr>
<td>AK</td>
<td>3 years in state (1 year in district)</td>
<td>NE</td>
<td>1 year in district</td>
</tr>
<tr>
<td>AZ</td>
<td>3 years in state (1 year in county)</td>
<td>NV</td>
<td>1 year in state (1 year in district)</td>
</tr>
<tr>
<td>AR</td>
<td>2 years in state (1 year in district)</td>
<td>NH</td>
<td>2 years in state (1 year in district)</td>
</tr>
<tr>
<td>CA</td>
<td>3 years in state (1 year in district)</td>
<td>NJ</td>
<td>2 years in state</td>
</tr>
<tr>
<td>CO</td>
<td>1 year in state</td>
<td>NM</td>
<td>District resident</td>
</tr>
<tr>
<td>CT</td>
<td>Same as elector in district</td>
<td>NY</td>
<td>5 years in state (1 year in district)</td>
</tr>
<tr>
<td>DE</td>
<td>3 years in state</td>
<td>NC</td>
<td>1 year in state (1 year in district)</td>
</tr>
<tr>
<td>FL</td>
<td>2 years in state</td>
<td>ND</td>
<td>1 year in state</td>
</tr>
<tr>
<td>GA</td>
<td>2 years in state (1 year in district)</td>
<td>OH</td>
<td>1 year in state</td>
</tr>
<tr>
<td>HI</td>
<td>3 years in state (1 year in district)</td>
<td>OK</td>
<td>Same as elector in district</td>
</tr>
<tr>
<td>ID</td>
<td>1 year in district</td>
<td>OR</td>
<td>1 year in district</td>
</tr>
<tr>
<td>IL</td>
<td>2 years in state (1 year in district)</td>
<td>PA</td>
<td>4 years in state (1 year in district)</td>
</tr>
<tr>
<td>IN</td>
<td>2 years in state (1 year in district)</td>
<td>RI</td>
<td>Same as elector in district</td>
</tr>
<tr>
<td>IA</td>
<td>1 year in state (60 days in district)</td>
<td>SC</td>
<td>Same as elector in district</td>
</tr>
<tr>
<td>KS</td>
<td>Same as elector in district</td>
<td>SD</td>
<td>2 years</td>
</tr>
<tr>
<td>KY</td>
<td>2 years in state (1 year in district)</td>
<td>TN</td>
<td>3 years in state (1 year in district)</td>
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<tr>
<td>LA</td>
<td>2 years in state (1 year in district)</td>
<td>TX</td>
<td>2 years in state</td>
</tr>
<tr>
<td>ME</td>
<td>1 year in state</td>
<td>UT</td>
<td>3 years in state (6 months in district)</td>
</tr>
<tr>
<td>MD</td>
<td>1 year in state (6 months in district)</td>
<td>VT</td>
<td>2 years in state (1 year in district)</td>
</tr>
<tr>
<td>MA</td>
<td>1 year in district</td>
<td>VA</td>
<td>Same as elector in district</td>
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<tr>
<td>MI</td>
<td>Same as elector in district</td>
<td>WA</td>
<td>Same as elector in district</td>
</tr>
<tr>
<td>MN</td>
<td>1 year in state (6 months in district)</td>
<td>WV</td>
<td>1 year in district</td>
</tr>
<tr>
<td>MS</td>
<td>4 years in state (2 years in district)</td>
<td>WI</td>
<td>1 year in state</td>
</tr>
<tr>
<td>MO</td>
<td>2 years in state (1 year in district)</td>
<td>WY</td>
<td>1 year in district</td>
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is three years.\footnote{27}{See, e.g., ALASKA CONST. art. II, § 2 (Alaska); CAL. CONST. art. 4, § 2.4(c) (California); DEL. CONST. art. II, § 3 (Delaware); HAWAII CONST. art. III, § 6 (Hawaii); TENN. CONST. art. II, § 9 (Tennessee); UTAH CONST. art. VI, § 5(1)(d) (Utah).} (Note that Nebraska is listed in each table, even though that state has a unicameral legislature.) Given the high rates of relocation that exist among Americans, these requirements present significant impediments to running for office in many states.

\section*{V. The Wisdom of Durational Residency Requirements}

\subsection*{A. Judicial Justifications}

Why do states continue to have durational residency requirements? One scholar who has recently examined this issue, Professor Michael Pitts, finds that there are three prevalent rationales that courts have invoked for these requirements. These include (1) the ability of candidates to understand the problem and needs of their constituencies; (2) the need for voters to have adequate time to assess the candidacies of the persons running for office; and (3) to prevent political carpet-bagging.\footnote{28}{Pitts, supra note 3, at 346; see also, e.g., Sununu v. Stark, 383 F. Supp. 1287, 1290 (D.N.H. 1974) ("The three principle state interests served by the durational residency requirement are: first, to ensure that the candidate is familiar with his constituency; second, to ensure that the voters have been thoroughly exposed to the candidate; and third, to prevent political carpet-bagging.").} Professor Pitts only weighs the justifications given for residency requirements for candidates. As we saw, the courts have considered the wisdom of residency requirements for voters, too. But let us begin our examination of the justification for durational residency requirements by briefly looking at some of the rationales that Professor Pitts has found for candidates.

The first rationale for upholding durational residency requirements has to do with ensuring that candidates understand the needs and problems of their constituents. The assumption is that a candidate who lives in the district for a longer period of time will be more knowledgeable about that district’s issues and its constituents’ needs. “The purpose of residency statutes,” a court in Missouri explained, “is to ensure that governmental officials are sufficiently connected to their constituents to serve them with sensitivity and understanding.”\footnote{29}{Lewis v. Gibbons, 80 S.W.3d 461, 466 (Mo. 2002).} Other courts have determined that candidates should have the opportunity to “know the customs and mores of the people,”\footnote{30}{State ex rel. Brown v. Summit Cty. Bd. of Elections, 545 N.E.2d 1256, 1259 (Ohio 1989).} to “understand all the local problems,”\footnote{31}{Bolanowski v. Raich, 330 F. Supp. 724, 730 (E.D. Mich. 1971).} and to “know the people of the community.”\footnote{32}{Id.} In short, durational qualifications allow a candidate
“the opportunity to become familiar with the issues and concerns that are important to the people he or she seeks to represent.”

Separately, another rationale often invoked is that durational residency requirements provide voters with more information about the candidate. Such requirements give voters, as the Alaska Supreme Court put it, “a period in which they may become familiar with the character, habits and reputation of candidates for political office.” They “ensure that voters have time to develop a familiarity with the candidate.” The requirements provide voters the “the opportunity to become acquainted with the candidate’s ability, character, personality, and reputation.” While this justification is about educating voters, it concerns the need for having a durational residency requirement that restricts candidates.

Finally, a third reason that is often given for residency requirements is to prevent carpet-bagging. Following the Civil War, those from the North who moved to the South to take advantage of the unstable financial and political climate there were called “carpetbaggers.” The implication was that these were transient citizens who moved south with all of their possessions to take advantage of Southerners. A carpet bag referred to the form of luggage that these newcomers often carried; it was essentially a suitcase or satchel that was made out of carpet-like materials. The term has since been pejoratively to describe political candidates who move to a new geographic region where they have no previous ties, and quickly seek to get elected to political office there. Candidate residency qualifications ostensibly protect communities from these types of people. As a federal district court in Michigan explained, durational residency qualifications serve citizens “in protecting [them] from ‘raiders’ who are not seriously committed to the interests of the community.”

In addition to these justifications given by courts, Professor Pitts argues that there are two other justifications for candidate durational residency requirements. The first of these is that these require-

333. Robertson v. Bartels, 150 F. Supp. 2d 691, 696 (D. N.J. 2001); see also Pitts, supra note 3, at 347 n.22 (citing Lewis, Summit Cty., Bolanowski, and Robertson for the proposition that residency requirements serve a government interest by guaranteeing that candidates are familiar with the issues present in their district and among constituents).
338. Id.
ments help lower the number of candidates in any given election by keeping “frivolous” candidates off the ballot. Variations on the same theme have often appeared in other forms, including justifications that durational residency requirements also prevent “ballot crowding” and prevent an election from becoming too “unwieldy.” Separately, another justification that Professor Pitts finds for durational residency requirements is that they work to ensure geographic representation. The requirement that a person has to live in a certain geographic region of a state for a set period of time may work to better ensure that the region’s needs and character receive adequate representation in the state’s legislature.

B. Scholarly Reactions

The scholarly community has long been strongly opposed to durational residency requirements. As Professor Pitts states emphatically, “Residency requirements should be eliminated.” He contends that durational residency qualifications neither hold up under close scrutiny, nor do the reasons for them seem to be empirically justified. Several of the reasons that courts have given for these requirements are concerned with the need to protect the interests of voters. Yet Professor Pitts and others argue that voters are not ignorant. They are perfectly capable of making good choices, and a candidate’s lack of connection to a local community is something that voters should quickly understand and be able to judge for themselves. If a candidate is new to a legislative district or a candidate’s home is located outside the geographic region from which he is seeking election, this is a matter that voters should be able to detect and weigh in proper perspective on their own.

Of course, whether Professor Pitts is correct on this point is open to debate. Much of the literature on the “political ignorance” of voters posits that one of the problems with modern democracy is precisely that most of the public is usually ignorant of politics and government. Many people know that their votes are unlikely

342. See Pitts, supra note 3, at 359.
343. Id. at 360.
344. Id. at 342.
345. Id. at 356 & n.46, 378-79 & n.118.
346. Id. at 363.
347. Id. at 363-64.
348. Id. at 364.
349. See generally, e.g., Ilya Somin, Democracy and Political Ignorance: Why Smaller Government Is Smarter (2013) (making the argument that one of the biggest problems with modern democracy is that most of the public is usually ignorant of politics and government); see also Dmitry Bam, Voter Ignorance and Judicial Elections, 102 KY.
to change the outcome of an election and thus do not see a benefit in educating themselves about political candidates, much less taking time out of their day to vote.\textsuperscript{350} Some scholars have argued that while this may be rational, it creates a nation of people with little political knowledge and little ability to judge good policies for themselves.\textsuperscript{351} To be fair to Pitts, his arguments only apply to durational residency requirements as they affect candidates. As Pitts explains, “My argument and perspective is that, at least in relation to residency, voters will likely get sufficient information [to] be able to process that information adequately.”\textsuperscript{352} In his view, durational residency requirements limit freedom of choice, limit competition, and limit the ideas and perspectives among which voters are able to choose.\textsuperscript{353}

Gavin Dow points to other serious problems with durational residency requirements. One is that they force courts to get involved in ordinary politics. They often place courts in situations where the court has to make a decision quickly.\textsuperscript{354} Courts that are faced with a durational residency challenge on the eve of an election do not have much information or good precedent on which to base their decisions, and they risk damaging their reputations and legitimacy when they are forced to resolve heated election contests.\textsuperscript{355} Other scholars have also argued that durational residency requirements should be deemed constitutionally suspect, because they impinge on fundamental rights that deserve the judiciary’s protection, including the right of an individual to vote, the freedom to travel, and perhaps even the First Amendment right of freedom of political association.\textsuperscript{356}
C. Democratic Underpinnings

Despite what other scholars have written, I believe that durational residency requirements are not uniformly irrelevant, and one could make the case that they have legitimate democratic underpinnings. In terms of democratic theory, durational residency requirements are not as perplexing as some scholars make them out to be. But before advancing this argument, we first have to return to the distinction between the two different kinds of durational residency requirements that this Article has highlighted. First, durational residency requirements have been applied to voters. Second, they have been applied to political candidates. Our framers were well aware of this important distinction, and it surfaced during their debates. Unfortunately, scholars have often collapsed this distinction when criticizing the justifications for these requirements.

Durational residency requirements for voters are difficult to justify in a democracy like the United States that is characterized by a high degree of mobility. In the 1970s, both Congress and the federal courts began to understand this and, as a result, severely curtailed durational residency requirements for voters. But importantly, durational residency requirements were not eliminated entirely. Short durational residency periods were still needed for administrative purposes, for instance. A state has to know who its voters are in order to run elections effectively, and it takes time to register new voters. Durational residency requirements for voters ensure that elections may be run smoothly. Such durational residency requirements are often functionally interchangeable with modern voter registration deadlines. In both cases, the requirements are designed to give states adequate time to sign people up to vote. Yet another justification for having short durational residency requirements for voters is to prevent voter fraud. Beyond these reasons, it is hard to see why durational residency requirements for voters need to exist.

The situation for candidates, however, is different. Some scholars believe that imposing durational residency restrictions on office-seekers is unnecessary if the purpose of an election is to permit a majority of voters to select a candidate who is the most qualified individual for the job. If voters are able judge for themselves who the best candidate to represent them is, they will place appropriate weight on the candidate’s attributes that are relevant for the job, including the fact that the candidate may be from somewhere else. In this sense, durational residency requirements should be seen as being antidemocratic, the argument goes, because they could block the election of the candidate who would otherwise be the majority’s choice.357

357. See Dow, supra note 227, at 1534.
However, this view of the matter does not take into account other aspects of democratic theory, for durational residency requirements could also themselves be viewed as a legitimate exercise of popular will. When durational residency requirements are enacted by democratically-elected legislatures, their existence reflects a democratic judgment made by the people in the first place. There is merit in respecting the wishes of the people, as articulated through the legislative process. From one of democracy’s other vantage points, therefore, durational residency requirements may be legitimate. This is especially so when these requirements are enshrined in a democratically framed constitution.

There is yet another vantage point from which durational residency requirements can be justified in democratic theory. These requirements play an important role in democracy precisely because modern democratic practice involves electing representatives from distinct and diverse legislative districts. Those who oppose durational residency requirements often engage in what Professor Gardner describes as “a kind of democratic reductionism that equates democracy with raw, nationwide majoritarianism.” But most democracies do not work this way. Because we live in a country comprised of different electoral districts, majoritarian sentiment cannot be translated perfectly into legislative representation. In some cases, our legislative districts correspond with the boundaries of our states, which elect our Senators. In some cases, they consist of congressional districts within the states. Usually, these districts differ significantly from one another, not only in terms of their distinct populations but also in terms of other values and attributes. Reasonable durational residency requirements for candidates help to protect the interests of these districts and help steer both state and national legislative politics in the direction of championing local issues.

The framers understood that some qualifications had to be placed on candidates for office, and they created qualifications that ensured capable and loyal men would serve in Congress. No person could be a Representative unless he had “attained to the Age of twenty five Years,” had “been seven Years a Citizen of the United States,”

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358. Id.
359. Id.
360. E-mail from Professor James A. Gardner to author (Aug. 25, 2015) (on file with author). I thank Professor Gardner for sharing this idea with me.
361. Id.
and “when elected, [was] an Inhabitant of that State in which he shall be chosen.”365 Similarly, no person could be a Senator unless he had “attained to the Age of thirty Years,” had “been nine Years a Citizen of the United States,” and “when elected, [was] an Inhabitant of that State for which he shall be chosen.”366 And if voters found the best political candidate for a House seat happened to be twenty-four, or the best candidate for a Senate seat happened to be twenty-nine, would the Constitution prevent these younger candidates from being elected? The answer is yes, it would.

Like these requirements, durational residency requirements serve an important purpose. Our democracy is constructed out of geographic regions. Senators represent the people of their states, and Congressmen represent the people of their districts. There is something so basically intuitive about forcing a district’s representative to reside in the district that he or she represents that even the framers understood it. They did not want states to be represented by wealthy interests from neighboring states, and they were fearful of reproducing the “rotten borough” system that had developed in Britain. Though the framers ultimately did not include a durational residency qualification for members of the House and Senate, they did include one for the President, who had to reside in the United States for fourteen years prior to his election. And the framers were cognizant of the durational residency requirements that existed in the states. These qualifications allowed the states to maintain their distinct, individual, and often unique identities.

Reasonable durational residency qualifications for both voters and candidates are required for modern democracy. “While it’s impossible to prove residency requirements provide absolutely zero benefit in every situation,” Professor Pitts writes, “it seems likely that situations where residency requirements clearly benefit the electorate are outliers.”367 Professor Pitts’s argument goes too far, and this Article disagrees with this assessment. Where voting is concerned, reasonable durational residency requirements are necessary for administrative efficiency. Where political candidates are concerned, durational residency requirements work to ensure that local interests are prized. In some states today, durational residency requirements may be too long, but it cannot be said that such requirements, to the extent they are reasonable, contravene democracy entirely.

364. Id.
365. Id.
367. Michael J. Pitts, Against Residency Requirements 15 (unpublished manuscript) (on file with author).
VI. Conclusion

The best way to understand durational residency requirements is to view them as a part of American history. These requirements were around at the time of the colonies and their merits were debated at the Constitutional Convention. The framers’ debates resulted in a mixed blessing: they voted against imposing durational residency requirements on candidates for the House and Senate, while they allowed these requirements to continue to flourish in the states. That compromise was perhaps expected, given that the delegates could not agree among themselves on how the Constitution should regulate the right to vote. For a number of the delegates, voting was understood to be a state matter and that is how they preferred to leave it.

Lengthy durational residency requirements for voters were maintained by the states for nearly two hundred years. The increasing mobility of American society following the Second World War, together with the increasing consciousness concerning voting rights of the 1960s, eventually put durational residency requirements on Congress’s agenda. Congress limited the amount of time that the states had to register voters for presidential elections to thirty days, and the states began to follow suit by limiting the registration and durational residency periods for their state election contests. The Supreme Court helped the states along when it held in Dunn v. Blumstein that onerous state durational residency requirements violated the Equal Protection Clause. Once again, the states had to conform, and one by one, they shortened the length of these requirements for voters.

The history of candidate requirements turned out differently. The federal government had no reason to infringe upon the election of state officials, and no constitutional basis for doing so. When candidates have challenged durational residency requirements for infringing upon their own equal protection rights, federal courts have turned these challenges away. They have likewise turned away challenges brought under the theory that candidate durational residency requirements impinge on the rights of voters. Over time, two different systems would develop regarding durational requirements for candidates seeking public office. Federal candidates had no dur-

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368. See, e.g., Sununu v. Stark, 383 F. Supp. 1287, 1292 (1974) (concluding that “the State has a compelling interest [sic] to impose durational residency requirements upon those who seek state-elective office and that such an imposition does not constitutionally interfere with plaintiff’s right to interstate travel”).

369. Id. (“[Plaintiffs] allege that the durational residency requirement infringes upon three constitutional rights: first, the right to vote for the candidate of their choice; second, the right to associate for the advancement of their political beliefs; and third, the right to interstate travel. Their contention that the residency requirement adversely affects their right to associate and travel interstate is without merit. . . . The compelling state interest in prescribing eligibility requirements [for candidates] clearly outweighs the minimal interference with their right to cast an effective vote.”).
tional residency requirement to meet. Thus Robert F. Kennedy, Jr. and Hillary Clinton could run for Senate in New York while being residents of another state. On the other hand, the states maintained lengthy durational residency restrictions for their governors and legislators, not to mention their mayors and city council members.

Durational requirements are not necessarily antithetical to democracy, and they have been a part of American constitutional history for as long as that great experiment has lasted. The preferred and most effective way of gaining access to public office in a democratic society is the ballot box. When durational residency requirements for public office interfere substantially with the right of the people to vote for the candidates of their choice, they should be seen as being incompatible with a democratic government and inconsistent with the equal protection of its laws. But reasonable durational residency restrictions serve many important purposes. They promote a sense of democratic community and ensure that candidates are cognizant of local issues. They also help preserve the distinctions and characteristics of different legislative districts. Diversity in legislative districts is a phenomenon found in the legislature of almost every state. When the people choose who will govern them, they choose a representative who has demonstrated a commitment to their community and to their legislative district. In practice, our political communities are split into bounded geographic districts. These geographic districts elect politicians to serve in legislatures, which ultimately govern the greater country of which the district forms a part. Our geographically bounded political communities should have the power to determine, within reason, the candidates whom their people elect. Durational residency requirements in the United States further this goal.
Many of the Supreme Court’s important holdings concerning campaign finance law are not pure matters of constitutional interpretation. Rather, they are “contingent” constitutional determinations: the Court’s conclusions rest in substantial part on legislative facts about the world that the Court finds, intuits, or assumes to be true. While earlier commentators have recognized the need to improve legislative factfinding by the Supreme Court, other aspects of its treatment of legislative facts—particularly in the realm of campaign finance—require reform as well.

Stare decisis purportedly insulates the Court’s purely legal holdings and interpretations from future challenge. Factually contingent constitutional rulings should, in contrast, be more susceptible to future revision. The facts underlying contingent holdings may change, litigants in a later case may present different evidence concerning those facts, social or technological developments may occur, new discoveries may be made, or a later court’s assessments or assumptions concerning those facts may differ. The Court’s campaign finance jurisprudence exhibits the opposite tendency of what theory would predict, however. The Court has proven much more willing to revisit its purely legal interpretations of the First Amendment than its constitutionally contingent holdings.

Many of the Court’s campaign finance rulings pay insufficient attention to the importance of legislative facts. They reiterate holdings of prior cases as if they were pure declarations of law, without recognizing the underlying legislative facts upon which those holdings depend. This can lead future courts to overestimate these holdings’ binding force, overlooking their dependence on certain facts. Several cases also make critical assertions concerning legislative facts without citing support either in the record or from extrinsic sources.

Perhaps the biggest impediment to the effective use of legislative facts in campaign finance cases is the vagueness of the decision rules the Court has crafted to implement the First Amendment in this field. Many of the Court’s doctrines turn on standards—for example, whether an act poses a risk of apparent corruption—that are vague, underdefined, and fail to provide litigants and future courts with sufficient guidance concerning the nature and extent of evidence necessary to satisfy them. Such indeterminacy allows courts to resolve campaign finance cases based primarily on subjective, ad hoc intuitions and preferences rather than provable legislative facts.
I. INTRODUCTION

Much of constitutional law is far less settled than we generally take it to be. For example, it is often stated, as a matter of black-letter law, that the Fourth Amendment exclusionary rule does not prohibit the government from using unconstitutionally seized evidence in grand jury proceedings.1 This declaration, a reflection of the Supreme Court’s holding in United States v. Calandra,2 appears to be a matter of pure constitutional interpretation—that is, a pure statement of law.

That holding, however, is premised on the Calandra Court’s assessment of various facts, including the extent to which applying the exclusionary rule in grand jury proceedings would interfere with the grand jury’s operations or deter police misconduct.3 Calandra stated, “Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best. . . . [I]t is unrealistic to assume that application of the [exclusionary] rule to grand jury proceedings” would “deter[] . . . police misconduct . . . .”4

Thus, the Court’s conclusion does not rest primarily on legal grounds, such as the Constitution’s text, structure, or history, but rather on its assessment of a few key facts, including the extent to which applying the exclusionary rule to grand jury proceedings would deter police from engaging in unconstitutional searches. That fact

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3. Id. at 350 (“Against this potential damage to the role and functions of the grand jury, we must weigh the benefits to be derived from this proposed extension of the exclusionary rule.”).

4. Id. at 351-52.
does not arise directly from the Constitution itself, but rather is an empirical assessment about the world as it existed at the time of the Court’s ruling, and is by no means immutable, or even necessarily correct. Indeed, Professor Seth Stoughton, a former police officer, has demonstrated that the Supreme Court’s assumptions about police officers’ motivations are often faulty and that police frequently conduct searches and make arrests to further a wide range of goals other than achieving convictions.\(^5\)

Justice Blackmun’s opinion in *Ballew v. Georgia* presents an even more extreme example of the Justices’ reliance on extrinsic facts in applying the Constitution.\(^6\) The defendant had been convicted of obscenity in state court before a five-member jury.\(^7\) He contended that his conviction violated the Sixth and Fourteenth Amendments,\(^8\) which he argued required a jury of no less than six people in criminal cases.\(^9\) Justice Blackmun held that, as a matter of fact, “the purpose and functioning of the jury in a criminal trial is seriously impaired, and to a constitutional degree, by a reduction in size to below six members.”\(^10\)

Citing over nineteen sources, including books, studies, articles, and student notes,\(^11\) he stated that empirical data suggests that “progressively smaller juries are less likely to foster effective group deliberation,”\(^12\) “the accuracy of the results achieved by smaller and smaller panels” is doubtful,\(^13\) and “verdicts of jury deliberation in criminal cases will vary . . . to the detriment of . . . the defense” as “juries become smaller.”\(^14\) His interpretation and application of the Sixth Amendment right to a jury trial rested primarily on this empirical research concerning group decision-making, rather than the text, original understanding, or history of application of the Sixth Amendment itself.\(^15\)

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5. Seth W. Stoughton, *Policing Facts*, 88 Tul. L. Rev. 847, 852 (2014) (“[T]here are no formal mechanisms that would encourage officers to reevaluate the quality of their arrests based on the conviction results, and informal pressures actively discourage officer interest, leading officers to pay less attention to convictions than the Court assumes.”).


7. *Id.* at 226-27.

8. U.S. CONST. amend. VI, XIV.


10. *Id.* at 239.

11. *Id.* at 231 n.10.

12. *Id.* at 232.

13. *Id.* at 234.

14. *Id.* at 236.

15. *Id.* at 232-34; see also Gonzales v. Carhart, 550 U.S. 124, 159 (2007) (upholding a ban on partial-birth abortions based in part on the Court’s assumption that, despite the absence of “reliable data to measure the phenomenon,” it is “unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained” and that “[s]evere depression and loss of esteem can follow”).
Not all constitutional holdings share this dynamic. For example, in *Mahler v. Eby*, the Court held that the Ex Post Facto Clause did not preclude the petitioners from being deported under an amended immigration law based on crimes for which they had been convicted before the law’s enactment. Citing the Court’s prior interpretation of the Ex Post Facto Clause in *Calder v. Bull*, *Mahler* declared, “The inhibition against the passage of an ex post facto law . . . applies only to criminal laws and not to a deportation act like this.” The Court adjudicated this issue solely as a matter of law, based exclusively on the Immigration Act and Ex Post Facto Clause, without taking into account any empirical facts, generalizations, or assumptions about the world.

All of these cases resulted in holdings that appear to provide definitive interpretations or applications of the Constitution. *Calandra* holds that the government may use unconstitutionally seized evidence in grand jury proceedings. *Ballew* declares that the Sixth Amendment prohibits states from using a five-person petit jury in a criminal case. *Mahler* concludes that the Ex Post Facto Clause does not bar the government from designating certain crimes as deportable offenses after they already have been committed. The first two holdings, however, depend in large part on empirical, and potentially changing (or even incorrect) facts about the world beyond the four corners and legislative history of the constitutional clause at issue.

This Article introduces the phrase “contingent constitutionality” to refer to a constitutional holding that is based substantially upon—that is, contingent upon—potentially falsifiable facts about the world, commonly called “legislative facts.” As a matter of law, contingent constitutional holdings should be treated as far less settled than purely legal holdings (i.e., those based solely on the text, structure, original intent or understanding, or history of application of the constitutional or legal provision at issue), and courts should be more willing to reconsider them. The facts underlying contingent constitutional holdings may change, litigants in a later case may present dif-

18. *Id.* (citation omitted) (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386 (1798)).
ferent evidence concerning those facts, social change or technological developments may occur, new discoveries may be made, or a later court’s assessments or assumptions concerning those facts may differ.

As holdings of prior cases are repeated in treatises, hornbooks, articles, and subsequent cases, in isolation from the reasoning of the underlying opinions, however, contingent constitutional rulings often come to be treated as direct interpretations of the Constitution itself that do not rest on intermediary factual findings or assumptions. Conversely, subsequent cases instead sometimes treat the factual underpinnings of precedents as established legal principles, rather than purportedly empirical statements or assumptions about the world that are potentially susceptible to counterproof.

This Article offers an analysis of contingent constitutionality, particularly in the campaign finance context. Part II begins by exploring the concept of contingent constitutionality in greater depth, demonstrating that many important constitutional holdings rest on legislative facts that are subject to continued change, evolving understandings, and new evidence. It contends that the judiciary, and in particular the Supreme Court, should be more careful to ensure that its discussions of case holdings distinguish between those which are pure matters of law, and those which are contingent upon potentially changing extrinsic facts. Part II further contends that courts should be more willing to overturn contingent constitutional rulings than those involving primarily legal determinations. Moreover, when crafting legal tests and doctrines for applying constitutional provisions (i.e., constitutional decision rules), the Court should consider whether it is reasonably possible for litigants to prove, or even provide meaningful evidence concerning, the legislative facts upon which those decision rules rely.

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23. See, e.g., FEC v. Beaumont, 539 U.S. 146, 161 (2003) ("[R]estrictions on political contributions have been treated as merely ‘marginal’ speech restrictions subject to relatively complaisant review under the First Amendment, because contributions lie closer to the edges than to the core of political expression."); see also FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 259-60 (1986) ("We have consistently held that restrictions on contributions require less compelling justification than restrictions on independent spending.").


25. Other scholars, calling for reform of appellate courts’ factfinding, have identified campaign finance jurisprudence as an area in which the Court relies on factual findings and assumptions in crafting constitutional doctrine. See, e.g., Brianne J. Gorod, The Adversarial Myth: Appellate Court Extra-Record Factfinding, 61 DUKE L.J. 1, 28-31 (2011).

26. See infra note 32 and accompanying text.
Part II turns to the specific context of campaign finance law, distinguishing the Court’s pure constitutional holdings from its contingent constitutional holdings. This Part argues that, in the campaign finance context, the Court has failed to recognize the importance of contingent constitutionality by refusing to reassess earlier cases’ contingent constitutional holdings based on new or different evidence in subsequent cases. If anything, campaign finance jurisprudence exhibits the opposite tendency: the Court has been far more willing to readjust its purely legal interpretations of the First Amendment than it has been to revisit its factually contingent holdings. Moreover, the Court’s decision rules for applying the First Amendment in campaign finance cases have provided very little guidance to litigants concerning the nature and extent of evidence necessary to satisfy them. This Part explores these issues in three main areas of campaign finance law: the Court’s refusal to recognize proxy speech as pure speech entitled to full constitutional protection, its holdings concerning the validity of various contribution limits, and its declaration that independent expenditures do not give rise to a risk of corruption.

Part IV briefly concludes, arguing that the Court must be more attentive to the role of legislative facts in campaign finance cases. In particular, it should be willing to reassess its contingent constitutional rulings in this field in the face of new evidence in subsequent cases.

II. CONTINGENT CONSTITUTIONALITY

At the foundation of every constitutional ruling lie operative propositions: pure statements of law in which the Court interprets the Constitution’s meaning. Typically, an operative proposition is a statement of the general principle that a constitutional provision embodies. For example, the Supreme Court has held that the First Amendment guarantees fundamental rights of political speech and association.

Many scholars contend that most constitutional rulings also are based on decision rules: judicially created tests that courts employ to determine whether the underlying operative propositions have been

27. See infra note 85.
28. See infra Section III.A.
29. See infra Section III.B.
30. See infra Section III.C.
32. NAACP v. Button, 371 U.S. 415, 431 (1963); see also Morse v. Frederick, 551 U.S. 393, 403 (2007) (“Political speech, of course, is at the core of what the First Amendment is designed to protect.”).
For example, the Supreme Court has held that laws which substantially burden pure speech are “subject to strict scrutiny,” meaning they are valid only if they are narrowly tailored to serve a compelling governmental interest. More limited restrictions on First Amendment activities, in contrast, are subject only to a “rigorous” form of intermediate scrutiny, requiring the government to demonstrate that they are reasonably tailored to further an important interest.

Star decisis insulates both operative propositions and decision rules, to a substantial extent, from subsequent changes. It counsels that “an argument that [the Court] got something wrong—even a good argument to that effect—cannot by itself justify scrapping settled precedent.” The Court has described stare decisis as “a foundation stone of the rule of law.” Although stare decisis is “not an inexorable command,” departure from the doctrine “demands special justification,” particularly where a principle has been applied in a “long line of precedents.”

Most constitutional decision rules require the Court to assess certain facts. A legal provision’s constitutionality seldom hinges

33. Berman, supra note 31, at 9; Laurin, supra note 31, at 1007-08. While the dispute is immaterial to this Article, some scholars question whether it is accurate, meaningful, or possible to distinguish between operative propositions and decision rules. See David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. CHI. L. REV. 190, 207-08 (1988).
37. Some commentators have argued that stare decisis applies with greater force to operative principles than decision rules, since operative principles are the result of pure constitutional interpretation, whereas decision rules are based in part on practical implementation concerns. See Berman, supra note 31, at 113.
39. Michigan v. Bay Mills Indian Cmtv., 134 S. Ct. 2024, 2036 (2014); see also Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989) (describing stare decisis as “a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon ‘an arbitrary discretion’ ” (quoting THE FEDERALIST NO. 78, at 490 (Alexander Hamilton) (H. Lodge ed., 1888))).
42. Bay Mills Indian Cmtv., 134 S. Ct. at 2036. The Court considers several factors in determining whether to abandon stare decisis, including whether the precedent has proved unworkable, “the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.” Montejo v. Louisiana, 556 U.S. 778, 792-93 (2009).
primarily on “adjudicative facts” about the particular parties that happen to be before the Court or the specific incident, instrument, or transaction giving rise to the case, however. Instead, it usually depends on facts about the world, collectively called “legislative facts.” These include facts about how people typically think, act, or feel under certain circumstances; the likely consequences of different incentives or courses of action; and social meaning. “Facts having constitutional magnitude range widely, from the effect of a railroad licensing requirement on interstate commerce to the nature of man.” Many legislative facts “are of a complex nature, built on an intricate structure of data and inferences.”

When determining adjudicative facts, courts are generally bound by the rules of evidence. When determining legislative facts, in contrast, a court is neither required to follow the rules of evidence, nor limited to the evidentiary record. Rather, it is free to take judi-

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44. KENNETH CULP DAVIS, ADMINISTRATIVE LAW TREATISE 353 (2d ed. 1983). Adjudicative facts necessary to resolve constitutional claims are sometimes referred to as “constitutional facts,” Henry P. Monaghan, Constitutional Fact Review, 85 COLUM. L. REV. 229, 230-31 & n.17 (1985), and are subject to de novo review in certain contexts, such as in First Amendment cases, see Miller v. Fenton, 474 U.S. 104, 114, 117 (1985); see also, e.g., Bose Corp. v. Consumers Union of U.S., 466 U.S. 485, 508 n.27 (1984); Edwards v. South Carolina, 372 U.S. 229, 235 (1963). See generally Adam Hoffman, Note, Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts, 50 DUKE L.J. 1427 (2001) (identifying various types of cases in which the Supreme Court will review constitutional facts de novo). Monaghan contends that federal appellate courts generally have discretion to review constitutional facts de novo, but are not required to do so. See Monaghan, supra at 276.


47. Faigman, supra note 43, at 551 (footnote omitted).


49. See FED. R. EVID. 201(a) (providing that restrictions on a court’s ability to take judicial notice do not extend to legislative facts); Keeton, supra note 22, at 31 (“[B]oth trial and appellate courts, in making premise-fact decisions, are free to draw upon sources of knowledge not admissible under the formal rules of evidence that apply to adjudicative-fact finding.”).

50. See Jeffrey C. Dobbs, New Evidence on Appeal, 96 MINN. L. REV. 2016, 2045 (2012) (“[F]ar more common is a willingness by appellate courts to consider new evidence on legislative facts at every turn . . . ”); Gorod, supra note 25, at 6 (“[N]othing in the current legal framework prevents a higher court from looking outside the record created by the parties and relying on its own factual findings to reverse the trial court’s decision.”).
cial notice of whatever legislative facts it wishes, and an appellate court need not defer to a lower court’s findings on those issues. The Advisory Committee note to the Federal Rules of Evidence explains that a judge is “unrestricted in his investigation and conclusion” when determining legislative facts. “He may make an independent search for persuasive data, or rest content with what he has or what the parties present.”

In general, the Court is likely to begin by scrutinizing the evidentiary record that the parties assembled below, as well as their briefs on appeal. Briefs that focus on presenting legislative facts often are referred to as “Brandeis briefs,” after Louis Brandeis’ famous brief in Muller v. Oregon containing over 100 pages of social science data and other evidence concerning the consequences of long working hours on women.

In important constitutional cases, the Court typically receives numerous amicus briefs containing legislative facts, as well. The Supreme Court virtually never denies leave to file an amicus brief. “In a recent term, . . . a total of 399 amicus briefs were filed in 74 of the 79 cases decided. . . . Four or more amicus briefs were filed in over half of the decided cases.” Many of these briefs, akin to Brande-

51. Dobbins, supra note 50, at 2044; see also Schauer, supra note 45, at 58 (“[T]he phenomenon of reliance on external information to establish legislative facts has long been part of the appellate landscape.”). See generally Allison Orr Larsen, Confronting Supreme Court Fact Finding, 98 VA. L. REV. 1255 (2012) (providing an empirical examination of the extent to which the Supreme Court conducts independent factual research).

52. See Keeton, supra note 22, at 41-43; see also Lockhart v. McCree, 476 U.S. 162, 168 n.3 (1986); Caitlin E. Borgmann, Appellate Review of Social Facts in Constitutional Rights Cases, 101 CALIF. L. REV. 1185, 1188, 1190 (2013) (recognizing that it is “widely believed” that appellate courts may review social facts “independently,” but arguing that district courts’ findings concerning social facts should be subject to clearly erroneous review).

53. FED. R. EVID. 201(a) adv. comm. note (quoting Edmund M. Morgan, Judicial Notice, 57 HARV. L. REV. 269, 270-71 (1944)); see also Chastleton Corp. v. Sinclair, 264 U.S. 543, 548 (1924) (“[T]he Court may ascertain as it sees fit any fact that is merely a ground for laying down a rule of law.”).

54. FED. R. EVID. 201(a) adv. comm. note (quoting Morgan, supra note 53, at 270-71).

55. Ann Woolhandler emphasizes that litigants have a strong incentive to provide the Court with as much supporting evidence as they can concerning pertinent legislative facts. Ann Woolhandler, Rethinking the Judicial Reception of Legislative Facts, 41 VAND. L. REV. 111, 118, 121 (1988).

56. 208 U.S. 412 (1908).

57. Dobbins, supra note 50, at 2049-50. See generally Marion E. Doro, The Brandeis Brief, 11 VAND. L. REV. 783 (1958). Some commentators have critiqued Brandeis briefs precisely because appellate courts can use them to adjudicate cases based on new facts that were not introduced in the district court. See John Frazier Jackson, The Brandeis Brief—Too Little, Too Late: The Trial Court as a Superior Forum for Presenting Legislative Facts, 17 AM. J. TRIAL ADVOC. 1, 5 (1993).

58. See Dobbins, supra note 50, at 2051-54.


60. Id. at 756.
is briefs, presented the Court with legislative facts from outside the record.\textsuperscript{61} Professor Allison Larsen’s empirical research identifies problems with the Court’s reliance on amici.\textsuperscript{62} She demonstrates that a substantial number of amicus briefs “cite a study that [the amicus] funded itself,” assert facts based on information that is not publicly accessible, or present evidence based on “methods which have been seriously questioned by others working in the field.”\textsuperscript{63}

Larsen’s research further demonstrates that the Court also frequently uses the Internet to conduct its own “in house” research into legislative facts “without reliance on the parties or amici—at an astonishing rate.”\textsuperscript{64} The Court may be more willing to rely on such independent research in civil liberties cases than ones that turn primarily on economic issues.\textsuperscript{65} Many commentators, including Larsen, have questioned the reliability of independent factual research that judges perform themselves.\textsuperscript{66} She points out that the identities, qualifications, and biases of the authors of many websites, such as Wikipedia, often cannot be readily determined, and the websites’ content is not subject to adversarial testing.\textsuperscript{67} And judges sometimes do not even bother doing such research, instead deciding cases based on their own assumptions and intuitions about legislative facts.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{61} Allison Orr Larsen, The Trouble with Amicus Facts, 100 Va. L. Rev. 1757, 1773 (2014); see also Gorod, supra note 25, at 35-37 (discussing the Supreme Court’s receptivity to amicus briefs to help it engage in extra-record factfinding).
\item \textsuperscript{62} Larsen, supra note 61, at 1764.
\item \textsuperscript{63} Id.; see also Borgmann, supra note 52, at 1216 (contending that amicus briefs often contain “dubious factual assertions”).
\item \textsuperscript{64} Larsen, supra note 51, at 1262; accord Dobbins, supra note 50, at 2057; Gorod, supra note 25, at 57.
\item \textsuperscript{65} Karst, supra note 43, at 96.
\item \textsuperscript{66} See, e.g., Larsen, supra note 51, at 1262-63 (pointing out that independent judicial factfinding creates risks including “the possibility of mistake, unfairness to the parties, and judicial enshrinement of biased data”); Layne S. Keele, When the Mountain Goes to Mohammed: The Internet and Judicial Decision-Making, 45 N.M. L. Rev. 125, 149-51 (2014); see also Peggy C. Davis, “There is a Book Out . . . .”: An Analysis of Judicial Absorption of Legislative Facts, 100 Harv. L. Rev. 1539, 1542 (1987) (arguing that courts’ assessment of legislative facts is “often superficial” and “deeply problematic”); Gorod, supra note 25, at 9, 11; cf. Coleen M. Barger, On the Internet, Nobody Knows You’re a Judge: Appellate Courts’ Use of Internet Materials, 4 J. App. Prac. & Process 417 (2002) (outlining concerns with courts’ factual research on the Internet); Maurice Rosenberg, Improving the Courts’ Ability to Absorb Scientific Information, in SCIENCE AND TECHNOLOGY ADVICE TO THE PRESIDENT, CONGRESS, AND JUDICIARY 480, 482 (William T. Golden ed., 1988) (“The judiciary’s current method of absorbing scientific information on legislative facts is haphazard, unruly and unreliable.”). Keeton has a more sanguine view about the reliability of the judiciary’s factfinding capabilities concerning legislative facts, though he recommends certain procedures to help ensure the accuracy of their findings. Keeton, supra note 22 at 46-48.
\item \textsuperscript{67} Larsen, supra note 51, at 1262-63.
\item \textsuperscript{68} See Faigman, supra note 43, at 544-45; Gorod, supra note 25, at 56-57 (recognizing that judges “may assume that a particular belief is established ‘fact’ even when there is no basis for that assumption”); Larsen, supra note 51, at 1260 (recognizing that a court “can
Unlike courts’ legal interpretations, the factual premises of their rulings are not subject to stare decisis. As Kurst explains, “Much of the law’s vitality comes from the willingness of courts to re-examine findings of legislative fact to a far greater extent than they re-examine other propositions of law.” Litigants therefore should have the opportunity to challenge the legislative facts upon which a purportedly binding precedent is based, as a way of demonstrating that it is no longer valid.

When courts, commentators, and litigants fail to distinguish between constitutional holdings that are based on pure interpretations of law, and those that rest in large part on legislative facts, they inadvertently overestimate the binding nature of the latter by overlooking the factual contingencies upon which they are based. And even when lower courts recognize that the Supreme Court’s holdings are based on certain legislative facts, they might feel bound to continue accepting those legislative facts as true, even in future cases that involve different legal provisions and litigants, despite record evidence to the contrary.

If litigants present evidence concerning a legislative fact that the Supreme Court did not consider, a later court should determine whether it affects the Court’s holding, rather than waiting the years or decades it might otherwise take for the Court itself to reconsider the issue. Likewise, as social changes, technological advances, new research, or other developments undermine the legislative facts upon which a ruling is based, courts should be willing to reassess whether the factual premises, and therefore the holding, of a precedent remain valid. As Professor Stuart Minor Benjamin explains, “Appellate opinions are only as robust as the facts on which they are based. When those facts evaporate, the opinion on which they rest is weakened as well.”

simply assert an emphatic view of [a] fact with nothing to support the view except for ‘common experience’.”


71. Id. at 109.
72. Kenneth Culp Davis, Judicial Notice, 55 COLUM. L. REV. 945, 970 (1955); Gorod, supra note 25, at 57, 64 (calling for lower courts to decline to apply findings of legislative facts from higher courts’ precedents that appear incorrect).
The Supreme Court reserves to itself the “prerogative of overruling its own decisions” when they rest on “reasons rejected in some other line of decisions.”\(^7^4\) But this principle does not compel a future court to follow a precedent that rests on facts that, based on the evidence before it, do not appear true. As is often the case with constitutional interpretation, this power may be abused, but it is a problem that the Supreme Court may readily resolve through summary reversals and remands.

It might be objected that emphasizing the contingent nature of precedents undermines their practical utility, because future litigants would be freer to challenge their factual underpinnings.\(^7^5\) When a constitutional holding is based on certain legislative facts, however, it is more faithful to the underlying decision rule for future courts to confirm that those facts exist or continue to exist, rather than relying on the Supreme Court’s findings, assumptions, or intuitions concerning those facts in a previous case, potentially from decades earlier. If the Court finds itself in persistent disagreement with lower courts over the existence of particular legislative facts, the Court might consider either reformulating its description of those facts or modifying the decision rule to focus on different facts. Alternatively, if the Court wishes for a principle to apply regardless of whether a particular legislative fact is actually true, it should impose that principle as a matter of law—that is, as a matter of pure constitutional interpretation—without purporting to make it contingent upon a factual condition.

At a minimum, the Supreme Court itself should be willing to overturn a ruling that is contingent on legislative facts it no longer accepts as true. For the Court to be in a position to do so, it must: (i) be clear about which holdings are purely the result of direct constitutional interpretation, and which are contingent on legislative facts; (ii) craft constitutional decision rules that identify the legislative facts upon which its rulings are based in terms that give meaningful guidance to both litigants and future courts, rather than relying on vague standards that implicitly encourage future courts to rely on intuition; and (iii) avoid treating findings of legislative fact in precedents as assertions of law that carry binding force in subsequent cases.


\(^7^5\) See Benjamin, supra note 73, at 287 (recognizing that focusing on the facts underlying constitutional rulings “undercut[s] the seeming permanence of appellate decisions”).
III. LEGISLATIVE FACTS AND CAMPAIGN FINANCE

Modern campaign finance law is built around the fundamental constitutional distinction between political contributions and independent expenditures.\(^\text{76}\) The Court has held that limits on contributions to candidates, political parties, and PACs impose only limited burdens on First Amendment rights and therefore are subject only to intermediate scrutiny.\(^\text{77}\) Contribution limits generally survive such scrutiny because they are reasonably tailored to furthering the government’s interest in fighting actual and apparent quid pro quo corruption.\(^\text{78}\) Independent expenditures, in contrast, are funds that a person spends on political communications about federal elections without direct or indirect suggestions, guidance, or input from a candidate or political party.\(^\text{79}\) Broadly speaking, the Supreme Court has held that, because independent expenditures constitute pure speech, limits upon them are subject to strict scrutiny and are almost invariably unconstitutional.\(^\text{80}\)

This dichotomy between political contributions and independent expenditures relies extensively on legislative facts.\(^\text{81}\) The Court’s


\(^{77}\) See id. at 26-28.

\(^{78}\) Id. But see McCutcheon v. FEC, 134 S. Ct. 1434, 1442 (2014) (holding that aggregate contribution limits are unconstitutional); Randall v. Sorrell, 548 U.S. 230, 262 (2006) (“[T]he specific details of Act 64’s contribution limits require us to hold that those limits violate the First Amendment, for they burden First Amendment interests in a manner that is disproportionate to the public purposes they were enacted to advance.”); McConnell v. FEC, 540 U.S. 93, 231-32 (2003) (invalidating prohibition on political contributions by minors).


\(^{80}\) Buckley, 424 U.S. at 45-51; see also infra notes 179-92. But see Bluman v. FEC, 800 F. Supp. 2d 281, 288 & n.3 (D.D.C. 2011) (three-judge court) (upholding law prohibiting foreign nationals other than lawful permanent residents from making independent expenditures in connection with federal elections), aff’d without opinion, 132 S. Ct. 1087 (2012).

\(^{81}\) Most broadly, Buckley and its progeny rest on some general and largely unobjectionable factual assertions about the importance of free political discussions in maintaining a vibrant democratic government. 424 U.S. at 14 (“Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.”). Justices have expressed similar sentiments throughout the Court’s history. See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (declaring that a “robust exchange of ideas” leads to the “discovery of truth”); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (agreeing that “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth”). Of course, as an empirical matter, it is debatable whether full and robust political debate actually leads to a better-informed electorate. See Derek E. Bambauer, Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas, 77 U. Colo. L. Rev. 649, 651 (2006) (“[R]esearch in cognitive psychology and behavioral economics shows that humans operate with significant, persistent perceptual biases that skew our interactions with information. These biases undercut the assumption that people reliably sift data to find truth.”).
rulings in this area, however, often fail to identify the evidentiary or other basis that supports the Court’s findings. \(^8^2\) And subsequent cases often fail to distinguish between holdings that are pure interpretations of law and those that were contingent upon potentially changing facts. \(^8^3\)

As discussed above, \(^8^4\) sitting Justices might be particularly unwilling to revisit their purely legal interpretations of the First Amendment, especially due to stare decisis. Attacks on precedents’ factual underpinnings, particularly attacks based on evidence the Court did not previously consider, conceptually represent the most viable approach for seeking change. Several of the findings or assumptions upon which the Court has based its holdings in campaign finance cases are, at a minimum, dubious and potentially susceptible to coun-

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A large body of empirical research suggests that exposure to accurate evidence or data often does not lead people to change their beliefs and can even cause them to cling to contrary beliefs with even greater intensity. See, e.g., Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 304 (2010); Monica Prasad et al., “There Must Be a Reason”: Obama, Saddam, and Inferred Justification, 79 SOC. INQUIRY 142, 144, 148, 153 (2009). Further reducing the efficacy of political dialogue is what Dan Kahan and Donald Braman term “cultural cognition”: a “series of interlocking social and psychological mechanisms that induce individuals to conform their factual beliefs about contested policies to their cultural evaluations of the activities subject to regulation.” Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL’Y REV. 149, 171 (2006). They argue that, “[b]ecause cultural cognition determines what sorts of information individuals find reliable, culturally polarized beliefs . . . stubbornly persist in the face of scientific advances in understanding.” Id.


Political discussions among like-minded people might lead them further from accurate conclusions in other ways. Rather than facilitating the determination of truth, collective deliberations can lead to the adoption of more extreme beliefs. See Cass R. Sunstein, *Deliberative Trouble! Why Groups Go to Extremes*, 110 YALE L.J. 71, 88-90 (2000). And to the extent that liberal and conservative beliefs are partly a function of brain anatomy or functioning, robust expression and political debates may not affect people’s beliefs much at all. See, e.g., David M. Amodio et al., *Neurocognitive Correlates of Liberalism and Conservatism*, 10 NATURE NEUROSCIENCE 1246, 1247 (2007); Ryota Kanai et al., *Political Orientations Are Correlated with Brain Structure in Young Adults*, 21 CURRENT BIOLOGY 677 (2011).

Thus, while the Court’s assumption that robust political debate will facilitate the determination of truth appears facially reasonable, it is the kind of reflexive, intuitive assertion that empirical research suggests, at a minimum, is likely overbroad and somewhat inaccurate. It is the type of legal fiction, however, that the Court has strong institutional reasons to accept as true, notwithstanding any counterproof.

82. See, e.g., *McCutcheon*, 134 S. Ct. at 1452; *Buckley*, 424 U.S. at 47.

83. See, e.g., SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc).

84. See supra Part II.
terproof in subsequent litigation. It bears emphasis, however, that the Court’s rulings in this area have been the opposite of what one might expect. It has shown greater willingness to revisit its purely legal interpretations of the Constitution than the factual underpinnings of holdings that are contingent on critical legislative facts. 85

The Court’s campaign finance jurisprudence also demonstrates the importance of establishing constitutional decision rules that are susceptible to meaningful proof, rather than calling for courts to base their rulings in substantial part on guesses, intuitions, stereotypes, or assumptions. In crafting many of its decision rules in this area, it appears that the Court failed to consider the extent to which various legislative facts can be concretely proven or the quantum or type of evidence that would be sufficient to establish (or disprove) such facts. 86 Clearer, more specific constitutional decision rules would help litigants develop their cases and allow future courts to adjudicate campaign finance challenges more objectively.

This Part explores these issues as they arise in three different contexts in campaign finance law. Section A explores the Court’s holding that political contributions are entitled to minimal constitutional protection as a type of speech. Section B discusses the Court’s rulings concerning the validity (or invalidity) of various types of restrictions on political contributions. Finally, Section C analyzes the Court’s conclusion that independent expenditures generally cannot be limited because they do not pose a risk of corruption.

A. Political Contributions as Speech

One of the core tenets of campaign finance jurisprudence over the past forty years has been the Court’s holding that contribution limits abridge First Amendment rights to a lesser extent than restrictions on independent expenditures (i.e., pure political speech) and therefore are subject only to intermediate scrutiny. 87 In Buckley v. Valeo, the Court held that a contribution limit “entails only a

85. Compare McConnell v. FEC, 540 U.S. 93, 152-54 (2003) (holding that the government’s compelling interest in preventing corruption extends to preventing the “purchase [of influence] and the “sale of access” to officeholders), with Citizens United v. FEC, 558 U.S 310, 359-60 (2010) (“The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt . . . . Ingratiation and access . . . are not corruption.”).

86. See infra Sections III.B, III.C.

87. Buckley, 424 U.S. at 21-22.
marginal restriction” on freedom of expression, as well as a more substantial restriction on freedom of association (though not enough to trigger full constitutional protection).\textsuperscript{88}

The Court’s conclusion that political contributions entail only a minimal communicative element is based on a mix of pure legal principles and conceptually falsifiable legislative facts. First, the Court noted that “[a] contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support.”\textsuperscript{89} This is definitionally true and does not appear susceptible of empirical proof or disproof. Even if a contributor writes a note in the memo field of a check to explain why she is providing the contribution, the contribution itself—the funds being given to the candidate—does not convey that information. It is unclear, however, whether the vagueness of the expression that a contribution embodies remains constitutionally significant from a purely legal perspective. Nearly a quarter-century after Buckley, the Court held in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston that:

\textbf{[A]} narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a “particularized message,” would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll.\textsuperscript{90}

Second, the Buckley Court stated that the amount a person contributes does not send a meaningful message about the extent of his or her support for the candidate.\textsuperscript{91} “At most,” the Court opined, “the size of the contribution provides a very rough index of the intensity of the contributor’s support.”\textsuperscript{92} The Court added that to determine the “intensity” of a contributor’s support for a candidate based on the amount of his contribution, it would also be necessary to consider his “financial ability and his past contribution history.”\textsuperscript{93}

These legislative facts appear highly debatable and might reasonably be subject to counterproof in future litigation. Litigants might be able to present public opinion surveys to demonstrate that most members of the public draw a strong correlation between the amount a person contributes to a candidate and the extent to which that

\textsuperscript{88} Id.; see also id. at 22 (recognizing that a contribution “serves to affiliate a person with a candidate” and “enables like-minded persons to pool their resources in furtherance of common political goals”).

\textsuperscript{89} Id. at 21.


\textsuperscript{91} Buckley, 424 U.S. at 20-21.

\textsuperscript{92} Id. at 21.

\textsuperscript{93} Id. at 21 n.22.
person “really” supports the candidate. Likewise, litigants could likely adduce evidence that most political parties and candidates regard people who contribute higher amounts as their strongest supporters. Indeed, many fundraising materials aimed at high-dollar contributors contain language to that effect.  

It is far from intuitive that a $20 contribution sends substantially the same message as a $2700 contribution. Political contributions present a clear case of “putting your money where your mouth is.” Talk is cheap; a verbal expression of support often may seem far less meaningful or significant than a monetary contribution. It is at least reasonably possible that evidence in a subsequent case may lead the Court to conclude that it underestimated the communicative value of political contributions.

Third, and perhaps most significantly, the Court reasoned that contributions are distinguishable from speech because, although they “may result in political expression” if the recipient spends the funds “to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.”  

California Medical Association (“CalMed”) v. FEC elaborated that a person cannot claim full First Amendment protection for facilitating “proxy speech,” or speech by other people with which they agree. The CalMed Court explained that a “sympathy of interests alone does not convert” speech by the recipient of a contribution into that of the contributor.

This principle may be the most vulnerable part of the Court’s analysis of contribution limits. Buckley elsewhere holds that the act of spending money to subsidize speech may itself be treated as pure speech. As the Court said of independent expenditures, “[T]he dependence of a communication on the expenditure of money [does not] operate[] itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.” The reduced constitutional protection for contributions therefore does not stem from the fact that the contributor must spend money to subsidize the recipient’s political speech, but rather that the contributor is seeking to subsidize and adopt someone else’s message.

94. See, e.g., Maggie Haberman, Clinton Fund-Raising, for Starters, N.Y. TIMES (Apr. 12, 2015, 7:43 PM), http://www.nytimes.com/politics/first-draft/2015/04/12/clinton-fund-raising-for-starters/?_r=0 (noting that supporters of Hillary Clinton who contributed the maximum permissible amount of $2700 would “earn[] . . . status as ‘Hill-starters’ ”).

95. Buckley, 424 U.S. at 21.

96. 453 U.S. 182, 196 (1981) (holding that “speech by proxy” through contributions to a PAC “is not the sort of political advocacy that this Court in Buckley found entitled to full First Amendment protection”).

97. Id.

98. Buckley, 424 U.S. at 16.
Future litigants reasonably might be able to introduce expert and lay evidence demonstrating that the identity of a speaker can have more of an impact on whether an audience accepts a message than the content of the message itself. Listeners might be more willing to accept certain messages if they come from sources that share their values, agree with them on most other issues, can speak from personal experience or knowledge, or otherwise have special credibility. Barack Obama can speak about the perceived need for some African-American men to play a greater role in their children’s lives in a way that Mitt Romney, uttering the same words, could not. Marco Rubio similarly claimed he was uniquely situated to defend the Republican Party’s policies toward the poor, asking rhetorically, “If I’m our nominee, how is Hillary Clinton going to lecture me about living paycheck to paycheck?” He continued, “I was raised paycheck to paycheck. . . . [H]ow is she going to lecture me about student loans? I owed over $100,000 just four years ago.” More broadly, promises or messages directly from candidates may be much more effective than the same claims from third parties about those candidates.

Aristotle’s *Rhetoric* conveyed this idea through the concepts of *ethos* and *pathos*: appeals to the credibility of the speaker and the emotions of the audience, respectively. To Aristotle, *ethos* was arguably the most important aspect of a message. The Court likewise has recognized that the First Amendment protects the non-


100. *See* Julie Bosman, *Obama Sharply Assails Absent Black Fathers*, N.Y. TIMES (June 16, 2008), http://www.nytimes.com/2008/06/16/us/politics/15nd-obama.html?_r=0 (“ ‘Too many fathers are M.I.A, too many fathers are AWOL, missing from too many lives and too many homes,’ Mr. Obama said . . . . Mr. Obama laid out his case in stark terms that would be difficult for a white candidate to make, telling the mostly black audience not to ‘just sit in the house watching SportsCenter’ . . . . ‘); *see also* Aamer Madhani, *Obama: There’s No Longer Time for Excuses for Black Men*, USA TODAY (May 19, 2013), http://www.usatoday.com/story/news/politics/2013/05/19/obama-morehouse-college-commencement/2324241/ (“Obama spoke in very personal terms to the 500 young men as he urged them to . . . become . . . good fathers and good husbands.”).


102. *Id.*

103. Federal campaign finance law is premised, in part, on the notion that hearing directly from a candidate has special significance. When a candidate takes advantage of statutorily reduced rates to run an attack ad on cable television, the commercial must end with either a “full-screen view of the candidate” declaring that she authorized the advertisement, or a photograph of the candidate accompanied by a voice-over of the candidate conveying that message. 52 U.S.C. § 30120(d)(B)(i) (Supp. II 2014).


105. *See id.*
rational, “emotive” aspects of communications, precisely because they “may often be the more important element of the overall message sought to be communicated.”

A mailer, television advertisement, or other communication from a candidate or party may perfectly and perhaps even uniquely convey a potential contributor’s feelings and beliefs. She may wish to subsidize further dissemination of that communication (or similar ones), rather than attempt to fund her own imitation of it. Many such contributors reasonably might believe that they cannot create their own mailers, websites, or other such communications of comparable efficacy, particularly since candidates, political parties, and PACs typically employ expensive consultants, public relations firms, and professional writers to prepare their materials.

The law of evidence recognizes this phenomenon as an adoptive admission. Through her words or actions, a person may embrace a third party’s statement as her own, and the statement will be legally attributed to her. In the unique context of campaign finance jurisprudence, however, the Court deems such adoptive admissions as a less accurate representation of a person’s beliefs, and far less worthy of constitutional protection, than the person’s own independent speech. Litigants in future cases may reasonably be able to compile an evidentiary record to persuasively challenge the Court’s conclusion that contributions deserve reduced constitutional protection because “the transformation of contributions into political debate involves speech by someone other than the contributor.”

Finally, the Court concluded that contribution limits impose no more than “marginal” restrictions on speech because they do not “in any way infringe the contributor’s freedom to discuss candidates and issues.” The availability of alternate channels of communication is a factual issue that appears indisputable. As discussed above, however, a person’s physical freedom to personally discuss candidates and issues may not be nearly as meaningful as his ability to adopt and facilitate expression by others with whom he agrees.

107. See FEC v. Nat’l Conservative Pol. Action Comm., 470 U.S. 480, 495 (1985) (“[C]ontributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money.”).
108. See Fed. R. Evid. 801(d)(2)(B); United States v. Williams, 445 F.3d 724, 735 (4th Cir. 2006) (“The adoptive-admission doctrine permits statements of others to be treated by the jury as statements of the party—it is as if the party himself made the statement.”).
110. Id. at 20-21.
And the Supreme Court has come to recognize that alternative modes of political involvement are seldom practically available when a person has an interest in multiple candidates.\footnote{111} Thus, the Court’s conclusion that political contributions entail only a minimal expressive element is based on a mix of purely legal premises that have been weakened by subsequent holdings and legislative facts that may be open to counterproof in future cases. Post-
\textit{Buckley} case law has typically minimized or overlooked the factually contingent nature of this holding, however. Both the Supreme Court and lower courts often reiterate that political contributions involve minimal expressive content as if that assertion were a matter of pure constitutional law, rather than a conclusion based on the Court’s factual conclusions in \textit{Buckley}.\footnote{112} Based on empirical research, expert opinion, and evidence from political candidates and contributors, the Court may conclude that either contributions in general, or contributions specifically to subsidize “speech by proxy” in particular, are entitled to full constitutional protection.\footnote{113} Were the Court to conclude that contributions are a fully protected form of speech, contribution limits would be subject to strict scrutiny.\footnote{114}

\textbf{B. Limits on Political Contributions}

The Court’s precedents concerning the constitutionality of contribution limits purport to rest upon legislative facts, but in reality are based primarily on ad hoc subjective judgments. The decision rule the Court has crafted to determine the validity of contribution limits is so vague and underdefined that courts lack sufficient guidance in ascertaining whether it has been satisfied, and litigants have little direction as to the nature, weight, or extent of evidence they must adduce to carry their respective burdens. Moreover, the legislative facts that the decision rule treats as dispositive appear to depend mostly on judicial intuition.

\textit{Buckley} held that contribution limits are constitutional if they are “closely drawn” to furthering the government’s interest in preventing

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111. McCutcheon v. FEC, 134 S. Ct. 1434, 1449 (2014) (“[P]ersonal volunteering is not a realistic alternative for those who wish to support a wide variety of candidates or causes. Other effective methods of supporting preferred candidates or causes without contributing money are reserved for a select few, such as entertainers capable of raising hundreds of thousands of dollars in a single evening.”).

112. \textit{See}, e.g., \textit{id}. at 1444.

113. \textit{Cf. id}. at 1462-63 (Thomas, J., concurring) (arguing that “[n]one of the [Buckley] Court’s bases” for concluding “that contributions are different in kind from direct expenditures . . . withstands careful review”).

quid pro quo corruption or the appearance of such corruption. Applying that standard, the Court upheld the validity of limits on contributions to candidates. The Court acknowledged that the extent of corruption created by candidate contributions “can never be reliably ascertained.” It found that the risk of corruption was sufficient, however, to warrant contribution limits based on “deeply disturbing examples surfacing after the 1972 election” which demonstrated “that the problem [wa]s not an illusory one.” The Court recognized that quid pro quo bribery was already independently prohibited and that disclosure requirements ensured that the government and public would know about any large contributions to a candidate. It responded that Congress was “entitled” to conclude that contribution limits are “a necessary legislative concomitant” to those other measures.

*Buckley* and its progeny leave unsettled a wide variety of issues concerning the standard for determining when the specter of corruption is sufficient to justify particular contribution limits or other such restrictions. The Court elaborated in a subsequent case that “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.” It remains unclear,

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115. *Buckley*, 424 U.S. at 25. The Court has also identified various interests that are constitutionally impermissible rationales for campaign finance restrictions. For example, the government may not limit contributions to “equaliz[e] the relative ability of individuals and groups to influence the outcome of elections.” *Id.* at 48. The Court explained that the First Amendment prohibits the government from “restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others.” *Id.* at 48-49; see also *McCutcheon*, 134 S. Ct. at 1450 (“[It is not an acceptable governmental objective to ‘level the playing field,’ or to ‘level electoral opportunities,’ or to ‘equaliz[e] the financial resources of candidates.’ ”) (second alteration in original) (first quoting Ariz. Free Enter. Club’s Freedom Club PAC v. Bennett, 131 S. Ct. 2806, 2811 (2011); then quoting Davis v. FEC, 554 U.S. 724, 741 (2008); and then quoting *Buckley*, 424 U.S. at 56)). Likewise, the Government may not “determine for itself what speech and speakers are worthy of consideration” by “taking the right to speak from some and giving it to others.” *Citizens United v. FEC*, 558 U.S. 310, 340-41 (2010). Finally, the Government may not limit contributions to prevent contributors from gaining “influence [over] or access [to]” government officials, because “[i]ngratiation and access . . . are not corruption.” *Id.* at 360; see also *McCutcheon*, 134 S. Ct. at 1451 (“[T]he Government may not seek to limit the appearance of mere influence or access.”).

116. *Buckley*, 424 U.S. at 26 (“[L]imit[ing] the actuality and appearance of corruption resulting from large individual financial contributions” is “a constitutionally sufficient justification” for base limits on contributions to candidates.).

117. *Id.* at 27.

118. *Id.*

119. *Id.* at 27-28.

120. *Id.* at 28.

however, what exactly the government must prove in order to defend a particular contribution limit.\textsuperscript{122} There are many possible interpretations, but none is entirely satisfactory.

It may be that a contribution limit is justified if a particular type of transaction has any potential to corrupt a candidate. The Court’s precedents do not support such an interpretation, however. For example, as discussed in the next Section,\textsuperscript{123} the Court has consistently held that the risk of corruption associated with independent expenditures is too remote to warrant restricting them. Alternatively, the Court could implicitly be applying a threshold, requiring the government to show that a certain percentage of instances of a particular type of transaction involves quid pro quo corruption or that some non-negligible number of such transactions has led to such corruption in the past. But the Court repeatedly has upheld contribution limits despite its recognition that the vast majority of even large contributions do not involve corruption.\textsuperscript{124} Prohibiting a practice to prevent corruption when the overwhelming majority of instances of such conduct are not corrupt eviscerates any pretention of “closely drawn” tailoring.

It appears that the Court instead might be applying an objective standard, asking whether a particular type of contribution, in the Court’s view, poses a reasonable likelihood of corrupting a candidate or officeholder. Such a standard places less weight on empirical evidence and appears to turn primarily on the Court’s subjective intuitions about politics and politicians, making jurisprudence in this area unnecessarily subjective and unpredictable. Further, it is unclear what constitutes a “reasonable” or “unreasonable” likelihood of corruption or how a future court should go about attempting to make that determination. Relying on such an ad hoc approach, rather than more concrete principles, also tends to undermine the perceived legitimacy of the Court’s rulings in this highly charged and politicized area.\textsuperscript{125}

These difficulties are even greater when attempting to weigh the government’s interest in combating “the appearance of corruption” posed by a particular type of contribution.\textsuperscript{126} Conceptually, apparent

\textsuperscript{122} See id. (“While Buckley’s evidentiary showing exemplifies a sufficient justification for contribution limits, it does not speak to what may be necessary as a minimum.”).

\textsuperscript{123} See infra Section III.C.

\textsuperscript{124} Citizens United v. FEC, 558 U.S. 310, 357 (2010) (“[R]estrictions on direct contributions are preventative, because few if any contributions to candidates will involve quid pro quo arrangements.”); see also McCutcheon v. FEC, 134 S. Ct. 1434, 1458 (2014).

\textsuperscript{125} Cf. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959) (arguing that constitutional cases should rest on principles and reasoning that transcend immediate outcomes and generate consistent decisions).

\textsuperscript{126} Buckley v. Valeo, 424 U.S. 1, 27 (1976).
corruption may exist even in the absence of actual corruption. The Court has failed, however, to provide standards for determining the magnitude or validity of such concerns. For example, is the appearance of corruption to be determined based solely on the perspective of a member of the general public, someone familiar with all the details of the transaction at issue, or someone familiar with campaign finance law and First Amendment doctrine? The ability of individuals to contribute unlimited amounts of money to SuperPACs, and of SuperPACs (like other PACs) to spend unlimited amounts of money on political advertisements, reasonably might be seen as potentially corrupting to a member of the public who is aware of neither the concept of an “independent expenditure” nor the Court’s view that such expenditures do not create a risk of corruption.

Similarly, is the issue whether a reasonable person possibly could conclude that a particular transaction involves quid pro quo corruption, or that he likely would do so, or that a majority of the public would find the transaction questionable? The frustrating vagueness of the Court’s appearance-of-corruption standard allows it to effectively determine the constitutionality of campaign finance laws based primarily on its intuitions and assumptions, rather than more concrete legislative facts susceptible to proof or falsification.

The Court’s subsequent rulings concerning contribution limits purport to follow Buckley. The vagueness of Buckley’s decision rule for determining the validity of contribution limits and the indeterminacy of the legislative facts upon which it is based, however, have caused the Court to reach conflicting conclusions about different types of limits without clear differences in the underlying evidentiary records. The Court’s rulings concerning contribution limits appear to be based more on subjective ad hoc determinations than the underlying legislative facts that Buckley deems dispositive.

This Section will focus on three examples: Nixon v. Shrink Missouri Government PAC, which upheld state-level contribution limits; McConnell v. FEC, which upheld federal limits on soft money contributions to state and local parties but invalidated a blanket prohibition on contributions from minors; and McCutcheon v. FEC, which invalidated aggregate contribution limits.

129. See Buckley, 424 U.S. at 47.
1. Shrink Missouri

In *Nixon v. Shrink Missouri Government PAC*, the Eighth Circuit had invalidated Missouri’s limits on contributions to candidates for certain state offices.\(^{133}\) Although *Buckley* had upheld the constitutionality of contribution limits, the Eighth Circuit properly recognized that this holding was not a pure interpretation of the Constitution, but rather was contingent upon legislative facts, including record evidence concerning “perfidy . . . in federal campaign financing in 1972.”\(^{134}\) The Eighth Circuit refused to “infer that [Missouri] state candidates for public office are corrupt or that they appear corrupt from the problems that resulted from undeniably large contributions made to federal campaigns over twenty-five years ago.”\(^{135}\) It therefore required the State to “prove that Missouri has a real problem with corruption or a perception thereof as a direct result of large campaign contributions.”\(^{136}\)

The State’s only evidence, according to the court, was an affidavit of the senator who co-chaired the committee that enacted the contribution limits. The affidavit offered his opinion that “there was the ‘real potential to buy votes’ if the limits were not enacted, and that contributions greater than the limits ‘have the appearance of buying votes.’ ”\(^{137}\) The Eighth Circuit concluded that this evidence was insufficient as a matter of law to demonstrate that contribution limits would further the State’s interest in combatting corruption.\(^{138}\)

The Supreme Court reversed, holding that *Buckley* is “authority for comparable state regulation” of political contributions.\(^{139}\) Quoting extensively from *Buckley*, the Court held that Missouri’s contribution limits furthered the State’s interest in battling corruption.\(^{140}\) It declared that “the dangers of large, corrupt contributions and the suspicion that large contributions are corrupt are neither novel nor implausible.”\(^{141}\) It went on to opine that the senator’s affidavit, as well as some newspaper articles introduced in the district court (which the Eighth Circuit did not mention) discussing actions various government officials took that favorably impacted large contributors,


\(^{134}\) *Id.* at 522.

\(^{135}\) *Id.*

\(^{136}\) *Id.*

\(^{137}\) *Id.*

\(^{138}\) *Id.*


\(^{140}\) *Id.* at 386-90 (quoting *Buckley v. Valeo*, 424 U.S. 1, 15-16, 20-22, 24-28, 30 (1976)).

\(^{141}\) *Id.* at 391.
“substantiat[e]” concerns about corruption in Missouri.\(^{142}\) The Court concluded, “[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters.”\(^{143}\)

Buckley treated the validity of limits on contributions to federal candidates as a constitutional issue to be resolved in large part based on certain underlying legislative facts, most notably including the risk of actual or apparent corruption such contributions cause. Nixon, however, significantly downplayed the contingent nature of Buckley’s holding, treating contribution limits, in effect, as prima facie valid. The Court was largely unwilling to consider evidence concerning Missouri politics in particular or the remarkable differences in circumstances between present-day Missouri and the federal government of a quarter-century earlier. Nor was the Court receptive to possible differences in public perception of federal corruption and Missouri politicians.

2. McConnell

In McConnell v. FEC,\(^{144}\) the Court upheld the constitutionality of a provision in the Bipartisan Campaign Reform Act (“BCRA”) limiting “soft money” contributions to political parties.\(^{145}\) Soft money is a label applied to funds used by political parties to pay for something other than contributions to federal candidates, coordinated expenditures with federal candidates, or communications that clearly advocate the election or defeat of a federal candidate.\(^{146}\) Prior to BCRA, the most common uses of soft money were for activities aimed at state or local elections, voter registration drives, get-out-the-vote campaigns, generic party advertising, and issue advocacy.\(^{147}\) During that pre-BCRA era, federal contribution limits did not apply to soft money; political parties could accept unlimited amounts of such funds. BCRA effectively eliminated soft money; the Act provides that any funds that a national, state, or local political party uses in connection with a federal election must be raised in compliance with federal contribution limits.\(^{148}\)

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142. Id. at 393.
143. Id. at 395.
The Court upheld BCRA’s extension of contribution limits to soft money, including section 323(b), which limits soft money contributions to state and local political party committees. The Court held that section 323(b) was “designed to foreclose” circumvention of limits on contributions to national political parties “by sharply curbing state committees’ ability to use large soft-money contributions to influence federal elections.” The Court pointed out that federal candidates and national parties sometimes “ask donors who have reached the limit on their direct contributions to donate to state committees.” It opined that “[t]here is at least as much evidence as there was in Buckley that such donations have the intent—and in at least some cases the effect—of gaining influence over federal officeholders.” The Court went on to observe that it was “‘neither novel nor implausible,’ for Congress to conclude that . . . federal candidates would be just as indebted to these contributors as they had been to those who had formerly contributed to the national parties.” It later reiterated that “[c]ommon sense dictates” that federal candidates would be grateful for soft money contributions to state parties to be used to subsidize voter registration or get-out-the-vote efforts that may benefit them.

To the extent the Court relied on “common sense” rather than record evidence in reaching its conclusions, it may have improperly reduced the government’s burden in defending the constitutionality of laws that impinge upon First Amendment rights. This approach effectively shifts the burden to those challenging the law to demonstrate that the Court’s “common sense” is wrong by proving a negative: that contribution limits do not give rise to a potential for corruption. It is unclear what evidence would be necessary to accomplish such a task, such as the absence of any bribery prosecutions based on contributions to state parties, or testimony from candidates as to the relative lack of importance of soft money contributions to state and local political parties.

Supporters of campaign finance reform should not necessarily embrace the Court’s use of “common sense” as a barometer for determining the constitutionality of contribution limits, however. As discussed in the next Section, the Court’s intuitions have led it to conclude—in the apparent absence of empirical evidence—that inde-
pendent expenditures categorically do not give rise to a risk of quid pro quo corruption.\textsuperscript{156} And even the \textit{McConnell} Court’s common sense did not lead it to uniformly uphold restrictions on contributions. Another BCRA provision prohibited minors from contributing to candidates or political parties.\textsuperscript{157} \textit{McConnell} held that this prohibition violated minors’ First Amendment rights.\textsuperscript{158} The government argued that the ban prevented parents from circumventing their contribution limits by funneling additional contributions through their children.\textsuperscript{159} It had presented evidence in the district court of four instances of parents doing so.\textsuperscript{160}

The Supreme Court rejected this rationale on the grounds that the government offered “scant evidence” that such circumvention was actually occurring.\textsuperscript{161} It stated, “Absent a more convincing case of the claimed evil, this interest is simply too attenuated for § 318 to withstand heightened scrutiny.”\textsuperscript{162} The Court also pointed out that BCRA’s prohibition on making a contribution in another person’s name already prohibits parents from contributing funds through their children.\textsuperscript{163}

The Court’s unwillingness to recognize the potential for circumvention through minors’ contributions stands in stark contrast with its concern over soft money contributions to state and local parties. With both provisions, the government asked the Court to speculate that a lack of regulation could lead to corruption. The Court was willing to assume that soft money contributions to state parties would cause federal officeholders to be grateful and lead to potential corruption\textsuperscript{164} but, as discussed below, refused to apply similar reasoning to independent expenditures.\textsuperscript{165} It was also unwilling to assume that contributors might route money through their children to circumvent contribution limits.\textsuperscript{166}

\textsuperscript{156.} See infra Section III.C.
\textsuperscript{158.} McConnell, 540 U.S. at 231.
\textsuperscript{159.} Id. at 232.
\textsuperscript{161.} McConnell, 540 U.S. at 232.
\textsuperscript{162.} Id.
\textsuperscript{163.} Id. (citing 2 U.S.C. § 441f (recodified at 52 U.S.C. § 30122 (Supp. II 2014)). The Court further held that a complete prohibition on contributions from minors was “overinclusive” and that more narrowly tailored means of preventing circumvention were available. Id.
\textsuperscript{164.} Id. at 165.
\textsuperscript{165.} See infra Section III.C.
\textsuperscript{166.} McConnell, 540 U.S. at 232.
The contrasts among these rulings arise in part from the indeterminacy of the decision rules the Court is applying. Neither *Buckley* nor its progeny clearly or specifically identify how “real” or “certain” a potential for corruption must be, the extent to which the government must show that corruption of that type has occurred in the past, or the frequency with which it will occur. Moreover, the legislative facts underlying these holdings cannot definitively be ascertained based on objective evidence. They unavoidably rest in substantial part on the Court’s subjective judgments about human nature, tolerance for risk, and speculation about the future. Consequently, the Court has flexibility to accept a relatively minimal showing in one context, approving contribution limits on soft money contributions to state and local parties, while insisting on a heightened showing in another context, by invalidating a prohibition on contributions from minors.

3. McCutcheon

Finally, in *McCutcheon v. FEC*, the Supreme Court held that the risk of actual and apparent corruption was insufficient to support aggregate limits on the total amount that a person may contribute to all candidates and political committees in an election cycle. The Court reasoned that, so long as each contribution a person makes is under the statutory base limit, there is no reason to effectively limit the number of such non-corrupting contributions she may make through an aggregate limit.

The government also had failed to show that contributors would likely try to circumvent the base limit on contributions to a particular candidate by making large contributions to numerous other entities that would, in turn, contribute to that candidate. In one of the most critical sentences in the opinion, the Court stated, “[T]here is not the same risk of quid pro quo corruption or its appearance when money flows through independent actors to a candidate, as when a donor contributes to a candidate directly.” The Court did not cite any evidence, whether anecdotal, expert, or even polling, to support this critical assumption. Rather, it explained that when a contributor provides funds to a PAC, and the PAC in turn decides to contribute

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170. *Id.*
that money to a candidate, “such action occurs at the [PAC’s] discretion—not the donor’s,” because the donor “must by law cede control over the funds.”\textsuperscript{171}

The Court recognized that when a donor makes the maximum permissible contribution to many of a party’s candidates, “all members of the party or supporters of the cause may benefit, and the leaders of the party or cause may feel particular gratitude.”\textsuperscript{172} It did not believe, however, that “such shared interest, standing alone,” presents “an opportunity for quid pro quo corruption.”\textsuperscript{173} While \textit{McCutcheon} was correctly decided, it is another example of how the boundary between legal holdings and findings of legislative fact is blurry, and many legislative facts the Court must ascertain are difficult to establish.

4. \textit{Reconsidering the Role of Legislative Facts in Contribution Limits}

The precedents discussed throughout this Section establish many principles. Contribution limits generally are permissible because they impose only limited restrictions on association and minimal restrictions on speech.\textsuperscript{174} Limits on soft money contributions to political parties are constitutional,\textsuperscript{175} aggregate contribution limits\textsuperscript{176} and prohibitions on contributions by minors\textsuperscript{177} are not. Each of these assertions appears to be a pure statement of law directly interpreting the Constitution but, in truth, each rests on factual assertions and assumptions that, at least in concept, remain subject to challenge in future cases. When courts, commentators, and counsel either assert these propositions divorced from the facts upon which they are contingent, or instead quote an opinion’s factual premises as if they were binding legal rulings, they subtly misrepresent and, over time, undermine the contingent nature of these holdings.

This pastiche of rulings concerning contribution limits stems in part from the vagueness of the underlying decision rule the Court is purporting to apply. The Court has held that contributions may be limited to prevent corruption, but it has not adopted a clear or consistent position on whether the corruption must be proven or may be merely assumed; the frequency, likelihood, and extent of corruption necessary to warrant such restrictions; when other statutory re-
stricctions may be deemed sufficient to prevent such corruption; or the perspective from which an act must be viewed to determine whether it appears corrupt. Accordingly, it is difficult for a litigant to determine in advance of a ruling whether any collection of evidence is sufficient to make a restriction constitutional. Greater specificity in the decision rule would help future courts base their rulings on legislative facts rather than assumptions or intuition.

C. Independent Expenditures

As discussed earlier, nearly a half-century of campaign finance case law is built upon Buckley’s dichotomy between contributions and independent expenditures. That dichotomy, in turn, is based on the Court’s assertion in Buckley that independent expenditures do not give rise to a constitutionally cognizable risk of corruption. Buckley declared that the “absence of prearrangement and coordination of an expenditure with the candidate or his agent not only undermines the value of the expenditure to the candidate, but also alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate.” A substantial chunk of modern campaign finance law rests upon this seemingly unassuming premise.

Based on this assertion, the Court consistently has struck down limits on independent expenditures by nearly every type of speaker that has come before it, including individuals, PACs, political parties, and, in its much-maligned decision in Citizens-United, corporations. Similarly, the overwhelming majority of circuits has

179. Id.
180. Id. at 51 (holding that FECA’s “independent expenditure limitation is unconstitutional under the First Amendment”). But see Bluman v. FEC, 800 F. Supp. 2d 281, 288 & n.3 (D.D.C. 2011) (three-judge court) (upholding law prohibiting foreign nationals other than lawful permanent residents from making independent expenditures in connection with federal elections), aff’d without opinion, 132 S. Ct. 1087 (2012).
184. Citizens United, 558 U.S. at 365 (invalidating prohibition on corporate independent expenditures because “the Government may not suppress political speech on the basis of the speaker’s corporate identity”); see also FEC v. Mass. Citizens for Life, Inc.,
held that political committees that solely make independent expenditures (colloquially referred to as “SuperPACs”) have a First Amendment right to accept unlimited contributions. As the D.C. Circuit explained:

In light of the [Supreme] Court’s holding as a matter of law that independent expenditures do not corrupt or create the appearance of quid pro quo corruption, contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption. The Court has effectively held that there is no corrupting “quid” for which a candidate might in exchange offer a corrupt “quo.”

. . . .

. . . . [T]he government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.

Some courts have gone even further, allowing political committees that make political contributions to establish separate, segregated accounts (“Carey accounts”) that may accept unlimited contributions to fund their independent expenditures.

Thus, both SuperPACs and Carey accounts—and the hundreds of millions of dollars in political spending for which they account—owe their existence to the Buckley Court’s assertion that independent expenditures cannot be corrupting because the “ab-

479 U.S. 238, 263 (1986) (holding that “restriction of independent spending is unconstitutional as applied to certain non-profit corporations).

185. SpeechNow.org v. FEC, 599 F.3d 686, 689 (D.C. Cir. 2010) (en banc) (holding that contribution limits are “unconstitutional as applied to individuals’ contributions” to “an unincorporated nonprofit association” that “intends to engage in express advocacy” and will “operate exclusively through ‘independent expenditures’ ”); see Wis. Right to Life State PAC v. Barland, 664 F.3d 139, 154 (7th Cir. 2011) (“[T]here is no valid governmental interest sufficient to justify imposing limits on fundraising by independent-expenditure organizations.”); Long Beach Area Chamber of Commerce v. City of Long Beach, 603 F.3d 684, 696 (9th Cir. 2010) (“Nor has the City shown that contributions to the Chamber PACs for use as independent expenditures raise the specter of corruption or the appearance thereof.”); Thalheimer v. City of San Diego, No. 09-CV-2862-IEG (BGS), 2012 U.S. Dist. LEXIS 6563, at *38-40 (S.D. Cal. Jan. 20, 2012).

186. SpeechNow.org, 599 F.3d at 694-96 (emphasis added).


sence of . . . coordination” between the candidate and the entity making the expenditure “undermines” its value to that candidate. On its face, this appears to be a factual assertion. Yet, as others have recognized, Buckley did not provide any empirical basis for this assertion, and it has seldom been subject to empirical analysis or reconsideration in later cases. Like the Court’s view in McCutcheon that an officeholder cannot be corrupted by contributions to candidates other than himself, its conclusion in Buckley concerning independent expenditures’ lack of corrupting influence appears to be a matter of intuition, rather than evidence. And, through repetition, this intuition has hardened into a principle that, in the words of the en banc D.C. Circuit, is now deemed settled “as a matter of law.”

If the Court wished to interpret the First Amendment as categorically prohibiting restrictions on independent expenditures, it should have framed that conclusion as a direct interpretation of the Constitution itself: a true matter of law. Buckley’s approach, however, presents the right to engage in unlimited independent expenditures as a contingent assertion. If a future litigant were able to demonstrate that independent expenditures can corrupt politicians, the right to make such expenditures without limit would evaporate. But, as with the Court’s decision rule concerning contribution limits, it has never explained the nature of the factual showing that would be necessary to demonstrate the corrupting potential of independent expenditures.

Thus, putting aside the substance of the Court’s doctrine concerning independent expenditures, Buckley’s reasoning concerning independent expenditures is the worst of all worlds for all sides. For supporters of unlimited independent expenditures, Buckley frames that right in unnecessarily precarious terms. If Buckley is read literally, the right does not exist as a matter of pure constitutional interpretation, but rather is contingent upon the Court’s factual belief that independent expenditures are categorically unable to create a risk of actual or apparent corruption. Even if the Court respects stare decisis and does not change its interpretation of the First Amendment, the right to make unlimited independent expenditures can be overturned if a future litigant convinces the Court that they pose some unspecified risk of actual or apparent corruption. And as independent

193. Cf. Larsen, supra note 190, at 109 (arguing that the Court was “not really finding facts” but rather “building bright line rules”).
194. See supra Section III.B.
expenditures exceed a billion dollars per election cycle,\(^\text{195}\) it is virtually inevitable that, at the very least, some sort of apparent quid pro quo incident will eventually occur.

For opponents of independent expenditures, *Buckley* presents a tantalizing target that somehow is always hovering just out of reach. *Buckley*—as interpreted and applied in *Citizens United*\(^\text{196}\)—suggests that the Constitution would not protect the right to engage in unlimited independent expenditures if they were shown to give rise to actual or apparent quid pro quo corruption. Yet the Court has never clarified what, exactly, a litigant must demonstrate to satisfy this standard. How many apparent quid pro quo arrangements must be proven for independent expenditures to become subject to regulation? Would public opinion polls about the appearance of corruption be sufficient? Opinion testimony from current or former members of Congress?

To the extent courts such as the D.C. Circuit declare that independent expenditures are not corrupting as a matter of law,\(^\text{197}\) they confuse legislative facts with legal holdings. Such confusion elevates a holding that purports to be contingent upon certain underlying facts into a direct interpretation of the Constitution itself. The Court itself treated its factual findings about independent expenditures as if they were legally binding holdings protected by stare decisis in *American Tradition Partnership v. Bullock*.\(^\text{198}\) The plaintiffs in *Bullock* filed a lawsuit in Montana state court, challenging a Montana law that prohibited corporations from making independent expenditures concerning state candidates or political parties.\(^\text{199}\) The State introduced affidavits and deposition excerpts in defense of the ban describing Montana’s long history of corruption.\(^\text{200}\) In the early 1900s, corporations had spent tremendous sums of money to influence state elections and officeholders, and effectively controlled state government.\(^\text{201}\)

The State’s evidence showed that contemporary Montana remained subject to outside corporate influence because “the resources upon which its economy depends . . . depend upon distant markets.”\(^\text{202}\) One affidavit explained that “even small expenditures of

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197. See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686, 694 (D.C. Cir. 2010) (en banc).
199. *Id.* (citing MONT. CODE ANN. § 13-35-227(1) (2011)).
201. *Id.* at 8-9.
202. *Id.* at 9.
money can impact Montana elections.” Due to the state’s small population, campaigns in Montana are “marked by person-to-person contact and a low cost of advertising compared to other states.” Allowing unlimited corporate independent expenditures would shift the emphasis of campaigns to fundraising. Former state officials also testified that, because they had funded their statewide campaigns with a total of only a few hundred dollars, they “could have been derailed by an opposing expenditure of even a couple of thousand dollars.”

Based on this evidence, the Montana Supreme Court upheld the state’s ban on independent expenditures by corporations. Although *Citizens United* had been decided only the year before, the court concluded that it was not controlling, since its holding was based on the U.S. Supreme Court’s factual findings concerning federal elections and the evidence before it. The Montana Supreme Court emphasized, “[T]he factual record before a court is critical to determining the validity of a governmental provision restricting speech.”

The Montana Supreme Court concluded that the State had “unique and compelling interests” in prohibiting corporate independent expenditures. It held, “Issues of corporate influence, sparse population, dependence upon agriculture and extractive resource development, location as a transportation corridor, and low campaign costs make Montana especially vulnerable to continued efforts of corporate control to the detriment of democracy and the republican form of government.”

It is doubtful that the evidence before the court was sufficient to justify a prohibition on independent expenditures by corporations. Some of the evidence the court relied upon involved the corrupting effect of large campaign contributions and therefore was marginally, if at all, relevant to corporate independent expenditures. Similarly, it does not appear that any of the examples of bribery the court discussed involved independent expenditures. Much of the opinion

203. *Id.*
204. *Id.* at 10.
205. *Id.*
206. *Id.*
207. *Id.* at 13.
208. *Id.* at 6 (“*Citizens United* was decided under its facts or lack of facts . . .”).
209. *Id.*
210. *Id.* at 11.
211. *Id.*
212. See, e.g., *id.* at 10 (explaining evidence that “voters were concerned that they ‘didn’t really count’ in the political process unless they can make a material financial contribution”); *id.* (“[T]hree of [four] Americans believe that campaign contributions affect judicial decisions in states where judges are elected.”).
focused more on concerns about corporate “influence” over Montana elections and “control” of state government than specific quid pro quo corruption, which the U.S. Supreme Court has held is the only valid basis for restricting political spending. The Montana Supreme Court also feared that unlimited independent expenditures would reduce voters’ interest and willingness to participate in the political process. Such concerns appear completely speculative and, in any event, are not grounds for limiting First Amendment activities.

Despite the shortcomings of the Montana Supreme Court’s opinion, it properly recognized that Buckley’s and Citizens United’s holdings concerning independent expenditures were not matters of pure constitutional interpretation, but rather were contingent on certain legislative facts. And the Montana Supreme Court believed that the State had established that different legislative facts existed concerning Montana elections, thereby warranting restrictions on corporate independent expenditures in Montana that may be unconstitutional elsewhere, under different circumstances.

The U.S. Supreme Court reversed in a terse, one-paragraph, 5-4 decision. It noted that Citizens United had invalidated a federal law that was “similar” to Montana’s on the grounds that “political speech does not lose First Amendment protection simply because its source is a corporation.” The Court held that “[t]here can be no serious doubt” that “the holding of Citizens United applies to the Montana state law.” It added that Montana’s arguments “either were already rejected in Citizens United, or fail to meaningfully distinguish that case.” Four Justices strenuously dissented, pointing out that Citizens United should not “bar the Montana Supreme Court’s finding, made on the record before it, that independent expenditures by corporations did in fact lead to corruption or the appearance of corruption in Montana.”

The Bullock majority exemplifies the Court’s careless treatment of legislative facts in campaign finance cases. If the Court wished to categorically preclude any governmental entity from limiting independent expenditures as a matter of law, without regard to the existence of extrinsic facts, then it should have framed its conclusion in

213. Id. at 9-10.
217. Id. (quoting Citizens United, 558 U.S. at 342).
218. Id.
219. Id.
220. Id. (Breyer, J., dissenting).
Buckley and Citizens United as a purely legal assertion, rather than a factually contingent holding. If, instead, an entity’s First Amendment right to engage in unlimited independent expenditures hinges on the existence or absence of certain facts, the Court should be clearer and more specific about what a litigant must establish to satisfy the Court’s standard, and more willing to examine future litigants’ factual records.

As discussed above with regard to contributions,\(^{221}\) it is unclear what evidence either a supporter of unlimited independent expenditures or a governmental entity seeking to regulate them must adduce to establish whether such expenditures by particular entities or in certain elections may lead to actual or apparent corruption. Would public opinion polls be sufficient? How much, if any, background must people be given about the distinctions among contributions, coordinated expenditures, and independent expenditures before being polled? Would testimony from former government officials be sufficient? Can the Court draw important inferences from evidence that government officials have acted favorably toward individuals or entities who had made independent expenditures supporting their candidacies? The Bullock Court’s approach, which effectively precludes litigants from demonstrating that independent expenditures can give rise to actual or apparent corruption under certain circumstances, improperly disregards the contingent nature of Buckley’s and Citizens United’s holdings.

Above all, the Court must avoid allowing a litigant to attempt to establish a legislative fact through definitional sophistry. Buckley held that independent expenditures cannot give rise to a risk of corruption because, by definition, they do not involve “prearrangement and coordination” between the speaker and a candidate.\(^{222}\) The Court, in large part, defined away the possibility of corruption. Under the Court’s view, if Congress were to redefine “contribution” as the transfer of funds to a candidate for reasons unrelated to a quid pro quo transaction, then a contribution could not, by definition, give rise to a risk of corruption, either. Money given to a candidate as part of a bribe or other corrupt quid pro quo arrangement would be excluded from the definition of “contribution.” If the Court wishes to continue determining the constitutionality of restrictions on First Amendment activities based on the likelihood they might involve actual or apparent corruption, then it cannot allow the risk of corruption to be simply defined out of existence.

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221. See supra Section III.B.

222. Buckley v. Valeo, 424 U.S. 1, 47 (1976). If an expenditure was prearranged with a candidate, it would be deemed a coordinated expenditure rather than an independent expenditure, see 52 U.S.C. § 30101(17) (Supp. II 2014), and treated as a contribution subject to base limits, id. § 30116(a)(7)(C).
IV. CONCLUSION

The judiciary—the Supreme Court in particular—has paid insufficient attention to the critical role of legislative facts in its constitutional holdings, particularly in campaign finance jurisprudence. Most basically, in discussing precedents, courts sometimes fail to distinguish between holdings that are pure statements of law, based solely on the Constitution itself, and those that are contingent upon underlying legislative facts. When factually contingent holdings get repeated in later cases, divorced from their underlying factual premises, they appear to be statements of law subject to stare decisis and sometimes are treated as such. Moreover, when a court treats a contingent holding as binding without assessing the continued accuracy of the underlying facts, it affords the holding improperly strong binding force. At least in theory, both legislative facts and legal holdings that are contingent upon them should be subject to challenge in future litigation, in which the litigants may compile a very different evidentiary record, without regard to stare decisis.223

In campaign finance cases, the Court also has paid inadequate attention to whether the legislative facts upon which its decision rules are based are reasonably susceptible to meaningful proof. Many of the Court’s standards are far too vague, giving litigants scant guidance as to how they can be satisfied. Such indeterminacy leaves courts free to resolve important constitutional questions based primarily on intuition, reaching conclusions that can be both difficult to predict and reconcile with each other.

These are not partisan critiques. Few people find current campaign finance law completely satisfactory. In some respects, paying greater attention to the role of legislative facts in the Court’s campaign finance jurisprudence may lead to greater constitutional protection. The Court may conclude, for example, that it has underestimated the extent to which contributions constitute a form of constitutionally protected speech. In other respects, it may lead to reduced protection; for example, courts may find themselves more open to considering evidence (if it exists) of actual or apparent quid pro quo corruption from independent expenditures. At a minimum, greater focus on the issue can lead to more coherent, predictable, and perhaps even persuasive rulings.

More generally, focusing on the factually contingent nature of many constitutional rulings offers an exciting and potentially unsettling perspective on constitutional law. The need to reduce constitutional law to hornbook principles, treatises, and outlines often abstracts away from its true, much more complex nature. Principles of

223. See generally Larsen, supra note 190 (arguing that factual statements from the Supreme Court should not be treated as authoritative in future cases).
constitutional law that appear established—at least unless the Court changes its interpretation of the Constitution—instead depend upon certain facts about the world. Those facts might not have been adequately proven in a prior case or may be subject to new or different evidence in future cases. Focusing on the factually contingent nature of constitutional rulings, rather than their legal holdings alone, is like perceiving what appears to be a solid block of wood instead as a collection of atoms, separated by gulfs of space. What appears to be definitive is, upon closer perception, contingent; what appears to be an assertion of law is, upon closer analysis, largely factual. Such shifts in focus can lead to illuminating insights, even when we already know that such complexity is lying just beneath the surface.
I. INTRODUCTION

Arizona State Legislature v. Arizona Independent Redistricting Commission might be viewed as a dispute about the control over redistricting, with a heavy emphasis on the perceived problems of and solutions to partisan gerrymandering and incumbent entrenchment.¹ Or the case might be about the power of the people to wrest control from an unresponsive legislature and pass their own laws via ballot initiative.² But that is not really this case. This Article notes

². Id. at 2675 (“In this light, it would be perverse to interpret the term ‘Legislature’ in the Elections Clause so as to exclude lawmaking by the people . . . .”); cf. Derek T. Muller, Invisible Federalism and the Electoral College, 44 ARIZ. ST. L.J. 1237 (2012) (describing the breadth of state control over presidential elections).
that it is something more nuanced. This case is less about the ballot initiative or about partisan gerrymandering, and more about a delegation of legislative power from the legislature to an unelected agency.

The case turned almost exclusively on the definition of the word “Legislature” as it appears in the Constitution, which has little precedent in Supreme Court opinions except for a couple of century-old cases of tangential relevance. But there is also a rich history of interpreting and constructing the Elections Clause—but it has occurred in Congress and in the states. These historical election disputes were all but absent in the Supreme Court, effectively ignored.

This Article examines the dispute over Arizona’s independent redistricting commission largely through a critique of the delegation of power from the legislature to an unelected entity. It then examines the historical records from two sources. First, it scrutinizes pre-Seventeenth Amendment discussions about the power to delegate legislative power to the people. Second, it considers congressional adjudications about election disputes concerning the proper role of the state legislature and delegations of the lawmaking power to other entities. These two examinations conclude that the historical understanding of the power of the “Legislature” precluded a delegation of its power to another entity. It concludes with some concerns about several Justices’ conclusions in the case, along with parting thoughts about the impact of these historical records in future litigation.

II. BACKGROUND

Arizonans enacted Proposition 106 in 2000, which transferred the power to draw legislative districts from the Arizona legislature to an independent redistricting commission. The Arizona legislature sued, challenging the commission’s power to redraw congressional districts. That is because it cited Article I, Section 4, Clause 1 of the United States Constitution, often known as the “Elections Clause.” It provides “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of choosing [sic] Senators.”

The Arizona state legislature argued that the ballot initiative transferred power from the legislature to the commission. Because

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4. ARIZ. CONST. art. IV, pt. 2, § 1.
the legislature must retain at least some power to draw congressional districts, it claimed that transference was unconstitutional. And because the independent redistricting commission is not the “Legislature,” the law should fall.

An additional point about what was at issue in this case requires clarification. The issue was not specifically whether a ballot initiative could create a redistricting commission. Indeed, at oral argument, Paul Clement, representing the legislature, noted that the issue would be the same whether the transfer of power happened by an executive fiat.7 Instead, the problem was that the newly created commission permanently and totally divested the legislature of any power to draw districts.8 Mr. Clement further suggested that a permanent delegation of authority to this commission, even if sanctioned by the state legislature, might also be problematic.9 That total divestment is the problem—not necessarily the means by which the divestment took place.

The Arizona Constitution assigns the independent redistricting commission its responsibilities in the “legislative responsibilities” section.10 There, it characterizes the commission as exercising “legislative power” when considering a challenge to the removal of a member of the commission.11 Thus, vesting the redistricting commission in an independent commission delegates the legislature’s power.

The briefs in the case focused on founding-era dictionaries12 and a couple of early twentieth century Supreme Court cases.13 But many

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8. Id. at 12.
9. Id. at 14.
10. ARIZ. CONST. art. IV, pt. 2, § 1.
11. Id.
13. But many
other sources of authority have grappled extensively with this definition of the word “Legislature”—evidenced by the litigation and debates surrounding pre-Seventeenth Amendment reforms regarding the election of senators and in the quasi-judicial findings of Congress itself in disputes arising under the Elections Clause.

III. LEGISLATIVE DELEGATIONS CONCERNING THE ELECTION OF SENATORS

Article I, Section 3 of the Constitution provides, “The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six Years; and each Senator shall have one vote.” 14 Section 4 continues, “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing [sic] Senators.” 15 The phrase “by the Legislature thereof” appears in consecutive sections of the Constitution. The difference is in the verbs “chosen” and “prescribed.” 16

Admittedly, an analogy comparing the two rests on an assumption that the “Legislature” for purposes of section 3 is the same as the “Legislature” for purposes of section 4. The Court has not always treated them the same, 17 and neither has Congress. 18 But some analysis about the meaning of the word “Legislature” in section 3 prior to the Seventeenth Amendment still might prove instructive.

At the founding, the Constitution originally dictated that the “Legislature [of the State]” was responsible for electing that state’s senators. 19 A compromise at the constitutional convention ensured that

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13. Brief for Appellant, supra note 6, at 9, 13 (citing Ohio ex rel. Davis v. Hildebrant, 241 U.S. 565 (1916); then citing Smiley v. Holm, 285 U.S. 355 (1932)); Brief for Appellees, supra note 12, at 40-41 (citing Smiley, 285 U.S. at 365-66; then citing Hildebrant, 241 U.S. at 569-70; and then citing Hawke v. Smith, 253 U.S. 221, 229-31 (1920)).


15. Id. art. I, § 4, cl. 1.

16. Id.

17. Smiley, 285 U.S. at 365-66 (explaining that the term ‘legislature’ has always referred to the same thing, the legislative body that makes the laws of the people, and noting that the use of the term in different relations throughout the federal Constitution only implies that that same body will perform different functions in different situations); see also Ariz. State Legislature, 135 U.S. at 2667-68 (explaining state legislatures performed different functions, dependent on the duties required by the different sections of the Constitution).

18. Cf. Hayward H. Smith, History of the Article II Independent State Legislature Doctrine, 29 FLA. ST. U. L. REV. 731, 769 & n.249 (2001) (noting that in 1903, the Senate as a whole firmly rejected a senate report by the Senate Committee on the Judiciary that implied that the two uses of “legislature” should be interpreted identically).

one of the houses of Congress would be held accountable directly to
the people, and the other house would be more directly responsive to
the state legislature. By the early twentieth century, this measure
of election had fallen out of favor with progressives: increased dead-
lock, spoiled selections, and vacancies led to disapproval. They fa-
vored direct election of senators. State legislatures themselves disap-
proved of the responsibility the Constitution placed upon them—they
were very close to calling a constitutional convention before Con-
gress ratified the Seventeenth Amendment and sent it to the states.
But why was the Seventeenth Amendment required? If state legisla-
tures wanted to give their power to the people, could they have
done so directly? Contemporaneous legal consensus agreed unani-
mously that state legislatures could not so delegate their power to
another entity.

A. Preference Primaries and Ballot Notations

Oregon first attempted a unilateral effort to provide for the direct
election of senators. It held a preferential primary in which the peo-
ple could vote for their preferred senate candidate. But the primary
did not bind the legislature: plurality winners of this election had no

20. James Madison, Thursday June 7th, 1787, in 1 THE RECORDS OF THE FEDERAL
CONVENTION OF 1787, at 150, 152-56 (Max Farrand ed., 1911) (recording the ten to one
dismissal of James Wilson’s proposal to consider referring election of senators to the people
followed by the ten to zero approval of John Dickenson’s motion to appoint election of the
Senate to state legislatures); James Madison, Monday June 25, in THE RECORDS OF THE
FEDERAL CONVENTION OF 1787, supra, at 405-08 (recording the nine to two dismissal of the
same proposition when Wilson brought it up again in a different context).

21. Jay S. Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of
the Seventeenth Amendment, 91 NW. U. L. REV. 500, 538-46 (1997) (claiming the three
major motivations for the Seventeenth Amendment to be popular concern over corruption
in state legislatures, deadlock and delay in the election of senators, and an argument by
members of the populist movement that the people could be and should be entrusted with
direct election).

22. Ralph A. Rossum, The Irony of Constitutional Democracy: Federalism, the
Supreme Court, and the Seventeenth Amendment, 36 SAN DIEGO L. REV. 671, 710 (1999)
(stating that twenty-seven of the thirty-one states needed had formally called for a
convention, with Arizona and New Mexico expected to do so as soon as their statehoods
became official, and with Alabama and Wyoming having submitted resolutions but not yet
formally called for a convention).

24. See infra Sections IV.A-B.
25. Alan P. Grimes, Democracy and the Amendments to the Constitution 76
(1978).
right to the Senate, and their fate still hinged on the state legislature’s vote. Popular primary winners could lose, and did lose, the actual election when the state legislature met.

Nevertheless, the Oregon system became a model for many states after its introduction. Similar efforts were underway in other states, and some of these efforts were met with legal challenges. Often, legal scrutiny examined whether the preference primary operated as a delegation of power from the legislature to the people. The North Dakota Supreme Court, for example, when examining the state’s statutes that mirrored Oregon’s, concluded, “The Legislature still elects the senator, and the act merely gives the voters of each party an opportunity to express their choice of candidates, as we have heretofore observed.”

The fact that the authority to elect senators still resided with the “legislature” mattered. The Wisconsin Supreme Court also considered the scope of a preference primary. With rhetorical flourish, it emphasized that “the duty of the legislators to meet, consult, and exercise their conscientious judgments” remained with the legislature, but that the primary indicated, “the wishes of the people are entitled to grave consideration.”

But, as with North Dakota, a primary merely influenced the legislature, something like a petition to the legislature. The ultimate power resided in the Wisconsin legislature, which saved the law.

[If it be the object and purpose of this law to shift the burden of, and responsibility for, the election of United States Senators from the Legislature to the electorate; if our legislators are to play the part of automatons and become mere passive instruments by and through whom the will of the voters is to be carried out; if to them is left the perfunctory duty of ratifying the action of the voters at the primaries, as the members of our electoral college confirm the result of a presidential election; if the electors in reality elect United States Senators, instead of the Legislature—then the constitutional scheme has been superseded, and the spirit of the Constitution has been evaded and disregarded.]

26. C.H. Hoebekke, The Road to Mass Democracy: Original Intent and the Seventeenth Amendment 146 (1995) (“But there was still the irritating possibility that a candidate who had garnered a bare plurality of primary votes in one party would win the Senate seat over a much more popular candidate whose party was not in the legislative majority.”).


28. Grimes, supra note 25, at 76.

29. State ex rel. McCue v. Blaisdell, 118 N.W. 141, 147 (N.D. 1908); see also id. (“[I]t is not a delegation of legislative power, as the Legislature, in electing a United States Senator, does not act in a legislative way at all.”).

30. State ex rel. Van Alstine v. Frear, 125 N.W. 961, 971 (Wis. 1910).

31. Id.
An additional initiative sought to strengthen the impact of the Oregon system by giving incentives to legislatures to support the people’s choice.

Candidates for the legislature were then “permitted” to include in their platform one of two statements regarding their views on the election of senators. ‘Statement #1’ assured the voters that a candidate would, regardless of party affiliation, abide by the results of the general election. ‘Statement #2’ declared the candidate’s intention to vote according to his personal discretion, and no doubt to his own political peril.  

A similar law was also implemented in Nebraska.  

There might be problems with a ballot notation that dictates whether a candidate for office pledges to adhere to some other condition for office—indeed, the Supreme Court expressly struck down similar notations in Cook v. Gralike, even as Nebraska relied on its history of senate pledge notations. The goal, of course, was to put weighty political pressure on the legislature. Nevertheless, neither the original Oregon system, nor the addition of a ballot notation, seized away from the legislature the role in electing senators. Instead, both sought to influence the state legislature in the exercise of its function without wholly usurping it.

B. Pledges

The Oregon system took another step beyond primaries and notations. By 1908, a new law would require members of the legislature to take an oath pledging to vote for the senate candidate who received the most votes in the preference primary, making a pledge supporting “Statement #1” compulsory. Commentary at the time concluded, “Doubtless this measure was unconstitutional . . . .” Its constitutionality in Oregon was never challenged; but similar efforts in other states are instructive.

A challenge to Wisconsin’s primary concluded that no pledge was required in its laws, which avoided any potential problems: “Not a word is said in the act about requiring legislative candidates to pledge themselves to support the nominee of the party. The law in

32. Hoebike, supra note 26, at 146.
33. Rossum, supra note 22, at 710.
35. Eaton, supra note 27, at 169 n.22 (“I further state to the people of Oregon as well as to the people of my delegation district that during my term of office I will always vote for that candidate for United States Senator in Congress who has received the highest number of the people’s votes for that position at the general election next preceding the election of the Senator in Congress without regard of my individual preference.”).
36. Id. at 96.
terms imposes no duty upon any member of the Legislature to vote for any person who was a candidate before the primary.” In North Dakota, a similar pledge was struck down as an additional qualification for state legislative office. Once the pledge was negated, the primary system could remain in place, because “[t]he legislative member is in no manner obligated or required, except perhaps morally” to vote for any candidate.

Finally, even though no litigation challenged the compulsory Oregon pledge, it remained unenforceable. Consider the Oregon legislature's senate election in early 1913, well after the full force of the Oregon system was in place and shortly before the ratification of the Seventeenth Amendment. Despite a compulsory pledge purportedly binding all legislators, some legislators still voted for a senate candidate who did not receive the plurality of the preference primary’s votes. Contemporary scholarly commentary generally accepted that any such system could not result in the legislature wholly abdicating its role in electing senators. Indeed, one concern addressed the “delegation” of legislative power “to some commission.” The legislature would continue to exercise its own judgment and final authority in senate elections until the ratification of the Seventeenth Amendment.

37. State ex rel. Van Alstine v. Frear, 125 N.W. 961, 971 (Wis. 1910).
38. State ex rel. McCue v. Blaisdell, 118 N.W. 141, 145 (N.D. 1908); see also id. (assessing the “assumption that the pledge feature of the law, when considered in connection with the provisions permitting the members of each political party to designate their choice as to senatorial candidates, in effect operates as an election of United States Senators by popular vote, instead of by the Legislature, as the federal Constitution requires. If, therefore, the pledge feature of the statute is eliminated because unconstitutional [sic], much of counsel’s argument ceases to have any force.”); accord Frear, 125 N.W. at 971 (“This provision was held to be unconstitutional and void, because it was an attempt to coerce the member of the Legislature to abdicate their right to use their individual judgments in making a selection, but it was also held that such [a] void provision did not affect the remainder of the act.”); id. at 972 (“[T]he act creates neither a legal duty nor moral obligation to carry out the verdict at the primary . . . .”) (Marshall, J., concurring).
39. See Journal of the Senate of the Twenty-Seventh Legis. Assemb. of the State of Or., Reg. Sess., at 117 (1913) (noting that Harry Lane won the plurality of votes in the preference primary and recording a vote in the Oregon Senate of twenty-eight votes for Mr. Lane and two votes for Ben Selling); id. at 131 (noting the preference primary results and recording a vote in the Oregon House of fifty-nine votes for Mr. Lane and one vote for Mr. Selling).
40. Note, Devices for Securing in Substance Direct Election of United States Senators., 24 Harv. L. Rev. 50, 50-51 (1910); cf. Samuel Russell, The Constitutional Power of State Legislatures to Direct Election of Senators by the Popular Electorate, 16 Va. L. Reg. 818, 820 (1911) (explaining that amending Article I, Section 3 of the Constitution to include “in such manner as the legislature thereof may direct,” consistent with the Presidential Electors Clause, would ensure state discretion in the manner of appointment).
41. Russell, supra note 40, at 820 (comparing the legislature submitting senators’ election to a popular vote with an agent submitting a doubtful point to his principal for decision, the precise opposite of delegation).
This trail through the Oregon system suggests that while legislatures increasingly obtained direct guidance from their constituents regarding senate elections, they were never fully “deprived” of their ultimate role in electing senators. They always held the ultimate authority and final say in the process—despite other forces that would increasingly persuade or influence their election process. Notable, too, is the emphasis on the power of the legislature and not on the form of the possible delegation—judicial critiques focused much more on the fact that the legislature may have lost power than the fact that the transfer of power happened by initiative. It also explains why the Seventeenth Amendment was needed to amend the Constitution: neither a popular initiative nor a legislative act could delegate its electoral authority to some other tribunal. The text of the Constitution precluded such a delegation, and amendment was necessary.

IV. LEGISLATIVE DELEGATIONS CONCERNING THE ELECTIONS CLAUSE

The Constitution also provides that each house of Congress “shall be the Judge of the Elections, Returns and Qualifications of its own Members.” Courts have established myriad ways of adjudicating congressional elections disputes. But Congress itself also engages in a judicial function when it evaluates who has won an election, and whether that winner is qualified to take a congressional seat. I have


43. See Russell, supra note 40, at 821 (“It is for the United States Senate to construe these provisions of the Constitution, and they would be construed with a view to place no unnecessary restrictions on the right of each state to its equal suffrage in the senate. The Constitution does not forbid the election of United States Senators by the people, but rather commits the matter to legislative discretion.”); see also DANIEL A. SMITH & CAROLINE J. TOLBERT, EDUCATED BY INITIATIVE: THE EFFECTS OF DIRECT DEMOCRACY ON CITIZENS AND POLITICAL ORGANIZATIONS IN THE AMERICAN STATES (2004).


46. See Barry v. United States ex rel. Cunningham, 279 U.S. 597, 613 (1929) (“Generally, the Senate is a legislative body, exercising in connection with the House only the power to make laws. But it has had conferred upon it by the Constitution certain powers, which are not legislative, but judicial, in character. Among these is the power to judge of the elections, returns, and qualifications of its own members.”). See generally Powell v. McCormack, 395 U.S. 486 (1969) (discussing extensively the scope and limits of Congress’s power to adjudicate upon its own members’ qualifications).
written extensively about Congress’s role in this regard when it comes to qualifications. But what about elections? Specifically, has Congress ever interpreted what the Elections Clause means?

As an important qualification to the enumerations below, these cases are complicated. They are at times internally inconsistent. They often include findings that are not essential to the decision to seat or deny to seat a member. Sometimes they include findings that are not ultimately adopted by a house of Congress. And the descriptions below are great simplifications, which may lack some of the nuance that the totality of the congressional record might reflect.

A. The Independent State Legislature Doctrine

Congress’s power to adjudicate election disputes has been significant — and not just to interpret the winners and losers, but to scrutinize conformity with statutory and constitutional law. In some of those cases, Congress and state courts have interpreted the Elections Clause through the lens of the “independent state legislature doctrine” — the notion that the state legislature’s power pursuant to the Clause arises from the United States Constitution and not from any state law. Four congressional adjudications typify examination of this doctrine.

1. The Case of Farlee Against Runk

In 1846, Mr. Runk won an election by just 16 votes, but Mr. Farlee argued that it was only because thirty-six students at Princeton illegally voted for Mr. Runk. Of the nineteen depositions, of those not entitled to vote, four had voted for Runk, one for Farlee, and the remaining fourteen declined to testify. An 1844 law promulgated by the legislature forbid college students from voting in New Jersey, but a subsequent constitutional amendment permitted students to vote if they were residents of the state for one year and of the county for five months. If the Princeton students were eligible, or if they were not determinative of the outcome, then Mr. Runk would win; if the prior law trumped the later constitutional amendment, and if the illegal voters were not determinative of the outcome, then Mr. Farlee would

48. See e.g., Franita Tolson, Congressional Authority to Protect Voting Rights After Shelby County and Arizona Inter Tribal, 13 Election L.J. 322, 328-34 (2014).
win. By a split vote, 96-96, Mr. Runk retained his seat. In 1846, a state constitutional amendment supplanted the state legislature’s prior law—or, the evidence was inconclusive to establish that enough invalid votes existed under the state legislature’s law.

2. The Case of Shiel Against Thayer

Oregon in 1861, George K. Shiel was elected on the day fixed by the state’s constitution. A.J. Thayer, however, had been later elected on the day of the presidential election. There was no law dictating that the congressional election was to be held on the day of the presidential election. But a committee report noted that the state constitution “has fixed, beyond the control of the legislature, the time for holding an election for Representative.” Mr. Shiel was seated pursuant to the state constitution in the absence of a directive from the state legislature.

3. The Case of Baldwin Against Trowbridge

In 1864, the Michigan constitution required voters to be residents of the state three months prior to Election Day. To enfranchise soldiers, the Legislature enacted a law authorizing voting even if one had not been a resident for that period. Mr. Trowbridge was permitted to retain his seat, even though he had been elected with the support of soldiers who voted pursuant to the state law rather than the constitutional requirement.

4. The Case of Donnelly Against Washburn

In 1880, Ignatius Donnelly challenged a seat held by William D. Washburn of Minnesota. One basis for the challenge was the fact that the state legislature required that St. Paul and Minneapolis number their ballots for elections as a mechanism to prevent fraud, and Mr. Washburn was elected under that system. The state courts later found the law unconstitutional because it violated the privilege of secrecy in voting. But in Mr. Washburn’s defense, members of the committee noted that the state constitution held no power over the legislature in this instance, because “this right and power is derived

50. ASHER C. HINDS, 1 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 813, at 1054-56 (1907); see also CONG. GLOBE, 35th Cong., 1st Sess. 2319 (1858).
51. HINDS, supra note 50, § 613, at 797.
52. Id. § 522, at 654.
53. ASHER C. HINDS, 2 HINDS’ PRECEDENTS OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES § 856, at 24-27 (1907).
54. Id. § 947, at 238.
exclusively from the Constitution of the United States.” Ultimately, the committee could not reach a conclusion on the matter, and Mr. Washburn retained his seat, effectively elected pursuant to the state legislature’s statute and not the state constitutional provision.

In *Arizona State Legislature*, the Court only addressed two of these cases, *Shiel* and *Baldwin*, and Justices gave the cases differing weight. The majority cited the dicta in *Shiel* for the proposition that the Constitution could control a state law—dicta, because there was no state law to the contrary. Chief Justice Roberts’ dissent cited *Baldwin* for the proposition that a state law could trump the Constitution.

### B. Additional Views of the Power of the State Legislature Under the Elections Clause

The “independent state legislature doctrine,” however, is not the only basis for congressional exploration of the scope of the legislature’s power under the Elections Clause. A reading of Congress’s adjudication of disputes arising under the Elections Clause leads to a few potential conclusions.

#### 1. Executive Power to Fill Vacancies: The Case of John Hoge

In 1804, the House evaluated whether to seat John Hoge of Pennsylvania. A congressman resigned, and the governor issued a writ of election. Hoge won that election. Some members of the House argued that the election was not valid because the rules for the election had not been prescribed by the “Legislature,” but by the executive. Nevertheless, the House seated him, because pursuant to Article I, Section 2, Clause 4, the “Executive Authority” of a state “shall issue Writs of Election to fill” vacancies, and, absent a rule from the Legislature articulating the time, place, and manner of such elections, the executive has the power to articulate such rules. The executive could act in the absence of the state legislature on account of independent authorization under the Constitution.

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55. *Id.* § 947, at 240.


57. *Id.* at 2685-86 (Roberts, C.J., dissenting).

58. *See generally 14 ANNALS OF CONG., 837-58 (1804); id.* at 841-44 (showing the explanation of Mr. Findley, chairman of the Committee on Elections, and his finding that “[t]he Governor had acted in obedience to the express words of the Constitution, and violated no law of the State”).
2. **Constitutional Conventions**

   a. **The Cases of Edouard Gilbert and George W. Wright**

   A California convention promulgated the state constitution, then placed it before the people to ratify it. At the same election, the people elected two representatives to the House, pursuant to the soon-to-be-ratified Constitution. The elections of these two were challenged in 1850—after all, there was no Legislature of California, much less a constitution, and there may have been an invalid election as a result. But the House looked at its historic practice regarding newly admitted states. Most states had sent representatives without a law passed by the legislature designating the time, place, and manner of elections.\(^59\) And while in most cases the constitution of the state had been adopted prior to the election (even though the election took place without an act of the legislature), in at least one other state did the two events occur simultaneously.\(^60\) The House ultimately seated the two representatives pursuant to the state constitution in the absence of a legislative directive.\(^61\)

   b. **The Case of the West Virginia Members of the Forty-Third Congress**

   West Virginia held a constitutional convention in early 1872. It authorized a ratification vote, and elections for members of the legislature, on the fourth Thursday of August. But an 1869 law enacted by the legislature required congressional elections to take place on the fourth Thursday of October. Congressional elections were held on both dates, and the dueling slates were presented to Congress. The House ultimately concluded that the convention did have the power to prescribe the time for elections, citing precedent in Michigan and Iowa. And the House concluded that the election could take place on the very day that the rules purporting to establish the time for

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59. CONG. GLOBE, 31st Cong., 1st Sess. 1790 (1850) ("Now, I have examined all the precedents that I have been able to find since this question arose, and so far as that examination has extended, I find that every one of the new States, except Missouri and Texas, sent Representatives here, and they were admitted to seats on this floor, without any law having been previously passed by the Legislature of such State designating the time, place, and manner of holding the elections."); id. ("This Government has been going on for half a century, admitting new States upon the very same principle, so far as the admission of Representatives on this floor is concerned, upon which these Representatives from California claim to be admitted . . . .").

60. Id. ("But there is another objection taken to this, and it is, that in most of these cases the constitution had been adopted before the members of Congress were elected. Granted. But here is a case before us to meet that objection. Here is the constitution of Michigan . . . . And was the admission of the members thus elected objected to? Not at all. But there was, I suppose, at that time, in this body, no astute constitutional lawyer distinguished as the gentleman from North Carolina, to raise such an objection.").

61. Id. at 1779, 1795.
elections were ratified by the people. It ultimately upheld the election held pursuant to the convention in the absence of a law from the state legislature.

c. The Cases of James B. Belford and Thomas M. Patterson

A similar episode took place in Colorado in 1876. Despite the strong protests to the contrary, such as claims that “th[e] grant to the convention is void because [it is] forbidden by the Constitution,” and “[t]he Constitution gave Congress the right to do it itself, not to authorize some other tribunal,” the members of the House concluded that the elections pursuant to rules promulgated by the convention were proper.

3. Delegations

a. The Case of John P. Stockton

The New Jersey Legislature had enacted a law authorizing a joint session of the legislature to elect senators to Congress. The joint meeting adopted its own rules, including rules dictating that the recipient of a majority of the votes would be elected as senator. On March 15, 1865, the joint meeting adopted a rule by a vote of forty-one to forty that the plurality winner would win the election. John P. Stockton then received forty votes and was elected by plurality vote.

A dispute arose over whether this mode of election was valid. The New Jersey Legislature had enacted a law indicating that senators “shall be appointed by the Senate and General Assembly of this State in joint meeting assembled.” Congress apparently agreed that the legislature could elect a senator pursuant to Article I, Section 3 while sitting in a joint session. Members of the Senate, however, disputed whether the joint meeting could promulgate a rule authorizing election by plurality vote. “Appointed,” it was argued, was a term of art in New Jersey that included a vote by a majority; or, absent a

62. See generally HINDS, supra note 50, § 522, at 649-60, for exhaustive details.
63. See id. at 660 (finding that two candidates were “duly elected” by virtue of the August election).
64. 6 CONG. REC. 154 (1877).
65. See generally HINDS, supra note 50, §§ 523-524, at 660-67, for exhaustive details.
67. Id. at 1564.
68. Id.
69. Id.
70. Id. at 1565.
71. Id.
directive from the legislature, a majority vote was necessary.\textsuperscript{72} While the joint session may have had the authority to promulgate its own rules, it did not have the authority to alter preexisting rules—“it cannot undertake to change the parliamentary law or the common law, because that is a matter that only the Legislature can do.”\textsuperscript{73}

Further debate arose over how the state defines its own “legislature.” Mr. Stockton himself pointed out that the New Jersey Constitution “declares it a Legislature when sitting separately” and “declares it to be a Legislature when in joint meeting assembled.”\textsuperscript{74} It became a philosophical point as to whether the “legislature” might also include the two houses in joint meeting.\textsuperscript{75}

But in the end, the validity of the election turned on only one of two conclusions: that the joint convention was simply the legislature arranged in a different form; or, that the joint convention’s parliamentary rule was not a “manner” “prescribed” pursuant to the Elections Clause.

As to the matter of form, it seemed straightforward to conclude the legislature meeting in joint convention acted in the capacity of the legislature, “for they could not give the authority to anybody else.”\textsuperscript{76} But form was not the sole issue; function mattered as well. The legislature for “choosing” was very different than the legislature for “prescribing,” and while the legislature in joint assembly might well elect, it could only do so because this configuration did not impair the “choosing” function.\textsuperscript{77} For example, it did not prevent the legislature from electing “without the participation of the Governor.”\textsuperscript{78} Accordingly, a joint convention could elect a senator because the legislature had merely arranged itself into a different form and not delegated its authority to another body.\textsuperscript{79}

\begin{footnotesize}
\textsuperscript{72} Id. (“And the word appointed is one used in the ancient constitution of New Jersey . . . . Under the old constitution it meant election by a majority of all votes. We submit that such is its meaning now.”); id. at 1566 (statement of Mr. Clark) (“[T]he Legislature of New Jersey being silent on that subject, no competent authority having prescribed the rule, it was necessary that there should be a majority of the votes of that joint convention to entitle the Senator from New Jersey to hold his seat . . . .”).

\textsuperscript{73} Id. at 1568 (statement of Mr. Fessenden).

\textsuperscript{74} Id. (statement of Mr. Stockton).

\textsuperscript{75} Id. at 1568-69; see also id. at 1571 (statement of Mr. Johnson) (“[T]here is nothing in the Constitution of the United States which prescribes to the States the manner in which they shall elect their Legislature, or the powers which they shall devolve upon the Legislatures so chosen.”).

\textsuperscript{76} Id. at 1571 (statement of Mr. Johnson).

\textsuperscript{77} Id. at 1590.

\textsuperscript{78} Id.; see also 3 Joseph Story, Commentaries of the Constitution of the United States § 703 (1991).

\textsuperscript{79} Cong. Globe, 39th Cong., 1st Sess. 1599 (1866).
\end{footnotesize}
But exercising the lawmaking function was slightly different. “The Legislature referred to in the Constitution is that tribunal in which is vested the law-making power.”\textsuperscript{80} The joint convention lacked the same power as the legislature, because it could not enact its own laws.

[If] there had been a law upon the statute-book requiring a majority this convention could not have elected by a plurality, then I say that that convention could not make such a rule. If it could not repeal a law of the State, how has it this whole subject under its control and the right to say by what number of votes a man shall be appointed Senator? If they could say that he could be appointed by a plurality they might just as well say that he might be selected by lot, or by a committee appointed who should designate a name and that individual be declared elected.\textsuperscript{81}

Because the legislature had not enacted a law authorizing election by plurality vote, the joint convention could not do so itself.\textsuperscript{82}

A fallback claim argued the joint convention was not prescribing the manner of election in a lawmaking capacity.\textsuperscript{83} If election by plurality vote were a kind of parliamentary rule that fell outside of the typical formal lawmaking function, then the joint convention could promulgate it without usurping the function of the legislature.\textsuperscript{84}

Neither argument carried the day. And, with ambiguity, the Senate omitted the actual reasoning for determining that Stockton was not entitled to his seat from their exclusion resolution.\textsuperscript{85}

b. The Case of Sessinghaus v. Frost

Missouri had no statewide voter registration law in place in 1880 but had one in place for certain cities. St. Louis did not qualify as one

\textsuperscript{80} Id. at 1590.
\textsuperscript{81} Id. at 1595 (statement of Mr. Cragin); see also id. at 1601 (statement of Mr. Sumner) (“This power is to be exercised by the ‘Legislature,’ which may prescribe the manner. It is not to be exercised by any other body than the Legislature, and the manner is to be prescribed by the Legislature. Now, assuming that it may be exercised in joint meeting, it is clear that this must be in pursuance to some legislative act, which shall prescribe in advance the manner.”); id. at 1668 (arguing that the joint convention could not exercise legislative power).
\textsuperscript{82} See, e.g., id. at 1677 (statement of Mr. Sherman) (“While the Legislature may prescribe a plurality rule in the election of a Senator, a joint convention of the Legislature in the exercise of the law cannot do it.”).
\textsuperscript{83} Id. at 1673 (statement of Mr. Stockton) (“Although the Legislature in joint meeting assembled may not be able to pass a law, or do any act which the Houses are required to do separately, when it is admitted that they can elect a Senator, it necessarily follows that they can pass rules for their governance while in the performance of that duty.”).
\textsuperscript{84} Cf. id. at 1594 (statements of Mr. Clark and Mr. Stockton).
\textsuperscript{85} Id. at 1677.
of those cities, but it enacted its own voter registration law anyway. As a result, a number of otherwise-eligible voters were refused the right to vote.

The majority of the committee considering the question concluded that the St. Louis ordinance could not control the election.\textsuperscript{86} And more detailed commentary questioned whether the state legislature could even cede power to the city if it wanted to do so: “The Constitution of the United States having expressly declared that the manner of holding elections for Representatives shall be prescribed in each State by the Legislature thereof, could the State Legislature or the constitution of Missouri delegate its authority to any other power, to any other body?”\textsuperscript{87} The answer was no:

I think there is no man . . . who will go to the length of saying that any city, by virtue of any State constitution or any legislative enactment can adopt a system of registration imposing upon voters regulations other than those imposed upon them by the constitution of their State or by the Legislature thereof.\textsuperscript{88}

V. CONCLUDING THOUGHTS

To derive conclusions from these precedents is a challenge. But some tendencies are apparent. The House has concluded that the power to “prescribe” the “times, places, and manner” of elections may be affected by other provisions of the Constitution, such as the Article I, Section 2 power of the executive to issue writs of election when vacancies happen. The Senate has found some relationship, but not perfect symmetry, in the word “Legislature” in Article I, Section 3 and Section 4. There has been some, but not complete, preference for the independent state legislature doctrine to allow the legislature to act unencumbered by state constitutional law. The House has found some flexibility responding to direct democracy in the context of constitutional conventions; and there has been skepticism of the delegation of legislative authority to another government entity. These tendencies can clarify some understatements in the Court’s factual explanations in the Arizona redistricting opinions.

A. Direct Democracy

By the mid-nineteenth century, Congress had repeatedly confronted issues concerning constitutional conventions, scrutinizing whether the people could act in a lawmaking capacity. And houses of

\textsuperscript{86} HINDS, supra note 53, § 975, at 313-14.

\textsuperscript{87} 14 CONG. REC. 3617 (1883) (statement of Mr. Miller).

\textsuperscript{88} Id.; accord HINDS, supra note 53, § 975, at 314 (statement of Mr. A.A. Ranney) (“It is more than doubtful whether the legislature, which is alone invested with authority of this kind, could thus delegate it any way.”).
Congress generally permitted the people to exercise that authority, perhaps to the Chief Justice’s surprise.\textsuperscript{89} Nevertheless, what state conventions might take from the state legislature they might be required to give back to the state legislature, because the conventions only acted in the absence of any other law. Indeed, when the state had just been admitted to the union, promulgation of a new constitution occurred at a time when no state legislature, much less state, existed.\textsuperscript{90}

Additionally, the \textit{Arizona State Legislature} majority opinion acknowledged that direct lawmaking did exist at the founding and early in the Republic, and that it did not “gain[] a foothold” until the twentieth century.\textsuperscript{91} That is true, but somewhat misleading in the context of construing the phrase “Legislature.” (Indeed, it is somewhat irrelevant to note later in the opinion that “the initiative and the referendum—were not yet in our democracy’s arsenal,” when other forms of direct democracy were known well before the twentieth century and bear upon the question of the direct democracy and the power of the “Legislature.”)\textsuperscript{92}

Historically, Congress also continued to turn to the independent state legislature doctrine in ensuing legislation, and state courts would continue to believe that the legislature could trump a state constitution.\textsuperscript{93} Even in instances when state courts found a state law unconstitutional, a house of Congress might still conclude that the Elections Clause permitted the federal election to take place under that state law.\textsuperscript{94}

Justice Ginsburg’s majority opinion in \textit{Arizona State Legislature} does not accurately reflect these points, noting that in \textit{Baldwin}, the Michigan Supreme Court held “as courts generally do, that state leg-

\begin{itemize}
\item \textsuperscript{89} \textit{Cong. GLOBE}, 31st Cong., 1st Sess. 1795 (1850); \textit{Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n}, 135 S. Ct. 2652, 2677-80 (2015) (Roberts, C.J., dissenting). Even this did not occur without some dissent in Congress. \textit{See id.} And perhaps the greatest and earliest critic of this view was Justice Joseph Story, who spoke out vociferously against any efforts of the Massachusetts constitutional convention of 1820 to provide for any regulation of federal elections, as doing so would usurp the state legislature’s role under the Elections Clause. \textit{See generally} \textit{Journal of Debates and Proceedings in the Convention of Delegates, Chosen to Revise the Constitution of Massachusetts} 110 (Boston, Daily Advertiser rev. ed. 1853), http://www.archive.org/details/cu31924032657326 (“Here an express provision was made for the manner of choosing representatives by the state legislatures. They have unlimited discretion in the subject. . . . [T]hat is the proposition on the table? It is to limit this discretion . . . .”).
\item \textsuperscript{90} \textit{Cong. GLOBE}, 31st Cong., 1st Sess. 1795 (1850).
\item \textsuperscript{91} \textit{Ariz. State Legislature}, 135 U.S. at 2659.
\item \textsuperscript{92} \textit{Id.} at 2672.
\item \textsuperscript{93} \textit{See generally} Michael T. Morley, \textit{Rethinking the Right to Vote Under State Constitutions}, 67 VAND. L. REV. EN BANC 189 (2014).
\item \textsuperscript{94} \textit{HINDS, supra} note 53, § 947, at 238.
\end{itemize}
islation in direct conflict with the State’s constitution is void.”^{95} Courts, yes—but not necessarily Congress. Courts facing a conflict between two provisions might conclude that the constitution trumps the law, but a house of Congress judging an election might still conclude that the law trumps the constitution—at least, if the adjudicating of the election also includes a consideration of the scope of the Elections Clause. Indeed, the Michigan Supreme Court did not even consider an Elections Clause argument that might have otherwise empowered the state legislature: it only compared the state law to its state constitution.^{96}

**B. Congressional Precedent**

This distinction between the roles of courts and Congress yields two more questions about the proper role of these precedents. First, this case represents an instance of the Supreme Court tacitly assuming jurisdiction over a dispute that is supposedly reserved to Congress. At the very least, the Court has felt comfortable extending its role into these types of disputes that had traditionally been reserved to Congress.^{97} And it is, after all, an area in which Congress has regularly engaged its judicial function and pored over the relevant provisions of the Constitution in dispute.

This critique differs from the pure standing critique that Justices Scalia and Thomas raised in their dissents.^{98} They worried about the courts “treading upon” separation of powers disputes between “state legislatures and executives.”^{99} That worry, however, is distinct from the notion that Congress, and perhaps not the judiciary, ought to resolve the interpretation of the Elections Clause pursuant to its Article I, Section 5 power. And that might come closer to the political question doctrine.^{100}

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96. See *People ex rel. Twitchell v. Blodgett*, 13 Mich. 127, 136 (1865) (“And we are only concerned, therefore, in determining whether the constitution of Michigan has prevented the state legislature from exercising complete control over the locality of elections, and whether, if such control is limited, the limitation is applicable to the subject before us.”).


98. Curiously, although Justices Scalia and Thomas agreed that there was no standing and would have dismissed the Arizona state legislature’s claim, they chose to dissent rather than concur in the result. See *Ariz. State Legislature*, 135 S. Ct. at 2694-97 (Scalia, J., dissenting); id. at 2697 (Thomas, J., dissenting).

99. *Id.* at 2697 (Scalia, J., dissenting).

100. See *Powell*, 395 U.S. at 548; see also Muller, *supra* note 47, at 578.
Second, the Court’s treatment of a few congressional adjudications, and its wholesale failure to cite many more, calls into question how courts ought to handle these precedents. After all, Congress is acting as judge in these election disputes; it takes evidence, holds hearings, and issues opinions, often citing its own precedents.\textsuperscript{101} It takes on a judicial function and acts in a judicial manner. How the Court might—and should—use those precedents remains deeply undertheorized, although the examination of congressional precedents is nothing new.\textsuperscript{102} While the Court introduces some rather ad hoc standards for these precedents (for instance, Chief Justice Roberts suggesting that \textit{Baldwin} is the superior precedent because it’s later in time than \textit{Shiel}), it might benefit the Court—and litigants—to explore more of these election disputes’ briefs, arguments, and opinions.

Justice Ginsburg does offer a rather unfair characterization of Congress’s role under Article I, Section 5 in \textit{Baldwin} in an attempt to diminish its value: “Finally, it was perhaps not entirely accidental that the candidate the Committee declared winner in \textit{Baldwin} belonged to the same political party as all but one member of the House Committee majority responsible for the decision.”\textsuperscript{103} Evidence suggests that Congress has generally resisted raw tribal partisanship in adjudicating election contests.\textsuperscript{104} To devalue Congress’s express authority to adjudicate election disputes as a kind of bare partisan squabbling is an undermining of the structural design of the Constitution in all election disputes.

\textbf{C. Legislative Delegations}

Finally, suppose one could surmount these justiciability problems and examine more deeply the historical election disputes adjudicated in Congress (or, in the context of the Seventeenth Amendment, in the state courts and legislatures). They offer a fairly consistent string of instances rejecting the proposition that the power of the legislature could be delegated to another entity. These are wholly missed by the Court.

The majority opinion in \textit{Arizona State Legislature} offers no constitutional analysis, simply asserting \textit{ipse dixit} that the state constitution authorizes the people to delegate legislative power to another

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102. See Powell, 395 U.S. at 509; see also U.S. Term Limits, 514 U.S. at 819.
104. See, e.g., Justin Levitt, \textit{The Partisanship Spectrum}, 55 WM. & MARY L. REV. 1787, 1840-41 (2014). \textit{But see id.} (acknowledging increased partisanship during and following the Civil War).
\end{flushleft}
agency. Chief Justice Roberts, in dissent, briefly notes this absence of legal authority for the delegation principle. But even that opinion misses a salient issue. Assuming the state legislature (or the people) had the power under state law (or the state constitution) to delegate its power to another, does the United States Constitution authorize that delegation?

There is a non-delegation doctrine in administrative law, one that extends to congressional power but not necessarily state legislative power. Within the congressional and state-based precedent of legislative power discussed above, however, one finds a similar non-delegation doctrine that prevents the authority from being transferred entirely from the state legislature to someone else.

The Seventeenth Amendment analogy rests, constitutionally speaking, on the idea that no one—neither the state legislature itself nor the people acting via initiative—could delegate the electoral power from the state legislature to the people. And the discussions in cases like Stockton and Sessinghaus turn largely upon the notion that the legislative power cannot be delegated to another entity—not to a joint convention, not to a municipality, not to anyone else.

There is some irony, then, in the majority’s position that seeks so strongly to separate the section 3 and section 4 powers of the state legislature. The section 3 power of the legislature to elect emphatically could never be delegated away, a point the majority readily accepts. But that the section 4 power—the lawmaking authority—of the state could be simply handed off to another agency to exercise on a permanent basis is far less obvious. Indeed, existing precedent disfavors the delegation of lawmaking authority to another entity.

Even within the analogous congressional non-delegation doctrine, agencies are given some authority that may otherwise ostensibly be within the purview of Congress: when Congress provides an “intelligible principle” to an agency, the agency may act within scope

106. Id. at 2677-78.
108. See Ariz. State Legislature, 135 S. Ct. at 2689 (Roberts, C.J., dissenting) (reflecting doubt that Congress could “delegate authority to one actor when the Constitution vests that authority in another actor” (quoting Whitman v. Am. Trucking Ass’ns, 531 U.S. 457, 472 (2001))).
109. While Justice Ginsburg’s opinion explains that the power to elect senators has a different “function,” one “to the exclusion of other participants,” it does not explain why that power could not have been delegated to another entity, unless the Constitution, overriding contrary state law, precluded such a delegation. See Ariz. State Legislature, 135 S. Ct. at 2667-68 (quoting Smiley v. Holm, 285 U.S. 355, 365 (1932)).
110. See discussion supra Section IV.B.3.a.
111. See discussion supra Section IV.B.3.b.
of that principle.\textsuperscript{112} And Congress always holds the final authority to override the decision of a federal agency.\textsuperscript{113} One could perhaps ignore the express legislative delegation to the independent commission and instead conclude that commission acted pursuant to the “intelligible principle” of a series of redistricting standards promulgated by the people.\textsuperscript{114}

But the Arizona legislature remained wholly cut out of the process, with no similar opportunity to override the decision of the commission. Its express purpose, after all, was to cut the legislature out of the process.

These deep-rooted understandings of the power of the legislature in the federal Constitution do not necessarily constrict the state legislature, of course. It might be the case that the federal Constitution, one of enumerated powers and one that specifically vests the lawmaking authority exclusively in Congress, does not include a similar non-delegation doctrine principle as to state legislatures. But Congress’s—and the states’—historical understanding of the legislature’s role in both section 3 and section 4 disputes belies the notion that the State can vest the legislature’s federal constitutional authority in an unelected body.\textsuperscript{115}

And the Elections Clause itself offers a similar structural reason to incorporate a non-delegation principle. The Clause permits “Congress . . . at any time by Law” to “make or alter such Regulations.”\textsuperscript{116} Because Congress may not cede this authority to another body, and because Congress always has the power to override the decisions of any agency that might otherwise engage in its regulatory capacity, a better reading of the state legislature’s role would subject it to similar constraints. After all, it would seem incongruous for state legislatures to have more power than Congress to allocate their authority without some meaningful explanation for such a distinction.\textsuperscript{117}

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\item[114.] \textit{See ARIZ. CONST. art. IV, pt. 2, § 1(14)} (describing scope of authority and factors the independent commission should consider in drawing congressional districts).
\item[115.] Despite the best efforts of the people of Arizona to divest the state legislature of any power in the area of redistricting, the very point of tasking the legislature with the primary lawmaking responsibility is precisely because it is the branch accountable to the people. \textit{See generally PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?} (2014).
\item[116.] U.S. CONST. art. I, § 4, cl. 1.
\item[117.] Admittedly, an immediate flaw with this reading of the Elections Clause arises when considering the state “legislature” itself. The legislature need not be composed in the same fashion as the United States Congress. But, it would undermine the notion that the “legislature” is wholly without an independent constitutional meaning and turns exclusively on how the states—including decisions of the people or within the state constitution—choose to define the “legislature.”
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This delegation point is certainly a narrow issue in the case, and these inquiries only scratch the surface of a much deeper investigation into the scope of any non-delegation principles that may extend to state legislatures under the United States Constitution. In this case, the broader affirmation of the people to enact laws via ballot initiative will likely have broader consequences, such as potentially authorizing the people to amend the manner of choosing electors, or consenting to divide a state into parts. Apparently, there is deeply engrained in the constitutional structure a prohibition on delegation of the electoral power, but not of the lawmaking power—when, in reality, the non-delegation doctrine in Article I cases places its emphasis on the lawmaking power.

But it is, perhaps, in some of these smaller points—the tacit acceptance of judicial authority to decide what Congress usually decides; the ad hoc, selective examination of Congress’s judicial precedents; the largely uncritical resolution of a permanent delegation of authority from the legislature to another entity—that the case will have a lasting impact on the roles of the judiciary and the legislature.


120. See, e.g., Lawson, supra note 112, at 351-53.
RESCUING RETROGRESSION

MICHAEL J. PITTS*

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I. INTRODUCTION

The Voting Rights Act¹ ain’t what it used to be. After a nearly half-century run of success, the Supreme Court used Shelby County v. Holder² to put one of the most seminal provisions of the Act, section 5, into what amounts to a permanent exile. While technically Shelby County did not slay section 5—it only interred the coverage formula from section 4 of the Act that makes section 5 operative—it seems unlikely section 5 will ever be functional again.³

Section 5’s demise is a shame. Section 5 prevented certain state or local governments (the so-called “covered jurisdictions”) from implementing changes to voting laws, such as redistricting plans or the movement of polling places, that discriminated against racial and language minorities (i.e., “minority voters”).⁴ Section 5 accomplished this important task through a process known as “preclearance” where the covered jurisdictions would have to garner approval from the federal government—either the United States Attorney General or a federal court in Washington, D.C.—prior to implementing any voting change.⁵ Over the years, this preclearance process prevented the implementation of voting changes adopted with a discriminatory purpose or, most importantly for purposes of this Article, which would have a retrogressive effect on minority voters.⁶ As a result, minority

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* © 2016. Professor of Law and Dean’s Fellow, Indiana University Robert H. McKinney School of Law. Thanks to Susan DeMaine for library assistance, Jessica Dickinson for research assistance, and Bob Berman for helpful comments. Thanks also to Franita Tolson and the editors of the Florida State University Law Review for organizing an excellent conference on the law of democracy and to the participants in the conference, especially Michael Morley, for comments.

2. 133 S. Ct. 2612 (2013).
3. Id. at 2631 (declaring section 4(b) unconstitutional and “issu[ing] no holding on § 5 itself”).
5. Id. at 99-100.
6. Id. at 100-01.
voters were able to make and retain significant gains in both the ability to cast a countable ballot and the ability to elect preferred candidates of their choice.7

The demise of section 5 means section 2 of the Voting Rights Act8 now stands as the main bulwark against voting discrimination. Section 2—for reasons that will be described more fully in this Article—does not provide the same level of protection as section 5. Section 2, through affirmative litigation brought by minority plaintiffs, prevents the use of electoral laws that under the “totality of the circumstances” have discriminatory “results.”9 This “results” standard provides less protection for minority voters than section 5’s retrogression test.

The thesis of this Article is a simple one—that the section 5 retrogression test should be “rescued” by importing it into the section 2 results framework. More specifically, proof that a newly adopted voting law will retrogress minority voting strength should create a strong presumption that the newly adopted voting law violates the section 2 results test. Part II of this Article will explicate more fully what the demise of section 5 has wrought and why the retrogression test is one of the most important things that has disappeared. Part III of this Article will provide details on how the retrogression test could be imported into section 2 and defends that importation from a doctrinal and theoretical perspective.

II. SECTION 5: WHAT HAS BEEN LOST

To fully comprehend why the section 5 retrogression standard should be imported into the section 2 results test, one needs to understand several things. First, one needs to appreciate how section 5’s retrogression standard operated as a protection for minority voters. Second, one needs to know what section 2’s results test currently protects. Finally, one needs to grasp the nature of the loss of

7. See Michael J. Pitts, Redistricting and Discriminatory Purpose, 59 AM. U. L. REV. 1575, 1582-88 (2010) (describing how enforcement of section 5 both retained existing gains for minority voters and compelled the creation of additional opportunities to elect candidates of choice); see also Michael J. Pitts, The Voting Rights Act and the Era of Maintenance, 59 ALA. L. REV. 903, 923 (2008) [hereinafter Pitts, Maintenance] (“Section 5, however, served as more than a shield to prevent backsliding; it was also wielded by the federal government as a sword to affirmatively compel the creation of additional ‘safe’ single-member districts, which inexorably led to an increase in descriptive representation.”).
9. Id. While the Supreme Court has not definitively so held, it would appear that section 2 also prevents the use of electoral laws that are purposefully discriminatory. Nipper v. Smith, 39 F.3d 1494, 1520 (11th Cir. 1994) (en banc) (holding that a section 2 violation can be proved by showing discriminatory purpose).
protection for minority voters that resulted from Shelby County—or what the University of Chicago’s Nicholas Stephanopoulos refers to as “the gap between Section 2 and Section 5.”

Section 5 had two unique aspects—one procedural, the other substantive. The unique procedural aspect was the idea of preclearance. In essence, covered jurisdictions were permanently enjoined from making changes to their election laws. In other words, section 5 froze the electoral laws in the covered jurisdictions, and a voting change could only be implemented in a covered jurisdiction if approval (i.e., preclearance) was obtained from a federal entity in Washington, D.C.—either the United States Attorney General through an administrative process or the D.C. District Court through litigation. In each instance, the federal government could not approve the voting change until determining the covered jurisdiction had met its burden of proving the change did not discriminate against minority voters in purpose or effect.

On the other hand, section 2, the primary remaining protection for minority voters, relies on the normal litigation process. Instead of voting laws being frozen until federal approval, a jurisdiction can immediately adopt and implement a voting change. The change will remain in place until a plaintiff brings an affirmative lawsuit and either proves that preliminary injunctive relief should issue or wins the case on the merits, both of which involve some demonstration that the voting change produces discriminatory results against minority voters.

In my view, losing the actual process of section 5 preclearance is the biggest harm to minority voters emanating from the Shelby County decision for two reasons. First, a huge deterrent to the adoption of discriminatory voting changes has been eliminated. The covered jurisdictions knew that to implement any voting change they had to secure federal approval and that federal approval would focus solely on the presence or absence of discrimination against minority voters. This knowledge led to the covered jurisdictions not adopting potentially discriminatory changes at all. Second, the section 5 pro-

12. Id.
13. Id. at 235.
16. Pitts, supra note 11, at 259 (describing deterrence factor); Tomas Lopez, Shelby County: One Year Later, BRENNAN CTR. FOR JUST. 2 (2014), http://www.brennancenter.org/
cess ensured that every single electoral change in the covered jurisdictions received some kind of review—what we might describe in *Harry Potter* terms as “constant vigilance.” 17 There was no opportunity for a voting change to slip through the cracks and be implemented in a covered jurisdiction without having some level of review by the federal government to ensure the absence of discrimination. 18

One does not have to look very far following the *Shelby County* decision to see how section 5 deterred the adoption of discriminatory changes. 19 In April 2013, prior to the *Shelby County* ruling, the North Carolina House passed a photo identification bill. 20 That bill sat idle, though, in the North Carolina Senate Rules Committee, quite likely because North Carolina Senators thought the bill would not pass muster under section 5. 21 But then *Shelby County* was handed down in June and the Senate Rules Committee Chair said, “So, now we can go with the full bill.” 22 The “full bill” ultimately adopted by North


18. Admittedly, this is from a theoretical perspective. It was always possible for a jurisdiction not to comply with section 5 preclearance by failing to submit a voting change for federal approval. However, such a failure was easily cured because a plaintiff could bring what was known as a section 5 enforcement action. See Pitts, *supra* note 11, at 236 (describing section 5 enforcement actions). Such an enforcement action was easy to win on the merits because all that needed proving was that a voting change had occurred and that preclearance for the change had not been obtained. See *id*.


21. *Id.* at 231 (noting that the Senate Rules Committee took no action on the proposal and implying that the lack of action related to the need to submit the proposal for preclearance); see also *id.* at 229 (“On June 25, 2013, the Supreme Court lifted certain Voting Rights Act restrictions that had long prevented jurisdictions like North Carolina from passing laws that would deny minorities equal access. The very next day, North Carolina began pursuing sweeping voting reform . . . ”) (citation omitted). Indeed, one federal court had already used section 5 to bar Texas’ photo identification requirement and another federal court had, in essence, rewritten South Carolina’s photo identification requirement to prevent retrogression. See generally *Texas v. Holder*, 888 F. Supp. 2d 113 (D.D.C. 2012); South Carolina v. United States, 898 F. Supp. 2d 30 (D.D.C. 2012).

22. *League of Women Voters*, 769 F.3d at 231.
Carolina included several changes that likely would have violated section 5 and are currently being challenged using section 2. But the “full bill” probably would never have been adopted absent Shelby County.

There is also good reason to think discriminatory changes will go unchallenged prior to implementation, particularly at the local level. High-profile changes, such as those that occurred in North Carolina, will likely generate publicity and concomitant litigation. However, lower-profile changes, such as redistricting plans in small school districts or changes from, say, single-member districts to at-large elections in little towns, could easily not generate attention. Moreover, even if they do generate some attention, there may not be sufficient incentives to litigate against such changes either prior to implementation or at all.

Unfortunately, the section 5 process, to paraphrase pop-star Taylor Swift, seems likely to “never, ever, ever, ever get back together.” Proposals to revive some form of section 5 lie stalled in Congress. And even if such proposals miraculously navigate the legislative shoals, the Supreme Court’s Shelby County decision leaves open the possibility of directly striking down section 5 in subsequent litigation.

The preclearance process, though, was not the only unique aspect of section 5—section 5 also contained a special substantive standard for preventing discrimination. Section 5’s substantive standard was

23. Id. at 229 (“North Carolina imposed strict voter identification requirements, cut a week off of early voting, prohibited local election boards from keeping the polls open on the final Saturday afternoon before elections, eliminated same-day voter registration, opened up precincts to ‘challengers,’ eliminated pre-registration of sixteen- and seventeen-year-olds in high schools, and barred votes cast in the wrong precinct from being counted at all.”).

24. Daniel P. Tokaji, Responding to Shelby County: A Grand Election Bargain, 8 HARV. L. & POLY REV. 71, 77 (2014) (“There is no doubt that Shelby County’s removal of the preclearance bar precipitated enactment of this legislation. And North Carolina could be a harbinger of what is to come.”). For obvious reasons, it’s hard at this point to provide an example of a change that has slipped through the cracks.

25. Michael J. Pitts, Let’s Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff’s Suggestion to Scuttle Section 5 of the Voting Rights Act, 84 NEB. L. REV. 605, 612-17 (2005) (arguing that section 5’s greatest deterrent impact occurs at the local level).

26. See id.

27. TAYLOR SWIFT, WE ARE NEVER EVER GETTING BACK TOGETHER (Big Machine 2012).


29. See Shelby Cty. v. Holder, 133 S. Ct. 2612, 2631 (2013) (“We issue no holding on § 5 itself . . . .”); see also id. (“I would find § 5 of the Voting Rights Act unconstitutional as well.”) (Thomas, J., concurring).
two-pronged. On the one hand, section 5 prohibited voting changes adopted with a discriminatory purpose. The purpose standard, however, exists both in the Equal Protection Clause and in section 2 of the Voting Rights Act, so it was not unique to section 5. On the other hand, section 5 prohibited voting changes adopted with a discriminatory effect, with discriminatory effect defined as any change that would lead to a retrogression of minority voting strength. Thus, section 5 uniquely prevented the implementation of new voting laws that would leave minority voters worse off than if the status quo was retained.

A couple of simple examples—one from the context of vote dilution (i.e., the ability to elect a sufficient number of preferred candidates of choice) and the other from the context of vote denial (i.e., the inability to participate in an election by casting a countable ballot)—demonstrate how this worked. The first hypothetical involves vote dilution and redistricting. Assume the City of Mobile, Alabama, had seven single-member districts and three of those districts were controlled by minority voters, thus allowing minority voters to elect their preferred candidates of choice. Then assume that the City adopted a redistricting plan reducing the number of single-member districts controlled by minority voters from three districts to two districts and sought preclearance for that new redistricting plan. In this simplified hypothetical, section 5 prevented the implementation of the newly adopted redistricting plan because it reduced by one the number of districts controlled by minority voters.

The second hypothetical involves vote denial and the moving of a polling place. Assume the City of Augusta, Georgia, had a precinct with a polling place in a government building located in the middle of a minority neighborhood. Assume that the City decided to move the polling place several miles away from the minority neighborhood to a white neighborhood, and that the new polling place would be a

31. See Rogers v. Lodge, 458 U.S. 613, 617-19 (1982) (describing discriminatory purpose under the Equal Protection Clause); see also Garza v. Cty. of Los Angeles, 918 F.2d 763, 766 (9th Cir. 1990) (“Thus, after the 1982 amendment, the Voting Rights Act can be violated by both intentional discrimination in the drawing of district lines and facially neutral apportionment schemes that have the effect of diluting minority votes.”).
32. 52 U.S.C. § 10304(b); Beer v. United States, 425 U.S. 130, 141 (1976) (“[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.”).
34. Districts that allow minority voters to elect preferred candidates of choice are generally referred to as “safe,” “crossover,” or “coalition” districts. For definitions of these terms, see Bartlett v. Strickland, 556 U.S. 1, 13 (2009).
church with an all-white congregation. In this simplified hypothetical, section 5 prevented the polling place from moving out of the minority neighborhood because it would make it harder for minority voters to participate in an election.

The two losses of *Shelby County* recognized above on the procedural and substantive level are similar to the losses recognized by the University of Chicago’s Nicholas Stephanopoulos. In an article devoted to, in essence, identifying what was lost when *Shelby County* neutered section 5, Professor Stephanopoulos identifies three key procedural differences between section 5 and the most prominent remaining bulwark against voting discrimination—section 2:

The burden of proof is on the plaintiff under Section 2 but on the jurisdiction under Section 5. The default is that a challenged policy goes into effect under Section 2 but that it does not under Section 5. And the party that typically invokes the VRA’s protections is a private plaintiff under Section 2 but the DOJ under Section 5.\(^{35}\)

In essence, the second and third aspects identified by Professor Stephanopoulos are the section 5 preclearance process itself. In that way, we are in agreement that much was lost from a process perspective. However, in my view, and how I differ from Professor Stephanopoulos is on my focus of emphasis. Professor Stephanopoulos largely analyzes the gap from the perspective of a change duly adopted being put through the preclearance process as opposed to affirmative litigation under section 2.\(^{36}\) In contrast, my main emphasis of what was lost procedurally would be on the deterrence value of section 5. Put differently, Professor Stephanopoulos’s article seems to focus on the gap between section 2 and section 5 *after a change is actually adopted*;\(^{37}\) I think the primary procedural loss occurs because section 5 prevented discriminatory changes from ever being adopted in the first place.\(^{38}\)

\(^{35}\) Stephanopoulos, *supra* note 10, at 57. I do not think the shifting of the burden of proof is all that significant of a difference between section 2 and section 5. The burden of proof should only come into play when the evidence is in equipoise, and that does not happen all that often. Indeed, Professor Stephanopoulos seems to imply that the burden of proof will not play a large role in many instances. *Id.* at 63 (“Sometimes the allocation of the burden is immaterial.”).

\(^{36}\) *Id.* at 118-26.

\(^{37}\) *See id.* at 66 (focusing on empirical evidence of “how many policies that were blocked by Section 5 would have gone into effect had only Section 2 been available to challenge them” while only briefly recognizing the deterrent effect of section 5).

\(^{38}\) To put the idea differently, if a change that arguably violates section 2 is never adopted in the first place, one does not have to worry at all about different burdens of proof, a discriminatory law going into temporary effect, or the need for private plaintiffs to litigate.
On the substantive side, Professor Stephanopoulos distinguishes between the vote dilution and vote denial context. In the vote dilution context, he identifies the gap between section 2 and section 5 as:

Section 2 does not extend to bizarrely shaped districts while Section 5 does. Section 2 does not encompass districts that merge highly dissimilar minority communities while Section 5 again does. And Section 2 does not cover districts whose minority voters comprise less than 50 percent of their total population while Section 5 does once more.\(^{39}\)

On the vote denial side, Professor Stephanopoulos notes:

Under Section 2, plaintiffs typically need to demonstrate not only that a statistical disparity exists between minorities and whites, but also that a franchise restriction interacts with social and historical conditions to cause the disparity. Under Section 5, on the other hand, a disparate impact alone usually suffices to prevent a restriction from going into effect, as long as the burden imposed by the restriction on voting is material\(^{40}\).  

Again, Professor Stephanopoulos and I are in much agreement in relation to the substantive loss, but my emphasis would be different in the vote dilution context. I agree with Professor Stephanopoulos that section 2 would not prevent the backsliding of so-called “crossover” districts where minority voters comprise less than fifty percent of the district’s total population and also might substantially agree that section 2 does not cover districts that merge highly dissimilar minority communities (what Professor Stephanopoulos terms “heterogeneous” districts).\(^{41}\) Yet my concern about the gap between section 2 and section 5 does not lie solely with losing bizarrely shaped districts, crossover districts, or heterogeneous districts. My main concern is losing what one might call “run of the mill” districts that allow minority voters to elect preferred candidates of choice and that do not fall into any of these categories, and I will discuss this concern more in Part III.\(^{42}\)

In short, procedural and substantive losses resulted from Shelby County. And it seems unlikely that the section 5 process will be re-

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\(^{39}\) Stephanopoulos, supra note 10, at 58.

\(^{40}\) Id. at 60.

\(^{41}\) Id. at 74. I disagree with Professor Stephanopoulos that section 5 required the retention of “bizarrely shaped” districts. See id. The Department of Justice’s guidance on this matter explicitly stated that “preventing retrogression under Section 5 does not require jurisdictions to violate Shaw v. Reno and related cases.” Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011). And it appears from Professor Stephanopoulos’s article that he equates “bizarrely shaped” districts with those that violate the Shaw line of cases. See Stephanopoulos, supra note 10, at 77-78 (noting the Shaw line of cases in discussing geographic compactness).

\(^{42}\) See infra notes 51-55.
suscitated. However, it seems slightly more possible that the substantive retrogression standard could be salvaged in some way, shape, or form. The next Part turns to an analysis of how that retrogression standard could be rescued and why it should be rescued.

III. RESCUING RETROGRESSION

The days of section 5’s procedural prowess seem finished, but the unique substantive standard of retrogression might still be saved. In this Part, I will lay out a substantive proposal for rescuing the retrogression standard. I will also explain why this proposal can comport with existing doctrine and why this proposal makes sense from a theoretical perspective. Finally, I will address potential pitfalls and downsides of this proposal.

A. The Presumption of a Section 2 Violation

The basic framework for rescuing retrogression is a simple one—make the retrogression test from section 5 a part of the substantive standard of section 2. I would propose to do that by adding a gloss on the current framework for finding a violation of section 2—creating a strong presumption of a section 2 violation when a voting change retrogresses minority voting strength.

But before discussing the addition of retrogression into section 2, one must know how section 2’s results standard operates. To prove a violation of the section 2 results standard in the context of vote dilution claims (e.g., claims against at-large election systems or redistricting plans), plaintiffs must show the existence of the three so-called Gingles preconditions: (1) that the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) that minority citizens are “politically cohesive” (i.e., they vote as a cohesive bloc); and (3) that white voters cast ballots “sufficiently as a bloc to enable [them] . . . usually to defeat the minority’s preferred candidate.”

If a plaintiff proves the existence of the Gingles preconditions, then the court considers the “totality of the circumstances,” which includes an examination of the so-called Senate Factors, such as a history of voting-related discrimination, and whether proportionality exists.

The key, though, to section 2’s vote dilution framework is that it can compel a state or local government to create additional opportunities for minority voters to elect preferred candidates of choice. For

44. Id. at 36-37.
45. Id. at 36-37, 44-45; Pitts, Maintenance, supra note 7, at 920 n.111 (listing the “Senate factors”; see also Johnson v. De Grandy, 512 U.S. 997, 1000 (1994) (noting the relevance of proportionality to the totality of circumstances).
instance, a successful section 2 lawsuit can force a county to switch from an at-large system where minority voters were unable to elect any preferred candidate of choice to a system of single-member districts where minority voters are able to elect at least one preferred candidate of choice. A successful section 2 lawsuit can also compel a county that already has single-member districts to create one or more districts allowing minority voters to elect preferred candidates of choice.

The approach section 2 takes to election laws that might deny the ability to cast a countable ballot (such as the locations of polling places, the equipment used to vote, voter identification requirements) is, to put it mildly, not nearly as well defined. Suffice to say that no clear framework has emerged to answer important questions such as whether proof of vote dilution is necessary to a section 2 claim and whether there is a “voter fault” defense under section 2. Indeed, the greatest sticking point may be what more needs to be proved beyond disparate impact to find a violation of section 2 in the vote denial context. Several courts have asserted that a plaintiff bringing a section 2 vote denial claim needs to prove something more than disparate impact, but as Professor Stephanopoulos notes, “the lower courts disagree as to what this ‘something more’ actually is.”

My proposal would preserve existing section 2 doctrine as it relates to vote dilution and vote denial when challenging existing laws. I would, however, add an additional layer to the section 2 results


48. See, e.g., Brown v. Detzner, 895 F. Supp. 2d 1236, 1249 (M.D. Fla. 2012) (“[I]t appears that in the Eleventh Circuit a plaintiff must demonstrate something more than disproportionate impact to establish a Section 2 violation.”); see also Frank v. Walker, 768 F.3d 744, 753 (7th Cir. 2014) (“Section 2(b) tells us that § 2(a) does not condemn a voting practice just because it has a disparate effect on minorities.”); Gonzalez v. Arizona, 677 F.3d 383, 405 (9th Cir. 2012) (“[A] § 2 challenge ‘based purely on a showing of some relevant statistical disparity between minorities and whites,’ without any evidence that the challenged voting qualification causes that disparity, will be rejected.” (quoting Smith v. Salt River Project Agric. Improvement & Power Dist., 109 F.3d 586, 595 (9th Cir. 1997))).

49. Stephanopoulos, supra note 10, at 108-09 (discussing lower court case law in this area). I tend to agree with Professor Stephanopoulos that in the vote denial context “there is substantive space between Section 2 and Section 5—but that it is not as extensive as it first might seem.” Id. at 116.
standard when dealing with a newly adopted law.\footnote{50} In such a situation, if plaintiffs could demonstrate that the newly adopted law would have a retrogressive effect on minority voters, the newly adopted law would presumptively violate the section 2 results test. The burden would then shift to the defendant state or local government to provide a legitimate, nondiscriminatory reason for the retrogression in order to avoid section 2 liability.

Consider a few hypothetical applications. Assume a city with a 33% citizen voting age Latino population has five single-member districts, two of which allow Latino voters to elect preferred candidates of choice. On the heels of the most recent Census data, the city adopted a redistricting plan that only includes one district that allows Latino voters to elect a preferred candidate of choice. In this situation, the retrogression in the number of single-member districts that allow Latino voters to elect a candidate of choice would create a strong presumption of a section 2 violation and, absent unique circumstances (such as I will detail below), would end up being a section 2 violation.\footnote{51}

Importantly, here is what rescuing retrogression helps preserve that the existing section 2 framework might very well not. In the hypothetical, it is not at all clear that even if the Gingles preconditions existed and plaintiffs presented evidence of some—or even most—of the Senate factors, that a section 2 results violation would be found. A court might easily say that one out of five districts in the context of a 33% Latino citizen voting age population provides sufficient representation for Latino voters and, therefore, does not amount to a section 2 violation.\footnote{52} Indeed, perhaps the greatest problem with applying section 2 in the vote dilution context comes in this

\footnote{50. The details of what constitutes “newly adopted” could be worked out on a case-by-case basis. The paradigm is a situation where, say, a redistricting plan or new voter identification requirement is adopted by a state or local government and then challenged by minority plaintiffs relatively soon after adoption. I would not allow section 2 plaintiffs to sit on their rights for, say, a decade and then challenge a law as retrogressive.}

\footnote{51. One thing that should be considered is what the remedy for such a violation would be. In many instances, reinstatement of the prior existing law would likely be the appropriate remedy. For example, if a city attempts to switch from single-member districts to at-large elections and that switch is found to be retrogressive and violate section 2, then the remedy would be reinstatement of the single-member districting method of election. However, in the context of redistricting, often the prior redistricting plan will violate one person, one vote because of the publication of Census data demonstrating the existing districts are malapportioned. In such an instance, the remedy might be a court order to draw a new, non-retrogressive redistricting plan.}

\footnote{52. See, e.g., Gonzalez v. City of Aurora, 535 F.3d 594 (7th Cir. 2008) (refusing to draw a second district (out of ten total districts) controlled by Latino voters when the Latino CVAP was 16.3%).}
type of hypothetical where a single-member districting plan provides some representation but somewhat less representation than could be provided.\textsuperscript{53}

While the reduction in the number of districts that allow Latino voters to elect a preferred candidate of choice would raise a presumption of retrogression, that presumption could be overcome by the city. For instance, the city might be able to show that demographic trends make it impossible to draw a second district for Latino voters while still complying with the constitutional mandate of one person, one vote.\textsuperscript{54} Or, the city might be able to demonstrate that legally significant racially polarized voting does not permeate city elections. In short, retrogression would not be an automatic violation.\textsuperscript{55}

Let’s take another hypothetical example of how the presumption would operate, this time from the context of vote denial. Assume a county has a particular precinct that has a roughly even mix of African-American and white population. In the precinct, residential segregation exists such that the African-American population is almost exclusively on the south side of the precinct and the white population is almost exclusively on the north side. The precinct’s polling place is a public building located on the south side of the precinct, but the county decides to move the polling place to a private building on the north side of the precinct, and there is evidence that such a move will lead to a lower turnout among African-American voters at upcoming elections. In such an instance, the retrogression of African-American voting strength would create a strong presumption of a section 2 violation.

Again, though, the presumption of a violation could be overcome. For instance, no violation would be found if the existing polling place

\textsuperscript{53} As previously intimated, I think this constitutes an important additional “gap”—particularly at the local level—between section 2 and section 5 that was not sufficiently emphasized by Professor Stephanopoulos. \textit{See supra} note 41 and accompanying text.

\textsuperscript{54} Reynolds v. Sims, 377 U.S. 533, 558 (1964) (articulating one person, one vote standard).

\textsuperscript{55} The idea that retrogression did not automatically violate section 5 was recognized by the Department of Justice in its review of redistricting plans:

There may be circumstances in which the jurisdiction asserts that, because of shifts in population or other significant changes since the last redistricting (\textit{e.g.}, residential segregation and demographic distribution of the population within the jurisdiction, the physical geography of the jurisdiction, the jurisdiction’s historical redistricting practices, political boundaries, such as cities or counties, and/or state redistricting requirements), retrogression is unavoidable. In those circumstances, the submitting jurisdiction seeking preclearance of such a plan bears the burden of demonstrating that a less-retrogressive plan cannot reasonably be drawn.

had burned down in a fire and no other location was available in the African-American portion of the precinct. Or, perhaps, the polling place had to be moved to accommodate disabled voters, and no other location accessible to disabled voters existed in the African-American portion of the precinct. As with vote dilution, the presumption of a Section 2 violation could be overcome by the defendant in the vote denial context as well.

To sum up, my proposal would be to have two “tracks” to proving a violation of the section 2 results standard. The first track would be the traditional analysis that has been performed for vote dilution (i.e., proof of the Gingles preconditions and then an analysis of the totality of the circumstances) and vote denial cases for some time. The second track—what might be called the “retrogression track”—would be proof of retrogression that creates a strong, though rebuttable, presumption of a section 2 violation. In this way, the section 5 retrogression standard could be rescued.

B. Why Rescue Retrogression?

My proposal “rescues” retrogression, but why would we want to do that? The primary reason to rescue retrogression is to retain the gains made by minority voters that have occurred since initial passage of the Voting Rights Act of 1965. Moreover, my proposal to rescue retrogression is doctrinally workable and relatively realistic. That said, rescuing retrogression inevitably involves trade-offs and potential downsides, which will also be explored.

The primary reason for rescuing retrogression is that the gains made by the Voting Rights Act since its adoption in 1965 must be preserved. In 2008, I wrote an article in the Alabama Law Review positing that the Voting Rights Act had entered an “Era of Maintenance” and that the primary goal of the Voting Rights Act going forward should be to maintain the gains made by minority voters.

56. It should be noted that Professor Stephanopoulos has advocated for changes to the substantive side of section 2 in the vote dilution context that would apply section 2 coverage to “districts that are strangely shaped or whose minority populations are heterogeneous or below 50 percent in size.” Stephanopoulos, supra note 10, at 61. In the vote denial context, he proposed to “make disparate impact alone the standard for Section 2 liability.” Id. He avers that this would generally create “Section 2 liability . . . in the exact circumstances in which there is retrogression under Section 5.” Id. at 123. However, because Professor Stephanopoulos’s focus was on identifying the gap between section 2 and section 5, both theoretically and empirically, he did not elaborate very much on these proposals. Indeed, he spent much more time discussing other ideas, such as a revised coverage formula or enhanced section 3 coverage, to fix the gap between section 2 and section 5. Id. at 119-22. Thus, while it might seem that Professor Stephanopoulos would agree that the retrogression test should be rescued—particularly in the context of vote dilution—it’s not clear that he would create the same system that I would.

57. See generally Pitts, Maintenance, supra note 7, at 906.
As I wrote:

Maintenance . . . may well represent the proper approach because it serves to best balance the competing realities and theories of the democratic process. No one theory can explain or set the entire agenda for American democracy . . . maintenance, with its allowance for traditional vote dilution litigation, recognizes the need to break up entrenched political interests that completely (or nearly completely) stifle political accountability to minority voters . . . [and] maintenance recognizes that the ability to compete in the legislature for preferred policy preferences . . . requires that the “toe-hold” that minority groups have in terms of descriptive representation be retained.58

Without question, minority voters are a lot better off in 2015 than they were in 1965. The ability of minority voters to participate—to register and cast a countable ballot—has drastically improved.59 Moreover, many more minority candidates are elected to federal, state, and local offices in 2015 than were elected in 1965.60

Despite these substantial gains, one would not say that we’ve arrived at perfect equality. In terms of participation, Latino and Asian-American registration and turnout rates are significantly lower than those of whites and African Americans.61 When considering descriptive representation, it is certainly true that the number of minority officials has increased substantially. However, minority groups remain “underrepresented at almost every level of government.”62 Indeed, the underrepresentation of minority groups remains most pronounced at the state and local level of government—the place where section 5 may have had its greatest impact.63 At the state

58. Id. at 908.

59. Khalilah Brown-Dean et al., Joint Center for Political & Econ. Studies, 50 Years of the Voting Rights Act 8 (2015), http://jointcenter.org/sites/default/files/VRA%20report%2C%203.5.15%20%2813%29%20am%20%28updated%29.pdf (“Since the Voting Rights Act’s 1965 passage, African Americans residing in former Confederate states have gone from near total disenfranchisement to registration and turnout rates that equal or surpass those of whites in the same states, at least in presidential general election contests.”).

60. Juliet Eilperin, What’s Changed for African Americans Since 1963, by the Numbers, Wash. Post (Aug. 22, 2013), http://www.washingtonpost.com/blogs/the-fix/wp/2013/08/22/whats-changed-for-african-americans-since-1963-by-the-numbers/ (“The number of African-American elected officials has also risen dramatically since researchers started tracking it in 1970. Forty-three years ago there were 1,469 black elected officials nationwide . . . in 2011 there were roughly 10,500 such officials.”); Brown-Dean, supra note 59, at 24-29 (“Since 1965, African Americans went from holding fewer than 1,000 elected offices to over 10,000, Latinos from a small number to over 6,000, and Asian Americans from under a hundred to almost a thousand.”).

61. Brown-Dean, supra note 59, at 8 (“Latino and Asian American registration and turnout rates, however, continue to trail [whites and African Americans] significantly.”).

62. Id. at 29.

63. See supra notes 25-26 and accompanying text.
level, whites account for 85% of all the seats even though whites are only 75% of all voters and 62% of the total population.\textsuperscript{64} At the local level, “whites still hold well over 90% of all local offices.”\textsuperscript{65}

Because some minority groups do not yet participate to the same extent as whites and because all minority groups have substantially less than proportional representation, it is enormously important that we maintain the gains that have been made thus far. I do not think the Shelby County decision means we are inevitably headed toward another era of massive, blatant disfranchisement and voting-related discrimination, such as occurred during the late 1800s.\textsuperscript{66} Yet it is important to remember the disfranchisement of the late 1800s did not happen overnight—it happened gradually over a period of about a quarter century.\textsuperscript{67} In light of that history, and current facts, preventing retrogression of minority voting strength should be at the forefront of Voting Rights Act enforcement, and rescuing retrogression helps quite a bit to achieve that end.\textsuperscript{68}

Rescuing retrogression also makes sense from a doctrinal perspective. I take, as a given, that UC-Davis’s Chris Elmendorf is correct when he notes that section 2 essentially amounts to “a delegation of authority [by Congress] to the courts to develop a common law of racially fair elections.”\textsuperscript{69} And that “Section 2 precedents should not enjoy the super-strong stare decisis typical of statutory precedents, but rather the weak stare decisis of precedents under the Sherman Act, the paradigmatic common law statute.”\textsuperscript{70} Because of these insights, flexibility exists to employ the common law of section 2 as a “vehicle for innovation and change.”\textsuperscript{71}

The “famously elliptical”\textsuperscript{72} language of section 2 provides a hook in the statutory text for rescuing retrogression through common law interpretation. Section 2’s plain language interprets “results” as a “totality of the circumstances” standard.\textsuperscript{73} The above language also interprets results in the opaque language of “less opportunity . . . to

\begin{enumerate}
\item BROWN-DEAN, supra note 59, at 32.
\item Id. at 33.
\item Richard M. Valelly, The Two Reconstructions: The Struggle for Black Enfranchisement 1, 121-22 (2004).
\item Id.
\item Id.
\item Because maintenance of existing minority voting strength is the primary goal, I would not allow minority heterogeneity of a district to serve as a justification for retrogression. See Stephanopoulos, supra note 10, at 78-80 (discussing minority heterogeneity).
\item Elmendorf, supra note 47, at 404.
\item Id. at 384.
\item Max Huffman & Mark Anderson, Devils, Scripture, and Antitrust 6 (Mar. 2015) (unpublished manuscript) (on file with author).
\item Gonzalez v. City of Aurora, 535 F.3d 594, 597 (7th Cir. 2008).
\item 52 U.S.C. § 10301(a) (Supp. II 2014).
\end{enumerate}
participate in the political process and to elect representatives of their choice.” 74 Section 2’s language also allows the “extent to which members of [a minority group] have been elected to office” as a factor to be considered in the totality of circumstances analysis. 75 Finally, section 2 does not create a “right” to proportional representation. 76

A full excursus into a statutory analysis of section 2 lies beyond the scope of this modest Article. But, at first blush, a totality of the circumstances analysis creates room for retrogression to serve as a presumption of a section 2 violation. 77 Indeed, the Supreme Court, in the early 1990s, added a new factor to the section 2 totality of the circumstances analysis, so precedent exists to support modifying the analysis. 78 Moreover, retrogression of minority voting strength would also seem to create, absent other compelling factors, “less opportunity” for minority group members “to participate in the political process and to elect representatives of their choice.” 79 Finally, to the extent

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74. Id. § 10301(b).
75. Id.
76. The full text of section 2 reads as follows:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(b)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Id. § 10301.

77. Cf. League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 241 (4th Cir. 2014) (“First, the district court bluntly held that ‘Section 2 does not incorporate a “retrogression” standard’ . . . . Contrary to the district court’s statements, Section 2, on its face, requires a broad ‘totality of the circumstances review.’ Clearly, an eye toward past practices is part and parcel of the totality of the circumstances.” (first quoting N.C. State Conference of NAACP v. McCrory, 997 F. Supp. 2d 322, 351 (2014); then quoting 52 U.S.C. § 10301(b))).


79. 52 U.S.C. § 10301(b) (emphasis added); cf. Ohio State Conference of the N.A.A.C.P. v. Husted, 768 F.3d 524, 558 (6th Cir. 2014) (“[U]nder the Section 2 analysis, the focus is whether minorities enjoy less opportunity to vote as compared to other voters. The fact that a practice or law eliminates voting opportunities that used to exist under prior law that African Americans disproportionately used is therefore relevant to an
the retrogression presumption applies to vote dilution claims, it considers the extent to which minority group members achieve electoral success and does not create a right to proportional representation because all it does is preserve existing gains rather than compel additional efforts to achieve proportional representation.\textsuperscript{80}

One could also find additional, though non-definitive, support for retrogression creating a presumption of a section 2 violation in one of the most recent Supreme Court decisions interpreting section 2. In\textit{League of United Latin American Citizens v. Perry (LULAC)}, a key to the Court’s holding that Texas’ congressional redistricting plan violated section 2 was the fact that the State “took away the Latinos’ [ability to elect a candidate of choice] because Latinos were about to exercise it.”\textsuperscript{81} Indeed, the Court mentioned that this change “undermined the progress of a racial group that has been subject to significant voting-related discrimination.”\textsuperscript{82} In essence, one might easily recast the \textit{LULAC} decision as one that fits with the general proposition that the section 2 results standard should generally prohibit the adoption of retrogressive voting laws.

In addition to theoretical and doctrinal reasons for rescuing retrogression, a practical reason also exists. Using retrogression as a presumption for a violation of the results test provides a relatively administrable standard. The retrogression test was implemented for several decades, and little evidence demonstrates that the test was difficult to administer. The Court, in the arena of election law, tends to prefer relatively simple tests to more complex inquiries with perhaps the paradigm of doctrinal administrability being the “sixth-grade arithmetic” of one person, one vote.\textsuperscript{83} In essence, retrogression as a presumption of a section 2 violation amounts to a judicially manageable standard.

\footnotesize{assessment of whether, under the current system, African Americans have an equal opportunity to participate in the political process as compared to other voters.	extsuperscript{\textit{a}}), \textit{vacated}, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

\textsuperscript{80} Perhaps the biggest doctrinal road-block to my proposal is a single sentence from a footnote in the Senate Report that accompanied the 1982 Amendment to section 2: “Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group.” S. Rep. No. 97-417, at 68 n.224 (1982). Of course, legislative history can easily be pushed to the side by using a plain-language interpretation. But, beyond that, because my proposal only involves retrogression creating a strong presumption of a section 2 violation, it is possible to argue that such a claim involves more than just demonstrating retrogression—it involves demonstrating that the retrogression has not been justified by the defendant.

\textsuperscript{81} 548 U.S. 399, 440 (2006).

\textsuperscript{82} \textit{Id.} at 439.

At the end of the day, the main reason to adopt my proposal—the need to maintain the gains made by minority voters since passage of the Voting Rights Act in the covered jurisdictions where many minority citizens reside—is both practical and theoretical. The doctrinal justifications merely show my proposal to be a plausible interpretation of section 2.84 Moreover, I think this proposal has more potential to be adopted because all it would take to be implemented is a change of one member of the Supreme Court rather than congressional action.85

C. Concerns About Rescuing Retrogression

Of course, any doctrinal test inevitably involves trade-offs. There are potential downsides to importing the section 5 retrogression test into the section 2 results standard. The primary downside on the vote dilution front would seem to be that section 5’s retrogression standard emphasizes descriptive over substantive representation and may not do much to move toward a day when the Voting Rights Act becomes unnecessary. The primary downside on the vote denial front would seem to be that the retrogression test might inhibit experimentation by state and local governments because they would be concerned about getting “stuck” with progressive changes. In addition, a few other less pressing problems merit discussion.

When it comes to vote dilution, rescuing retrogression will mean that, absent special circumstances, state and local governments will need to preserve districts that allow minority voters to elect their preferred candidates of choice. These types of districts almost invariably lead to minority voters achieving “descriptive representation”—the ability to elect candidates of the same minority group as the minority voters who control outcomes in the single-member district.86 The elevation of descriptive representation to such an inviolate level could lead to a reduction in substantive representation—the ability of minority voters to get their preferred policies implemented by legislative bodies.87

84. I leave to one side issues as to whether importing retrogression into section 2 would violate the United States Constitution. Presumably, a Supreme Court willing to rescue retrogression will find a way to avoid holding that such an approach violates the Constitution. Regardless, there is recent evidence that civil rights remedies heavily reliant on disparate impact analysis will pass constitutional muster. See Tex. Dept’ of Hous. & Cmty. Affairs v. Inclusive Cmty’s Project, Inc., 135 S. Ct. 2507 (2015) (upholding use of disparate impact standard in the Fair Housing Act).

85. I’m far less certain a change in membership of the Supreme Court would result in the overruling of Shelby County. It’s quite possible that ship has sailed.


But there may be reasons to prefer descriptive representation over substantive representation. First, descriptive representation is something courts can workably define, whereas other measures of political power seem harder to pin down. Second, descriptive representation sends an important symbolic message that may lead to greater participation. Third, descriptive representation, while not perfect, may well lead to substantive representation, particularly at the local level. Fourth, it’s not obvious to me that a clear path exists to achieve substantive representation. Put differently, even if substantive representation is the goal, will lessening the amount of descriptive representation actually cause better political outcomes for minority voters? Finally, rescuing retrogression would help preserve one type of district that seems more favorable to substantive representation—the “crossover” district.

Another problem with rescuing retrogression is that it may create outcomes that seem unfair when comparing the electoral practices of different jurisdictions, particularly in the vote denial context. For instance, one state may have same-day voter registration and another state may have a thirty-day advance registration requirement. Perhaps the state with same-day voter registration would like to implement a ten-day advance voter registration requirement, but doing so would retrogress minority voting strength. In this situation, rescuing retrogression would lead to one state not being able to make a change that might still be more liberal than another state, leading to what some might view as unfair treatment.

But section 2 and, indeed, election law itself has never been interpreted to require the exact same outcomes for different jurisdictions. For instance, in some places at-large elections violate section 2, but


91. Cf. Pitts, Maintenance, supra note 7, at 979 (questioning whether it is practical to trade off descriptive representation for substantive representation in most redistricting contexts, most notably at the local level).

92. See supra text accompanying note 41 (noting that “crossover” districts are part of the “gap” between section 2 and section 5).
in other places, at-large elections do not. As one court recently noted: “The focus [of Section 2] is on the internal processes of a single State or political subdivision and the opportunities enjoyed by that particular electorate. The text of section 2 does not direct courts to compare opportunities across States.” Indeed, other areas of election law work the same. In some instances, drawing a district allowing minority voters to elect a preferred candidate of choice will constitute racial gerrymandering; in other instances it will not. In some instances, an overall range of relative deviation of 0.6984 violates one person, one vote doctrine, in other instances, a higher overall range of relative deviation of 0.79 does not. A section 2 violation is always contingent upon particular facts and circumstances and has never mandated a “one-size fits all” approach—section 2 demands an “intensely local appraisal.”

The real problem when it comes to different treatment among the states is that rescuing retrogression might provide a disincentive to the adoption of electoral changes favorable to minority voters. For instance, a state might consider adopting, say, same-day voter registration but decide not to do so because this will create a new baseline for minority participation that the state will be stuck with forever. In this way, a section 2 that rescues retrogression might stifle electoral innovation.

Admittedly, this is a possibility, but probably not a large problem. It seems to me that the barrier to the adoption of changes that would be disproportionately positive for minority voters is not fear of being stuck with the change in perpetuity but not wanting minority voters to cast more ballots in large part because of their political leanings toward the Democratic Party. Put differently, if a jurisdiction wants to adopt a change favorable to minority voters, I do not think the new, more favorable voting rights baseline it creates is likely to be a


94. Ohio State Conference of the NAACP v. Husted, 768 F.3d 524, 559 (6th Cir. 2014).


98. I leave aside the incredibly thorny question of whether race or politics is the primary motivation in such an instance.
major barrier. Moreover, jurisdictions could avoid being stuck with changes in perpetuity by either adopting changes as short-term pilot programs or with sunset provisions that would not create a new benchmark for minority voting strength forever. Indeed, it is quite possible that the only “innovation” that will be stifled is the type of innovation adopted by North Carolina after the Shelby County decision.

There are also scenarios that would seem to be outliers that might pose thorny problems. For instance, it is possible a voting change would be beneficial to Latino voters at the expense of African-American voters. In such an instance, the presumption of a violation might be overcome by the jurisdiction if there is a demonstrated benefit to another minority group. Another likely outlier situation would be where a change is regressive for minority voters but would lead to greater participation by the electorate as a whole. Again, though, in this instance, a jurisdiction might be able to overcome the presumption of a violation through such a showing. And another outlier situation might occur when a minority group has much greater than proportional representation. But, again, a jurisdiction might be able to overcome the presumption of a violation.

Tough and unique cases may present themselves, but my overall point is that in the run of situations, it would be better to rescue retrogression and to worry less about unique circumstances. We should do what we can to preserve the significant gains made by minority voters since 1965, and the potential downsides of rescuing retrogression do not outweigh the need to maintain these gains.

IV. Conclusion

The section 5 process seems unlikely to re-emerge on the voting rights landscape. However, section 5’s substantive retrogression test should be rescued and imported into the section 2 results standard. This should occur because an overarching goal of the Voting Rights Act should be to maintain the gains fostered by the Act since 1965.

Admittedly, the proposal included in this Article is a modest one, and one that will not cure all that ails American democracy from the standpoint of minority voting rights. And even such a modest proposal seems unlikely, absent a change in membership of the Supreme Court, to be adopted. But in picking up the pieces of Shelby County, one has to start somewhere—and that start should be rescuing retrogression.

99. Of course, I admit on the margins this could make a difference. For instance, if passage of a new election law by the legislature is a close call, it is possible a key vote could be lost for this reason.

100. See supra notes 19-23.
VOTING IS ASSOCIATION

DANIEL P. TOKAJI*

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I. INTRODUCTION

What is the relationship between the First Amendment right to expressive association and the Fourteenth Amendment right to vote? It’s closer than you probably think. The Supreme Court employs a balancing test in constitutional challenges to a wide variety of election practices, including ballot access rules, blanket primaries, and voter identification. This standard is commonly referred to as “Anderson-Burdick” for the two main cases from which it derives, Anderson v. Celebrezze1 and Burdick v. Takushi.2 Recent lower court decisions have applied this test in constitutional challenges to state laws restricting same day registration,3 provisional voting,4 and early voting.5

The Anderson-Burdick standard is the offspring of a union between the Fourteenth Amendment right to vote and the First Amendment right of association.6 This Article explores the origins, development, and subsequent obscuration of the relationship between these two rights. It argues for a renewed recognition of the voting-association link when it comes to the burdens on voting challenged in the current generation of voting rights litigation.

Central to this story are two opinions by Justice John Paul Stevens, one written early in his tenure on the Supreme Court and the other near the end. The first opinion is Anderson, a challenge to ballot access restrictions that were used to exclude independent candidate John Anderson from Ohio’s 1980 presidential ballot. Anderson

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6. This Article addresses the relationship between voting and the right to expressive association, not to be confused with the very different right to intimate association. See Roberts v. U.S. Jaycees, 468 U.S. 609, 617-18 (1984) (distinguishing the two rights).
and his supporters brought a hybrid claim, asserting both First Amendment associational rights and Fourteenth Amendment equal protection rights. The Court struck down Ohio’s ballot access restrictions, citing the risk of discrimination “against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.” The Court thus suggested that restrictions on voting implicate First Amendment associational rights, insofar as it involves individual voters joining together with like-minded others as well as with political parties representing their views.

A quarter-century later, in Crawford v. Marion County Election Board, the Court upheld Indiana’s voter ID law against a facial challenge under the Fourteenth Amendment. Justice Stevens’ lead opinion adopts the balancing test articulated in Anderson and refined in Burdick to alleged burdens on voting. The dissenting Justices applied the same standard but reached a different conclusion. Since Crawford, lower courts have consistently used this standard in constitutional challenges to a wide variety election administration practices. But as in Crawford, plaintiffs have based their claims primarily on the Equal Protection Clause and not the First Amendment, despite the Anderson-Burdick standard’s roots in the right of expressive association.

This Article urges recovery of the lost linkage between the First Amendment right of expressive association and the Fourteenth Amendment right to vote. Voting restrictions implicate expressive association to the extent they prevent voters from joining together with like-minded voters, candidates, and political parties. The First Amendment provides an appropriate vehicle for voting claims because it acknowledges the risk that the party in power will abuse its authority to impede association by voters favoring its rival. By affirming the centrality of intermediary organizations—especially political parties—the right of association affirms a decidedly pluralist perspective in democracy.

Reviving the voting-association link would cast recent election administration cases, including Crawford and its lower-court progeny, in a different light—one that more accurately reflects the real-world dynamic in these cases. Disputes over voting rules are not

8. Id. at 793-94.
10. Id. at 189-91.
11. See infra Part II.
12. For an elaboration of this perspective, see generally BRUCE E. CAIN, DEMOCRACY MORE OR LESS: AMERICA’S POLITICAL REFORM QUANDARY (2015).
simply or even mainly about an individual’s right to cast a ballot without impediment. They are better understood as inter-party disputes, in which political insiders seek to block political outsiders from aggregating their votes so as to challenge the dominant group. Like the seminal First Amendment association cases of the McCarthy and civil rights eras, recent voting controversies center on the risk that those in power will suppress groups challenging that power—be it the Communist Party in the 1950s, the NAACP in the 1960s, independent-minded voters in 1980, or Democrats in Texas today. Viewing the right of association as a component of the right to vote allows us to understand the constitutional problems inherent when political insiders manipulate election rules to stymie those collectively seeking to challenge their power.

This Article is not the first to suggest a link between the First Amendment and the Fourteenth Amendment right to vote. Abner Greene,13 Lori Ringhand,14 and Janai Nelson15 are among those who have written on the subject, as have I.16 But most previous scholarship on the subject focuses on free speech rather than association. The leading exception is Guy Charles who thoroughly explored the relationship between voting and associational rights in a 2003 article.17 My account differs from his in two respects. First, Professor Charles understood the Anderson line of cases as resting on the First Amendment right of association instead of the Equal Protection Clause. I view equal protection and association as mutually reinforcing. Second, Professor Charles emphasized racial association, while this Article sees political parties as the central association in contemporary politics and the constitutional law of elections.18

What are the implications of recognizing that voting is a form of association protected by the First Amendment? Reconnecting voting and association would reframe the central issue in future constitutional litigation. It would thus lead to a sharpened understanding of


18. Dan Lowenstein also addressed associational rights in an excellent article written more than two decades ago, although his focus was on then-recent decisions according associational rights to political parties. Daniel Hays Lowenstein, Associational Rights of Major Political Parties: A Skeptical Inquiry, 71 TEX. L. REV. 1741 (1993). I address Professor Lowenstein’s views in Part III, infra.
the injury that the now ubiquitous Anderson-Burdick standard is designed to prevent. The State would have a heavier burden of justification to the extent that election rules have the effect of discriminating against voters supporting the opposing party. Associational rights provide an appropriate vehicle for understanding voting injuries, including not only ballot access and blanket primary issues to which the First Amendment has traditionally been deployed, but also election administration controversies to which it has not. Future litigants challenging burdens on voting should therefore add the First Amendment association claims to their arsenal. Doing so would hone in on the real injury in the current generation of voter ID, early voting, provisional voting, and voter registration cases: preventing non-dominant political parties and their supporters from challenging the party in power.

Part II of this Article traces the roots of the First Amendment right to expressive association, starting with the mid-century cases involving the NAACP and Communist Party and proceeding through later decisions involving compelled association and campaign finance regulation. Part III examines the relationship between voting and the associational rights through a close analysis of cases connecting these two rights, as well as more recent cases that overlook this connection. Part IV proposes the re-linking of voting and associational rights, arguing for a refinement of the Anderson-Burdick doctrine to focus on the disparate impact on non-dominant parties, and tracing how this refinement would play out in constitutional challenges to present-day voting restrictions.

II. THE ROOTS OF EXPRESSION ASSOCIATION

One of the leading statements of the core value underlying the First Amendment appears in Justice Thurgood Marshall’s opinion for the Court in Police Department v. Mosley.\footnote{19. 408 U.S. 92 (1972).} “[A]bove all else,” he wrote, “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”\footnote{20. \textit{Id.} at 95. For the leading scholarly exposition of this idea, see Kenneth L. Karst, \textit{Equality as a Central Principle in the First Amendment}, 43 U. Chi. L. Rev. 20, 26-29 (1975) (discussing Mosley); see also Geoffrey R. Stone, \textit{Fora Americana: Speech in Public Places}, 1974 Sup. Ct. Rev. 233, 273-80 (discussing Mosley). I have expounded on the centrality of equality under the First Amendment at length. See Tokaji, supra note 16.} The Court has reiterated this admonition many times, doubling down on it in recent First Amendment cases.\footnote{21. \textit{See Reed v. Town of Gilbert}, 135 S. Ct. 2218, 2226 (2015) (showing content-discriminatory sign regulations are subject to strict scrutiny).} As Justice Scalia put it in one of his last dissents: “[T]he First
Amendment is a kind of Equal Protection Clause for ideas.” It guards against government officials misusing their power to suppress points of view they disfavor. Most conspicuously, it prevents the dominant political group from trying to silence dissident groups that threaten its grip on power.

This conception of the First Amendment finds its most fulsome expression in the decisions in which the Supreme Court developed the right of association. From its beginnings, the main beneficiaries of this right have been groups advancing a political viewpoint contrary to that espoused by the powers-that-be. The Supreme Court developed the First Amendment right of association in a series of mid-century cases, most of them arising from governmental interference with two types of groups.

One line of cases involves the NAACP and other groups advocating for civil rights in the South. The first and most important of these decisions was *NAACP v. Alabama ex rel. Patterson*. An Alabama court had cited the NAACP for contempt after it refused to comply with an order that the group disclose its members in accordance with state law. In holding that the NAACP had a First Amendment right to resist disclosure, Justice Harlan wrote for the Court:

> Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the "liberty" assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.

Compelled disclosure of the NAACP’s members, the Court concluded, would paralyze its attempt to advocate for racial justice. This was an entirely realistic appraisal at the time, when threats and

25. Id. at 451.
26. Id. at 460 (citations omitted).
violence against those involved in the civil rights movement were routine in places like Alabama. Decisions following *NAACP v. Alabama* alarmingly gave like protection from disclosure to other civil rights groups and their members.\(^{27}\)

The other seminal line of expressive association cases involves the Communist Party and its members. Around the same time as the NAACP compelled disclosure cases, the Court decided two cases arising from convictions of Communist Party members. In *Scales v. United States*,\(^ {28}\) the Court upheld the conviction of a district chairman who not only knew of its illegal activities but also “specifically intend[ed] to accomplish [the aims of the organization] by resort to violence.”\(^ {29}\) By contrast, in *Noto v. United States*,\(^ {30}\) the Court reversed a conviction of a party member whose specific intent to further illegal activities had not been proven. The upshot was that mere association with a political party, despite its illegal aims, was insufficient to convict. Later cases expanded this protection beyond criminal cases, prohibiting the denial of other benefits such as employment\(^ {31}\) or bar membership\(^ {32}\) based on party membership alone. These cases thus prevent the government from imposing either criminal penalties or other sanctions based on one’s dissident political views absent evidence of an intent to promote illegal activity. The chief concern is that government-targeting of unpopular groups would discourage people from joining, thus impoverishing public debate.

Other cases extend protection to people associating as a way to advance their political beliefs through litigation. In this area, too, the groundbreaking case arose from the civil rights movement. In *NAACP v. Button*,\(^ {33}\) the Court struck down a Virginia law prohibiting lawyers from soliciting prospective clients, which had been used to stop the NAACP’s efforts to organize civil rights lawsuits. Justice Brennan’s opinion for the Court held that the litigation, in which the NAACP sought to engage, was not just a means of resolving private

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27. See Shelton v. Tucker, 364 U.S. 479 (1960); see also Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539 (1963) (holding that petitioner’s conviction for failing to release information contained in the membership was a violation of the right of association protected by the First and Fourteenth Amendments).


29. *Id.* at 229 (second alteration in original) (quotation omitted).


disputes but also “a form of political expression.” While recognizing that the NAACP was “not a conventional political party,” its litigation sought to advance the collective interests of the African American community. Virginia’s law thus infringed upon the associational rights of the NAACP, as well as its members and its lawyers. Later cases extended this protection to other groups engaged in impact litigation such as labor unions and advocates for reproductive rights. The unifying theme is that the State may not prevent people from associating in pursuit of ideological goals through litigation.

The freedom to associate in pursuit of shared political goals sometimes includes the freedom not to associate as well. An example is *Abood v. Detroit Board of Education*, in which the Court held that public employees could not be compelled to support a labor union’s ideological activities, though they could be required to pay for the union’s collective bargaining services. The First Amendment’s protection against compelled association is not, however, absolute. In *Roberts v. United States Jaycees*, the Court held that the First Amendment’s protections did not extend to a private club’s exclusion of women, which was a violation of a state civil rights statute, because the admission of women would do no discernible damage to the club’s expressive aims. On the other hand, the Court struck down the application of a state law prohibiting discrimination on the basis of sexual orientation in *Boy Scouts of America v. Dale*. The Court accepted the Boy Scouts’ claim that accepting gays would undermine its antigay message and, accordingly, infringe on its right to expressive association.

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34. *Id.* at 429.
35. *Id.* at 431.
37. *In re Primus*, 436 U.S. 412 (1978). On the other hand, the same day it handed down *Primus*, the Court held in another case that states may prohibit solicitation of purely commercial offers of legal assistance. *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).
38. 431 U.S. 209 (1977); see also *Keller v. State Bar of Cal.*, 496 U.S. 1, 14-16 (1990) (finding that the bar association may require members to pay fees used for regulation of the profession, but not political advocacy). In recent years, the Roberts Court has extended the protection against compelled association further, requiring that workers “opt in” to support certain union political activities rather than allowing unions to charge them for such activities unless they “opt out.” *Knox v. Serv. Emps. Int’l Union, Local 1000*, 135 S. Ct. 2277, 2293 (2012). Currently before the Court is another First Amendment challenge to compelled support for a union’s collective bargaining services. *Friedrichs v. Cal. Teachers Ass’n*, 135 S. Ct. 2933 (2015) (granting certiorari petition).
40. *Id.* at 626-27.
42. *Id.* at 648, 651; see also *Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos.*, 515 U.S. 557 (1995) (holding that a private group organizing a St. Patrick’s Day parade had a right to exclude a group with an antithetical message).
extends only to those whose participation would interfere with the group’s message. As with other cases involving associational rights, the central question in the compelled association cases is whether state action has impeded a group’s ability to express its ideological perspective.

Similar concerns are at play in cases involving campaign finance regulation, an area worthy of special note given its close connection to voting. Two aspects of campaign finance law implicate expressive association. The first is restrictions on political contributions, which Buckley v. Valeo famously distinguished from restrictions on expenditures. While restrictions on the latter directly impede political speech, the Court reasoned, contribution limits are only a “marginal” restriction on speech. Buckley viewed contribution limits as mainly affecting association, rather than speech, and thus warranting less searching scrutiny than expenditure limits. The other aspect of campaign finance law implicating associational rights is compelled disclosure of campaign contributions and expenditures. Since Buckley, the Supreme Court has recognized that mandatory disclosure has the potential to chill would-be donors and spenders, subjecting such requirements to “exact scrutiny.” While generally upholding disclosure requirements, the Court has recognized the need to accommodate groups and individuals that may suffer retaliation if contributions are made public. Accordingly, it has held that individuals and groups may claim an exception where there is a “reasonable probability” that compelled disclosure will lead to threats, harassment, or reprisals. Following NAACP v. Alabama, this test is grounded in recognition that compelled disclosure can paralyze non-

44. 424 U.S. 1 (1976).
45. Id. at 20-21.
46. Id. at 24-25 (“[T]he primary First Amendment problem raised by the [Federal Election Campaign] Act’s contribution limitations is their restriction of one aspect of the contributor’s freedom of political association.”).
47. Id. at 25. Although Buckley itself is imprecise regarding the level of scrutiny, the Court later clarified that contribution limits need only be “closely drawn” to an important interest, while expenditure limits must satisfy strict scrutiny and be narrowly tailored to a compelling interest. See McCutcheon v. FEC, 134 S. Ct. 1434, 1445 (2014); McConnell v. FEC, 540 U.S. 93 (2003); Nixon v. Shrink Mo. Gov’t PAC, 528 U.S. 377, 386-88 (2000).
48. 424 U.S. at 64.
50. Buckley, 424 U.S. at 70-71.
51. Id. at 74. The Court later found this test satisfied in Brown v. Socialist Workers’ 74 Campaign Committee, 459 U.S. 87, 98-101 (1982). More recently, the Court has applied the same test to compelled disclosure of referendum signatories. Doe v. Reed, 561 U.S. 186, 200-01 (2010).
mainstream political groups, whose fundraising and therefore expression may be stymied if their supporters’ identities are publicized.

Thus far, I have focused on cases that involve political association but do not directly concern the act of voting. There is, however, another line of cases in which the Court has extended the right of expressive association to voters, candidates, and parties joining together at the ballot box. Part III discusses those cases.

III. ASSOCIATION AND THE VOTE

The Supreme Court has long flirted with the idea that voting is a form of speech protected by the First Amendment, but has never adopted this position. It has, however, held that voting is a form of expressive association protected by the First Amendment.

Before exploring the connection between voting and association, it is worth considering the road not taken. The Court entertained the argument that voting was protected speech in Harper v. Virginia Board of Elections52 but wound up striking down the poll tax based solely on the fundamental right to vote under the Fourteenth Amendment.53 Justice Douglas’ opinion for the Court in Harper observed that “[w]ealth, like race, creed, or color, is not germane to one’s ability to participate intelligently in the electoral process.”54 By denying the vote to citizens unable to pay the $1.50 poll tax, Virginia was effectively discriminating against poor people in violation of the Equal Protection Clause. The Harper plaintiffs argued that voting is speech protected by the First Amendment, but the Court declined to rule on that ground.55 Nor has it since then, though some Justices have occasionally toyed with the possibility.56 The Court’s closest brush with the idea since then was Bush v. Gore.57 That opinion silently borrows from First Amendment cases, looking with suspicion

53. Harper, 383 U.S. at 665-70; see Reynolds v. Sims, 377 U.S. 533, 561-62 (1964) (holding that restrictions on voting must be “carefully and meticulously scrutinized” because the right to vote is fundamental); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (holding that voting is “a fundamental political right, because preservative [sic] of all rights”).
54. 383 U.S. at 668; accord id. at 665.
55. Id. at 665.
56. Most notable is Justice Kennedy’s concurring opinion in Vieth v. Jubelirer, in which he suggests that challenges to partisan gerrymandering might be grounded in the First Amendment. 541 U.S. 267, 314-17 (2004) (Kennedy, J., concurring). This decision is addressed infra Part IV.
57. 531 U.S. 98 (2000); see also Citizens United v. FEC, 558 U.S. 310, 425 & n.52 (2010) (Stevens, J., dissenting) (citing legal scholarship for the proposition that “voting is, among other things, a form of speech”).
on schemes given to government officials to regulate speech, but ultimately rested—at least explicitly—on the right to vote under the Equal Protection Clause.

While not viewing voting as speech, the Court has, for decades, held that some aspects of voting are protected forms of association under the First Amendment. The first case to recognize the voting-association link was *Williams v. Rhodes*, decided two years after *Harper*. *Williams* involved a challenge to Ohio’s requirement that new political parties file petition signatures, equal to fifteen percent of the ballots cast in the last gubernatorial election, by February in order to get on the presidential ballot. This restriction was challenged by the American Independent Party and the Socialist Labor Party.

In striking down Ohio’s restrictions, Justice Black’s opinion for the Court relied on both the Equal Protection Clause and the First Amendment. The Court cited the NAACP and Communist Party decisions on freedom of association, extending their principle to state laws restricting political parties’ access to the ballot. The problem, according to the opinion, was that the law advantaged political insiders over outsiders, “giv[ing] the two old, established parties a decided advantage over any new parties . . . and thus plac[ing] substantially unequal burdens on both the right to vote and the right to associate.” The Court thus required the State to provide a compelling interest justifying its restriction and then proceeded to reject the State’s proffered justifications. Most significantly, it rejected the stated interest in favoring a two-party system on the ground that Ohio’s law went further, “favor[ing] two particular parties—the Republicans and the Democrats—and in effect tends to give them a complete monopoly.” Without a sufficient interest to justify the law, Ohio’s ballot access restriction was held to impose an impermissible burden on voting and associational rights.

58. Tokaji, supra note 16, at 2487-95; see also Greene, supra note 13, at 132-33 (discussing the suspicion of public officials discretion and the uncited First Amendment line of cases in *Bush v. Gore*). The Court has also considered the very different question of whether a legislator’s vote is speech protected by the First Amendment, holding it is not. Nev. Comm’n on Ethics v. Carrigan, 131 S. Ct. 2343, 2350-51 (2011).
60. 393 U.S. 23 (1968).
61. *Id.* at 24-27.
62. *Id.* at 26.
63. *Id.* at 30, 31.
64. *Id.* at 31.
65. *Id.* at 31-34.
66. *Id.* at 32.
67. *Id.* at 34. The Court proceeded to hold that the Independent Party was entitled to be placed on the ballot, but not the Socialist Labor Party, which had asked to be added to the ballot later, on the ground that this relief would be too disruptive. *Id.* at 34-35. Justice
Williams was an important step forward in two respects. First, it explicitly recognized the link between the First Amendment right of expressive association and the Fourteenth Amendment right to vote. Second, Williams involved a positive claim to get something from the government, rather than a negative claim to be left alone. Most earlier cases involved the State’s unwanted government intrusion on the affected group’s liberty interest—for example, the government seeking a membership list in *NAACP v. Alabama* or restricting solicitation of clients in *NAACP v. Button*. By contrast, the Williams plaintiffs were demanding something from the State: a place on the ballot. That said, Williams is not as much of an extension of precedent as it might first appear. Some of the Communist Party cases likewise involved an affirmative claim to something from the government—a job or, later, admission to the bar—that was denied on account of party affiliation. There is still a difference, however, in that these benefits were expressly denied on account of belief or association in the earlier cases. By contrast, Williams relied on the *practical effect* of the State’s restrictions on non-dominant political parties and their supporters.

Subsequent cases follow Williams in affirming the link between voting and association, while qualifying both rights. The Court would go on to uphold some restrictions on third party and independent candidates’ access to the ballot, such as reasonable signature and disaffiliation requirements. In other cases, it invalidated rules that imposed too great a burden on would-be voters or candidates, especially those seeking to challenge the two major parties’ grip on power. For example, in *Kusper v. Pontikes*, the Court struck down a requirement that voters be disaffiliated from one party for at least twenty-three months before voting in the primary of another, finding it too great a restriction on voters associating with the party of their

Douglas concurred, emphasizing the harm to dissident political parties from Ohio’s rule, but would have granted relief to the Socialist Labor Party as well. *Id.* at 35-41 (Douglas, J., concurring). Justice Harlan concurred in the judgment, grounding his reasoning in the First Amendment and Due Process Clause of the Fourteenth Amendment, not the Equal Protection Clause. *Id.* at 41-48 (Harlan, J., concurring). Justice Stewart and Chief Justice Warren dissented. *Id.* at 48 (Stewart, J., dissenting); *id.* at 63 (Warren, C.J., dissenting).

68. See generally Storer v. Brown, 415 U.S. 724 (1974) (upholding the requirement that candidates be disaffiliated from political parties for a year before running as independents); Jenness v. Fortson, 403 U.S. 431 (1971) (upholding the requirement that third party and independent candidates obtain signatures from five percent of registered voters).

69. See e.g., Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) (striking down a requirement that new parties and independent candidates in Chicago obtain at least 25,000 petition signatures); Lubin v. Panish, 415 U.S. 709 (1974) (striking down a $701.60 filing fee where there was no alternative means of getting on the primary ballot); Bullock v. Carter, 405 U.S. 134 (1972) (striking down filing fees as high as $8900 to get on the primary ballot).
choice. Some of these cases emphasize equal protection, others freedom of association, but none of them question the link between these rights that Williams recognized.

A critical development in the law of voting and association was Justice Stevens’ opinion for the Court in Anderson, another challenge to Ohio ballot access rules. A state statute required that independent presidential candidates file papers in late March, seventy-five days before the primary election and more than seven months before the general election. The plaintiffs were John Anderson, an independent candidate for President in 1980, and three voters supporting his candidacy.

Justice Stevens’ opinion in Anderson solidifies and develops the link between voting and association. Because “a candidate serves as a rallying-point for like-minded citizens,” Justice Stevens wrote, restrictions on ballot access may hinder voters’ freedom to associate with both candidates of their choice and one another. The risk is particularly great where dominant parties make rules that exclude independent or minor party candidates. That does not mean that all state restrictions on ballot access are invalid. The Court reconciled Williams’ requirement of a compelling interest with the more lenient standard suggested in later decisions, by articulating a balancing test. As a practical matter, Justice Stevens’ opinion recognized that states must impose some regulations on elections. There is accordingly no “litmus-paper test” for separating valid and invalid ones. Courts should instead weigh the “character and magnitude” of the harm to First and Fourteenth Amendment rights against the “precise interest put forward by the State.” While “reasonable, nondiscriminatory restrictions” are generally justified by the State’s “important regulatory interests,” stronger government interests are required to justify more serious burdens, including ones that are discriminatory.

Anderson’s standard focuses mainly on the impact that the challenged practice has on voters favoring independent or non-dominant party candidates. At the center of the inquiry is the effect of the challenged practice on those likely to favor political outsiders. The Court emphasized that it is not just the “magnitude” or the burden but also its “character”—or, as stated at the end of the opinion, not just the

70. 414 U.S. 51 (1973).
72. Id. at 783.
73. Id. at 787-88.
74. Id. at 789.
75. Id.
76. Id. at 788.
77. Id. at 789.
“extent” of the burden but also its “nature”—that is critical.78 Especially problematic are burdens that “fall[] unequally on new or small political parties or on independent candidates,” because they “discriminate[] against those candidates and—of particular importance—against those voters whose political preferences lie outside the existing political parties.”79 This framing puts the challenged practice’s disparate impact on certain groups at the center of the analysis. Anderson does not require proof of a discriminatory purpose, though such evidence would presumably be relevant in illuminating the character of the burden on voting.

Applying its newly formulated standard, the Court concluded that Ohio’s early filing deadline had a “substantial impact” on the associational rights of independent-minded voters.80 By requiring independent candidates to file two and one-half months before the state primary, it would bar those driven to enter the fray by developments occurring during the parties’ nomination process. It therefore threatened to deny an adequate choice to voters disaffected by and dissatisfied with the choices offered by the major parties.81 The Anderson Court proceeded to find the State’s interests inadequate to justify this burden. Especially significant is its discussion of Ohio’s asserted interest in promoting political stability. The Court rejected the idea that the “desire to protect existing political parties from competition” could justify restrictions on independent and minor-party candidates’ ballot access.82 Protecting the major parties from competition was not an acceptable reason for “the virtual exclusion of other political aspirants from the political arena.”83 Ohio’s rule was especially burdensome, the Court recognized, because independent and minor-party candidates often start as a “dissident group” attempting to exert influence within a major party.84 To exclude them from the general election ballot through an extremely early filing deadline would deny such dissident groups any meaningful leverage.

In addition to providing a legal standard, Anderson deepened the connection between the rights of association and voting that Williams recognized. The Court expressly grounded its analysis in both, citing NAACP v. Alabama’s holding that association is a central aspect of the liberty protected by the First Amendment and Williams’ holding that voting and associational rights overlap when it comes to ballot

78. Id. at 806.
79. Id. at 793-94.
80. Id. at 790, 795.
81. Id. at 792.
82. Id. at 801, 805-06.
83. Id. at 802.
84. Id. at 805.
access. And in the concluding paragraph of its opinion, the Court stressed that its “primary concern was not the interest of candidate Anderson, but rather, the interests of the voters who chose to associate together to express their support for Anderson’s candidacy and the views he espouse[s].” This statement makes unmistakably clear that the Court viewed voting as a form of association, for which Anderson’s supporters collectively enjoyed constitutional protection.

The right that Anderson affirms is best understood as a hybrid, grounded in both the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In a footnote citing Williams, Justice Stevens’ opinion for the Court explained that the Court’s holding was premised on both the First and Fourteenth Amendments:

In this case, we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment. These cases, applying the “fundamental rights” strand of equal protection analysis, have identified the First and Fourteenth Amendment rights implicated by restrictions on the eligibility of voters and candidates, and have considered the degree to which the State’s restrictions further legitimate state interests.

Professor Charles understands Anderson to ground the Court’s analysis in the right of association under the First Amendment instead of the right to vote under the Equal Protection Clause of the Fourteenth Amendment. The better interpretation, in my view, is that Anderson is grounded in both voting and associational rights. Here and elsewhere in the opinion, the Court expressly states it is relying on both the First and Fourteenth Amendments. Declining to engage in a “separate” equal protection analysis is not the same as rejecting the Equal Protection Clause as a source of the hybrid right it recognized. To the contrary, the Court elsewhere affirms that ballot access rules may affect both voting and associational rights. Anderson synthesizes associational and voting rights, rather than replacing the former with the latter.

85. Id. at 786-87.
86. Id. at 806 (emphasis added).
87. Id. at 786 n.7 (citations omitted).
88. The reference to the Fourteenth Amendment could be understood to refer to the Due Process Clause, which has long been thought to incorporate the First Amendment. But, Anderson’s references to the right to vote belie the argument that the Court was backing away from the Equal Protection Clause, the primary textual source of that right. See also id. at 787 (quoting Williams v. Rhodes, 393 U.S. 23, 30-31 (1968), for the proposition that voting and associational rights overlap when it comes to ballot access restrictions).
The Court refined the Anderson voting-association standard in *Burdick v. Takushi*, upholding a challenge to Hawaii’s ban on write-in voting.⁸⁹ Justice White’s opinion for the majority unambiguously reaffirmed Anderson’s “flexible” standard, reiterating that courts should weigh the “character and magnitude” of the challenged restriction against the “precise interests put forward by the State.”⁹⁰ It also quotes Anderson’s statement that “reasonable, nondiscriminatory restrictions” may generally be supported by “the State’s important regulatory interests.”⁹¹ *Burdick*’s main doctrinal contribution is to clarify that only a restriction that is “severe” should receive strict scrutiny, requiring government to show it is narrowly tailored to a compelling interest.⁹² Finding the State’s prohibition on write-in voting to be “slight” in magnitude and “politically neutral” in character, *Burdick* held that the State’s interests in preventing factionalism and party raiding were sufficient to sustain it.⁹³ While the dissenting opinion by Justice Kennedy (joined by Justices Blackmun and Stevens) thought the burden more serious and the state interests more modest than the majority,⁹⁴ the dissent expressly agreed with the Court’s “careful statement . . . of the test to be applied.”⁹⁵ Thus, all nine Justices in *Burdick* agreed on the constitutional standard.

Other cases apply Anderson’s standard to restrictions on minor parties’ access to the ballot. While usually exhibiting greater solicitude for the State’s interests, they do not change the standard or the hybrid nature of the right Anderson recognized. An example is *Munro v. Socialist Workers Party*,⁹⁶ which upheld a state requirement that minor-party candidates receive at least one percent of primary votes to appear on the general election ballot. Another is *Timmons v. Twin Cities Area New Party*,⁹⁷ upholding a state ban on “fusion” candidacies. Both cases find the burden on minor parties modest and the

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⁹⁰ 504 U.S. at 434 (quoting Anderson, 460 U.S. at 789).
⁹¹ Id. (quoting Anderson, 460 U.S. at 788).
⁹² Id.
⁹³ Id. at 438-40.
⁹⁴ Id. at 442-50 (Kennedy, J., dissenting).
⁹⁵ Id. at 445.
state interests adequate to justify that burden. Yet they apply the same basic framework that the Court adopted in Anderson, reaffirming its fusion of voting and association claims.

The Court would later extend Anderson’s reasoning to disputes between the major parties. The first and still most important case to do so was Tashjian v. Republican Party of Connecticut. Justice Marshall’s opinion for the Court struck down Connecticut’s prohibition on independent voters participating in primaries as applied to the state Republican Party, which had adopted a rule allowing independent voters to participate in its primary. At the time, Democrats controlled the state legislature and, in a party-line vote, refused to change state law to accommodate Republicans’ desire to include independents in their primary. Applying the Anderson standard, the Court concluded that the State had imposed an impermissible burden on association.

Like the minor-party and independent-candidate decisions on which it builds, Tashjian reflects a concern with a dominant party seeking to diminish the strength of a rival group. Professor Lowenstein has criticized Tashjian, partly on the ground that “the major parties are grown-ups who, generally speaking, can be expected to take care of themselves.” This may sometimes be true—but not always. After all, the dominant major party is more likely to have its grip on power threatened by the other major party than by minor

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98. Munro defers to the State’s interests in avoiding voter confusion, ballot overcrowding, and frivolous candidacies. Timmons adds the interest in promoting “political stability” to the list of those that may justify ballot access restrictions. My two casebook co-authors, Rick Hasen and Dan Lowenstein, have disagreed over the import of Timmons. Professor Hasen criticizes Timmons for recognizing the preservation of the two-party system as a legitimate interest. See Richard L. Hasen, Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States to Protect the Democrats and Republicans from Political Competition, 1997 SUP. CT. REV. 331, 367-71 (1997). Professor Lowenstein’s more sympathetic account is that Timmons affirmed the interest in a healthy two-party system rather than the promotion of the two-party system (and thus the exclusion of minor parties) per se. Daniel H. Lowenstein, Legal Regulation and Protection of American Parties, in HANDBOOK OF PARTY POLITICS 456, 464 (Richard S. Katz & William Crotty eds., 2006). While the Hasen-Lowenstein disagreement is peripheral to this Article, I agree with Professor Lowenstein’s understanding of Timmons. Whoever is right, Timmons reaffirms Anderson’s holding that there are limits on the major parties’ authority to restrict independent and minor-party candidates’ ballot access. 520 U.S. at 367 (showing state interest in stability “does not permit a state to completely insulate the two-party system from minor parties’ or independent candidates’ competition and influence” (citing Anderson v. Celebrezeze, 460 U.S. 780, 802 (1983))).


100. Id. at 213-25. But see Clingman v. Beaver, 544 U.S. 581 (2005) (upholding semi-closed primary system under which party members and independent voters could vote in party primary, but other parties’ members could not).


102. Lowenstein, supra note 18, at 1790.
parties or independent candidates. There was certainly a reasonable argument to be made for uniform rules in Tashjian, as Professor Lowenstein has observed. But there is also good reason for judicial skepticism, where one major party controls the machinery of government and uses that power to make life difficult for its main competitor.

To recap, the Anderson-Burdick standard has been applied in a wide variety of electoral contexts, including state laws regulating ballot access, restricting write-in voting, and determining who may vote in party primaries. These cases affirm, explicitly or implicitly, the link between voting and association recognized in Williams and developed in Anderson. For the most part, the cases in which the Court has found a violation are ones in which a dominant major party uses its power to impede association among voters favoring the other major party, minor parties, or independent candidates.

The most recent doctrinal development involves a subject that, at first glance, seems quite dissimilar to the voting-association cases detailed above: voter identification. In Crawford v. Marion County Election Board, a majority of Justices applied the Anderson-Burdick standard to an Indiana law requiring most voters to present government-issued photo ID at the polls. Unlike ballot access cases such as Williams and Anderson, Crawford did not involve a claim that voters were denied their First Amendment right to associate

103. Id.
104. See, e.g., Issacharoff & Pildes, supra note 101, at 654-59. Some later cases involving major-party associational rights are more difficult to justify on this ground. The Court would later extend Anderson from inter-party to intra-party disputes in Eu v. San Francisco County Democratic Central Committee, striking down California’s ban on certain party endorsements and restrictions on internal party governance. 489 U.S. 214, 222-23 (1989). For a compelling critique of judicial intervention in this case, see Lowenstein, supra note 18, at 1777-87. It is not obvious why judicial intervention is necessary, absent evidence that one faction of a party has been locked out of its deliberations, as were African Americans from the Texas Democratic Party in the White Primary Cases. See id. at 1748-49. Also difficult to justify on this ground is the decision in California Democratic Party v. Jones, 530 U.S. 567, 572-86 (2000), striking down a state blanket primary in which non-party members were allowed to vote in a party primary over the major parties’ objections. In contrast to Tashjian, this was not a case in which the dominant major party was frustrating voting and association rights of its main competitor. It was instead a dispute among different factions within the major parties, particularly the Republican Party. See Michael S. Kang, The Hydraulics and Politics of Party Regulation, 91 IOWA L. REV. 131, 164-65 (2005). In a later case, Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449-59 (2008), the Court would uphold, against a facial challenge, a different kind of blanket primary—one in which all candidates appeared on the ballot with their party affiliation and the top two vote-getters, regardless of party, would proceed to the general election. This Article leaves to one side the difficult question what role courts should play in resolving intra-party disputes, a question thoughtfully and comprehensively addressed—with different answers—in the above articles by Professors Lowenstein and Kang. My focus here is on disputes between, not within, political parties.
with a party, candidate, or other voters. The *Crawford* plaintiffs grounded their claim solely on the Fourteenth Amendment right to vote, not the right of association.

The Justices were divided into three groups in *Crawford*. The narrowest ground for the decision appears in the lead opinion by Justice Stevens (joined by Chief Justice Roberts and Justice Kennedy). His legal analysis begins by noting that the Court of Appeals distinguished *Harper*, on the ground that voter ID is relevant to a voter’s qualifications to vote, while the poll tax was not.\(^\text{106}\) It proceeds to apply the constitutional standard of *Anderson* and its progeny, balancing the burden placed on voting against the precise interest put forward by the State.\(^\text{107}\) According to Justice Stevens, the number of affected voters was “small” and the “magnitude of the burden” uncertain on the record before the Court.\(^\text{108}\) Although the plaintiffs asserted that Indiana’s law would have a negative effect on indigent voters, evidence of an excessive burden on them or any other identifiable class of voters was lacking.\(^\text{109}\) Given the modest burden on voters, the State’s claimed interests in fraud prevention, voter confidence, and election modernization were sufficient to sustain the statute against a facial challenge.

Under *Anderson* and the voting-as-association cases that followed, the central question is the impact of the challenged law on supporters of a non-dominant party or candidate. *Crawford*’s discussion of this point is telling. Justice Stevens’ lead opinion observed that Indiana’s law was approved on a party-line vote, with Republicans uniformly supporting it and Democrats uniformly opposing it.\(^\text{110}\) From this fact, it could fairly be inferred that partisan considerations played a role in its passage. But the existence of such motivations—inevitably present in any law regulating elections—was insufficient to invalidate the law on its face. Justice Stevens explained: “If a *nondiscriminatory* law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”\(^\text{111}\)

Justice Stevens’ opinion did not explain precisely what was meant by “nondiscriminatory,” but the context suggests that the negative effects of the law are paramount. This is consistent with *Anderson* and the other cases cited, which focus on the impact that a law has

\(^\text{106}\) *Id.* at 188.

\(^\text{107}\) *Id.* at 189-91.

\(^\text{108}\) *Id.* at 200.

\(^\text{109}\) *Id.* at 202.

\(^\text{110}\) *Id.* at 203.

\(^\text{111}\) *Id.* at 204 (emphasis added).
on voters favoring non-dominant parties or independent candidacies. It is also consistent with Justice Stevens’ view in partisan gerrymandering cases, in which he has advocated attention to “whether the plan has a significant adverse impact on an identifiable political group.”\textsuperscript{112} The \textit{Crawford} record was conspicuously devoid of evidence that Indiana’s law would have a disproportionate impact on Democrats compared to Republicans.\textsuperscript{113} The lead opinion suggests that this omission was a serious one, undercutting the suggestion that Indiana’s law was discriminatory and therefore subject to strict scrutiny.

Justice Scalia’s concurrence (joined by Justices Thomas and Alito) purported to apply \textit{Anderson} and \textit{Burdick}, but read those cases differently. He urged a “two-track approach,” applying strict scrutiny in cases where there is a severe burden and deferring to the states in other cases.\textsuperscript{114} As Justin Levitt has explained, Justice Scalia’s approach is more like a light switch, while that of the other Justices is more like a dimmer with the State’s burden of justification increasing with the burden on voters.\textsuperscript{115} Unlike the lead opinion—as well as the dissents—Justice Scalia would avoid any judicial inquiry into the “individual impacts” on voters.\textsuperscript{116} While this statement might be understood to imply that \textit{collective} impacts are relevant, it appears that this group would find a severe burden only in cases where discriminatory intent to disadvantage a particular group is proven.\textsuperscript{117}

Justice Souter’s dissent (joined by Justice Ginsburg) applies the same standard as Justice Stevens, balancing the “character and magnitude” of the burden on voting against the “precise interests put forward by the state.”\textsuperscript{118} But Justice Souter found the burden on voters to be more substantial than the majority, focusing especially

\begin{itemize}
  \item \textsuperscript{112} Karcher v. Daggett, 462 U.S. 725, 751 (1983) (Stevens, J., concurring).
  \item \textsuperscript{113} 553 U.S. at 200-03.
  \item \textsuperscript{114} \textit{Id.} at 204-05 (Scalia, J., concurring).
  \item \textsuperscript{115} Justin Levitt, Crawford—\textit{More Rhetorical Bark Than Legal Bite?}, BRENNAN CTR. FOR JUSTICE (May 2, 2008), http://www.brennancenter.org/blog/crawford-more-rhetorical-bark-legal-bite.
  \item \textsuperscript{116} \textit{Crawford}, 553 U.S. at 205 (Scalia, J., concurring).
  \item \textsuperscript{117} \textit{Id.} at 207. This position is difficult to square with earlier cases in the \textit{Anderson} line, in which the Court struck down restrictions on ballot access without finding an intent to disadvantage a particular group. A cryptic footnote in Justice Scalia’s opinion suggests that economic burdens on voting—like the poll tax or filing fees—may warrant heightened scrutiny even without discriminatory intent. See \textit{id.} at 207 n.* (“[I]t suffices to note that we have never held that legislatures must calibrate \textit{all} election laws, \textit{even those totally unrelated to money}, for their impacts on poor voters or must otherwise accommodate wealth disparities.”) (second emphasis added). This does not, however, explain why the Court struck down ballot access requirements unrelated to money in cases such as \textit{Williams} and \textit{Anderson}. See Anderson v. Celebrezze, 460 U.S. 780 (1983); Williams v. Rhodes, 393 U.S. 23 (1968).
  \item \textsuperscript{118} \textit{Crawford}, 553 U.S. at 211, 223-24 (Souter, J., dissenting).
\end{itemize}
on voter IDs’ effects on indigent voters.\textsuperscript{119} Justice Breyer’s dissent applied a similar balancing standard, without expressly relying on \textit{Anderson} and \textit{Burdick}, focusing on the law’s impact on voters who are poor, elderly, or disabled.\textsuperscript{120}

Despite the absence of a majority opinion, a majority of Justices in \textit{Crawford} agreed on two key points. The first is that the constitutional standard drawn from \textit{Anderson} and \textit{Burdick} applies in challenges to voter ID laws, and presumably other barriers to voting. At least eight and possibly all nine Justices agree on this point.\textsuperscript{121} Second, a majority of Justices (those joining the lead opinion and dissents) agree that courts should balance the character and magnitude of the burden on voters against the precise interests put forward by the State.\textsuperscript{122} For these Justices, the impact of the law on a definable \textit{group} of voters is germane to defining its character. Because the \textit{Crawford} plaintiffs focused on voter ID’s impact on poor people, that is the group on which the Justices’ opinions primarily focus. Yet these opinions leave open the possibility—and the lead opinion strongly suggests—that the impact on adherents of a non-dominant \textit{political party} might also be relevant.

There is a major difference between \textit{Crawford} and previous cases I have discussed. Unlike the precedents upon which it relies, \textit{Crawford} was based solely on the right to vote under the Equal Protection Clause, not the right of association under the First Amendment. Constitutional cases concerning voting barriers since \textit{Crawford} have likewise been litigated and decided primarily if not exclusively as right-to-vote cases. Examples include two cases from Ohio decided during the 2012 election season. The first case, \textit{Northeast Ohio Coalition for the Homeless v. Husted},\textsuperscript{123} challenged a state rule requiring the rejection of provisional ballots cast in the correct polling place but the wrong precinct—often referred to as “right church, wrong pew” ballots—due to poll worker error. Plaintiffs sought relief under the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Sixth Circuit affirmed a preliminary injunction requiring that these ballots be counted, focusing its analysis on the burden Ohio’s rule imposed on voters who are not directed to the

\begin{itemize}
\item \textsuperscript{119} Id. at 212, 220.
\item \textsuperscript{120} Id. at 237-41 (Breyer, J., dissenting).
\item \textsuperscript{121} Justice Breyer may not be in agreement; however, he seems to apply the \textit{Anderson-Burdick} standard without expressly citing those cases.
\item \textsuperscript{122} That majority includes the three Justices signing on to the lead opinion (Justice Stevens, Chief Justice Roberts, and Justice Kennedy) along with the three dissenters (Justices Souter, Ginsburg, and Breyer). \textit{Crawford}, 553 U.S. at 181-83.
\item \textsuperscript{123} 696 F.3d 580 (6th Cir. 2012). The Sixth Circuit reversed the district court’s preliminary injunction as to provisional ballots with a deficient affirmation. Id. at 599-60.
\end{itemize}
correct precinct.\textsuperscript{124} The other case is \textit{Obama for America v. Husted},\textsuperscript{125} a challenge to Ohio’s rule allowing only military and overseas voters to use in-person early voting during the last three days prior to the election. The Sixth Circuit affirmed the preliminary injunction in that case as well, finding that the unequal treatment of voters likely violated the Equal Protection Clause.\textsuperscript{126} Both cases were thus litigated as Fourteenth Amendment voting cases, not First Amendment association cases.

The Sixth Circuit cases are typical of post-\textit{Crawford} cases challenging state voting rules.\textsuperscript{127} Plaintiffs have primarily based their claims on the Equal Protection Clause, sometimes adding a claim under the Due Process Clause of the Fourteenth Amendment.\textsuperscript{128} They have generally not included First Amendment claims in their complaints. An exception is \textit{Veasey v. Perry}, a challenge to Texas’ voter ID requirement in which plaintiffs alleged violations of the First Amendment as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment.\textsuperscript{129} That case, however, is unusual. The general rule has been for plaintiffs to ground their claims exclusively on the right to vote and not the right of association—despite the Supreme Court’s recognition that voting is association protected by the First Amendment.\textsuperscript{130}

In summary, the Court has long recognized the linkage between the right to expressive association and the right to vote under the Equal Protection Clause of the Fourteenth Amendment. It first recognized that linkage in cases involving minor party and independent candidates’ access to the ballot, later extending it to cases in which the dominant major party imposes burdens on the other major party.

\textsuperscript{124} \textit{Id.} at 591-99.
\textsuperscript{125} 697 F.3d 423 (6th Cir. 2012).
\textsuperscript{126} \textit{Id.} at 428-36.
\textsuperscript{127} For citations to some of those cases, see \textit{supra} notes 3-5.
\textsuperscript{130} \textit{See supra} pp. 771-75.
Anderson developed a balancing test for voting-association cases, subsequently refined in Burdick. In Crawford and subsequent lower court cases, however, the connection between the right to vote and the right to expressive association was severed. Constitutional challenges to burdens on voting have mostly been litigated under the Equal Protection Clause of the Fourteenth Amendment, not the First Amendment right of association. The consequence has been to shift the focus away from the challenged laws’ effects on different subgroups of voters, particularly those defined by party affiliation. Part IV argues for recovery of the voting-association link.

IV. RECONNECTING VOTING AND ASSOCIATION

Litigants and courts should rekindle the relationship between the constitutional rights of voting and association. Voting rights lawyers should allege violations of the First Amendment right of association in cases challenging burdens on voting such as ID requirements, restrictions on voter registration, and limitations on early voting. Courts entertaining these cases should focus on the disparate effect of these practices on different political groups. While disparate effects on racial groups, people with disabilities, and economic status are important, political party association is especially important. Accordingly, voting rights lawyers should present proof of a disparate impact on voters inclined to support the non-dominant party, and courts should consider this evidence in determining whether a given burden is “discriminatory” in character, thus demanding a higher burden of justification from the State.

To be clear, I am not arguing for abandonment of the voting-association doctrine recognized in Williams, defined in Anderson, clarified in Burdick, and applied to voting burdens in Crawford. I am instead calling for refinement of that doctrine. The Anderson-Burdick balancing test effectively captures the need for courts to focus on not only the “magnitude” of the restriction, but also its “character.” While magnitude includes both the number of voters affected and the degree of burden on the individual voter, the character of the burden includes its discriminatory impact on particular subgroups of voters. It also captures the necessity of scrutinizing the specific interests proffered by the State in support of its restrictions, with stronger interests required to justify greater burdens.

The major problem with the Anderson-Burdick standard, as applied in voting cases since Crawford, is that it’s unclear exactly what the inquiry into the “character” of the burden should entail. Anderson explicitly made discrimination relevant to the inquiry, but lower courts have struggled to figure out what kind of discrimination—specifically, discrimination against whom—is most significant. Dif-
different plaintiffs and judges have considered the impact on various groups of voters, including poor people, racial minorities, homeless people, people with disabilities, and elderly voters. In contrast to the voting-association cases from which the Anderson-Burdick standard derives, post-Crawford courts have not looked directly at the challenged practice’s partisan impact.

The primary cost of forgetting the link between voting and association has been to lose focus on political parties. That focus was central to the line of decisions from which the Anderson-Burdick standard emerged. Why should political party be relevant in measuring the character of a voting restriction? The simple answer is that parties are the primary means through which democratic politics is organized, a reality long recognized by the voting-association cases in the Anderson line. What these cases have in common is the dominant party’s adoption of rules that disadvantage voters supporting a non-dominant party or faction. Elected officials at the federal and state level almost always come to office through the nomination of their political party. Most voters register and vote as members of a party, while even independent voters tend to align with one major party or the other on a consistent basis.\textsuperscript{131} Party identity has become increasingly intense in the current age of hyperpolarized politics, not only among elected officials but also among voters.\textsuperscript{132}

To be sure, political parties are amorphous and multifarious entities, as political scientists have long understood. Over a half-century ago, V.O. Key characterized parties as comprising three distinct groups: the party-in-government, the party leadership, and the party-in-the-electorate.\textsuperscript{133} Contemporary scholarship recognizes that it is even more complicated than that. A recent article by Joey Fishkin and Heather Gerken sums it up nicely: “[A] party today is best understood as a loose coalition of diverse entities, some official and


some not, organized around a popular national brand.”¹³⁴ Now more than ever, the major political parties are complex and fluid entities with lots of moving parts. Recognition of this reality does nothing to diminish the centrality of parties in organizing democratic politics and defining our political identities as citizens, voters, candidates, and officeholders. While party leadership may be weak, party attachment is stronger than ever.¹³⁵

Putting political parties at the center of the constitutional inquiry is therefore justified under both precedent and present-day reality. Equally important, a focus on political parties would also best capture the injury that underlies plaintiffs’ claims. The primary reason for concern with present-day restrictions on voting is that they are thinly disguised efforts at partisan manipulation, designed to help the dominant major party at the expense of its main competitor.¹³⁶ This is true not only of voter ID laws, but also restrictions on voter registration, early voting, and provisional voting that have since emerged as major issues. As the district judge in Crawford aptly put it, “[T]his is a partisan controversy that has spilled into the courts.” That is an accurate description of Crawford and many of the lower court cases since then. The lesson is not that courts should shy away from deciding such cases, but that they should directly address the partisan effects of the challenged practices. Their failure to do so is a direct consequence of forgetting the link between voting and associational rights.

For scholars and students of election law, the suggestion that constitutional litigation should be viewed through the prism of inter-party struggles may seem painfully obvious. The backdrop against which this litigation occurs, after all, is almost always a state’s dominant party enacting rules that make it more difficult for supporters of the opposing party to vote. Advocates of a “structural” approach to elections have long focused on barriers to fair competition,¹³⁷ while advocates of rights-based approaches also recognize the need for close judicial scrutiny of party-based discrimination.¹³⁸ While part of the backdrop, that is not how these cases have been litigated up until

¹³⁵ Id. at 183, 187.
¹³⁷ The leading example is the influential work of Issacharoff & Pildes, supra note 101.
now. Litigants and courts have not focused directly on partisan disparate impact. Recognition of the associational rights implicated by voting cases would allow courts to focus on the real harm, the dominant political party disadvantaging supporters of its main rival.

My colleague Ned Foley has made a similar point, arguing that the constitutional inquiry should focus on whether voting rules are efforts at partisan manipulation. But Professor Foley suggests that the Anderson-Burdick balancing be jettisoned entirely, favoring an approach that would expressly look to whether the challenged practice is “a ploy to achieve partisan advantage.” I agree with his recognition of the underlying problem, though not with his proposed elimination of the established constitutional standard. Professor Foley’s new test suggests that courts focus on legislature’s partisan intent, while the clarification of the Anderson-Burdick I recommend would focus on partisan impact. My approach is more consistent with precedent, specifically the Anderson-Burdick-Crawford line of cases, which focus on effect rather than an intent to disadvantage political parties, while avoiding the difficulties that inevitably accompany intent- or purpose-based inquiries. It is also more practical. After all, partisan considerations are always—without exception—in play when political actors adopt a voting rule. Deciding how much of partisan purpose is too much is an impossible question. Perhaps most significant, Professor Foley’s proposed standard would put courts in the uncomfortable position of having to accuse the dominant party of partisan manipulation to find a constitutional violation. Judges may occasionally be willing to go out on this limb, but it is neither reasonable nor conducive to healthy inter-branch relations to require that they do so, even if it were a manageable inquiry.

An effects-based balancing standard, moreover, is better calibrated to address the competing interests that are almost invariably in play in cases involving burdens on the vote. On one side are the negative effects that a given practice will have on voters favoring a non-dominant party. The greater the disparate impact on voters affiliated with the non-dominant party, the stronger the State’s justification

140. Id.
141. For an excellent analysis of the problem in a different context, specifically equal protection claims inquiring into whether race is the predominant factor in redistricting, see Daniel Hays Lowenstein, You Don’t Have to Be Liberal to Hate the Racial Gerrymandering Cases, 50 STAN. L. REV. 779 (1998).
142. A rare example is the dissenting opinion of Judge Evans from the Seventh Circuit’s decision upholding Indiana’s voter ID law in Crawford v. Marion County Election Board, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting) (“Let’s not beat around the bush: The Indiana voter photo ID law is a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”).
should be. A refined version of the *Anderson-Burdock-Crawford* standard—one that puts partisan effects at the center of the analysis—is not only faithful to the voting-association precedents described in Part II, but it does the best job reconciling the competing interests involved in these cases. Balancing tests invariably involve some degree of indeterminacy, but not necessarily more than intent-based inquiries. The hard truth is that no bright-line rule will effectively address the concern with dominant parties adopting election laws that disadvantage their competitors. Any standard, whether focused on intent or effects, will be dependent on the evidence adduced in discovery and at trial, making it inherently difficult to predict the outcome in advance. That is as it should be. A balancing test that considers the disparate impact on voters favoring non-dominant parties will address this concern while taking into account the legitimate competing interests that voting cases implicate.

This is not to deny that other group associations may also be relevant under the *Anderson-Burdock* balancing standard. Of these, the most salient is race. That is partly because of the country’s long and ugly history of racial exclusion, exemplified by the NAACP cases from which the right of association emerged.143 While not formally a political party, the NAACP functioned like one in some respects, challenging the firm grip on power held by the dominant faction, the all-white Democratic Party. The exclusion of voters based on their race or ethnicity is not solely of historical concern. As Professor Charles has documented, race remains central to political identity today.144 And minority voters, especially African Americans and Latinos, but also Asian Americans, lean strongly Democratic.145 The Democratic voting preferences of most racial minorities provide a strong incentive for Republicans, when they control the levers of power, to improve their own electoral preferences by enacting laws that disproportionately exclude these groups. It is difficult—and practically meaningless—to ask whether race or party predominates where there is a high correlation between the two.146 Elected officials of one party may very well be pursuing partisan ends by excluding minority voters who consistently support the other. While this phenomenon may seem most likely when Republicans are in power, it is at least conceivable that Democrats might also engage in such

143. *See supra* notes 24-27, 33-35 and accompanying text.
144. Charles, *supra* note 17, at 1232.
145. *Id.* at 1233-35; Hasen, *supra* note 138, at 62.
exclusion with respect to minority sub-groups that lean Republican. Either way, the racially disparate impact of the law is relevant because it is closely related to its partisan effects.

On this point, I suggest a different emphasis than Professor Charles, the author of the most comprehensive analysis of the relationship between voting and associational rights to date. While Professor Charles emphasized racial identity as a basis for association, I view parties as central because they are the primary associations through which we organize politically. This is not to deny that racially focused association groups (like the NAACP) are critical at certain places and times and may play a role very similar to parties. Nor is it to deny the possibility that the dominant racial group within a political party might try to diminish the clout of a minority racial group with the same party, warranting judicial intervention. But we no longer live in a world where racial minorities are excluded from political parties. The racial impact of a law is germane to its partisan intent and effect. In places with a high degree of racial polarization, the two are likely to be highly correlated. But the primary unit of analysis under the voting-association doctrine upon which this Article is focused should be party.

How would this play out in practice? The basic framework would be the same one that lower courts have applied since Crawford, requiring that the “character and magnitude” of the voting restriction be weighed against the “precise interest” proffered by the State. Courts would still consider the “magnitude” of the burden, including the number of voters affected and the degree to which each affected individual is burdened. The main difference would be an explicit recognition that a central component of the “character” of the burden is the impact on members of a non-dominant political party. For a voting rule adopted by Republicans, courts would look at its negative effect on Democratic voters; for a rule adopted by Democrats, courts would look at its negative effect on Republicans. This question has


149. The latter category may seem less common, but there have been some instances in which Democrats have been accused of adopting rules that disadvantage Republicans. One example is Virginia’s treatment of military and overseas voters during the 2008 election,
lurked in the background in post-*Crawford* voting rights cases, but plaintiffs have rarely put forward direct evidence of a disparate impact on voters associated with the non-dominant party. Under the *Anderson-Burdick* balancing standard, the larger the partisan disparity, the heavier the State’s burden to justify the disparity. The analysis of state interests would be the same as under current law with fraud prevention, voter confidence, and administrative convenience among those that courts should consider. The more severe the burden—particularly its disparate impact on the non-dominant party—the heavier the State’s burden of justification.

To this point, my consideration has been limited to the effect that revitalization of the voting-association link would have on election administration litigation. I close with a cautious suggestion regarding its potential impact on another highly contentious area of election law: partisan gerrymandering claims. In two cases last decade, a splintered Supreme Court rejected equal protection claims alleging excessive partisanship in drawing district lines.\(^\text{150}\) In *Vieth v. Jubelirer*, four Justices would have rejected the claim as a nonjusticiable political question.\(^\text{151}\) The fifth vote to reject the claim was Justice Kennedy, who disagreed with the plurality’s reasoning on the political question issue, but rejected the plaintiffs’ proposed standard without specifying exactly what standard he thought should govern partisan gerrymandering claims.\(^\text{152}\) Justice Kennedy remained agnostic on the constitutional standard in *League of United Latin American Citizens v. Perry*,\(^\text{153}\) joined on the fence by Chief Justice Roberts and Justice Alito.\(^\text{154}\)

Justice Kennedy’s concurring opinion in *Vieth* contained the intriguing suggestion that the First Amendment might provide a more promising basis for these claims than the Equal Protection Clause.\(^\text{155}\)


\(^\text{151}\) *id.* at 306-17 (Kennedy, J., concurring).

\(^\text{152}\) *id.* at 414 (Kennedy, J.).

\(^\text{153}\) *id.* at 492 (Roberts, C.J., joined by Alito, J., concurring in part and dissenting in part).

He specifically mentioned several First Amendment cases burdening voters on the basis of party association including Anderson, suggesting a “pragmatic or functional assessment that accords some latitude to states.” Commentary on Justice Kennedy’s suggestion has mostly been critical, questioning whether partisan motivations can ever be excised completely from redistricting. But Justice Kennedy’s Vieth concurrence need not—and I think should not—be understood as requiring that redistricting be entirely free from partisan considerations any more than the Anderson line of cases requires that voting rules be entirely free from partisan considerations. He is better understood as suggesting that future partisan gerrymandering claimants focus on how great a burden the challenged plan imposes on the opposition, weighing that burden against the State’s proffered interests. Applying the Anderson-Burdick-Crawford balancing standard in the manner I have suggested here—with a special eye on the character and magnitude of the burden on non-dominant parties—might be the best approach to gerrymandering claims as well as barriers to the right to vote as such.

V. CONCLUSION

For almost a half-century, the Supreme Court has recognized the link between the First Amendment right to expressive association and the Fourteenth Amendment right to vote. In the Anderson line of cases, it transformed this recognition into a manageable doctrine, requiring courts to balance the burdens imposed by the challenged practice against the State’s asserted interests. At the heart of this inquiry is the extent to which the challenged rule has a disproportionate effect on non-dominant political parties and independent candidates. Crawford imported Anderson’s standard into the realm of election administration, without expressly recognizing its connection to the First Amendment right of association. The cost of losing the voting-association connection is to obscure the central question whether the challenged voting practice advantages the dominant party by impeding participation by those likely to support its main rival. The time has come to restore the severed link between the constitutional rights of voting and association. Doing so would not radi-


cally alter the existing constitutional standard, but it would focus litigants and courts on the right question.