

VOTING RIGHTS AND ELECTION LAW

2011 Supplement

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Chapter 1

VOTING QUALIFICATIONS

B. Defining the Community and Excluding Outsiders

Page 70. Insert the following after Note 12:

12a. States vary in their methods for selecting judges. Some states use the “Missouri Plan,” or “merit selection,” one element of which is the use of commissions to screen potential nominees. Details differ across states, but commonly the commission selects a certain number of candidates, and the governor must choose from among the candidates approved by the commission. The commission, therefore, has considerable power in the selection process.

The membership of the commissions is determined by a variety of methods in the states using forms of the Missouri Plan, but lawyers—and in particular the organized bar—are sometimes given disproportionate influence in the selection of commissioners. *See* Stephen J. Ware, *The Missouri Plan in National Perspective*, 74 MO. L. REV. 751 (2009). Some states’ commissions, for example, have a certain number of members chosen by the organized bar; in Kansas, a majority of the nine-member commission is elected by the bar.¹

Does such a system violate the Equal Protection Clause, as interpreted in *Kramer*? *See* Nelson Lund, *May Lawyers Be Given the Power To Elect Those Who Choose Our Judges? “Merit Selection” and Constitutional Law*, 34 HARV. J.L. & PUB. POL’Y 1043 (2011). *Cf.* *Hellebust v. Brownback*, 42 F.3d 1331 (10th Cir. 1994) (striking down Kansas’s procedure for selecting members of the state’s Board of Agriculture because the procedure empowered delegates from private agricultural associations to select members of the board).

¹ The power granted to the bar may result in candidates approved by the commissions who are more ideologically attuned to the interests of the organized bar than would be the case if the bar lacked such influence. *See* Brian T. Fitzpatrick, *The Politics of Merit Selection*, 74 MO. L. REV. 675 (2009).

Chapter 2

POLITICAL QUESTIONS

B. The Non-Justiciability of the Guarantee Clause

Page 116, insert the following after Note 1:

1a. While most cases seem to read *Luther* and *Pacific States* for the proposition that all legal challenges on Guarantee Clause grounds are non-justiciable, that has not prevented commentators from arguing that some current forms of direct democracy can violate the Clause. See, e.g., Jacob M. Heller, Note, *Death by a Thousand Cuts: The Guarantee Clause Regulation of State Constitutions*, 62 STAN. L. REV. 1711 (2010) (arguing that frequent use of the initiative in California arguably to micromanage what would otherwise be legislative functions violates the Guarantee Clause); William R. Leinen, Note, *Preserving Republican Governance: An Essential Government Functions Exception to Direct Democratic Measures*, 52 WM. & MARY L. REV. 997 (2010) (making a similar argument).

C. “Well Developed and Familiar” Standards of Equal Protection

Page 156, add the following at the end of Note 1:

For an argument that the Court is right not to review partisan gerrymandering aggressively in cases like *Vieth*, in part because the Court is not institutionally competent to decide the difficult questions involved, and contrasting that to the purportedly easier case of *Baker v. Carr* itself, see Luis Fuentes-Rohwer, *Looking for a Few Good Philosopher Kings: Political Gerrymandering as a Question of Institutional Competence*, 43 CONN. L. REV. 1157 (2011).

Page 157. Insert the following after Note 4:

4a. For a vigorous argument that the opinions in *Vieth*, and earlier cases, reveal that partisan gerrymandering can have both positive and negative aspects, and that one of the former is that such gerrymandering can be “constitutionally desirable,” as a political safeguard of federalism, see Franita Tolson, *Partisan Gerrymandering as a Safeguard of Federalism*, 2010 UTAH L. REV. 859. The author argues that the power to gerrymander congressional districts enables states to ensure that congressional representatives are responsive to state interests.

Page 157. Insert the following at the end of Note 6:

For a recent symposium on attempts to formulate apolitical redistricting processes, see 5 DUKE J. CONST. L. & PUB. POL’Y 1 (2010) (containing contributions by Gerken, Buchler, Huefner, Altman & McDonald, and Salling).

Page 158. Insert the following at the end of Note 8:

Professor Pildes has concluded that “there is less evidence than one might think to suggest that gerrymandered election districts, which might still be pernicious for any number of other reasons, play a significant role in causing the rise of political polarization.” Richard H. Pildes, *Why The Center Does Not Hold: The Causes of Hyperpolarized Democracy in America*, 99 CAL. L. REV. 273, 307-08 (2011). Among other things, Pildes observed that non-gerrymandered districts (such as for U.S. Senators) also have yielded less competitive elections, and that members of Congress have been voting in increasingly polarized ways, whether or not they come from competitive districts.

Chapter 3

ONE PERSON, ONE VOTE

B. The Constitutional Basis for One Person, One Vote

Page 192. Add the following after Note 9:

10. In distributing legislative seats, some states count prison populations as part of the districts in which the prisons are located, even though the prisoners are permitted to vote. The effect is to give greater voting power to the others living in those districts, including prison guards' families, whose interests may not coincide with those of the inmates. By the same token, the areas in which the inmates used to live are not granted the influence they would possess if the prisoners were counted as residing in the last place they lived before imprisonment. Does this practice violate one person, one vote? Does it matter that minority races are disproportionately represented in prison populations and that prisons are often located in rural, mainly white, areas? See Dale Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 STAN. L. & POL'Y REV. 355 (2011).

Chapter 4

PRECLEARANCE UNDER SECTION 5 OF THE VOTING RIGHTS ACT

D. The Constitutionality of Section 5 Revisited

Page 235. Add the following after Note 4:

4a. Several states—including some covered jurisdictions—have recently passed laws requiring voters to show identification (often photo identification) at the polls. Critics charge that the laws disproportionately burden the elderly, the poor, and racial minorities. Nevertheless, the Supreme Court upheld one such law against a facial challenge, *see Crawford v. Marion County Election Bd.*, 553 U.S. 181 (2008) [p. 1082]. The Justice Department precleared Georgia’s new photo-ID law in 2005, but new laws in South Carolina and Texas are currently awaiting preclearance. Should the Justice Department interpose objections to such laws? *See* Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 59 HOW. L.J. 785 (2006).

Page 281. Add the following to Note 2, before the citation of Professor Gerken’s blog post:

Jenigh J. Garrett, *The Continued Need for the Voting Rights Act: Examining Second-Generation Discrimination*, 30 ST. LOUIS U. PUB. L. REV. 77 (2010);

Page 282. Add the following paragraph to the end of Note 3:

It did not take long for other cases to be filed challenging the 2006 VRA reauthorization as exceeding Congress’s Fourteenth and Fifteenth Amendment enforcement powers. Two suits are particularly notable, although as of this writing both are in early stages of litigation. *See LaRoque v. Holder*, 2011 U.S. App. LEXIS 13907 (D.C. Cir. 2011) (holding that the plaintiffs have standing to challenge the Act); *Shelby County v. Holder*, 270 F.R.D. 16 (D.D.C. 2010) (limiting discovery).

Page 282. Add the following to Note 4, before the citation of Mr. Goldstein’s blog post:

Christopher B. Seaman, *An Uncertain Future for Section 5 of the Voting Rights Act: The Need for a Revised Bailout System*, 30 ST. LOUIS U. PUB. L. REV. 9 (2010);

Chapter 7

TERM LIMITS

A. Introduction

Page 576. Add the following to Note a:

Nathaniel Birkhead, et al., *The Impact of State Legislative Term Limits on the Competitiveness of Congressional Elections*, 38 POL. RES. Q. 842 (2010) (finding that state term limits have had little impact on competitiveness of congressional elections, as the increased number of termed-out state legislators who run for Congress is offset by other political factors); James Alt, et al., *Disentangling Accountability and Competence in Elections: Evidence from U.S. Term Limits*, 73 J. POL. 171 (2011) (finding some differences in economic policies between term-limited and reelection-eligible governors).

B. The Constitutionality of Term-Limiting Members of Congress

Page 590. Insert the following after Note 6:

7. How does *U.S. Term Limits* apply to other state regulation of the election process for federal office? For example, should it invalidate state laws that permit the recall of members of Congress? For an affirmative answer to that question, see *Committee to Recall Robert Menendez v. Wells*, 7 A.3d 720 (N.J. 2010). There, the New Jersey Supreme Court struck down a state constitutional provision permitting the recall of any elected official representing New Jersey in Congress. The Court held that the same federal constitutional analysis applied by *U.S. Term Limits* leads to the conclusion that state recall provisions are not permissible. While many state provisions, a few explicitly, and more implicitly, arguably permitted the recall of members of Congress, and while there were apparently no cases directly on point, the court noted that the consensus of scholarly commentary, as well as other authorities (*e.g.*, opinions of state attorneys general), both before and after *U.S. Term Limits*, was that such provisions were unenforceable.

Chapter 8

POLITICAL SPEECH

B. Defamation and the Problem of False Statements

Page 625. Add the following Note before Note 1, and renumber all subsequent Notes accordingly:

1. *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), involved a challenge to a Minnesota statute criminalizing knowing or reckless false statements concerning ballot questions. The Eighth Circuit held that such knowing or reckless false statements were not categorically outside the protection of the First Amendment, and remanded for the district court to apply strict scrutiny. *Id.* at 636.

Page 626. Add the following Note immediately before the section on Media Coverage:

7. Should false campaign speech be entitled to any more—or any less—protection than false speech about other topics? May Congress, for example, punish one who falsely represents that he has won an award for distinguished military service? *See* 18 U.S.C. § 704(b). The Ninth Circuit struck down the statute prohibiting such representations. *United States v. Alvarez*, 617 F.3d 1198 (2010), *reh'g en banc denied* 638 F.3d 666 (9th Cir. 2011). In an opinion concurring in the denial of rehearing, Chief Judge Kozinski argued that it was necessary to provide constitutional protection for “the white lies, exaggerations and deceptions that are an integral part of human intercourse.” 638 F.3d at 673 (Kozinski, C.J., concurring). Do you agree?

D. Anonymous Speech

Page 686. Delete Note 3 and replace it with the following (moving Note 4 on page 687 to the end of this case, and renumbering it as Note 6):

DOE v. REED

Supreme Court of the United States
561 U.S. ___, 130 S. Ct. 2811 (2010)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which JUSTICE KENNEDY, JUSTICE GINSBURG, JUSTICE BREYER, JUSTICE ALITO, and JUSTICE SOTOMAYOR join].

The State of Washington allows its citizens to challenge state laws by referendum. * * * This case arises out of a state law extending certain benefits to same-sex couples, and a corresponding referendum petition to put that law to a popular vote. [The referendum, R-71, appeared on the November 2009 ballot. By a margin of 53% to 47%, the voters approved the law.] Respondent intervenors invoked the [Washington Public Records Act (PRA)] to obtain copies of the petition, with the names and addresses of the signers. Certain petition signers and the petition sponsor objected, arguing that such public disclosure would violate their rights under the First Amendment.

The course of this litigation, however, has framed the legal question before us more broadly. The issue at this stage of the case is not whether disclosure of this particular petition would violate the First Amendment, but whether disclosure of referendum petitions in general would do so. We conclude that such disclosure does not as a general matter violate the First Amendment, and we therefore affirm the judgment of the Court of Appeals. We leave it to the lower courts to consider in the first instance the signers' more focused claim concerning disclosure of the information on this particular petition, which is pending before the District Court. * * *

The compelled disclosure of signatory information on referendum petitions is subject to review under the First Amendment. An individual expresses a view on a political matter when he signs a petition under Washington's referendum procedure. In most cases, the individual's signature will express the view that the law subject to the petition should be overturned. Even if the signer is agnostic as to the merits of the underlying law, his signature still expresses the political view that the question should be considered "by the whole electorate." *Meyer v. Grant*, 486 U.S. 414, 421 (1988) [p. 688]. In either case, the expression of a political view implicates a First Amendment right. * * *

Respondents counter that signing a petition is a legally operative legislative act and therefore "does not involve any significant expressive element." It is true that signing a referendum petition may ultimately have the legal consequence of requiring the secretary of state to place the referendum on the ballot. But we do not see how adding such legal effect to an expressive activity somehow deprives that activity of its expressive component, taking it outside the scope of the First Amendment. * * *

We have a series of precedents considering First Amendment challenges to disclosure requirements in the electoral context. These precedents have reviewed such challenges under what has been termed "exacting scrutiny." See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 64 (1976) [p. 1064] (*per curiam*).

That standard "requires a 'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." To withstand this scrutiny, "the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." *Davis [v. Federal Election Comm'n]*, 554 U.S. 724, 744 (2008) [p. 1007].¹

Respondents assert two interests to justify the burdens of compelled disclosure under the PRA on First Amendment rights: (1) preserving the integrity of the electoral process by combating fraud, detecting invalid signatures, and fostering government transparency and accountability; and (2) providing information to the electorate about who supports the petition. Because we determine that the State's interest in preserving the integrity of the electoral process suffices to defeat the argument that the PRA is unconstitutional with respect to referendum petitions in general, we need not, and do not, address the State's "informational" interest.

The State's interest in preserving the integrity of the electoral process is undoubtedly important. * * * The State's interest is particularly strong with respect to efforts to root out fraud, which not only may produce fraudulent outcomes, but has a systemic effect as well: It "drives

¹ JUSTICE SCALIA doubts whether petition signing is entitled to any First Amendment protection at all. His skepticism is based on the view that petition signing has "legal effects" in the legislative process, while other aspects of political participation—with respect to which we have held there is a First Amendment interest—do not. That line is not as sharp as JUSTICE SCALIA would have it; he himself recognizes "the existence of a First Amendment interest in voting," which of course also can have legal effect. The distinction becomes even fuzzier given that only *some* petition signing has legal effect, and any such legal effect attaches only well after the expressive act of signing, if the secretary determines that the petition satisfies the requirements for inclusion on the ballot. Petitions that do not qualify for the ballot of course carry no legal effect.

honest citizens out of the democratic process and breeds distrust of our government.” *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*); see also *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 196 (2008) [p. 1082] (opinion of STEVENS, J.). The threat of fraud in this context is not merely hypothetical; respondents and their *amici* cite a number of cases of petition-related fraud across the country to support the point.

But the State’s interest in preserving electoral integrity is not limited to combating fraud. That interest extends to efforts to ferret out invalid signatures caused not by fraud but by simple mistake, such as duplicate signatures or signatures of individuals who are not registered to vote in the State. That interest also extends more generally to promoting transparency and accountability in the electoral process, which the State argues is “essential to the proper functioning of a democracy.”

Plaintiffs contend that the disclosure requirements of the PRA are not “sufficiently related” to the interest of protecting the integrity of the electoral process. They argue that disclosure is not necessary because the secretary of state is already charged with verifying and canvassing the names on a petition, advocates and opponents of a measure can observe that process, and any citizen can challenge the secretary’s actions in court. They also stress that existing criminal penalties reduce the danger of fraud in the petition process.

But the secretary’s verification and canvassing will not catch all invalid signatures: The job is large and difficult (the secretary ordinarily checks “only 3 to 5% of signatures”), and the secretary can make mistakes, too. Public disclosure can help cure the inadequacies of the verification and canvassing process.

Disclosure also helps prevent certain types of petition fraud otherwise difficult to detect, such as outright forgery and “bait and switch” fraud, in which an individual signs the petition based on a misrepresentation of the underlying issue. The signer is in the best position to detect these types of fraud, and public disclosure can bring the issue to the signer’s attention.

Public disclosure thus helps ensure that the only signatures counted are those that should be, and that the only referenda placed on the ballot are those that garner enough valid signatures. Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot. In light of the foregoing, we reject plaintiffs’ argument and conclude that public disclosure of referendum petitions in general is substantially related to the important interest of preserving the integrity of the electoral process.

Plaintiffs’ more significant objection is that “the strength of the governmental interest” does not “reflect the seriousness of the actual burden on First Amendment rights.” According to plaintiffs, the objective of those seeking disclosure of the R-71 petition is not to prevent fraud, but to publicly identify those who had validly signed and to broadcast the signers’ political views on the subject of the petition. Plaintiffs allege, for example, that several groups plan to post the petitions in searchable form on the Internet, and then encourage other citizens to seek out the R-71 signers.

Plaintiffs explain that once on the Internet, the petition signers’ names and addresses “can be combined with publicly available phone numbers and maps,” in what will effectively become a blueprint for harassment and intimidation. To support their claim that they will be subject to reprisals, plaintiffs cite examples from the history of a similar proposition in California and from the experience of one of the petition sponsors in this case.

In related contexts, we have explained that those resisting disclosure can prevail under the First Amendment if they can show “a reasonable probability that the compelled disclosure [of personal information] will subject them to threats, harassment, or reprisals from either

Government officials or private parties.” *Buckley, supra*, at 74; see also *Citizens United [v. Federal Election Comm’n]*, 558 U.S. ___, 130 S. Ct. 876, 175 L. Ed. 2d 753 [(2010)] [p. 1075]. The question before us, however, is not whether PRA disclosure violates the First Amendment with respect to those who signed the R-71 petition, or other particularly controversial petitions. The question instead is whether such disclosure in general violates the First Amendment rights of those who sign referendum petitions.

The problem for plaintiffs is that their argument rests almost entirely on the specific harm they say would attend disclosure of the information on the R-71 petition, or on similarly controversial ones. But typical referendum petitions “concern tax policy, revenue, budget, or other state law issues.” Voters care about such issues, some quite deeply—but there is no reason to assume that any burdens imposed by disclosure of typical referendum petitions would be remotely like the burdens plaintiffs fear in this case.

Plaintiffs have offered little in response. They have provided us scant evidence or argument beyond the burdens they assert disclosure would impose on R-71 petition signers or the signers of other similarly controversial petitions. Indeed, what little plaintiffs do offer with respect to typical petitions in Washington hurts, not helps: Several other petitions in the State “have been subject to release in recent years,” plaintiffs tell us, but apparently that release has come without incident.

Faced with the State’s un rebutted arguments that only modest burdens attend the disclosure of a typical petition, we must reject plaintiffs’ broad challenge to the PRA. In doing so, we note—as we have in other election law disclosure cases—that upholding the law against a broad-based challenge does not foreclose a litigant’s success in a narrower one. See *Buckley, supra*, at 74 (“minor parties” may be exempt from disclosure requirements if they can show “a reasonable probability that the compelled disclosure of a party’s contributors’ names will subject them to threats, harassment, or reprisals from either Government officials or private parties”); *Citizens United, supra*, at ___ (disclosure “would be unconstitutional as applied to an organization if there were a reasonable probability that the group’s members would face threats, harassment, or reprisals if their names were disclosed”). * * *

[*Affirmed.*]

JUSTICE BREYER, concurring.

In circumstances where, as here, “a law significantly implicates competing constitutionally protected interests in complex ways,” the Court balances interests. *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402 (2000) [p. 843] (BREYER, J., concurring). * * * As I read their opinions, this is what both the Court and JUSTICE STEVENS do. And for the reasons stated in those opinions (as well as many of the reasons discussed by JUSTICE SOTOMAYOR), I would uphold the statute challenged in this case. With this understanding, I join the opinion of the Court and JUSTICE STEVENS’ opinion.

JUSTICE ALITO, concurring.

The Court holds that the disclosure under the Washington Public Records Act (PRA) of the names and addresses of persons who sign referendum petitions does not as a general matter violate the First Amendment, and I agree with that conclusion. Many referendum petitions concern relatively uncontroversial matters, and plaintiffs have provided no reason to think that disclosure of signatory information in those contexts would significantly chill the willingness of voters to sign. Plaintiffs’ facial challenge therefore must fail.

Nonetheless, facially valid disclosure requirements can impose heavy burdens on First Amendment rights in individual cases. * * * The possibility of prevailing in an as-applied challenge provides adequate protection for First Amendment rights only if (1) speakers can obtain the exemption sufficiently far in advance to avoid chilling protected speech and (2) the showing necessary to obtain the exemption is not overly burdensome. With respect to the first requirement, the as-applied exemption becomes practically worthless if speakers cannot obtain the exemption quickly and well in advance of speaking. To avoid the possibility that a disclosure requirement might chill the willingness of voters to sign a referendum petition (and thus burden a circulator’s ability to collect the necessary number of signatures), voters must have some assurance *at the time when they are presented with the petition* that their names and identifying information will not be released to the public. The only way a circulator can provide such assurance, however, is if the circulator has sought and obtained an as-applied exemption from the disclosure requirement well before circulating the petition. Otherwise, the best the circulator could do would be to tell voters that an exemption might be obtained at some point in the future. Such speculation would often be insufficient to alleviate voters’ concerns about the possibility of being subjected to threats, harassment, or reprisals.

Additionally, speakers must be able to obtain an as-applied exemption without clearing a high evidentiary hurdle. We acknowledged as much in *Buckley*, where we noted that “unduly strict requirements of proof could impose a heavy burden” on speech. 424 U.S., at 74. Recognizing that speakers “must be allowed sufficient flexibility in the proof of injury to assure a fair consideration of their claim,” we emphasized that speakers “need show only a *reasonable probability*” that disclosure will lead to threats, harassment, or reprisals. *Ibid.* (emphasis added). * * *

In light of those principles, the plaintiffs in this case have a strong argument that the PRA violates the First Amendment as applied to the Referendum 71 petition.

* * * The widespread harassment and intimidation suffered by supporters of California’s Proposition 8 provides strong support for an as-applied exemption in the present case. * * *

What is more, when plaintiffs return to the District Court, they will have the opportunity to develop evidence of intimidation and harassment of Referendum 71 supporters * * *. For example, plaintiffs allege that the campaign manager for one of the plaintiff groups received threatening e-mails and phone calls, and that the threats were so severe that the manager filed a complaint with the local sheriff and had his children sleep in an interior room of his home. * * *

As-applied challenges to disclosure requirements play a critical role in protecting First Amendment freedoms. To give speech the breathing room it needs to flourish, prompt judicial remedies must be available well before the relevant speech occurs and the burden of proof must be low. In this case—both through analogy and through their own experiences—plaintiffs have a strong case that they are entitled to as-applied relief, and they will be able to pursue such relief before the District Court.

JUSTICE SOTOMAYOR, with whom JUSTICE STEVENS and JUSTICE GINSBURG join, concurring.
* * *

The Court today confirms that the State of Washington’s decision to make referendum petition signatures available for public inspection falls squarely within the realm of permissible election-related regulations. Public disclosure of the identity of petition signers, which is the rule in the overwhelming majority of States that use initiatives and referenda, advances States’ vital interests in “[p]reserving the integrity of the electoral process, preventing corruption, and

sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of government.” * * *

On the other side of the ledger, I view the burden of public disclosure on speech and associational rights as minimal in this context. As this Court has observed with respect to campaign-finance regulations, “disclosure requirements . . . ‘do not prevent anyone from speaking.’” *Citizens United*, 558 U.S., at ___. When it comes to initiatives and referenda, the impact of public disclosure on expressive interests is even more attenuated. While campaign-finance disclosure injects the government into what would otherwise have been private political activity, the process of legislating by referendum is inherently public. To qualify a referendum for the ballot, citizens are required to sign a petition and supply identifying information to the State. The act of signing typically occurs in public, and the circulators who collect and submit signatures ordinarily owe signers no guarantee of confidentiality. For persons with the “civic courage” to participate in this process, the State’s decision to make accessible what they voluntarily place in the public sphere should not deter them from engaging in the expressive act of petition signing. Disclosure of the identity of petition signers, moreover, in no way directly impairs the ability of anyone to speak and associate for political ends either publicly or privately.

Given the relative weight of the interests at stake and the traditionally public nature of initiative and referendum processes, the Court rightly rejects petitioners’ constitutional challenge to the State of Washington’s petition disclosure regulations. These same considerations also mean that any party attempting to challenge particular applications of the State’s regulations will bear a heavy burden. Even when a referendum involves a particularly controversial subject and some petition signers fear harassment from nonstate actors, a State’s important interests in “protect[ing] the integrity and reliability of the initiative process” remain undiminished, and the State retains significant discretion in advancing those interests. Likewise, because the expressive interests implicated by the act of petition signing are always modest, I find it difficult to see how any incremental disincentive to sign a petition would tip the constitutional balance. Case-specific relief may be available when a State selectively applies a facially neutral petition disclosure rule in a manner that discriminates based on the content of referenda or the viewpoint of petition signers, or in the rare circumstance in which disclosure poses a reasonable probability of serious and widespread harassment that the State is unwilling or unable to control. Cf. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Allowing case-specific invalidation under a more forgiving standard would unduly diminish the substantial breathing room States are afforded to adopt and implement reasonable, nondiscriminatory measures like the disclosure requirement now at issue. Accordingly, courts presented with an as-applied challenge to a regulation authorizing the disclosure of referendum petitions should be deeply skeptical of any assertion that the Constitution, which embraces political transparency, compels States to conceal the identity of persons who seek to participate in lawmaking through a state-created referendum process. With this understanding, I join the opinion of the Court.

JUSTICE STEVENS, with whom JUSTICE BREYER joins, concurring in part and concurring in the judgment.

This is not a hard case. It is not about a restriction on voting or on speech and does not involve a classic disclosure requirement. Rather, the case concerns a neutral, nondiscriminatory policy of disclosing information already in the State’s possession that, it has been alleged, might one day indirectly burden petition signatories. The burden imposed by Washington’s application

of the PRA to referendum petitions in the vast majority, if not all, its applications is not substantial. And the State has given a more than adequate justification for its choice. * * *

[A]ny effect on speech that disclosure might have is minimal. The PRA does not necessarily make it more difficult to circulate or obtain signatures on a petition, or to communicate one's views generally. Regardless of whether someone signs a referendum petition, that person remains free to say anything to anyone at any time. If disclosure indirectly burdens a speaker, "the amount of speech covered" is small—only a single, narrow message conveying one fact in one place. And while the democratic act of casting a ballot or signing a petition does serve an expressive purpose, the act does not involve any "interactive communication" and is "not principally" a method of "individual expression of political sentiment."

Weighed against the possible burden on constitutional rights are the State's justifications for its rule. In this case, the State has posited a perfectly adequate justification: an interest in deterring and detecting petition fraud.² * * *

There remains the issue of petitioners' as-applied challenge. * * * Any burden on speech that petitioners posit is speculative as well as indirect. For an as-applied challenge to a law such as the PRA to succeed, there would have to be a significant threat of harassment directed at those who sign the petition that cannot be mitigated by law enforcement measures.⁵ Moreover, the character of the law challenged in a referendum does not, in itself, affect the analysis. Debates about tax policy and regulation of private property can become just as heated as debates about domestic partnerships. And as a general matter, it is very difficult to show that by later disclosing the names of petition signatories, individuals will be less willing to sign petitions. Just as we have in the past, I would demand strong evidence before concluding that an indirect and speculative chain of events imposes a substantial burden on speech. * * *

Accordingly, I concur with the opinion of the Court to the extent that it is not inconsistent with my own, and I concur in the judgment.

JUSTICE SCALIA, concurring in the judgment. * * *

* * * Our Nation's longstanding traditions of legislating and voting in public refute the claim that the First Amendment accords a right to anonymity in the performance of an act with governmental effect. * * *

The filing of a [valid] referendum petition * * * has two legal effects: (1) It requires the secretary to place the measure referred to the people on the ballot at the next general election; and (2) it suspends operation of the measure, causing it only to have effect 30 days after it is approved during that election. A voter who signs a referendum petition is therefore exercising legislative power because his signature, somewhat like a vote for or against a bill in the legislature, seeks to affect the legal force of the measure at issue.²

² Washington also points out that its disclosure policy informs voters about who supports the particular referendum. In certain election-law contexts, this informational rationale (among others) may provide a basis for regulation; in this case, there is no need to look beyond the State's quite obvious antifraud interest.

⁵ A rare case may also arise in which the level of threat to any individual is not quite so high but a State's disclosure would substantially limit a group's ability to "garner the number of signatures necessary to place [a] matter on the ballot," thereby "limiting [its] ability to make the matter the focus of statewide discussion." *Meyer v. Grant*, 486 U.S., [at] 423.

² The Court notes that "only *some* petition signing has legal effect." That is true. Some petitions may never be submitted to the secretary; they are irrelevant here, since they will never be subject to the PRA. But some petitions that are submitted to the secretary may lack the requisite number of signatures. Even as to those, the petition signer has exercised *his portion* of the legislative power when he signs the petition, much like a legislator who casts a

Plaintiffs point to no precedent from this Court holding that legislating is protected by the First Amendment. Nor do they identify historical evidence demonstrating that “the freedom of speech” the First Amendment codified encompassed a right to legislate without public disclosure. This should come as no surprise; the exercise of lawmaking power in the United States has traditionally been public. * * *

Moreover, even when the people *asked* Congress for legislative changes—by exercising their constitutional right to “to petition the Government for a redress of grievances”—they did so publicly. The petition was read aloud in Congress. The petitioner’s name (when large groups were not involved), his request, and what action Congress had taken on the petition were consistently recorded in the House and Senate Journals. Even when the people exercised legislative power directly, they did so not anonymously, but openly in town hall meetings.

Petitioning the government and participating in the traditional town meeting were precursors of the modern initiative and referendum. * * * Plaintiffs’ argument implies that the public nature of these practices, so longstanding and unquestioned, violated the freedom of speech. There is no historical support for such a claim.

Legislating was not the only governmental act that was public in America. Voting was public until 1888 when the States began to adopt the Australian secret ballot. * * * Initially, the Colonies mostly continued the English traditions of voting by a show of hands or by voice—*viva voce* voting. * * *

Although there was variation, the election official would ordinarily compile a poll with the name and residence of each voter, and the name of the candidate for whom he voted. To prevent fraud, the Colonies in Rhode Island, New York, and New Jersey adopted the English rule that “copies of the poll must be delivered on demand to persons who were willing to pay a reasonable charge for the labor of writing them.” Some colonies allowed candidates to demand a copy of the poll and required the legislature to examine the poll in a contested election. Thus, as in this case, the government not only publicly collected identifying information about who voted and for which candidate, it also disclosed that information to the public.

Any suggestion that *viva voce* voting infringed the accepted understanding of the pre-existing freedom of speech to which the First Amendment’s text refers is refuted by the fact that several state constitutions that required or authorized *viva voce* voting *also* explicitly guaranteed the freedom of speech. Surely one constitutional provision did not render the other invalid.

Of course the practice of *viva voce* voting was gradually replaced with the paper ballot, which was thought to reduce fraud and undue influence. There is no indication that the shift resulted from a sudden realization that public voting infringed voters’ freedom of speech, and the manner in which it occurred suggests the contrary. States adopted the paper ballot at different times, and some States changed methods multiple times. * * *

The new paper ballots did not make voting anonymous. Initially, many States did not regulate the form of the paper ballot. Taking advantage of this, political parties began printing ballots with their candidates’ names on them. They used brightly colored paper and other distinctive markings so that the ballots could be recognized from a distance, making the votes public. * * *

It was precisely discontent over the nonsecret nature of ballot voting, and the abuses that produced, which led to the States’ adoption of the Australian secret ballot. * * * But I am aware of no contention that the Australian system was required by the First Amendment (or the state counterparts). That would have been utterly implausible, since the inhabitants of the Colonies,

losing vote.

the States, and the United States had found public voting entirely compatible with “the freedom of speech” for several centuries. * * *

Plaintiffs raise concerns that the disclosure of petition signatures may lead to threats and intimidation. Of course nothing prevents the people of Washington from keeping petition signatures secret to avoid that—just as nothing prevented the States from moving to the secret ballot. But there is no constitutional basis for this Court to impose that course upon the States—or to insist (as today’s opinion does) that it can only be avoided by the demonstration of a “sufficiently important governmental interest.” And it may even be a bad idea to keep petition signatures secret. There are laws against threats and intimidation; and harsh criticism, short of unlawful action, is a price our people have traditionally been willing to pay for self-governance. Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. * * *

JUSTICE THOMAS, dissenting. * * *

The expressive political activity of signing a referendum petition is a paradigmatic example of “the practice of persons sharing common views banding together to achieve a common end.” *Citizens Against Rent Control/Coalition for Fair Housing v. Berkeley*, 454 U.S. 290, 294 (1981) [p. 825]. A referendum supported by only one person’s signature is a nullity; it will never be placed on the ballot. * * * For these reasons, signing a referendum petition amounts to “political association” protected by the First Amendment.

This Court has long recognized the “vital relationship between” political association “and privacy in one’s associations,” *NAACP v. Alabama ex rel. Patterson*, 357 U.S., [at] 462, and held that “[t]he Constitution protects against the compelled disclosure of political associations and beliefs,” *Brown v. Socialist Workers ’74 Campaign Comm. (Ohio)*, 459 U.S., [at] 91. This constitutional protection “yield[s] only to a subordinating interest of the State that is compelling, and then only if there is a substantial relation between the information sought and an overriding and compelling state interest.” *Id.*, at 91-92. Thus, unlike the Court, I read our precedents to require application of strict scrutiny to laws that compel disclosure of protected First Amendment association. Under that standard, a disclosure requirement passes constitutional muster only if it is narrowly tailored—*i.e.*, the least restrictive means—to serve a compelling state interest.

Washington’s application of the PRA to a referendum petition does not survive strict scrutiny.

Washington first contends that it has a compelling interest in “transparency and accountability,” which it claims encompasses several subordinate interests: preserving the integrity of its election process, preventing corruption, deterring fraud, and correcting mistakes by the secretary of state or by petition signers.

It is true that a State has a substantial interest in regulating its referendum and initiative processes “to protect the[ir] integrity and reliability.” But Washington points to no precedent from this Court recognizing “correcting errors” as a distinct compelling interest that could support disclosure regulations. And our cases strongly suggest that preventing corruption and deterring fraud bear less weight in this particular electoral context: the signature-gathering stage of a referendum or initiative drive. The Court has twice observed that “the risk of fraud or corruption, or the appearance thereof, is more remote at the petition stage of an initiative than at the time of balloting.” [*Buckley v. American Constitutional Law Foundation*, 525 U.S. 182], 203 [(1999)] (quoting *Meyer v. Grant*, 486 U.S., [at] 427). * * *

We should not abandon those principles merely because Washington and its *amici* can point to a mere eight instances of initiative-related fraud. If anything, these meager figures reinforce the conclusion that the risks of fraud or corruption in the initiative and referendum process are remote and thereby undermine Washington's claim that those two interests should be considered compelling for purposes of strict scrutiny.

Thus, I am not persuaded that Washington's interest in protecting the integrity and reliability of its referendum process, as the State has defined that interest, is compelling. But I need not answer that question here. Even assuming the interest is compelling, on-demand disclosure of a referendum petition to any person under the PRA is "a blunderbuss approach" to furthering that interest, not the least restrictive means of doing so. The events that prompted petitioners' complaint in this case demonstrate as much.

As Washington explained during oral argument, after the secretary of state receives signed referendum petitions, his "first step . . . is to take them to his archiving section and to have them digitized. As soon as they're digitized, they're available on disks for anyone who requests them" under the PRA. In this case, two organizations announced their intention to obtain the digitized names and addresses of referendum signers and post them "online, in a searchable format."

There is no apparent reason why Washington must broadly disclose referendum signers' names and addresses in this manner to vindicate the interest that it invokes here. Washington * * * could put the names and addresses of referendum signers into a similar electronic database that state employees could search *without* subjecting the name and address of each signer to wholesale public disclosure. The secretary could electronically cross-reference the referendum database against the "statewide voter registration list" contained in Washington's "statewide voter registration database," to ensure that each referendum signer meets Washington's residency and voter registration requirements. Doing so presumably would drastically reduce or eliminate possible errors or mistakes that Washington argues the secretary *might* make, since it would allow the secretary to verify virtually all of the signatures instead of the mere "3 to 5%" he "ordinarily checks."

An electronic referendum database would also enable the secretary to determine whether multiple entries correspond to a single registered voter, thereby detecting whether a voter had signed the petition more than once. In addition, the database would protect victims of "forgery" or "bait and switch" fraud." In Washington, "a unique identifier is assigned to each legally registered voter in the state." Washington could create a Web site, linked to the electronic referendum database, where a voter concerned that his name had been fraudulently signed could conduct a search using his unique identifier to ensure that his name was absent from the database—without requiring disclosure of the names and addresses of all the voluntary, legitimate signers. * * *

Washington nevertheless contends that its citizens must "have access to public records . . . to independently evaluate whether the Secretary properly determined to certify or not to certify a referendum to the ballot." * * * But Washington's Election Code already gives Washington voters access to referendum petition data. Under [Washington law], "[t]he verification and canvass of signatures on the [referendum] petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records except upon" court order. Each side is entitled to at least two such observers[.] * * *

It is readily apparent that Washington can vindicate its stated interest in “transparency and accountability” through a number of more narrowly tailored means than wholesale public disclosure. Accordingly, this interest cannot justify applying the PRA to a referendum petition.

Washington also contends that it has a compelling interest in “providing relevant information to Washington voters,” and that on-demand disclosure to the public is a narrowly tailored means of furthering that interest. This argument is easily dispatched, since this Court has already rejected it in [*McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995)] [p. 668]. * * *

* * * People are intelligent enough to evaluate the merits of a referendum without knowing who supported it. Thus, just as this informational interest did not justify the Ohio law in *McIntyre*, it does not justify applying the PRA to referendum petitions. * * *

The difficulty in predicting which referendum measures will prove controversial—combined with Washington’s default position that signed referendum petitions will be disclosed on-demand, thereby allowing anyone to place this information on the Internet for broad dissemination—raises the significant probability that today’s decision will “inhibit the exercise of legitimate First Amendment activity” with respect to referendum and initiative petitions. * * *

Notes and Questions

1. Justice Alito suggested that as-applied challenges, to be useful, must be handled on a timely basis and should not face a “high evidentiary” hurdle. Justice Sotomayor countered that courts should be “deeply skeptical” of any as-applied challenge, and Justice Stevens argued that proving an as-applied challenge will be “very difficult” and should require “strong evidence.” Which approach makes the most sense? If the Sotomayor/Stevens approach is correct about the burdens facing an as-applied challenge, should the Court have been more willing to make a facial determination of unconstitutionality?

2. In May of 2010, a few weeks before *Doe* was decided, a multi-jurisdictional drug task force raided a “medical marijuana dispensary” near Tacoma, Washington, in the process seizing numerous completed petitions for a ballot initiative that would “remove state civil and criminal penalties for persons eighteen years or older who cultivate, possess, transport, sell, or use marijuana” in the state. Supporters of the initiative claimed that police intended to intimidate people out of signing petitions. Gavin Dahl, *Seized Marijuana Legalization Petitions Missing*, RAW STORY, May 26, 2010, at <http://rawstory.com/rs/2010/0526/case-marijuana-legalization-petitions-seized-drug-raid/>. After *Doe*, police can simply obtain information on petition signatories through the Public Records Act. Would (should) a complaint based on such actions meet the Alito standard for obtaining as-applied relief? The Sotomayor/Stevens standard? Does this set of facts cause you to rethink your views on *Doe*?

3. Justice Scalia argued that disclosure statutes encourage “civic courage, without which democracy is doomed.” Others, however, have expressed concern that there is little rational reason for voters to engage in learning about political issues. See JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF A CONSTITUTIONAL DEMOCRACY* (1962). Buchanan and Tullock focused on the fact that any one person’s vote was extremely unlikely to determine the outcome of an election, but it seems equally true that any one person’s signature is unlikely to determine whether an initiative or referendum appears on the ballot. Likewise, any one person’s financial contribution to a campaign is unlikely to determine the outcome. Given the often tenuous incentives to participate in civic life, should we demand that the minority who do participate also exhibit “civic courage” that goes beyond the norm?

In the wake of California’s Proposition 8, which amended the state constitution to define marriage as being between a man and a woman, there were many reports of harassment and vandalism against supporters of the initiative. Relying on mandatory-disclosure laws, opponents of the measure publicized the names and address of supporters, organized boycotts, and in some cases published on the Internet maps to donors’ homes. Said one leader opposed to Proposition 8, “Years ago we would never have been able to get a blacklist that fast and quickly.” See Bradley A. Smith, *In Defense of Political Anonymity*, 20 CITY J. 74, 77 (2010). Assuming that private boycotts are a legitimate tool for attempting to create social change—indeed, one itself protected by the First Amendment, see *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-66 (1958), should the state nonetheless be constitutionally prohibited from compelling the potential targets to disclose information that facilitates such boycotts and blacklists? Or is the proper balance between providing voters with information and protecting voters from harassment a classic matter for legislative balancing?

4. Justice Thomas argued that there are less restrictive means available for the state to fulfill its anti-fraud goals. Yet some of these means, such as creating and maintaining a searchable website, would cost the state money. In an era of tight state budgets, to what extent should least-restrictive-means analysis take into account the financial costs to the state of providing a less restrictive alternative?

5. Is the act of signing a petition “speech”? Justice Scalia characterized it as a legislative act and analogized petition-signing to “a vote for or against a bill in the legislature,” while the Court suggested that acts having governmental effect could also be speech where they constitute “the expression of a political view.” Nevertheless, in *Nevada Commission on Ethics v. Carrigan*, 564 U.S. ___, 180 L. Ed. 2d 150 (2011), an eight-Justice majority, in an opinion written by Justice Scalia, concluded that a vote in the legislature was not “speech” entitled to First Amendment protection:

[A] legislator’s vote is the commitment of his apportioned share of the legislature’s power to the passage or defeat of a particular proposal. The legislative power thus committed is not personal to the legislator but belongs to the people; the legislator has no personal right to it. * * * In this respect, voting by a legislator is different from voting by a citizen. While “a voter’s franchise is a personal right,” “[t]he procedures for voting in legislative assemblies . . . pertain to legislators not as individuals but as political representatives executing the legislative process.” *Coleman v. Miller*, 307 U.S. 433, 469-470 (1939) (opinion of Frankfurter, J.).

* * * There are, to be sure, instances where action conveys a symbolic meaning—such as the burning of a flag to convey disagreement with a country’s policies. But the act of voting symbolizes nothing. It *discloses*, to be sure, that the legislator wishes (for whatever reason) that the proposition on the floor be adopted, just as a physical assault discloses that the attacker dislikes the victim. But neither the one nor the other is an act of communication. * * *

Even if it were true that the vote itself could “express deeply held and highly unpopular views,” the argument would still miss the mark. This Court has rejected the notion that the First Amendment confers a right to use governmental mechanics to convey a message. * * * [A] legislator has no right to use official powers for expressive purposes.

564 U.S. at ___-___.

Is the analysis in *Carrigan* consistent with *Doe v. Reed*? Justice Alito, who concurred in the judgment on other grounds, thought not:

Voting has an expressive component in and of itself. * * * Just as the act of signing a petition is not deprived of its expressive character when the signature is given legal consequences, the act of voting is not drained of its expressive content when the vote has a legal effect. If an ordinary citizen casts a vote in a

straw poll on an important proposal pending before a legislative body, that act indisputably constitutes a form of speech. If a member of the legislative body chooses to vote in the same straw poll, the legislator's act is no less expressive than that of an ordinary citizen. And if the legislator then votes on the measure in the legislative chamber, the expressive character of that vote is not eliminated simply because it may affect the outcome of the legislative process.

Id. at __ (Alito, J., concurring in part and concurring in the judgment). The Court responded that “[i]t is one thing to say that an inherently expressive act [*i.e.*, signing a petition] remains so despite its having governmental effect, but is altogether another thing to say that a governmental act becomes expressive simply because the governmental actor wishes it to be so.” *Id.* at __ (opinion of the Court). Further, “[a] legislator voting on a bill is not fairly analogized to one simply discussing that bill or expressing an opinion for or against it. The former is performing a governmental act as a representative of his constituents; only the latter is exercising personal First Amendment rights.” *Id.* at __ n.5.

Should there be a constitutional right to anonymity in voting by “ordinary citizens,” *i.e.*, to the Australian ballot? Every state provides for secret balloting, but the Supreme Court has never been asked to decide on its constitutional status. For what it is worth, John Stuart Mill argued that except in rare circumstances, balloting should not be in secret. He believed that public voting would encourage responsibility and accountability for one's vote. *See* JOHN STUART MILL, ON REPRESENTATIVE GOVERNMENT 323-29 (Everyman ed. 1993).

I. Judicial Candidates' Speech

Page 783. Insert the following after Note 13:

13a. Does recusal unconstitutionally burden the First Amendment rights of a candidate's supporters? *Nevada Commission on Ethics v. Carrigan*, 564 U.S. __, 180 L. Ed. 2d 150 (2011), involved a state law requiring legislators to recuse themselves from voting on measures when their private commitments would call into question their “independence of judgment.” The Supreme Court held that the First Amendment right of free speech did not extend to casting a legislative vote, but did not address whether the recusal provision unconstitutionally burdened campaign speech.

In a concurring opinion, Justice Kennedy suggested that legislative recusal provisions may well violate the constitutional rights of persons who offer their support to candidates:

As a general matter, citizens voice their support and lend their aid because they wish to confer the powers of public office on those whose positions correspond with their own. That dynamic, moreover, links the principles of participation and representation at the heart of our democratic government. Just as candidates announce positions in exchange for citizens' votes, *Brown v. Hartlage*, 456 U.S. 45, 55-56 (1982) [p. 610], so too citizens offer endorsements, advertise their views, and assist political campaigns based upon bonds of common purpose. These are the mechanisms that sustain representative democracy.

564 U.S. at __ (Kennedy, J., concurring).

Nevertheless, Justice Kennedy suggested that requiring recusal of *judges* might be different:

The differences between the role of political bodies in formulating and enforcing public policy, on the one hand, and the role of courts in adjudicating individual disputes according to law, on the

other, may call for a different understanding of the responsibilities attendant upon holders of those respective offices and of the legitimate restrictions that may be imposed upon them.

Id. at ___. *See also id.* at ___ & n.3 (opinion of the Court) (noting that “[t]here are of course differences between a legislator’s vote and a judge’s, and thus between legislative and judicial recusal rules,” and contrasting a judge’s vote while on the bench (which is not part of the freedom of speech protected by the First Amendment) to his or her “speech during elections” (which was held in *Republican Party of Minnesota v. White* to be protected)).

Is Justice Kennedy’s proposed distinction between judges and legislators consistent with the reasoning of *Republican Party of Minnesota v. White*?

Page 783. Renumber Note 14 as Note 15, and replace it with the following:

15. *Problem.* In the years since *Republican Party of Minnesota v. White* struck down the announce clause, there has been much controversy about the constitutionality of other restrictions on judicial campaign activity. Are the following restrictions narrowly tailored to serve a compelling interest?

- a. Laws prohibiting judicial candidates from identifying themselves as members of political parties. *See Carey v. Wotitzek*, 614 F.3d 189 (6th Cir. 2010); *Siefert v. Alexander*, 608 F.3d 974 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011); *Republican Party of Minnesota v. White*, 416 F.3d 738 (8th Cir. 2005) (*en banc*) (on remand from the Supreme Court).
- b. Laws prohibiting judicial candidates from pursuing party endorsements. *See Republican Party v. White, supra.*
- c. Laws prohibiting judicial candidates from attending political gatherings. *See id.*
- d. Laws prohibiting judicial candidates from speaking at political gatherings or speaking on behalf of political organizations. *See Bauer v. Shepard*, 620 F.3d 704 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2872 (2011).
- e. Laws prohibiting judicial candidates from holding party office.
- f. Laws prohibiting judicial candidates from endorsing of opposing candidates for public office. *See Wersal v. Sexton*, 613 F.3d 821 (8th Cir. 2010); *Siefert, supra*; *Bauer, supra.*
- g. Laws prohibiting judicial candidates from personally soliciting campaign funds and requiring, instead, that funds be raised by a campaign committee separate from the candidate. *See Wersal, supra*; *Siefert, supra*; *Republican Party v. White, supra*, at 763-66; *Weaver v. Bonner*, 309 F.3d 1312, 1322-23 (11th Cir. 2003); *Stretton v. Disciplinary Board*, 944 F.2d 137, 144-46 (3d Cir. 1991).

Chapter 9

CAMPAIGN FINANCE

F. THE BIPARTISAN CAMPAIGN REFORM ACT AND ITS AFTERMATH

Page 1053. Insert the following after Note 6:

7. Does *Citizens United* undercut the constitutionality of the prohibition on corporate contributions as well as the prohibition on corporate expenditures? Compare *Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304 (8th Cir. 2011) with *United States v. Danielczyk*, 2011 U.S. Dist. LEXIS 60918 (E.D. Va. 2011).

G. PUBLIC FINANCING OF CAMPAIGNS

Page 1063. Insert the following after Note 4:

ARIZONA FREE ENTERPRISE CLUB'S FREEDOM CLUB PAC v. BENNETT

Supreme Court of the United States
564 U.S. ___, 2011 U.S. LEXIS 4992 (2011)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court [in which JUSTICE SCALIA, JUSTICE KENNEDY, JUSTICE THOMAS, and JUSTICE ALITO join]. * * *

The Arizona Citizens Clean Elections Act, passed by initiative in 1998, created a voluntary public financing system to fund the primary and general election campaigns of candidates for state office. All eligible candidates for Governor, secretary of state, attorney general, treasurer, superintendent of public instruction, the corporation commission, mine inspector, and the state legislature (both the House and Senate) may opt to receive public funding. Eligibility is contingent on the collection of a specified number of five-dollar contributions from Arizona voters, and the acceptance of certain campaign restrictions and obligations. Publicly funded candidates must agree, among other things, to limit their expenditure of personal funds to \$500; participate in at least one public debate; adhere to an overall expenditure cap; and return all unspent public moneys to the State.

In exchange for accepting these conditions, participating candidates are granted public funds to conduct their campaigns. In many cases, this initial allotment may be the whole of the State's financial backing of a publicly funded candidate. But when certain conditions are met, publicly funded candidates are granted additional "equalizing" or matching funds.

Matching funds are available in both primary and general elections. In a primary, matching funds are triggered when a privately financed candidate's expenditures, combined with the expenditures of independent groups made in support of the privately financed candidate or in opposition to a publicly financed candidate, exceed the primary election allotment of state funds to the publicly financed candidate. During the general election, matching funds are triggered when the amount of money a privately financed candidate receives in contributions, combined with the expenditures of independent groups made in support of the privately financed candidate

or in opposition to a publicly financed candidate, exceed the general election allotment of state funds to the publicly financed candidate. A privately financed candidate's expenditures of his personal funds are counted as contributions for purposes of calculating matching funds during a general election.

Once matching funds are triggered, each additional dollar that a privately financed candidate spends during the primary results in one dollar in additional state funding to his publicly financed opponent (less a 6% reduction meant to account for fundraising expenses). During a general election, every dollar that a candidate receives in contributions—which includes any money of his own that a candidate spends on his campaign—results in roughly one dollar in additional state funding to his publicly financed opponent. In an election where a privately funded candidate faces multiple publicly financed candidates, one dollar raised or spent by the privately financed candidate results in an almost one dollar increase in public funding to each of the publicly financed candidates.

Once the public financing cap is exceeded, additional expenditures by independent groups can result in dollar-for-dollar matching funds as well. Spending by independent groups on behalf of a privately funded candidate, or in opposition to a publicly funded candidate, results in matching funds. Independent expenditures made in support of a publicly financed candidate can result in matching funds for other publicly financed candidates in a race. The matching funds provision is not activated, however, when independent expenditures are made in opposition to a privately financed candidate. Matching funds top out at two times the initial authorized grant of public funding to the publicly financed candidate. * * *

An example may help clarify how the Arizona matching funds provision operates. Arizona is divided into 30 districts for purposes of electing members to the State's House of Representatives. Each district elects two representatives to the House biannually. In the last general election, the number of candidates competing for the two available seats in each district ranged from two to seven. Arizona's Fourth District had three candidates for its two available House seats. Two of those candidates opted to accept public funding; one candidate chose to operate his campaign with private funds.

In that election, if the total funds contributed to the privately funded candidate, added to that candidate's expenditure of personal funds and the expenditures of supportive independent groups, exceeded \$21,479—the allocation of public funds for the general election in a contested State House race—the matching funds provision would be triggered. At that point, a number of different political activities could result in the distribution of matching funds. For example:

- If the privately funded candidate spent \$1,000 of his own money to conduct a direct mailing, each of his publicly funded opponents would receive \$940 (\$1,000 less the 6% offset).
- If the privately funded candidate held a fundraiser that generated \$1,000 in contributions, each of his publicly funded opponents would receive \$940.
- If an independent expenditure group spent \$1,000 on a brochure expressing its support for the privately financed candidate, each of the publicly financed candidates would receive \$940 directly.
- If an independent expenditure group spent \$1,000 on a brochure opposing one of the publicly financed candidates, but saying nothing about the privately financed candidate, the publicly financed candidates would receive \$940 directly.

- If an independent expenditure group spent \$1,000 on a brochure supporting one of the publicly financed candidates, the other publicly financed candidate would receive \$940 directly, but the privately financed candidate would receive nothing.
- If an independent expenditure group spent \$1,000 on a brochure opposing the privately financed candidate, no matching funds would be issued.

A publicly financed candidate would continue to receive additional state money in response to fundraising and spending by the privately financed candidate and independent expenditure groups until that publicly financed candidate received a total of \$64,437 in state funds (three times the initial allocation for a State House race).

Petitioners in this case, plaintiffs below, are five past and future candidates for Arizona state office—four members of the House of Representatives and the Arizona state treasurer—and two independent groups that spend money to support and oppose Arizona candidates. They filed suit challenging the constitutionality of the matching funds provision. The candidates and independent expenditure groups argued that the matching funds provision unconstitutionally penalized their speech and burdened their ability to fully exercise their First Amendment rights.

* * * The District Court entered a permanent injunction against the enforcement of the matching funds provision, but * * * the Court of Appeals reversed the District Court. * * *

Although the speech of the candidates and independent expenditure groups that brought this suit is not directly capped by Arizona’s matching funds provision, those parties contend that their political speech is substantially burdened by the state law in the same way that speech was burdened by the law we recently found invalid in *Davis v. Federal Election Comm’n*, 554 U.S. 724 (2008) [p. 1007]. In *Davis*, we considered a First Amendment challenge to the so-called “Millionaire’s Amendment” of the Bipartisan Campaign Reform Act of 2002. Under that Amendment, if a candidate for the United States House of Representatives spent more than \$350,000 of his personal funds, [his opponent] was permitted to collect individual contributions up to \$6,900 per contributor—three times the normal contribution limit of \$2,300. The candidate who spent more than the personal funds limit remained subject to the original contribution cap. * * *

In addressing the constitutionality of the Millionaire’s Amendment, we acknowledged that the provision did not impose an outright cap on a candidate’s personal expenditures. We nonetheless concluded that the Amendment was unconstitutional because it forced a candidate “to choose between the First Amendment right to engage in unfettered political speech and subjection to discriminatory fundraising limitations.” *Id.*, at 739. * * *

The logic of *Davis* largely controls our approach to this case. Much like the burden placed on speech in *Davis*, the matching funds provision “imposes an unprecedented penalty on any candidate who robustly exercises [his] First Amendment right[s].” Under that provision, “the vigorous exercise of the right to use personal funds to finance campaign speech” leads to “advantages for opponents in the competitive context of electoral politics.” *Ibid.*

Once a privately financed candidate has raised or spent more than the State’s initial grant to a publicly financed candidate, each personal dollar spent by the privately financed candidate results in an award of almost one additional dollar to his opponent. That plainly forces the privately financed candidate to “shoulder a special and potentially significant burden” when choosing to exercise his First Amendment right to spend funds on behalf of his candidacy. If the law at issue in *Davis* imposed a burden on candidate speech, the Arizona law unquestionably does so as well.

The penalty imposed by Arizona’s matching funds provision is different in some respects from the penalty imposed by the law we struck down in *Davis*. But those differences make the Arizona law *more* constitutionally problematic, not less. First, the penalty in *Davis* consisted of raising the contribution limits for one of the candidates. The candidate who benefited from the increased limits still had to go out and raise the funds. He may or may not have been able to do so. The other candidate, therefore, faced merely the possibility that his opponent would be able to raise additional funds, through contribution limits that remained subject to a cap. And still the Court held that this was an “unprecedented penalty,” a “special and potentially significant burden” that had to be justified by a compelling state interest—a rigorous First Amendment hurdle. 554 U.S., at 739-740. Here the benefit to the publicly financed candidate is the direct and automatic release of public money. That is a far heavier burden than in *Davis*.

Second, depending on the specifics of the election at issue, the matching funds provision can create a multiplier effect. In the Arizona Fourth District House election previously discussed, if the spending cap were exceeded, each dollar spent by the privately funded candidate would result in an additional dollar of campaign funding to each of that candidate’s publicly financed opponents. In such a situation, the matching funds provision forces privately funded candidates to fight a political hydra of sorts. Each dollar they spend generates two adversarial dollars in response. Again, a markedly more significant burden than in *Davis*.

Third, unlike the law at issue in *Davis*, all of this is to some extent out of the privately financed candidate’s hands. Even if that candidate opted to spend less than the initial public financing cap, any spending by independent expenditure groups to promote the privately financed candidate’s election—regardless whether such support was welcome or helpful—could trigger matching funds. What is more, that state money would go directly to the publicly funded candidate to use as he saw fit. That disparity in control—giving money directly to a publicly financed candidate, in response to independent expenditures that cannot be coordinated with the privately funded candidate—is a substantial advantage for the publicly funded candidate. That candidate can allocate the money according to his own campaign strategy, which the privately financed candidate could not do with the independent group expenditures that triggered the matching funds.

The burdens that this regime places on independent expenditure groups are akin to those imposed on the privately financed candidates themselves. Just as with the candidate the independent group supports, the more money spent on that candidate’s behalf or in opposition to a publicly funded candidate, the more money the publicly funded candidate receives from the State. And just as with the privately financed candidate, the effect of a dollar spent on election speech is a guaranteed financial payout to the publicly funded candidate the group opposes. Moreover, spending one dollar can result in the flow of dollars to multiple candidates the group disapproves of, dollars directly controlled by the publicly funded candidate or candidates.

In some ways, the burden the Arizona law imposes on independent expenditure groups is worse than the burden it imposes on privately financed candidates, and thus substantially worse than the burden we found constitutionally impermissible in *Davis*. If a candidate contemplating an electoral run in Arizona surveys the campaign landscape and decides that the burdens imposed by the matching funds regime make a privately funded campaign unattractive, he at least has the option of taking public financing. Independent expenditure groups, of course, do not.

Once the spending cap is reached, an independent expenditure group that wants to support a particular candidate—because of that candidate’s stand on an issue of concern to the group—can

only avoid triggering matching funds in one of two ways. The group can either opt to change its message from one addressing the merits of the candidates to one addressing the merits of an issue, or refrain from speaking altogether. Presenting independent expenditure groups with such a choice makes the matching funds provision particularly burdensome to those groups. And forcing that choice—trigger matching funds, change your message, or do not speak—certainly contravenes “the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message.”⁶ * * *

Arizona * * * correctly points out that our decision in *Davis* focused on the asymmetrical contribution limits imposed by the Millionaire’s Amendment. But that is not because—as the State asserts—the reach of that opinion is limited to asymmetrical contribution limits. It is because that was the particular burden on candidate speech we faced in *Davis*. And whatever the significance of the distinction in general, there can be no doubt that the burden on speech is significantly greater in this case than in *Davis*: That means that the law here—like the one in *Davis*—must be justified by a compelling state interest.

The State argues that the matching funds provision actually results in more speech by “increas[ing] debate about issues of public concern” in Arizona elections and “promot[ing] the free and open debate that the First Amendment was intended to foster.” In the State’s view, this promotion of First Amendment ideals offsets any burden the law might impose on some speakers.

Not so. Any increase in speech resulting from the Arizona law is of one kind and one kind only—that of publicly financed candidates. The burden imposed on privately financed candidates and independent expenditure groups reduces their speech; “restriction[s] on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression.” *Buckley v. Valeo*, 424 U.S. [1], 19 [(1976)] [p. 797]. Thus, even if the matching funds provision did result in more speech by publicly financed candidates and more speech in general, it would do so at the expense of impermissibly burdening (and thus reducing) the speech of privately financed candidates and independent expenditure groups. This sort of “beggar thy neighbor” approach to free speech—“restrict[ing] the speech of some elements of our society in order to enhance the relative voice of others” is “wholly foreign to the First Amendment.” *Id.*, at 48-49.⁷ * * *

The State also argues, and the Court of Appeals concluded, that any burden on privately financed candidates and independent expenditure groups is more analogous to the burden placed on speakers by the disclosure and disclaimer requirements we recently upheld in *Citizens United v. Federal Election Comm’n*, 558 U.S. ___, 175 L. Ed. 2d 753 (2010) [p. 1075] than to direct restrictions on candidate and independent expenditures. This analogy is not even close. A

⁶ The dissent sees “chutzpah” in candidates exercising their right not to participate in the public financing scheme, while objecting that the system violates their First Amendment rights. The charge is unjustified, but, in any event, it certainly cannot be leveled against the independent expenditure groups. The dissent barely mentions such groups in its analysis, and fails to address not only the distinctive burdens imposed on these groups—as set forth above—but also the way in which privately financed candidates are particularly burdened when matching funds are triggered by independent group speech.

⁷ The dissent also repeatedly argues that the Arizona matching funds regime results in “more political speech,” but—given the logic of the dissent’s position—that is only as a step to *less* speech. If the matching funds provision achieves its professed goal and causes candidates to switch to public financing, there will be less speech: no spending above the initial state-set amount by formerly privately financed candidates, and no associated matching funds for anyone. Not only that, the level of speech will depend on the State’s judgment of the desirable amount, an amount tethered to available (and often scarce) state resources.

political candidate's disclosure of his funding resources does not result in a cash windfall to his opponent, or affect their respective disclosure obligations. * * *

The State contends that if the matching funds provision truly burdened the speech of privately financed candidates and independent expenditure groups, spending on behalf of privately financed candidates would cluster just below the triggering level, but no such phenomenon has been observed. That should come as no surprise. The hypothesis presupposes a privately funded candidate who would spend his own money just up to the matching funds threshold, when he could have simply taken matching funds in the first place.

Furthermore, the Arizona law takes into account all manner of uncoordinated political activity in awarding matching funds. If a privately funded candidate wanted to hover just below the triggering level, he would have to make guesses about how much he will receive in the form of contributions and supportive independent expenditures. He might well guess wrong.

In addition, some candidates may be willing to bear the burden of spending above the cap. That a candidate is willing to do so does not make the law any less burdensome. If the State made privately funded candidates pay a \$500 fine to run as such, the fact that candidates might choose to pay it does not make the fine any less burdensome. * * *

It is clear not only to us but to every other court to have considered the question after *Davis* that a candidate or independent group might not spend money if the direct result of that spending is additional funding to political adversaries. The dissent's disagreement is little more than disagreement with *Davis*.

The State correctly asserts that the candidates and independent expenditure groups "do not . . . claim that a single lump sum payment to publicly funded candidates," equivalent to the maximum amount of state financing that a candidate can obtain through matching funds, would impermissibly burden their speech. The State reasons that if providing all the money up front would not burden speech, providing it piecemeal does not do so either. And the State further argues that such incremental administration is necessary to ensure that public funding is not under- or over-distributed.

These arguments miss the point. It is not the amount of funding that the State provides to publicly financed candidates that is constitutionally problematic in this case. It is the manner in which that funding is provided—in direct response to the political speech of privately financed candidates and independent expenditure groups. And the fact that the State's matching mechanism may be more efficient than other alternatives—that it may help the State in "finding the sweet-spot" or "fine-tuning" its financing system to avoid a drain on public resources—is of no moment; "the First Amendment does not permit the State to sacrifice speech for efficiency."

The United States as *amicus* contends that "[p]roviding additional funds to petitioners' opponents does not make petitioners' own speech any less effective" and thus does not substantially burden speech. Of course it does. One does not have to subscribe to the view that electoral debate is zero sum to see the flaws in the United States' perspective. All else being equal, an advertisement supporting the election of a candidate that goes without a response is often more effective than an advertisement that is directly controverted. And even if the publicly funded candidate decides to use his new money to address a different issue altogether, the end goal of that spending is to claim electoral victory over the opponent that triggered the additional state funding.

Because the Arizona matching funds provision imposes a substantial burden on the speech of privately financed candidates and independent expenditure groups, "that provision cannot stand unless it is 'justified by a compelling state interest.'"

There is a debate between the parties in this case as to what state interest is served by the matching funds provision. The privately financed candidates and independent expenditure groups contend that the provision works to “level[] electoral opportunities” by equalizing candidate “resources and influence.” The State and the Clean Elections Institute counter that the provision “furthers Arizona’s interest in preventing corruption and the appearance of corruption.” * * *

We have repeatedly rejected the argument that the government has a compelling state interest in “leveling the playing field” that can justify undue burdens on political speech. In *Davis*, we stated that discriminatory contribution limits meant to “level electoral opportunities for candidates of different personal wealth did not serve “a legitimate government objective,” let alone a compelling one. 554 U.S., at 741. And in *Buckley*, we held that limits on overall campaign expenditures could not be justified by a purported government “interest in equalizing the financial resources of candidates.” 424 U.S., at 56. After all, equalizing campaign resources “might serve not to equalize the opportunities of all candidates, but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign.” *Id.*, at 57.

“Leveling electoral opportunities means making and implementing judgments about which strengths should be permitted to contribute to the outcome of an election,” *Davis, supra*, at 742—a dangerous enterprise and one that cannot justify burdening protected speech. * * * [S]uch basic intrusion by the government into the debate over who should govern goes to the heart of First Amendment values.

“Leveling the playing field” can sound like a good thing. But in a democracy, campaigning for office is not a game. It is a critically important form of speech. The First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the “unfettered interchange of ideas”—not whatever the State may view as fair.

As already noted, the State and the Clean Elections Institute disavow any interest in “leveling the playing field.” They instead assert that the “Equal funding of candidates” provision serves the State’s compelling interest in combating corruption and the appearance of corruption. But even if the ultimate objective of the matching funds provision is to combat corruption—and not “level the playing field”—the burdens that the matching funds provision imposes on protected political speech are not justified.

Burdening a candidate’s expenditure of his own funds on his own campaign does not further the State’s anticorruption interest. Indeed, we have said that “reliance on personal funds *reduces* the threat of corruption” and that “discouraging [the] use of personal funds[] disserves the anticorruption interest.” *Davis, supra*, at 740-741. That is because “the use of personal funds reduces the candidate’s dependence on outside contributions and thereby counteracts the coercive pressures and attendant risks of abuse” of money in politics. *Buckley, supra*, at 53. The matching funds provision counts a candidate’s expenditures of his own money on his own campaign as contributions, and to that extent cannot be supported by any anticorruption interest.

We have also held that “independent expenditures . . . do not give rise to corruption or the appearance of corruption.” *Citizens United*, 558 U.S., at ___, 130 S. Ct. 876. “By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.” *Id.*, at ___, 130 S. Ct. 876, 910. The candidate-funding circuit is broken. The separation between candidates and independent expenditure groups negates the possibility that independent expenditures will result in the sort of *quid pro quo* corruption with which our case

law is concerned. Including independent expenditures in the matching funds provision cannot be supported by any anticorruption interest.

We have observed in the past that “[t]he interest in alleviating the corrupting influence of large contributions is served by . . . contribution limitations.” *Id.*, at 55. Arizona already has some of the most austere contribution limits in the United States. Contributions to statewide candidates are limited to \$840 per contributor per election cycle and contributions to legislative candidates are limited to \$410 per contributor per election cycle. Arizona also has stringent fundraising disclosure requirements. In the face of such ascetic contribution limits, strict disclosure requirements, and the general availability of public funding, it is hard to imagine what marginal corruption deterrence could be generated by the matching funds provision.

Perhaps recognizing that the burdens the matching funds provision places on speech cannot be justified in and of themselves, either as a means of leveling the playing field or directly fighting corruption, the State and the Clean Elections Institute offer another argument: They contend that the provision indirectly serves the anticorruption interest, by ensuring that enough candidates participate in the State’s public funding system, which in turn helps combat corruption. We have said that a voluntary system of “public financing as a means of eliminating the improper influence of large private contributions furthers a significant governmental interest.” *Buckley, supra*, at 96. But the fact that burdening constitutionally protected speech might indirectly serve the State’s anticorruption interest, by encouraging candidates to take public financing, does not establish the constitutionality of the matching funds provision. * * *

The flaw in the State’s argument is apparent in what its reasoning would allow. By the State’s logic it could grant a publicly funded candidate five dollars in matching funds for every dollar his privately financed opponent spent, or force candidates who wish to run on private funds to pay a \$10,000 fine in order to encourage participation in the public funding regime. Such measures might well promote participation in public financing, but would clearly suppress or unacceptably alter political speech. How the State chooses to encourage participation in its public funding system matters, and we have never held that a State may burden political speech—to the extent the matching funds provision does—to ensure adequate participation in a public funding system. Here the State’s chosen method is unduly burdensome and not sufficiently justified to survive First Amendment scrutiny. * * *

The judgment of the Court of Appeals for the Ninth Circuit is reversed.

It is so ordered.

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

The majority contends that the matching funds provision “substantially burdens protected political speech” and does not “serv[e] a compelling state interest.” But the Court is wrong on both counts. * * *

* * * Arizona’s matching funds provision does not restrict, but instead subsidizes, speech. The law “impose[s] no ceiling on [speech] and do[es] not prevent anyone from speaking.” *Citizens United*, 558 U.S., [at] _____. * * * By enabling participating candidates to respond to their opponents’ expression, the statute expands public debate, in adherence to “our tradition that more speech, not less, is the governing rule.” [*Id.*] at ____, 130 S. Ct. 876, 911. What the law does—all the law does—is fund more speech.² * * *

² And the law appears to do that job well. Between 1998 (when the statute was enacted) and 2006, overall candidate expenditures increased between 29% and 67%; overall independent expenditures rose by a whopping 253%; and

[Petitioners] are making a novel argument: that Arizona violated *their* First Amendment rights by disbursing funds to *other* speakers even though they could have received (but chose to spurn) the same financial assistance. Some people might call that *chutzpah*.

Indeed, what petitioners demand is essentially a right to quash others' speech through the prohibition of a (universally available) subsidy program. Petitioners are able to convey their ideas without public financing—and they would prefer the field to themselves, so that they can speak free from response. To attain that goal, they ask this Court to prevent Arizona from funding electoral speech—even though that assistance is offered to every state candidate, on the same (entirely unobjectionable) basis. And this Court gladly obliges.

If an ordinary citizen, without the hindrance of a law degree, thought this result an upending of First Amendment values, he would be correct. That Amendment protects no person's, nor any candidate's, "right to be free from vigorous debate." Indeed, the Amendment exists so that this debate can occur—robust, forceful, and contested. * * * And this is no place more true than in elections, where voters' ability to choose the best representatives depends on debate—on charge and countercharge, call and response. So to invalidate a statute that restricts no one's speech and discriminates against no idea—that only provides more voices, wider discussion, and greater competition in elections—is to undermine, rather than to enforce, the First Amendment.⁴ * * *

* * * According to the Court, the special problem here lies in Arizona's matching funds mechanism, which the majority claims imposes a "substantia[l] burde[n]" on a privately funded candidate's speech. Sometimes, the majority suggests that this "burden" lies in the way the mechanism "diminish[es] the effectiveness" of the privately funded candidate's expression by enabling his opponent to respond. At other times, the majority indicates that the "burden" resides in the deterrent effect of the mechanism: The privately funded candidate "might not spend money" because doing so will trigger matching funds. Either way, the majority is wrong to see a substantial burden on expression.⁵

Most important, and as just suggested, the very notion that additional speech constitutes a "burden" is odd and unsettling. * * *

But put to one side this most fundamental objection to the majority's argument; even then, has the majority shown that the burden resulting from the Arizona statute is "substantial"? I will not quarrel with the majority's assertion that responsive speech by one candidate may make another candidate's speech less effective; that, after all, is the whole idea of the First Amendment, and a *benefit* of having more responsive speech. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the

average candidate expenditures grew by 12% to 40%.

⁴ The majority argues that more speech will quickly become "less speech," as candidates switch to public funding. But that claim misunderstands how a voluntary public financing system works. Candidates with significant financial resources will likely decline public funds, so that they can spend in excess of the system's expenditure caps. Other candidates accept public financing because they believe it will enhance their communication with voters. So the system continually pushes toward more speech. That is exactly what has happened in Arizona, see n.2, *supra*, and the majority offers no counter-examples.

⁵ The majority's error on this score extends both to candidates and to independent expenditure groups. Contrary to the majority's suggestion, nearly all of my arguments showing that the Clean Elections Act does not impose a substantial burden apply to both sets of speakers (and apply regardless of whether independent or candidate expenditures trigger the matching funds). That is also true of every one of my arguments demonstrating the State's compelling interest in this legislation. But perhaps the best response to the majority's view that the Act inhibits independent expenditure groups lies in an empirical fact already noted: Expenditures by these groups have risen by 253% since Arizona's law was enacted. See n. 2, *supra*.

thought to get itself accepted in the competition of the market”). And I will assume that the operation of this statute may on occasion deter a privately funded candidate from spending money, and conveying ideas by that means. My guess is that this does not happen often: Most political candidates, I suspect, have enough faith in the power of their ideas to prefer speech on both sides of an issue to speech on neither. But I will take on faith that the matching funds provision may lead one or another privately funded candidate to stop spending at one or another moment in an election. Still, does that effect count as a severe burden on expression? By the measure of our prior decisions—which have upheld campaign reforms with an equal or greater impact on speech—the answer is no.

Number one: *Any* system of public financing, including the lump-sum model upheld in *Buckley*, imposes a similar burden on privately funded candidates. Suppose Arizona were to do what all parties agree it could under *Buckley*—provide a single upfront payment (say, \$150,000) to a participating candidate, rather than an initial payment (of \$50,000) plus 94% of whatever his privately funded opponent spent, up to a ceiling (the same \$150,000). That system would “diminis[h] the effectiveness” of a privately funded candidate’s speech at least as much, and in the same way: It would give his opponent, who presumably would not be able to raise that sum on his own, more money to spend. And so too, a lump-sum system may deter speech. A person relying on private resources might well choose not to enter a race at all, because he knows he will face an adequately funded opponent. And even if he decides to run, he likely will choose to speak in different ways—for example, by eschewing dubious, easy-to-answer charges—because his opponent has the ability to respond. Indeed, privately funded candidates may well find the lump-sum system *more* burdensome than Arizona’s (assuming the lump is big enough). Pretend you are financing your campaign through private donations. Would you prefer that your opponent receive a guaranteed, upfront payment of \$150,000, or that he receive only \$50,000, with the *possibility*—a possibility that you mostly get to control—of collecting another \$100,000 somewhere down the road? Me too. That’s the first reason the burden on speech cannot command a different result in this case than in *Buckley*.

Number two: Our decisions about disclosure and disclaimer requirements show the Court is wrong. Starting in *Buckley* and continuing through last Term, the Court has repeatedly declined to view these requirements as a substantial First Amendment burden, even though they discourage some campaign speech. * * * Like a disclosure rule, the matching funds provision may occasionally deter, but “impose[s] no ceiling” on electoral expression.

The majority breezily dismisses this comparison, labeling the analogy “not even close” because disclosure requirements result in no payment of money to a speaker’s opponent. That is indeed the factual distinction: A matching fund provision, we can all agree, is not a disclosure rule. But the majority does not tell us why this difference matters. Nor could it. The majority strikes down the matching funds provision because of its ostensible *effect*—most notably, that it may deter a person from spending money in an election. But this Court has acknowledged time and again that disclosure obligations have the selfsame effect. If that consequence does not trigger the most stringent judicial review in the one case, it should not do so in the other.

Number three: Any burden that the Arizona law imposes does not exceed the burden associated with contribution limits, which we have also repeatedly upheld. * * * Rather than potentially deterring or “diminish[ing] the effectiveness” of expressive activity, these limits stop it cold. Yet we have never subjected these restrictions to the most stringent review. * * *

The majority thinks it has one case on its side—*Davis v. Federal Election Comm’n*—and it pegs everything on that decision. But *Davis* relies on principles that fit securely within our First Amendment law and tradition—most unlike today’s opinion. * * *

* * * In *Davis*, the candidate’s expenditure triggered a discriminatory speech restriction, which Congress could not otherwise have imposed consistent with the First Amendment; by contrast, in this case, the candidate’s expenditure triggers a non-discriminatory speech subsidy, which all parties agree Arizona could have provided in the first instance. In First Amendment law, that difference makes a difference—indeed, it makes *all* the difference. * * *

But what of the trigger mechanism—in *Davis*, as here, a candidate’s campaign expenditures? That, after all, is the only thing that this case and *Davis* share. If *Davis* had held that the trigger mechanism itself violated the First Amendment, then the case would support today’s holding. But *Davis* said nothing of the kind. * * * Indeed, *Davis* explained that Congress could have used that mechanism to activate a *non-discriminatory* (i.e., across-the-board) increase in contribution limits; in that case, the Court stated, “*Davis*’ argument would plainly fail.” *Id.*, at 737.⁸ The constitutional infirmity in *Davis* was not the trigger mechanism, but rather what lay on the other side of it—a discriminatory speech restriction. * * *

For all these reasons, the Court errs in holding that the government action in this case substantially burdens speech and so requires the State to offer a compelling interest. But in any event, Arizona has come forward with just such an interest, explaining that the Clean Elections Act attacks corruption and the appearance of corruption in the State’s political system. * * *

* * * The Clean Elections Act, the State avers, “deters *quid pro quo* corruption and the appearance of corruption by providing Arizona candidates with an option to run for office without depending on outside contributions.” And so Arizona, like many state and local governments, has implemented public financing on the theory (which this Court has previously approved), that the way to reduce political corruption is to diminish the role of private donors in campaigns.¹¹

And that interest justifies the matching funds provision at issue because it is a critical facet of Arizona’s public financing program. The provision is no more than a disbursement mechanism; but it is also the thing that makes the whole Clean Elections Act work. [P]ublic financing has an Achilles heel—the difficulty of setting the subsidy at the right amount. Too small, and the grant will not attract candidates to the program; and with no participating candidates, the program can hardly decrease corruption. Too large, and the system becomes unsustainable, or at the least an unnecessary drain on public resources. But finding the sweet-spot is near impossible because of

⁸ Notably, the Court found this conclusion obvious even though an across-the-board increase in contribution limits works to the comparative advantage of the non-self-financing candidate—that is, the candidate who actually depends on contributions. Such a system puts the self-financing candidate to a choice: Do I stop spending, or do I allow the higher contribution limits (which will help my opponent) to kick in? That strategic choice parallels the one that the Arizona statute forces.

¹¹ The majority briefly suggests that the State’s “austere contribution limits” lessen the need for public financing, but provides no support for that dubious claim. As Arizona and other jurisdictions have discovered, contribution limits may not eliminate the risk of corrupt dealing between candidates and donors, especially given the widespread practice of bundling small contributions into large packages. For much this reason, *Buckley* upheld *both* limits on contributions to federal candidates *and* public financing of presidential campaigns. Arizona, like Congress, was “surely entitled to conclude” that contribution limits were only a “partial measure,” and that a functional public financing system was also necessary to eliminate political corruption. In stating otherwise, the Court substitutes its judgment for that of Arizona’s voters, contrary to our practice of declining to “second-guess a . . . determination as to the need for prophylactic measures where corruption is the evil feared.” *Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) [p. 832].

variation, across districts and over time, in the political system. Enter the matching funds provision, which takes an ordinary lump-sum amount, divides it into thirds, and disburses the last two of these (to the extent necessary) via a self-calibrating mechanism. That provision is just a fine-tuning of the lump-sum program approved in *Buckley*—a fine-tuning, it bears repeating, that prevents no one from speaking and discriminates against no message. But that fine-tuning can make the difference between a wholly ineffectual program and one that removes corruption from the political system.¹² If public financing furthers a compelling interest—and according to this Court, it does—then so too does the disbursement formula that Arizona uses to make public financing effective. The one conclusion follows directly from the other.

* * * Less corruption, more speech. Robust campaigns leading to the election of representatives not beholden to the few, but accountable to the many. The people of Arizona might have expected a decent respect for those objectives.

Today, they do not get it. * * *

Notes and Questions

1. Was the Court correct that “[t]he logic of *Davis*” controlled the outcome of this case?
2. Much of Justice Kagan’s dissent is based on the premise that the law is consistent with “First Amendment values.” She argues that so long as the law is consistent with such values, the people, through their elected representatives, should decide public policy. The Majority responds that “[t]he First Amendment embodies our choice as a Nation that, when it comes to such speech, the guiding principle is freedom—the ‘unfettered interchange of ideas.’” Thus, beyond the controlling power of the *Davis* precedent, the two sides work from fundamentally different views about the how a judge should view constitutional interpretation – do First Amendment values predominate, or does the constitution choose among means to attain those values?

Similarly, note that the two opinions offer very different views of the likely empirical effects of both money in campaigns, and of the law, and have very different interpretations of the likely reason such laws are passed.

3. If Arizona’s matching funds had been triggered by only contributions by supporters of the privately financed candidate (*i.e.*, had ignored independent expenditures and the candidate’s own expenditures), should the result have been different? Did the dissent adequately account for the burdens on speech caused by the state’s use of independent expenditures and candidates’ own money in the matching-funds formula?

4. Justice Kagan argued that Arizona’s interest in distributing matching funds was not the equalization of resources *per se*, but rather encouraging candidates to opt-in to the public-financing system by promising the candidates the funds necessary to wage competitive races. Encouraging participation in the public-financing system, in turn, was tied to the traditional anti-corruption interest. Is this meaningfully different from the equality argument, or is it simply a back-door way of promoting equality in anti-corruption garb? (Interestingly, Justice Kagan clerked for Justice Marshall, who authored the Court’s opinion in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652 (1990) [p. 944]. That case, subsequently overruled by

¹² For this reason, the majority is quite wrong to say that the State’s interest in combating corruption does not support the matching fund provision’s application to a candidate’s expenditure of his own money or to an independent expenditure. The point is not that these expenditures themselves corrupt the political process. Rather, Arizona includes these, as well as all other, expenditures in the program to ensure that participating candidates receive the funds necessary to run competitive races—and so to attract those candidates in the first instance. That is in direct service of the State’s anti-corruption interest.

Citizens United, itself used anti-corruption language to mask an equality rationale for limiting corporate expenditures in candidate races.)

5. The Arizona law limited the matching funds to twice the initial grant. Which candidates, do you suppose, were most affected by the cap on matching funds? In other words, how would the cap affect which candidates were burdened by those matching funds? Should the cap have affected the constitutionality of the law?

6. Justice Kagan presumed that the statute was content neutral. Was it? As Justice Kagan pointed out, all candidates could decide to participate in the program, but is it possible *a priori* to identify candidates of certain beliefs or with certain bases of support who are less likely to accept public funding? Note that support for public financing tends to be higher among candidates and voters who favor a larger role for government, while ideological opposition tends to be concentrated among candidates who prefer a smaller role for government. Correspondingly, almost all candidates who declined to accept the subsidies in Arizona were Republicans. Should this matter so long as all candidates can participate? Are there constitutional issues posed by the government directly financing candidate speech that go beyond the question of whether the government funding system produces more or less total speech?

7. Since *Buckley*, the Court has allowed various campaign-finance laws to stand on the grounds that they serve the vital state interest in combating “corruption or its appearance.” Can taxpayer subsidies of campaigns themselves become a source of corruption that actually lowers public trust in government? Taxpayers, and hence the government, will normally have little interest in how private campaign contributions are spent. However, the government has a need and incentive to monitor government spending for fraud and abuse. And such fraud can erode public confidence in government. Consider the following episodes from Arizona:

- A candidate spent \$3118 on a camera, a desktop computer, a laptop, and a monitor, plus software for both computers. After the campaign, the candidate was allowed to keep the purchases. The candidate, running as a Green Party member, finished fifth with 2.6% of the vote. Green Party officials claimed not to have heard of her and opposed her election. Democrats further claimed that the candidate was actually a Republican, who re-registered as a Green to gain over \$60,000 in state subsidies and hoped to siphon votes from the Democrat in the race. The candidate won over 2300 votes, and the Republican won by fewer than 600.
- “A trio of young Scottsdale residents registered to run as ‘clean’ Libertarian candidates in 2002, only to blow \$86,000 on stuff like sushi and drinks at Sanctuary [a bar near the Arizona State University campus]. The three claimed that they were running a campaign designed to target ASU students.”
- On the final day of a contested primary race, a candidate spent \$405 on a GPS unit for his car, including a two-year service plan. Another spent \$795 at a bicycle shop.
- A candidate paid a marketing firm \$23,155 to help with the campaign. The firm’s sole owner was the candidate himself.
- A candidate paid himself \$2861 in “petty cash/miscellaneous” expenses during the three month campaign.

Sarah Fenske, *The Dirty Truth About Clean Elections*, Phoenix New Times, April 2, 2009, p.1, at <http://www.phoenixnewtimes.com/2009-04-02/news/the-dirty-truth-about-clean-elections/>.

Another problem may be “gaming” the system. One Arizona Republican primary featured three candidates: Bouie, Seel, and Crump. Bouie and Seel did not participate in the plan, but Crump did. Because Arizona has multi-legislator districts, two of the three candidates would

advance to the general election. Seel and Crump operated as a team. Thus, each time Bouie raised added funds, Crump got more money. But each time Seel, Crump's partner, raised more funds, Crump again got more money. Crump and Seel then both spent most of their campaign funds attacking Bouie, but not each other. Crump and Seel eventually won the primary. Similarly, in a Democratic primary race, three candidates ran as a team in the primary for state Corporations Commission. Because there were three open positions, all three could advance. One wealthy candidate chose not to participate and then spent \$250,000 of his own funds in the primary, thus triggering matching funds for his two participating teammates. The three candidates did not intend to campaign against one another in the primary, however, but against their likely Republican general-election opponents. Thus, the self-financed Democrat was able to "triple his investment." *Id.*

How might the state solve such problems legislatively? Or is some gaming of the system simply unavoidable, just as some military waste or some welfare fraud is unavoidable? If so, is it an acceptable price to pay for combating wider political corruption? Or does it undermine the entire anti-corruption argument?

8. *Problem:* Capital City launched a public-financing plan approximately two decades ago for candidates for Mayor and City Council. Under the plan, contributions to participating candidates up to \$150 are matched with \$6 of public funding. Participating candidates agree not to spend in excess of \$50,000. However, if a non-participating opponent exceeds the \$50,000 limit, the participating candidate can resume raising private funds, which are matched six-to-one, until his total receipts from contributions and public funds equals what the non-participating candidate has spent. All contributions, for both participating and non-participating candidates, are limited to \$250. Independent expenditures are not considered in the system. As Deputy City Attorney, you have been asked to advise the City Council on the constitutionality of the plan in light of the decision in *Arizona Free Enterprise*. Is the system constitutional?

I. MANDATORY DISCLOSURE OF CONTRIBUTIONS AND EXPENDITURES

Page 1079. Insert the following after Note 3:

3a. Disclosure raises several areas of concern, only one of which is how large contributions should be before disclosure is required. Another concern, which has become more significant in the wake of *Citizens United's* (p. 1014), protection of independent expenditures by corporations, is how much the government should be able to pierce through an organization to determine who "really" is paying for ads. In other words, how deep into the financing of political organizations should disclosure go? Consider the following example, based on actual practices in recent elections:

American Widget, Inc. is one of five widget manufacturers in the United States. It pays dues of \$1 million per year to the American Widget Manufacturers Association ("AWMA"), a trade association for the industry. AWMA then pays dues of \$500,000 per year to the National Chamber of Commerce, to support its work in fostering a healthy business environment. The Chamber wishes to influence judicial races in the state of Corruptopia, but seeks to encourage the engagement of the local business community. Thus, it offers to match up to \$1 million raised by the State Chamber to spend in state-supreme-court races. State Chamber establishes a subsidiary for its partisan political work, Good Government Fund, and gets the match from National

Chamber. Good Government Fund then forms the State Business Alliance with the State Manufacturers Association and State Retailers Association, to engage in political spending.

Ads run by the State Business Alliance state that they are paid for by the Alliance as independent expenditures. The Alliance files independent expenditures reports with the state, and lists, as contributors, the Good Government Fund, the State Manufacturers Association, and the State Retailers Association. Should anything more be disclosed? Who or what? Should all dues-paying members of the State Retailers be included in disclosure reports? Would it be informative to voters to know that American Widget supported the Widget Manufacturers which supported the National Chamber which supported the State Chamber which supported the Good Government Fund which supported the State Business Alliance? Is there a point at which the review up the “chain” should be cut off?

Does it matter why American Widget first surrendered the money? Or how many steps it is legally removed from control over the money? Should the government be able to penetrate all the way “up the chain” to the earliest source of the money?

Suppose the State Business Alliance also decides to make independent expenditures in support of Joe Nafta, a congressional candidate who strongly supports free trade agreements with various South American nations, because it likes his positions on taxes and regulation. The Widget Manufacturers Association, however, has endorsed Nafta’s opponent because its top legislative priority is to maintain high tariffs on imported South American widgets, which have been undercutting the prices charged by American widget manufacturers. Would it be helpful or confusing to voters to penetrate up the chain and require State Business Alliance to report the Widget Manufacturers Association as having helped to pay for the ads favoring Joe Nafta? *See Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F.3d 304 (8th Cir. 2011).

Chapter 10

AT THE POLLS

B. Burdens on Casting Ballots

Page 1096. Add the following after Note 8:

8a. Since *Crawford* was decided, several states—Alabama, Idaho, Kansas, Oklahoma, Rhode Island, Tennessee, Utah, and Wisconsin—have passed new or stricter Voter-ID laws, and several others are considering such laws. (South Carolina and Texas recently passed photo-ID laws as well, which must obtain preclearance under the Voting Rights Act before going into effect.) A useful catalogue of states' laws by the National Conference of State Legislatures is available at <http://www.ncsl.org/default.aspx?tabid=16602>. One can expect legal challenges to many of the new laws. Georgia's Supreme Court recently rejected a state-constitutional challenge to that state's law. *Democratic Party of Georgia v. Perdue*, 707 S.E.2d 67 (Ga. 2011).

C. Campaign-Free Zones Around Polling Places

Page 1112. Add the following to the end of Note 8:

Cf. Jeremy A. Blumenthal & Terry L. Turnipseed, *The Polling Place Priming (PPP) Effect: Is Voting in Churches (or Anywhere Else) Unconstitutional?*, 91 B.U. L. REV. 561 (2011) (suggesting that polling places may affect voting behavior, and offering absentee and convenience voting as a solution).

Chapter 11

COUNTING THE VOTES

B. Constitutional Limits

Page 1134. Add the following to Note 8:

For an argument that ADR techniques should be used more often in election-law disputes, see Erin Butcher-Lyden, Note, *The Need for Mandatory Mediation and Arbitration in Election Law Disputes*, 25 OHIO ST. J. ON DISP. RESOL. 531 (2010).

Page 1135. Add a new Note 9 after Note 8:

9. While plaintiffs invoking *Bush v. Gore* do not always prevail, the seeming dormancy of the case (see Note 7) can be overstated. Consider two elections in the Fall 2010 cycle. In one, U.S. Senator Lisa Murkowski was defeated in the Republican primary, but successfully retained her office, running as an independent write-in candidate in the general election. The losing candidate, who prevailed in the primary, thereafter filed suits in state and federal court to challenge some of the write-in votes for Murkowski, on the basis of spelling errors regarding her name. The Alaska Supreme Court rejected the challenges, holding state statutes did not require exact spellings, and that no more lenient standard for counting write-in votes (as compared to optical scanners) was used, so *Bush v. Gore* was not implicated. *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010). A few days later, the federal court also rejected the challenge on similar equal-protection grounds. *Miller v. Treadwell*, 736 F. Supp. 2d 1240 (D. Alaska 2010). The court held that (1) the Alaska Supreme Court in its decision had not violated the Elections Clause by, in effect, amending state statutes to allow misspelled write-in ballots to be accepted, since it rendered an acceptable interpretation of a “poorly drafted state statute,” and (2) unlike Florida in *Bush v. Gore*, the Alaska authorities used uniform standards in counting write-in ballots.

In another case, an unsuccessful candidate in a juvenile-court election sued in federal court, alleging due process and equal protection violations in the review and counting of provisional ballots that were cast in the wrong precincts, allegedly due to poll-worker errors. The federal court initially ordered state officials to undertake a review of the ballots and the counting process. In the meantime, the successful candidate and a voter sued in the Ohio Supreme Court, and obtained a declaration that any provisional ballots cast improperly, even due to poll-worker error, should not be counted under state law. *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011). Not long afterwards, the federal-court litigation culminated in a lengthy decision by the Sixth Circuit, *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011), which held that the plaintiff stated a cause of action and remanded for further proceedings. While acknowledging that federal courts should not interfere in “garden variety” election disputes, this case presented a “non-frivolous impairment of federal rights.” Among other things, the court held that since there was evidence that the local board of elections had “treated some miscast provisional ballots more favorably than others,” the plaintiff might prevail under *Bush v. Gore*. The court further held that the Ohio Supreme Court’s resolution of state-law issues in *Painter* did not resolve the federal constitutional issues, in part because those claims were not squarely

presented to the state court. It also held that it was unnecessary to address any arguments regarding the state-wide casting of ballots. A concurring judge was not confident that equal-protection violations under *Bush v. Gore* had been stated because, as he saw it, there might be rational reasons to have treated different groups of improperly cast provisional ballots differently.

C. The Help America Vote Act

Page 1144. Add the following to end of Note 2:

For an argument that, notwithstanding *Ohio Republican Party v. Brunner*, private rights of action should play a greater role in the enforcement of federal rights in election cases, see Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113 (2010).

Page 1145. Add the following to end of Note 3:

For further discussion, see Kathleen Hale & Ramona McNeal, *Election Administration Reform and State Choice: Voter Identification Requirements and HAVA*, 38 POL'Y STUD. J. 281 (2010) (studying how some states have adopted various forms of voter-identification laws that exceed the federal minimum imposed by HAVA); Charles Stewart III, *Voting Technologies*, 14 ANN. REV. POL. SCI. 353 (2011) (analyzing voting methods adopted by states in light of HAVA and other factors, and concluding that “attention to election technologies by political scientists is still only in its infancy”).

Page 1145. Add the following to end of Note 4:

These federal laws can interact in perhaps unexpected ways. For example, in *Gonzalez v. Arizona*, 624 F.3d 1162 (2010), *vacated and reh'g en banc granted*, 2011 U.S. App. LEXIS 8573 (9th Cir. 2011), the court held that while HAVA permits states to institute their own technological and administrative improvements, states could not impose additional requirements (such as documentary proof of citizenship) on the voter-registration process beyond those established by NVRA.

Chapter 12

REMEDYING ERRORS IN ELECTIONS

B. Re-Votes and the Uniform Date for Federal Elections

Page 1160. Add the following to the end of Note 3:

In *Putter v. Montpelier Public School System*, 697 A.2d 354 (Vt. 1997), plaintiff brought a federal claim under 42 U.S.C. § 1983 in state court, arguing that an election on a school bond was tainted by public officials spending public funds in favor of the proposal. Even assuming that there was impropriety, the court held that a new election was not appropriate, citing the high standard for relief found in federal cases.

Page 1161. Add the following to the end of Note 6:

Some studies of early voting indicate less than dramatic shifts in the number of voters. *See, e.g.*, Joseph D. Giammo & Brian J. Brox, *Reducing the Costs of Participation: Are States Getting a Return on Early Voting?*, 63 POL. RES. Q. 295 (2010) (concluding that forms of early voting ultimately have little effect on turnout, and merely offer additional convenience for those already inclined to vote). *See also* Symposium, *Time Shifting the Vote: The Quiet Revolution in American Elections*, 10 ELECTION L.J. 73-164 (2011).

D. State Remedies for Federal Elections

Page 1190. Add the following to the end of Note 3:

For further discussion of the proper judicial role in election-law litigation, see *The Role of Judges in Election Law*, 159 U. PENN. L. REV. PENNUMBRA 273 (2011) (debate between Daniel P. Tokaji and Allison R. Hayward).

Page 1190. Add the following to the end of Note 5:

For a debate over the descriptive accuracy and the normative desirability of Professor Hasen's "Democracy Canon," compare Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051 (2010), with Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173 (2010). For differing judicial perspectives on whether merely substantial, as opposed to strict, compliance with state voting requirements is appropriate, see, e.g., *Miller v. Treadwell*, 245 P.3d 867 (Alaska 2010) (holding that it was proper to count misspelled write-in votes because state election statutes should be construed in favor of voter enfranchisement); *State ex rel. Painter v. Brunner*, 941 N.E.2d 782 (Ohio 2011) (holding that provisional ballots cast in the wrong precincts due to poll-worker error should not be counted, given the "plain language" of the

relevant state statutes, which “are mandatory and must be strictly complied with”). *Cf. Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219, 243-44 (6th Cir. 2011) (suggesting without holding that the construction of state statutes in *Painter* may violate the Due Process Clause, because to “disenfranchise citizens whose only error was relying on poll-worker instructions appears to us to be fundamentally unfair”).

E. Public and Private Remedies

1. Federal Civil and Criminal Enforcement

Page 1190. Add the following to the end of footnote c:

Joshua A. Douglas, *The Procedure of Election Law in Federal Courts*, 2011 UTAH L. REV. ___ (forthcoming).

Page 1191. Add the following to the end of first full paragraph:

Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113 (2010) (arguing in favor of private rights of action).

Page 1190. Insert a new Note 6 after Note 5:

6. For an in-depth study of the *Coleman v. Franken* litigation, see Edward B. Foley, *The Lake Wobegone Recount: Minnesota’s Disputed 2008 U.S. Senate Election*, 10 ELECTION L.J. 129 (2011), suggesting that it can serve as a particularly useful case study on the promises and pitfalls of absentee voting.

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

Page 1218. Insert a new Note 4 after Note 3:

4. Much as courts have been reluctant to order new elections under *Bell v. Southwell*, courts have often (though not always) been reluctant to order injunctive relief for plaintiffs under *Roe*. Compare *Warf v. Bd. of Elections of Green County*, 619 F.3d 553 (6th Cir. 2010) (noting the principles of *Roe*, but refused to intervene after a state court declared all absentee votes invalid (amounting to 11% of all votes), in an election for a county clerk, since state precedent was followed and there was no fundamental unfairness), with *Hunter v. Hamilton County Bd. of Elections*, 635 F.3d 219 (6th Cir. 2011) (noting deference to state authorities shown in cases like *Warf*, but stating that allegations by the plaintiff, an unsuccessful candidate in an election for a county juvenile court, regarding the allegedly unequal treatment of different batches of miscast provisional ballots, suggested a “non-frivolous impairment of federal rights,” and that federal-court intervention was appropriate).