STRUCTURING JUDICIAL REVIEW OF ELECTORAL MECHANICS: EXPLANATIONS AND OPPORTUNITIES

CHRISTOPHER S. ELMENDORF†

This Article is the first of a series on constitutional judicial review of what the Supreme Court has termed "the mechanics of the electoral process," defined to include "the registration and qualification of voters, the selection and eligibility of candidates, and the voting process." Over the last few years, this subject has assumed a new salience as litigators challenge novel state-mandated procedures for registration, voting, and vote counting. For the first time since the 1960s, a significant number of voter participation cases are moving through the lower courts. The courts are substantially in agreement that these claims are governed by the doctrinal framework set forth in Burdick v. Takushi, but there is a catch: Burdick's statement of black-letter law significantly misdescribes the Supreme Court's actual practice in its electoral mechanics jurisprudence—or so I argue here. As a result, lower courts confronted with the new generation of voter participation claims have often pursued analytic methods that the Supreme Court is not likely to find congenial. Important avenues for doctrinal experimentation and elaboration are being overlooked. This Article develops a schematic map and a vocabulary for talking about the Supreme Court's methods in its electoral mechanics jurisprudence, one that should help lower courts (as well as litigants and law professors) to think more productively about the critical threshold question in such cases: what is the standard of review, and why? By way of illustration, the Article examines and critiques successive district court opinions enjoining Georgia's new photo ID requirements for voting.

† Professor of Law, University of California at Davis. B.A., Oberlin College; J.D., Yale Law School. Thanks to Floyd Feeney, Ned Foley, Rick Hasen, and Richard Winger for very thoughtful comments on earlier drafts. This Article also benefited from conversations and correspondence with Kerry Abrams, Diane Amann, Alan Brownstein, Alec Ewald, Brandon Garrett, Greg Klass, Ethan Leib, Spencer Overton, Jed Purdy, Christian Turner, and, above all, Christine Van Aken. Thomas Varnum did stellar work as my research assistant; Erin Murphy provided customarily superb assistance with library research; and Deans Rex Perschbacher and Kevin Johnson were unstinting in their support.
INTRODUCTION

Election law is coming full circle. In the 1960s, when the Warren Court declared that the "right to vote" was a "fundamental political right" protected by the Constitution, the major cases concerned access
to the polls and the weighting of votes. Different issues took center stage in the 1970s, 1980s, and 1990s. The Court delved into ballot access. It circumscribed the regulation of campaign finance. It created associational rights for political parties. And, through the Voting Rights Act, it limited the use of representational structures that, without weighting votes unequally, nonetheless disadvantaged racial minorities.

Today, however, voting itself is moving back to center stage—but in a new guise. Instead of challenging the de jure exclusion from the franchise of certain classes of voters, or the malapportionment of legislative districts, litigators are pressing claims that state-mandated procedures for registration, voting, and vote-counting—the nuts and bolts of elections—operate to burden voter participation excessively or unfairly. In the past two years alone, litigants have mounted successful constitutional challenges to novel voter ID requirements enacted by Georgia in 2005, by Missouri in 2006, and by Ohio in 2006. Litigants have also successfully mounted challenges to other novel voting procedures, such as requiring voters to present a photo identification to cast a ballot.

---


6 This Article focuses on claims founded on the Constitution. For a discussion of such claims under the Voting Rights Act, see Daniel P. Tokaji, The New Vote Denial: Where Election Reform Meets the Voting Rights Act, 57 S.C. L. REV. 689 (2006). Tokaji, following the lexicon introduced in Pamela S. Karlan’s The Rights To Vote: Some Pessimism About Formalism, 71 TEX. L. REV. 1705, 1707-08 (1993), refers to these as “voter participation” claims, as distinguished from “representation” and “governance” claims. I shall use the same terminology in this Article.

gants have also won injunctions against new laws in Georgia, Florida, and Ohio that regulate voter registration drives by civil-society organizations. And lawyer-activists convinced the Sixth Circuit that Ohio may not employ demonstrably inferior vote-counting technology in some counties if it uses superior technology elsewhere. On the other hand, voter ID challenges have been rebuffed by several courts, and the Sixth Circuit's opinion in a vote-counting case drew a withering dissent.

Given that four decades have passed since the Supreme Court converted voting into a fundamental right, one might expect there to be fairly well-settled answers to the question of what triggers heightened scrutiny in the voting rights domain, and what applying heightened scrutiny entails. The recent spate of litigation suggests that there is, in fact, substantial judicial agreement that constitutional challenges to the nuts and bolts of registration and voting are to be resolved using the method set forth in Burdick v. Takushi, a 1992 deci-

ID requirement effected a "severe burden" on the right to vote, and was tantamount to a poll tax).

8 Weinschenk v. State, 203 S.W.3d 201, 217-19 (Mo. 2006) (en banc). This case was nominally decided on state constitutional grounds, but the opinion largely follows the doctrinal framework employed in the Supreme Court's electoral mechanics jurisprudence, under which "severe restrictions" on voting rights trigger strict scrutiny. See id. at 212-16 (discussing these restrictions, explaining the application of strict scrutiny, and comparing cases decided under the federal Constitution).


10 Ass'n of Cmty. Orgs. for Reform Now v. Cox, No. 06-1891, slip op. at 16-17 (N.D. Ga. Sept. 28, 2006) (order granting preliminary injunction) (invalidating a regulation that required persons registering to vote to seal their completed application prior to submitting it to any person other than the state registrar or deputy registrar, and that prohibited the copying of completed voter registration applications); Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006) (entering a preliminary injunction against a law that established registration and training requirements, backed by criminal penalties, for paid participants in voter registration drives); League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (issuing a preliminary injunction against a law that fined voter registration organizations for late submissions).

11 Stewart v. Blackwell, 444 F.3d 843 (6th Cir. 2006), vacated en banc as moot, 473 F.3d 692 (6th Cir. 2007).


13 Stewart, 444 F.3d at 880-98 (Gilman, J., dissenting).

sion in which the Supreme Court undertook to restate the doctrines governing constitutional challenges to electoral mechanics (defined to include "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process"). Equally, however, this litigation illustrates the need for a new doctrinal heuristic for describing how the courts are supposed to approach such cases.

15 Id. at 433 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 (1983)). Note that neither Burdick nor Anderson uses the term "electoral mechanics" to describe "the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process." My choice of terminology is suggested by McIntyre v. Ohio Elections Commission, 514 U.S. 334, 345 (1995), which distinguished Anderson on the ground that the ban on anonymous political leafletting at issue in McIntyre did not "control the mechanics of the electoral process," but rather was a content-based "regulation of pure speech."

16 With the exception of Stewart, in each of the federal cases cited in notes 7-13, supra, the court applied the doctrinal framework of Burdick or Anderson (the principal case on which the Burdick Court relied). For other recent decisions from the U.S. courts of appeals applying Burdick to voter participation claims, see Wexler v. Anderson, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (rejecting a constitutional challenge to the state’s use of touchscreen voting without paper verification); Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004) (rejecting an asserted constitutional right of working mothers to vote by absentee ballot); Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) (rejecting a constitutional challenge to touchscreen balloting); Werme v. Merrill, 84 F.3d 479, 483-84 (1st Cir. 1996) (rejecting a constitutional challenge to requirement that certain poll workers be appointed by the two largest political parties); Ayers-Schaffner v. DiStefano, 37 F.3d 726, 729-30 (1st Cir. 1994) (holding it unconstitutional to exclude from a remedial election qualified voters who failed to participate in the original, invalid election). See also Greidinger v. Davis, 988 F.2d 1344, 1350-55 (4th Cir. 1993) (applying Anderson and holding unconstitutional a voter registration law that made registrants’ Social Security numbers publicly available).

However, a few judges have read Bush v. Gore, 531 U.S. 98 (2000), as exempting from the Burdick framework claims that a state has violated the Equal Protection Clause by using different voting or vote-counting procedures in different geographic areas. See Stewart, 444 F.3d at 861-62; Sw. Voter Registration Educ. Project v. Shelley, 344 F.3d 882, 895-96 (9th Cir. 2003), vacated on reh’g en banc, 344 F.3d 914 (9th Cir. 2003); cf. Richard L. Hasen, After the Storm: The Uses, Normative Implications, and Unintended Consequences of Voting Reform Research in the Post-Bush v. Gore Equal Protection Challenges, in RETHINKING THE VOTE 185, 188 (Ann N. Crigler et al. eds., 2004) (arguing that Bush departs from the Burdick jurisprudence). But see Wexler, 452 F.3d at 1292-33 (applying Burdick to a constitutional challenge to the use of different recount techniques in different regions); Stewart, 444 F.3d at 886-91 (Gilman, J., dissenting) (rejecting the extension of Bush beyond the narrow context of court-ordered recounts); Weber, 347 F.3d at 1106 (rejecting the notion that the state’s use of different voting technologies in different areas necessitates heightened scrutiny).

Other than the Bush-based cases, there is only one circuit court decision, post-Burdick, that fails to apply Burdick or Anderson in analyzing allegedly unconstitutional barriers to voter participation. This case, Charfasuros v. Board of Elections, 249 F.3d 941 (9th Cir. 2001), is predicated on the assumption that "any restrictions" on the right to vote trigger strict scrutiny. Id. at 951. That assumption is not tenable after Burdick.
Burdick is widely understood to prescribe sliding-scale or multiple-tier scrutiny, with the degree of scrutiny a function of the "character and magnitude" of the burden on voting or associational rights.  

Laws that effect a "severe" burden receive strict scrutiny; laws whose burden is minimal receive lax, rational-basis-like review; and laws whose burden is significant but not severe arguably receive something in between. Working from this starting point, the lower courts recently confronted with voter participation claims have generally begun by asking whether there exists a Supreme Court precedent that applies strict scrutiny or lenient review to a facially similar law. If so, and if the court is satisfied that the law at issue is sufficiently similar, the court will take shelter under the Supreme Court's decision. Illustrative examples include ACORN v. Bysiewicz and the poll tax holding in the first round of the Common Cause/Georgia v. Billups litigation.

In Bysiewicz, a federal district judge applied lax review to Connecticut's seven-day advance registration requirement for voting in general elections. Thirty years earlier, in Marston v. Lewis, an opaque per curiam opinion, the Supreme Court had said that Arizona's fifty-day registration cutoff was unobjectionable. The Bysiewicz plaintiffs sought to distinguish Marston on the ground that the plaintiffs in that case had not introduced evidence concerning the aggregate impact of the registration requirement. By contrast, the Bysiewicz

---

17 See, e.g., McClure v. Galvin, 386 F.3d 36, 41 (1st Cir. 2004) ("[T]he Supreme Court has suggested something of a sliding scale approach and has noted that there is no 'bright line' to separate unconstitutional state election laws from constitutional ones." (quoting Timmons v. Twin Cities Area New Party, 520 U.S. 351, 350 (1997)); Sw. Voter Registration Educ. Project, 344 F.3d at 899 ("Burdick . . . described [a] continuum of review . . ."); Fishbeck v. Hechler, 85 F.3d 162, 166 (4th Cir. 1996) ("[I]n Burdick v. Takushi, the Supreme Court prescribed a sliding scale analysis . . . ." (citation omitted)); Republican Party of Ark. v. Faulkner County, 49 F.3d 1289, 1296-97 (8th Cir. 1995) (characterizing Burdick as an example of "sliding-scale" scrutiny applied by the Supreme Court in electoral mechanics cases).

18 Although it is unambiguous that Burdick prescribes strict scrutiny for "severe" burdens, the standard of review properly applied in nonsevere-burden cases is not entirely clear. See infra notes 65-66 and accompanying text; Part II.C.2.


20 Common Cause/Ga. v. Billups (Common Cause/Ga. I), 406 F. Supp. 2d 1326 (N.D. Ga. 2005); see also Friedman v. Snipes, 345 F. Supp. 2d 1356, 1377-78 (S.D. Fla. 2004) (deeming a requirement that absentee ballots be returned by 7:00 p.m. on Election Day a "slight" burden, on the authority of Supreme Court decisions upholding time deadlines for political participation).


22 Memorandum of Law in Support of Plaintiffs' Request for a Declaration of Unconstitutionality at 56-58, Bysiewicz, 413 F. Supp. 2d 119 (No. 04-1624), 2005 WL 4113331.
plaintiffs produced uncontroverted studies of voting behavior by leading political scientists, demonstrating that a large fraction of the electorate does not "tune in" to political campaigns until just days before an election, and that rates of electoral participation would probably rise by about 5% if Connecticut eliminated its pre-election registration requirement (as have seven other states). But the district court concluded that this evidence was beside the point in light of the Supreme Court's lack of concern about other modest advance registration periods.

In Common Cause/Georgia I, a federal district judge applied strict scrutiny to Georgia's photo ID requirement for voting. The court reasoned, inter alia, that because Georgia charged a twenty dollar fee for the one form of state-issued ID made available to all voters, the ID requirement was tantamount to a poll tax. Per the Supreme Court's decision in Harper v. Virginia Board of Elections, poll taxes—and thus the Georgia photo ID requirement—were subject to strict scrutiny.

In much of the new voter participation litigation, however, the courts have not been able to locate Supreme Court precedents addressing formally similar laws. For example, most courts have thought it strained to analogize ID requirements to poll taxes if the state charges no fee for its voter ID. When there is no Supreme Court precedent addressing the type of law at issue, the lower courts have generally tried to investigate the actual impact of the challenged law on political participation. If the plaintiff establishes to a court's sat-

---

23 Id. at 8-13.
28 Federal courts have rejected this analogy as to every ID requirement other than the one enacted by Georgia in 2005. See, e.g., Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007) ("The Indiana law is not like a poll tax, where on one side is the right to vote and on the other side the state's interest in defraying ... election[] [costs] or ... limiting the franchise to [certain] people ... [or] excluding poor people or in discouraging [minorities]."); Gonzalez v. Arizona, No. CV 06-1268-PHX, 2006 WL 3627297 at *4-6 (D. Ariz. Sept. 11, 2006) (declining to characterize Arizona's requirements for registration and voting as a poll tax); Common Cause/Ga. v. Billups (Common Cause/Ga. II), 439 F. Supp. 2d 1294, 1352-55 (N.D. Ga. 2006) (rejecting the poll-tax characterization of a revised Georgia ID requirement enacted in 2006); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 826-28 (S.D. Ind. 2006) (rejecting the poll-tax characterization of an Indiana ID requirement).
29 In Common Cause/Georgia I, such anticipated impacts provided an alternative ground for applying strict scrutiny and striking down the law. See 406 F. Supp. 2d at 1362-66. For other cases in which courts based the standard of review on the actual or
satisfaction that the challenged law will substantially impact electoral participation, especially by disadvantaged voters, the court will characterize the burden as severe and apply strict scrutiny.\textsuperscript{30} If the plaintiff fails to make this showing, the court will treat the burden as insignificant or unproven and apply lax scrutiny.\textsuperscript{31} Federal judges have had differ-

\textsuperscript{30} See, e.g., Ass'n of Cmty. Orgs. for Reform Now v. Cox, No. 1:06-CV-1891-JTC, 2006 U.S. Dist. LEXIS 87080, at *16-18 (N.D. Ga. Sept. 27, 2006) (applying heightened scrutiny to voter registration regulations that “impair[ed] the ability of some of the Plaintiffs to obtain funding for voter registration drives” and caused one plaintiff organization not to conduct any drives during the year of the suit); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 701-07 (N.D. Ohio 2006) (applying heightened scrutiny to various regulations of voter registration by independent organizations, after concluding that the challenged regulations substantially hindered the plaintiffs’ efforts to register and turn out new voters); League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314, 1332-34 (S.D. Fla. 2006) (applying heightened scrutiny to regulations of voter registration drives, because (i) “[t]here is no dispute that Plaintiffs, all of whom are dedicated to increasing voter registration and voting, have shut down their voter registration drives because of the Law’s . . . penalties,” and (ii) “Plaintiffs’ testimony has demonstrated that the success of voter registration drives is severely undermined when third party organizations cannot collect voter registration applications”); Common Cause/Ga. II, 439 F. Supp. 2d at 1345-52 (applying exacting scrutiny to Georgia’s photo ID requirement, principally because “[t]he evidence in the record demonstrates that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a county registrar’s office”); Spencer v. Blackwell, 547 F. Supp. 2d 528, 535 (S.D. Ohio 2004) (foreseeing “an extraordinary and potentially disastrous risk of intimidation and delay,” amounting to a “severe” burden on the right to vote, from the novel application of an Ohio statute authorizing political parties to designate polling place challengers), rev’d sub nom. Summit County Democratic Cent. and Executive Comm. v. Blackwell, 388 F.3d 547, 551 (6th Cir. 2004) (concluding that the possibility of “longer lines . . . result[ing] from delays and confusion” was unlikely to constitute a severe burden); cf. Weinschenk v. State, 203 S.W.3d 201, 214-15 (Mo. 2006) (en banc) (deeming strict scrutiny of Missouri’s photo ID requirement appropriate because, inter alia, the procedures for obtaining an ID were “cumbersome” and thus likely to exclude voters who were not adept at navigating bureaucracies (internal quotation marks omitted) (quoting Harman v. Forssenius, 380 U.S. 528, 541 (1965))).

\textsuperscript{31} See, e.g., Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007) (“The fewer the people who will actually disfranchise themselves rather than go to the bother and . . . expense of obtaining a photo ID, the less of a showing the state need make to justify the law.”); Wexler v. Anderson, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (applying lax scrutiny to the plaintiff’s claim that the unavailability of manual recounts in those counties using touchscreen voting violates the Equal Protection Clause, reasoning that the plaintiffs “did not plead that voters in touchscreen counties are less likely to cast effective votes due to the alleged lack of a meaningful manual recount procedure”); Weber v. Shelley, 347 F.3d 1101, 1106 (9th Cir. 2003) (applying lenient scrutiny to the state’s certification of electronic voting machines, after deriding
ent understandings about the proper roles for common sense, anecdote, and social-scientific evidence in this inquiry. Some have insisted on hard evidence; others have freely indulged in conjecture. But these disagreements, themselves only latent, do not draw into question the basic notion that the task for courts in applying Burdick to novel fact patterns is to fully investigate the impact of the challenged law, and then to set scrutiny levels accordingly.

That notion reflects a perfectly sensible, face-value reading of Burdick's statement of legal doctrine. How else but through such an investigation could one say whether the magnitude of a regulatory burden is "severe" or "minor"? Moreover, the Court's rhetoric in electoral mechanics cases seems to invite all-things-considered, empirically oriented burden inquiries. The Court has reiterated, for example, that "it is essential to examine in a realistic light the nature as speculative the plaintiff's argument that this technology must be deemed severely burdensome due to the possibility of massive fraud); Werme v. Merrill, 84 F.3d 479, 484-85 (1st Cir. 1996) (deeming "slight" the burden imposed by a law providing for major-party appointment of poll workers because, inter alia, "the record evidence offers no reason to believe that minority parties are at special or undue risk because they have no right to appoint election inspectors and ballot clerks"); Gonzalez v. Arizona, No. CV 06-1268-PHX, 2006 WL 3627297 at *7 (D. Ariz. Sept. 11, 2006) ("Assessing the severity of the restrictions in this case requires an intense factual inquiry. Plaintiffs presented some evidence that hundreds, possibly thousands, of individuals will not be able to secure the requisite identification to enable them to vote. But... it is not clear what percentage of these individuals wish to vote but are actually unable to obtain identification... While not wishing to downplay the burden on certain individuals, Plaintiffs have not established that Proposition 200 represents a 'severe' burden."); Indy. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006) (applying lenient review to the plaintiffs' voter ID challenge because the "[p]laintiffs ha[d] failed to submit (1) evidence of individuals who will be unable to vote or who will be forced to undertake appreciable burdens in order to vote; and (2) any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote"); Friedman v. Snipes, 345 F. Supp. 2d 1356, 1378 (S.D. Fla. 2004) (judging a requirement that absentee ballots be returned by 7:00 p.m. on Election Day a "slight restriction"); League of Women Voters v. Blackwell, 340 F. Supp. 2d 823, 828-31 (N.D. Ohio 2004) (upholding an ID requirement for first-time voters after concluding that few voters would be affected and the burden would not be hard for them to surmount).

In the "hard evidence" camp are, for example, Indiana Democratic Party v. Rokita and Gonzalez v. Arizona. Conjectural reasoning about burdens may be found in, for example, Crawford v. Marion County Election Board and Common Cause/Georgia I.

I do not claim that the lower courts are in agreement regarding what impacts properly trigger heightened scrutiny. Some courts seem to focus on the participation bottom line (i.e., the extent to which the challenged requirement reduces turnout among eligible voters); others are concerned instead with the number and distribution of voters who face hurdles that the judge deems "appreciable" as such. I take up these and other distinctions in the lower courts' thinking in a forthcoming paper.
and extent... of [the] impact [of ballot-access restrictions] on voters." And the Court has variously professed that there is "no litmus-paper test" for separating valid from invalid electoral mechanics regulations, no "bright line," no "substitute for the hard judgments that must be made." Yet, strangely, when it comes time to decide an electoral mechanics case, the Court often reverts to formalism and lays down something like a litmus-paper test.

The Court's practice may be summarized thus: scrutiny levels depend on presumptive, first-pass determinations regarding the constitutional status (permissible or impermissible) of the challenged law. These determinations generally turn on formal inquiries into the type of burden created, simple proxies for impact, and, arguably, legislative purposes. The Court uses these inquiries not merely as an indirect means of ascertaining the practical burden on the plaintiff's exercise of voting or associational rights, or on the exercise of such rights by a larger class to which the plaintiff belongs. Rather, it appears that in determining the presumptive constitutional status of challenged electoral mechanics, the Court variously seeks (1) to insure that the electoral system achieves or manifests certain properties in the aggregate (such as adequate openness to change, political accountability, and participation by a full cross-section of the citizenry); (2) to identify laws whose probable costs far outweigh their likely benefits; and, probably, (3) to cabin lower courts' discretion to intervene in ways that might draw the judiciary's impartiality into doubt. (Thus, al-

---

38 Others have noted formalistic tendencies in the Court's election law jurisprudence. See, e.g., Richard H. Pildes, Commentary, Formalism and Functionalism in the Constitutional Law of Politics, 35 Conn. L. REV. 1525 (2003). But whereas Pildes sees the Court's election law formalism as a consequence of "analogizing from other areas of law to work out the meaning of the rights of politics," and hence as "fail[ing] to treat democratic politics as a distinct domain... in which the meaning of rights ought to be worked out with references to the function and purposes of the arena of democracy itself," id. at 1529, I am more sanguine. The Court's electoral mechanics jurisprudence may not be as ambitiously protective of "fair political competition" as Pildes would like, but it does, I shall argue, evince an appreciation of structural purposes and prudential concerns that are distinct to election law. It is doctrinally formalistic, but (often) functionally purposive.
though *Burdick* has come under attack from proponents of "structural" approaches to judicial review of election law, there is actually much for structuralists to like in the Court's electoral mechanics jurisprudence.\(^{39}\)

It is not my position that the Supreme Court's electoral mechanics case law is altogether coherent, in the sense that it reflects a settled and readily discerned understanding of constitutional purposes, or in the sense that one can consistently explain, from case to case, the Court's decision to select one technique or another from its arsenal in order to flip (or not to flip) the presumption of constitutionality.\(^{40}\)

---


My take on the electoral mechanics case law is broadly consistent with Charles's account of the malapportionment and Voting Rights Act case law. The Court uses the language of rights but its decisions are often easier to understand from a structural perspective (i.e., one concerned with the overall functioning of the political process). *See also* Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001) (arguing that in the *Shaw* line of cases and in *Bush v. Gore*, the Court "deploy[ed] the Equal Protection Clause not to protect the rights of an identifiable group of individuals, particularly a group unable to protect itself through operation of the normal political processes, but rather to regulate the institutional arrangements within which politics is conducted" (footnote omitted)).

\(^{40}\) Cf. Buckley v. Am. Constitutional Law Found., Inc., 525 U.S. 182, 208 (1999) (Thomas, J., concurring) (comparing precedents involving "voting and associational interests" with precedents about "core political speech," and observing that in the for-
My more limited claim is that the Court has answered the *Burdick* threshold question using a number of analytic strategies that, though sharing certain commonalities, bear at most a passing resemblance to the burden investigation process connoted by the *Burdick* test.  

Better heuristics for the process by which the Court sets scrutiny levels in its *Burdick* jurisprudence can be found, ironically, in two election law domains that have not been assimilated into the *Burdick* framework. Justice Breyer, writing for the plurality in *Randall v. Sorrell*, offered the best heuristic yet: he proposed that courts should look for “danger signs” of a substantial threat to the democratic process before applying heightened scrutiny to campaign contribution limits. Breyer then located such a scrutiny-elevating danger sign in the fact that the challenged contribution limits were lower than those in any other state. Justice Souter, dissenting in *Vieth v. Jubelirer*, said that the Court’s job in partisan gerrymandering cases was to “identify clues, as objective as we can make them, indicating that partisan competition has reached an extremity of unfairness.” This is in fact what the Supreme Court’s *Burdick* jurisprudence is largely about: a judicial

---

41 A couple of commentators have suggested that the severe/lesser burden inquiry is utterly without structure and “inherently subjective.” Lowell J. Schiller, Recent Development, *Imposing Necessary Boundaries on Judicial Discretion in Ballot Access Cases: Clingman v. Beaver*, 125 S. Ct. 2029 (2005), 29 HARV. J.L. & PUB. POL’y 331, 338 (2005); see also Joshua A. Douglas, Note, *A Vote for Clarity: Updating the Supreme Court’s Severe Burden Test for State Election Regulations that Adversely Impact an Individual’s Right To Vote*, 75 GEO. WASH. L. REV. 372, 381-82 (2007). I consider this view unjustifiably grim. To be sure, there is no single “coherent distinction” that unifies all the precedents. *Buckley*, 525 U.S. at 208. But as I endeavor to show in the next Part, the cases do exhibit characteristic modes of analysis, and there is enough structure in them to infer lessons for lower courts.

42 The domains in question concern campaign finance and the design of legislative districts. The reader may ask, “Are these not species of electoral mechanics?” It is a fair question. I do not attempt in this Article to define the conceptual boundaries of electoral mechanics other than to note that the term must encompass (per the Court) “the registration and qualifications of voters, the selection and eligibility of candidates, and the voting process.” *See supra* note 15 and accompanying text. For whatever reasons, the Court has not attempted to integrate its campaign finance, gerrymandering, and electoral mechanics cases into a unified body of law—though there are some recent indications of a convergence between the electoral mechanics and campaign-contribution-limit case law. *See infra* Part II.C.3.


44 Id. at 2492.

45 Id. at 2492-93.


47 Id. at 344 (Souter, J., dissenting).
endeavor to create and then to heed relatively simple and objective indicators for whether something is seriously amiss with the democratic process.

*Burdick*'s "burden" language tends to obscure this, and the obscurity comes at a price. The costs are twofold. First, lower courts confronted with novel electoral mechanics fact patterns have often failed to apprehend and explore the tools already (or arguably) available to them for choosing scrutiny levels. For example, in the new voter participation litigation, the lower courts have largely failed to develop and apply explicitly intent-informed standards of review, even though such an approach is plausibly invited by Supreme Court precedents. This failure is not for want of concern about constitutionally aberrant purposes. In the second round of the *Common Cause/Georgia* litigation, for example, the district court made a point of detailing the contentious partisan history of Georgia's photo ID requirement before issuing a preliminary injunction on other grounds.\(^48\) In the Seventh Circuit, Judge Terrence Evans opened his dissent from the court's decision sustaining the Indiana ID law by positing that the requirement was "a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."\(^49\) Yet he did not work this observation into the analytic section of his opinion.\(^50\) Judge Diane Wood, dissenting from the Seventh Circuit's denial of rehearing en banc, did suggest, briefly, an intent-informed standard of review,\(^51\) but she failed to ground this doctrinally in anything more than a passing

---


\(^49\) *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting).

\(^50\) Rather, toward the end of his opinion, Judge Evans sought to justify heightened scrutiny on the basis of his sense that the law would make voting "significantly more difficult for some eligible voters"—mostly those who are "poor, elderly, minorities, disabled, or some combination thereof." *Id.* at 955-97. His sense that the law would have this effect was perhaps grounded in his attribution of exclusionary purposes to the Indiana legislature. But he did not make the connection explicit, nor did he offer an account of the circumstances under which judges may properly infer partisan exclusionary intent when it is not admitted.

\(^51\) *See Crawford v. Marion County Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting) ("[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny." (emphasis added)).
observation that *Burdick* distinguishes between "severe" and "reasonable, nondiscriminatory" restrictions for standard-of-review purposes.\(^5\)

If one cost of *Burdick*’s obscuring heuristic is lower courts’ unawareness of doctrinal moves already available to them, the other lies in their failure to contribute to the development of new techniques, broadly congruent with the Supreme Court’s analytic approaches in the *Burdick* family of cases, for policing potentially abusive electoral mechanics. Novel fact patterns should provide the impetus for doctrinal innovation, but in the new voter participation litigation, the lower courts have come up short. Misdirected by the burden metaphor, the lower courts have made little effort to create new proxies—"as objective as we can make them"—for sorting challenged election laws into the presumptively permissible and presumptively impermissible categories. This failure to test out new techniques for structuring judicial review of electoral mechanics constricts the flow of information and ideas to the Supreme Court, and ultimately makes for a poorer body of election law.

The present Article, written with the hope of prompting litigants and lower courts (as well as academics) to engage more productively with the *Burdick* jurisprudence, provides an integrative account of the Supreme Court’s techniques for setting scrutiny levels in electoral mechanics cases. Part I puts *Burdick* in context, briefly explaining the history of and the rationale for the severe-burden threshold test. Part II documents and typologizes the strategies now available, or arguably available, to lower courts for determining the presumptive constitutional status of challenged requirements. I pay special attention to strategies that the Court has only gestured toward (and I take note of related tensions and inconsistencies where they exist), for it is by elaborating possibilities at the doctrinal margins that the lower courts may affect the shape of election law in the years ahead. Part III illustrates the ideas developed in Part II with a look at three district court opinions concerning Georgia’s photo ID requirements for voting. I sketch a few preliminary ideas about new techniques, consistent with the formalist tendencies and partly structural purposes of the *Burdick* jurisprudence, that lower courts might test out in such cases. I also offer some suggestions for how the Supreme Court could facilitate

---

52 Id. at 437-38 (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1991)) (internal quotation marks omitted). There is, I shall suggest, much to be said for grounding heightened scrutiny on indicia of impermissible purposes, see infra Parts II.C and III.A, but Judge Wood’s opinion makes little headway in developing this idea.
I. **BURDICK IN CONTEXT: THE PROBLEM OF JUDICIAL REVIEW OF ELECTORAL MECHANICS**

Some laws that burden voting or political association rights garner strict scrutiny. Many others receive very deferential judicial review. On first glance, it may be puzzling that any class of laws that materially burdens fundamental rights would receive light-touch judicial review. But judicial review of election laws presents a distinctive set of challenges.

The Supreme Court has long maintained, for example, that deferential review of electoral mechanics is generally appropriate because, "as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." To achieve these "necessary objectives," the Court later explained,

> States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends.

Under these circumstances, too much judicial scrutiny would be bad medicine. As the Court put it in *Burdick*: "[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."

The point can be put more dramatically: too much judicial involvement could itself burden the fundamental rights to vote and as-

---

53 But see Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 955-56 (1994) (suggesting that some type of limiting threshold inquiry into the nature and extent of burdens on fundamental rights becomes a practical and political necessity insofar as the Constitution is interpreted to protect a broad range of interests).


associate for political change. One danger, alluded to in Burdick, is ossification.58 If judges narrowly circumscribe what is permissible, the constitutionalization of election law threatens to forestall the very forms of experimentation that could make the right to vote more readily exercised and more effective as a source of public accountability. A second danger is electoral confusion. The Supreme Court recently suggested, for example, that the issuance of an injunction shortly before an election could disrupt voters', candidates', and pollworkers' expectations; the ensuing logistical snafus and disarray could well result in lost votes and turned-away voters.59 Third, too much judicial second-guessing of legislators' election law handiwork might, on the margins, lead sincere, policy-minded lawmakers to devote their energies to other subjects.60 Deterrence of legislative activity is welcome insofar as the constitutional costs of the deterred activity are likely to be high and the benefits low. But because the effective exercise of the right to vote depends on supportive legislation—legislation to facilitate access to the polls, to guard against fraud, to foster informative political campaigns, to ensure that voters have a decent range of choices, and more—deterrence of legislative activity in this area probably should not be invited unless the courts can narrowly target "bad" activity.

All of this warrants judicial caution and circumspection when courts are asked to adjudicate claims that a state's electoral mechanics unduly burden the right to vote. But it does not warrant abdication, for there is also the risk, as Ely and others since have emphasized, that the "ins" will use their power over the ground rules of political competition to keep the "outs" out.61 The critical and enormously difficult problem for the Supreme Court, then, is to elaborate a doctrinal framework that empowers lower courts to police abusive electoral re-

57 Cf. Brownstein, supra note 55, at 919 (arguing that the deferential "balancing" standard of review under Burdick should be reserved for "laws serving some uniquely important, [election-related] interest, such as the special goals of electoral equity and efficiency"; other laws that burden voting or associational rights would receive strict scrutiny).

58 Worries about election law ossification have been a persistent theme in the prescriptive doctrinal work of Richard Hasen. See, e.g., HASEN, THE SUPREME COURT AND ELECTION LAW, supra note 39, at 101-56 (arguing that Supreme Court deference to legislative value judgments is appropriate, and would remove the danger of ossification).


61 See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 103 (1980).
forms, while giving legislators plenty of room for constructive tinkering and experimentation. Hence Burdick, which tries to thread the needle thus:

A court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff’s rights.

Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. . . . When those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State’s important regulatory interests are generally sufficient to justify the restrictions.

Notice two things about this passage. First, the burden on rights fairly attributable to an election law is nominally decisive in setting scrutiny levels. Benefits will matter at the justification stage, but for scrutiny level purposes, burdens are all that count. Second, while

---


63 Alan Brownstein has argued, on the contrary, that the juxtaposition of “severe” and “reasonable, nondiscriminatory” restrictions in this passage means that Burdick contemplates strict scrutiny not only for laws whose impact is severe, but also for “laws that serve impermissible (i.e., discriminatory) goals or that burden rights beyond the state’s legitimate need to manage the conduct of elections.” Brownstein, supra note 53, at 918. His is not, I think, an intuitive reading. In the first paragraph I have quoted, the Court clearly distinguishes between regulatory “burdens” and public benefits (“justifications”). It is therefore odd to read the Court’s use of the term “severe restrictions” in the next paragraph (defined with reference to “the extent to which [the] challenged regulation burdens First and Fourteenth Amendment rights,” Burdick, 504 U.S. at 434 (emphasis added), as impliedly encompassing the state purpose behind and the public benefits of the challenged law. Moreover, Brownstein’s reading converts strict scrutiny into a conclusion (equivalent to a holding of unconstitutionality), rather than treating it as a standard of review. Yet in the electoral mechanics context, strict scrutiny need not be “fatal in fact.” See infra text accompanying notes 113-118 (explaining "best practices strict scrutiny"). And for what it’s worth, in the cases following Burdick, the Supreme Court has almost universally begun by characterizing the burden as severe or slight before turning to the state’s asserted justifications for the law. See infra note 66.
Burdick makes clear that "severe" burdens will be met with strict scrutiny, the quoted passage is ambiguous concerning the standard of review properly applied in nonsevere-burden cases. To say that "reasonable, nondiscriminatory restrictions" are generally justified by the state's "important regulatory interests" is to beg the question of how closely the reviewing court should examine the state's asserted regulatory interests (to see if they are "important") or the law's restrictions (to see if they are "reasonable" and "nondiscriminatory"). The Supreme Court has not done much to resolve this ambiguity, and a full investigation of the matter would take us well beyond the scope of this Article. For now, suffice it to say that the Supreme Court typically applies something like rational basis review in nonsevere-burden cases, but that the rationality standard may not be quite so lax as the one applied to ordinary economic and social legislation; also, to the extent that the burden is fairly characterized as "significant," if not quite "severe," some intermediate form of scrutiny may be in order.

Although I disagree with Brownstein concerning the most natural, face-value reading of Burdick, I agree with him that the electoral mechanics case law, taken as a whole, does invite arguments from legislative purpose. See infra Part II.C.

Burdick, 504 U.S. at 434.

I shall have something to say about discriminatory but nonsevere burdens in Part II.C.2, infra.

Since Burdick, in every case but one in which the Court has assayed the burden of an election law for standard-of-review purposes, it has characterized the burden as either "severe" or "slight" (sometimes "minor" or "trivial"). If the Court deems the burden slight, it proceeds with de facto rational basis review. The Court omits the magic words "rational basis," and it generally does not cite to foundational examples of anything-passes review like Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), but neither does it seriously probe the connection between the state's asserted interests and the regulations at issue. The Court has repeatedly excused the state of any obligation to come forward with empirical evidence to justify burdens characterized as minor. See, e.g., Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986) ("We have never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access"); cf. HASEN, THE SUPREME COURT AND ELECTION LAW, supra note 39, at 96 ("The common thread [in ballot-access and related cases] is that although the Court appears to have 'balanced' [interests], the 'balancing' lowered the level of scrutiny to be applied whenever the Court viewed the ballot-access rules (or rules governing minor parties) as imposing only a small burden on the parties.").

Timmons v. Twin Cities Area New Party was the exceptional case in which the Court deemed the burden at issue—Minnesota's ban on fusion candidacies—"not severe" yet "not trivial." 520 U.S. 351, 363 (1997). Having so characterized the burden, however, the Court attached no apparent significance to its intermediate status. Timmons sustained the fusion ban on the basis of a hypothetical parade of horribles. See id. at 364-65 ("[I]f fusion ban is justified by its interests in avoiding voter confusion, promoting candidate competition . . . , preventing electoral distortions and ballot manipulations,
and discouraging party splintering and "unrestrained factionalism."). The Court did not require Minnesota to come forward with any empirical evidence to back up the claimed connection between the fusion ban and the state's legitimate interests, nor did the Court concern itself with how fusion candidacies actually affect the political process in the states that accommodates the practice. See generally Richard L. Hasen, *Entrenching the Duopoly: Why the Supreme Court Should Not Allow the States To Protect the Democrats and Republicans from Political Competition*, 1997 SUP. CT. REV. 331 (discussing the significance of *Timmons*).

*Timmons* might be thought to stand for the proposition that rational basis is the true (albeit de facto) standard of review for all electoral mechanics cases in which the burden at issue has not been shown to be severe. But this position is untenable. For one, if the Court had really meant to consign all nonsevere burdens to rational basis scrutiny, it probably would have said as much. More importantly, ever since *Storer*, the Court has emphasized that its standard of review in election law cases is "flexible." As the Court put it in *Burdick*, "the rigoroussness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." 504 U.S. at 434 (emphasis added). The word "extent" connotes a spectrum of relevant variation, not a binary divide. So too does *Burdick* 's oddly circumspect and circular suggestion that in nonsevere-burden cases, "reasonable, nondiscriminatory restrictions" will "generally" be justified by "important regulatory interests." *Id.* (internal quotation marks omitted). At the very least, this invites plaintiffs to argue that the restriction at issue is "unreasonable," "discriminatory," or inadequately tied to "important" state interests—and hence unconstitutional even if not severely burdensome. See infra Part II.C (exploring ways in which discriminatory intent affects the standard of review); cf. Brownstein, supra note 53, at 917-19 (1994) (proposing that *Burdick* is best interpreted as implyingly providing for three tiers of review: strict scrutiny for severe and/or intentionally discriminatory burdens, intermediate balancing for significant but not severe or discriminatory burdens, and rational basis for slight, nondiscriminatory burdens).

Finally, there is the puzzle of *Bush v. Gore*, 531 U.S. 98 (2000), which found an Equal Protection violation in the recount order of the Florida Supreme Court following the 2000 presidential election. The Florida court had specified that the "intent of the voter" was to guide the recounting of ballots, but the court did not "formulat[e] uniform rules" and "specific standards" to ensure the "equal application" of the intent-of-the-voter principle. *Bush*, 531 U.S. at 105-06. As a result, recount practices varied from one county to the next, and even within counties as the recount progressed. See *id.* at 106-09 (discussing the practices of Miami-Dade County, Palm Beach County, and Broward County). *Bush* deemed this inconsistent treatment of ballots to contravene the Constitution's "rudimentary requirements of equal treatment and fundamental fairness" with respect to voting. *Id.* at 109.

Among the many puzzling features of *Bush* is that it does not even cite to the *Storer-Burdick* line of cases, notwithstanding that recount procedures would seem to be paradigmatic electoral mechanics regulations. Nor does the opinion explain the applicable standard of review. Rather, *Bush* posits only that the state has an "obligation to avoid arbitrary and disparate treatment of the members of its electorate." *Id.* at 105. It was feasible to set discretion-confining rules for the recounting of ballots, and the Florida court had failed to do so—end of story. (Justice Souter, explaining his agreement with the plurality's Equal Protection holding, said he could "conceive of no legitimate state interest served by" applying different rules for ascertaining the intent of the voter "to identical types of ballots used in identical brands of machines and exhibiting identical physical characteristics." *Id.* at 134 (Souter, J., dissenting). This is of course a stretch—the Florida court might well have pointed to its lack of expertise, the
Whatever *Burdick*'s ambiguities, the case does appear to mark a transition in the Court's thinking about judicial review of electoral mechanics. *Burdick*'s roots trace to a 1974 decision, *Storer v. Brown*, in which the Court backed off its brief experiment with exacting scrutiny of election laws in favor of a much mushier sort of scrutiny. According to *Storer*:

> [There is] no litmus-paper test for separating those [electoral] restrictions that are valid from those that are invidious under the Equal Protection Clause... [There] is no substitute for the hard judgments that must be made. Decision in this context... is very much a “matter of degree,” very much a matter of “consider[ing] the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification.” What the result of this process will be in any specific case may be very difficult to predict with great assurance.

*Burdick* can be seen as an attempt to impose a restraining structure upon the mush of “no litmus-paper test” review, by conditioning serious judicial scrutiny on proof of a severe burden. Although *Burdick* purported merely to restate the then-governing doctrine, *Storer*'s progeny had not always featured a threshold, scrutiny-level-determining inquiry into burden severity. Consider *Democratic Party of United States v. Wisconsin ex rel. La Follette*, for example, a 1981 decision striking down Wisconsin’s requirement that the state’s delegations to presidential nominating conventions vote in accordance with the results of the state’s open primary. Wisconsin contended that this press of time, or other factors as a “conceivable rational basis” for leaving the design of recount rules to local canvassing boards. So like the plurality, Souter was applying some form of moderately heightened scrutiny.)

*Bush* is extremely hard to make sense of if one understands the application of heightened judicial scrutiny—anything more than the vacuous rational basis review applied to economic legislation—to depend on the plaintiff first demonstrating a “significant” or “severe” burden. There had been no showing in *Bush* that any county canvassing board was using demonstrably inferior recount rules. But *Bush*'s failure to discuss *Burdick*, and the Court’s use of marginally heightened scrutiny, is unobjectionable if the state is understood to have a minimal obligation to avoid arbitrarily disparate treatment of participants in the political process, without regard to demonstrable consequences or burdens. Put differently, the import of *Bush* may be that “rational basis plus,” rather than ordinary rational basis, is the default standard of review in electoral mechanics cases.

---

68 *Id.* at 730 (alteration to internal quotation in original) (citations omitted) (quoting *Dunn v. Blumstein*, 403 U.S. 330, 348 (1972) and *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).
mandate placed only a "minor burden" on the national Democratic Party; the Party disagreed, calling the burden "substantial." Instead of sifting through the evidence and arguments on this point, Justice Stewart's opinion for the majority proclaimed:

[1]t is not for the courts to mediate the merits of this dispute [about the magnitude of the burden]. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution.71

In short, under La Follette, heightened scrutiny applies whether the burden is big or small. What matters is the fact of infringement on a constitutionally protected interest, not the severity of the infringement.72

That the Court itself understands Burdick to have marked a doctrinal transition is suggested by Justice Thomas's opinion for the six-justice majority in Clingman v. Beaver,73 the most recent decision applying the Burdick framework. In Clingman, the Libertarian Party of Oklahoma (LPO) challenged state rules that disallowed political parties from inviting citizens to vote in the party's primary if they were registered members of another party. The LPO had argued that the case was controlled by Tashjian v. Republican Party of Connecticut,74 a 1986 decision in which the Court applied strict scrutiny and struck down a statute barring political parties from inviting independents to vote in their primaries. But the Clingman Court had harsh words for Tashjian. The Court criticized Tashjian for "appl[y]ing] strict scrutiny with little discussion of the magnitude of the burdens imposed."75 Tashjian was said to be in tension with later cases that "clarified [that] strict scrutiny is appropriate only if the burden is severe."76

It is not surprising that the Supreme Court has sought to impose some order on the vagaries of "no litmus paper test" scrutiny. If judi-

70 Id. at 123.
71 Id. at 123-24 (footnote omitted).
72 Cf. id. at 138 (Powell, J., dissenting) (criticizing the majority for "upholding a First Amendment claim by one of the two major parties without any serious inquiry into the extent of the burden on associational freedoms").
74 479 U.S. 208 (1986).
75 Clingman, 544 U.S. at 591 (emphasis added). Justice Thomas spoke for a six-Justice majority in this portion of his opinion.
76 Id. at 592.
cial review of electoral mechanics regularly entailed open-ended weighing of "the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification," the Supreme Court would have no small amount of difficulty controlling lower-court interventions in the political process. It probably would not redound to the credit of the judiciary or the quality of the electoral process if lower courts freely intervened—or declined to intervene—on the basis of each judge's personal conception of what is good or reasonable or fair in matters of election law. There is also the danger that, in Justice Kennedy's cryptic words, the courts would end up "assuming political, not legal, responsibility for a process that often produces ill will and distrust." Justice Kennedy penned those words in warning against judicial review of partisan gerrymandering absent "rules to limit and confine judicial intervention," but his point is more general. Judicial intervention in the political process can have partisan effects, and those who oppose particular instances of judicial intervention are wont to accuse the courts of intending such effects. Accordingly, there is an ever-present danger that the courts' reputation for political neutrality—a reputation on which public support for the judiciary probably depends—will founder on the shoals of judicial intervention in the political process. This risk seems particularly acute, as Justice Kennedy suggests, where judicial intervention is highly discretionary, unconfined by clear rules.

79 Id.
80 Cf. Bush v. Gore, 531 U.S. 98, 153-58 (2000) (Breyer, J., dissenting) (predicting damage to the Court's reputation resulting from its disposition of this case). But see James L. Gibson et al., The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?, 33 BRIT. J. POL. SCI. 535, 542-43 (2003) (finding that the decision had little impact on "diffuse support" for the Supreme Court). In other contexts, the Court has sometimes linked its holdings, rules, or rhetoric to anxieties about public confidence in judicial impartiality. See, e.g., Mistretta v. United States, 488 U.S. 361, 407 (1989) ("The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action."); In re Murchison, 349 U.S. 133, 136 (1955) ("[The requirements of due process] may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way 'justice must satisfy the appearance of justice.'") (quoting Offutt v. United States, 348 U.S. 11, 14 (1954)).

II. UNDERSTANDING *BURDICK*: HOW THE COURT POLICES ELECTORAL MECHANICS (WITHOUT MUCH DATA)

The thesis that *Burdick* marked a doctrinal transition, and that scrutiny levels in electoral mechanics cases now depend on the magnitude of the burden fairly attributable to the challenged law, is correct in one respect but importantly mistaken in others. The approach to judicial review connoted by *Burdick*’s statement of black-letter law bears only a passing resemblance to the Supreme Court’s practice, pre- or post-*Burdick*.

As we have seen, what *Burdick* appears to prescribe is an approach to judicial review with three distinguishing characteristics. First, not all electoral mechanics will face the same degree of judicial scrutiny—rather, scrutiny levels will depend on the outcome of a threshold inquiry. Second, the threshold inquiry will entail sifting through empirical data concerning the actual workings of the challenged law, so that the “magnitude” (as well as the “character”) of the burden on voting or political association rights can be determined.\(^81\) Third, although *Burdick*’s formulation of the threshold test does not address baselines or metrics for measuring burdens, or even indicate whether “burden” is to be understood in individualistic or group-based terms, *Burdick*’s language of rights arguably connotes an individualistic approach.\(^82\)

Since *Burdick*, the Court has made a point of first characterizing burden severity and then stating the scrutiny level before moving on to assess the challenged law’s tailoring and the state interests presented on the law’s behalf.\(^83\) Prior to *Burdick*, as Justice Thomas suggested in *Clingman*, the Court occasionally proceeded with heightened

---

\(^81\) Cf. Michael Waterstone, *Constitutional and Statutory Voting Rights for People with Disabilities*, 14 STAN. L. & POL’Y REV. 353, 371-75 (2003) (inferring from the Court’s rhetoric in *Burdick* and associated cases that empirical questions about the “extent” to which “the right to vote [is] affected” would figure centrally in the disposition of contemplated voting-procedure challenges brought by people with disabilities).

\(^82\) Cf. Issacharoff & Pildes, supra note 39, at 670-74 (treating *Burdick* as emblematic of the Court’s putative focus on individual rights rather than structure in political process cases). I disagree with this reading of the substance of the Court’s decision in *Burdick*, see infra notes 162-171 and accompanying text, but it is a fair inference from *Burdick*’s nominal “burden on rights” prescription for setting scrutiny levels (given the individualistic thrust of most fundamental rights adjudication).

\(^83\) See supra notes 35-37 and accompanying text. The notable exception is *Bush v. Gore*, which does not even mention *Burdick*. On reconciling *Bush* with the *Burdick* jurisprudence, see supra note 66.
scrutiny from the outset. It is to this extent, and only to this extent, that Burdick may be said to mark a change in the Supreme Court’s electoral mechanics jurisprudence.

As for the rest of the process connoted by “the Burdick test,” it is a good ways removed from the Court’s typical practice. Rather than inquiring into the actual effects of challenged laws on voting or political association, the Court tends to favor inquiries that turn on the form of the challenged law, the law’s congruity or incongruity with the surrounding legal landscape, and, arguably, the intent of the enacting legislative body. Where the Court does consider effects at the threshold stage, it has developed easy-to-measure proxies for the normatively relevant effect, and uses these proxies to focus and simplify judicial inquiry.

The underlying concerns that drive the Court’s electoral mechanics interventions are not easy to decipher, nor are they likely to be unitary, but it is hard to make sense of the case law in conventional, individualistic terms. This body of law is not designed to enable the citizen or political organization that suffers a material burden to haul the state into court and make it provide a substantial justification for the imposition. The decisions are more readily understood as imperfect efforts to ensure that electoral systems manifest certain properties in the aggregate.

On balance, it would be apt to describe the Court’s practice in this way: laws pertaining to electoral mechanics carry a strong presumption of constitutionality, even though they touch upon the fundamental rights of voting and political association. As the Court said early on, in Storer, “it is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.” Most such laws therefore receive highly deferential review. Sometimes, however, an inspection of the challenged law’s form and context, informed by common sense and easy-to-measure-and-classify proxies for impact, reveals something alarming. If so, the presumption of constitutionality may be reversed, and the Court will take a close look at the

84 See Clingman v. Beaver, 544 U.S. 581, 591-92 (2005). In my view, the pre-Burdick cases that are now (arguably) anomalous include not only Tashjian and La Follette, see supra notes 69-71 and accompanying text, but also Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979), and, possibly, Anderson v. Celebrezze, 460 U.S. 780 (1983). However, it is possible that some or all of these cases could be saved through revisionist accounts of the basis of which the Court applied heightened scrutiny. Cf. infra notes 104, 288-289, and accompanying text.

law's tailoring and the justifications asserted for it. Though the Court uses the language of "burdens" in explaining reversals of the presumption of constitutionality, this language is generally opportunistic. When the Court says that an election law effects a "severe" burden, it is propounding a conclusion—that the ordinary presumption of constitutionality should be flipped—rather than explaining the basis for that conclusion.

The balance of this Part surveys and explains the principal strata-gems that the Court has used or invited to overcome the presumption of constitutionality (while simultaneously limiting the need for complicated empirical inquiries). There are three basic strategies. First, treat a burden as severe in kind, whatever its magnitude or practical effect. Second, define presumptive, formal cutoffs concerning how far a state may go with regulations that are not severe in kind. These cutoffs are formal in the sense that what is measured is not the ultimate object of concern, but rather some feature of the law itself or some easily ascertained proxy for its impact. There is considerable variety within this approach: cutoffs may be numerical or qualitative, for example, and they may be grounded upon bare judicial intuitions about what is necessary for the political process to work well, or on comparisons to analogous laws across states and over time. The third strategy for flipping the presumption of permissibility is to substitute an inquiry into the purpose of the statute for an inquiry into its effects. After canvassing these techniques, I shall take up the question of what role remains for empirical inquiry at the threshold, scrutiny-level-determining stage of judicial review.

Before plunging into the cases, let me stress a further point about the nature and the subject of my argument in this Part. My analysis is interpretive and constructive. It attempts to impose some order on an unruly body of law, one that has veered this way and that as the balance of power has shifted among Justices who have had quite different ideas about how to approach electoral mechanics cases. Justices Marshall, Brennan, and Douglas, for example, had little use for the threshold inquiry; they stood ready to apply strict scrutiny in any case in which plaintiffs could show that their political participation was hindered by the challenged requirement. Nor has Justice Stevens

86 This trio dissented in many election law cases at the dawn of the Storer era, and often thereafter. See, e.g., Marston v. Lewis, 410 U.S. 679, 682 (1973) (Marshall, J., dissenting); Burns v. Fortson, 410 U.S. 686, 688 (1973) (Marshall, J., dissenting); Rosario v. Rockefeller, 410 U.S. 752, 763 (1973) (Powell, J., dissenting); O'Brien v. Skinner,
been a fan of the threshold inquiry, though in contrast to the Marshall/Brennan/Douglas camp, Stevens has sometimes preferred open-ended balancing to strict scrutiny.87

Yet consistently since the time of Burdick and not infrequently before then, the center of the Court has thought that laws governing the mechanics of the electoral process carry a strong presumption of permissibility, and that heightened scrutiny must be predicated on some sort of threshold showing that overcomes this presumption. In recognition of this, my primary goal in this Part is to identify, explain, and provide a nomenclature for the strategies that the Court has used, either pre- or post-Burdick, to remove election laws from the presumptively permissible category. It will be useful to develop a shared vocabulary for what the Court has done, even if the Court's choice of one strategy or another is not always explicable, and even if the Court's interventions do not uniformly reflect a common purpose.

A. "Burdens" Severe in Kind

Laws that expressly regulate privileged aspects of the political process, or that use certain disfavored regulatory tools, have been deemed to effect a severe burden as a matter of law regardless of consequences. Strict scrutiny will follow. The Court has never hinted that the burden presumption associated with these types of laws is rebuttable. Thus, we may describe the burden as severe in kind. Strict scrutiny applies because of the character of the burden, not the magnitude.

A paradigm illustration of the in-kind approach to the characterization of burdens is Eu v. San Francisco County Democratic Central Committee,88 a decision that predates Burdick by three years but that the Court has repeatedly cited with approval since.89 A unanimous deci-

---

87 This is a theme of Stevens's jurisprudence generally. See Andrew M. Siegel, Equal Protection Unmodified: Justice John Paul Stevens and the Case for Unmediated Constitutional Interpretation, 74 FORDHAM L. REV. 2339, 2340 (2006) (stating that Justice Stevens's equal protection methodology disfavors "the use of tiers of review, multi-factor balancing tests, or any other mediating doctrine"). Perhaps the best example in the electoral mechanics jurisprudence is Stevens's opinion for a five-Justice majority in Anderson v. Celebrezze, 460 U.S. 780 (1983).
sion,\textsuperscript{90} \textit{Eu} struck down various California regulations of the internal structure and governance of political parties, as well as a ban on the endorsement of candidates by party-governing bodies.\footnote{The case was decided 8-0, with the Chief Justice not participating.} California contended that the burden of the endorsement ban was "miniscule"; the Supreme Court disagreed, stating that the party structure regulations "directly implicate the associational rights of political parties and their members."\textsuperscript{92} (The Court also stressed that the endorsement ban "directly affects speech which 'is at the core of our electoral process and of the First Amendment freedoms.'")\footnote{Id. at 222-23 (quoting \textit{Williams v. Rhodes}, 393 U.S. 23, 32 (1968)); \textit{see also} \textit{Buckley v. Am. Constitutional Law Found.}, 525 U.S. 182, 209-10 (1999) (Thomas, J., concurring) (arguing that any burden on core political speech is subject to strict scrutiny).} The Court did not predicate heightened scrutiny on evidence of, for example, the relative efficacy of California political parties pre- and post-enactment of the challenged laws; or on the comparative experience of political parties in California and other states; or on a record of instances in which California political parties had been thwarted in their efforts to implement a preferred set of internal party governance rules. Instead, the Court offered conjectures about how a political party \textit{might} want to organize itself in the absence of these strictures.\textsuperscript{94} The only evidence

\textit{Eu}, 489 U.S. at 218-19 (footnote omitted).

\textsuperscript{90} Id. at 222, 229.

\textsuperscript{92} Id. at 222-23 (quoting \textit{Williams v. Rhodes}, 393 U.S. 23, 32 (1968)); \textit{see also} \textit{Buckley v. Am. Constitutional Law Found.}, 525 U.S. 182, 209-10 (1999) (Thomas, J., concurring) (arguing that any burden on core political speech is subject to strict scrutiny).

\textsuperscript{94} The court suggested that

\textsuperscript{[a]} party might decide, for example, that it will be more effective if a greater number of its official leaders are local activists rather than Washington-based elected officials. The Code prevents such a change. A party might also decide that the state central committee chair needs more than two years to successfully formulate and implement policy. The Code prevents such an extension of the chair's term of office. A party might find that a resident of northern California would be particularly effective in promoting the party's message and in unifying the party. The Code prevents her from chairing the state central committee unless the preceding chair was from the southern part of the State.
of impact to which the opinion referred is that the Libertarian Party "was forced to abandon its region-based organization in favor of the statutorily mandated county-based system." Whether this affected the Libertarian Party's ability to function effectively was not explored.

In-kind burden characterization is not a one-way ratchet. It is the fate of some burdens to be classified as per se "not severe." Consider the Court's decision in *Timmons v. Twin Cities Area New Party* (decided five years after *Burdick*). The Eighth Circuit, relying on secondary historical sources, found that Minnesota's ban on fusion candidacies severely burdened the New Party's associational rights. "[M]inor parties," the circuit court concluded, "have played a significant role in the electoral system where multiple party nomination is legal, but have no meaningful influence where multiple party nomination is banned." Yet at the Supreme Court, neither the majority (per Justice Rehnquist) nor the dissent (per Justice Stevens) grounded its burden analysis on evidence of the effectiveness of third parties under fusion-permitting and fusion-disallowing regimes. Rehnquist deemed the burden not severe because the fusion ban left the New Party free to compete with other parties in recruiting candidates; citing *Eu*, he stressed that the fusion ban neither regulated the internal organization of the New Party nor debarred the Party from endorsing and supporting any candidate for public office. Stevens, by contrast, asserted that political parties have constitutional rights "to select their nominees for public office," "to communicate the identity of their nominees to the voting public," and, related to this, "to be on the election ballot." Because the New Party had shown enough support to qualify for the ballot under Minnesota law, but was prevented from putting on the ballot "the standard bearer who best represents the party's ideologies and preferences," the burden of the fusion ban was

---

*Eu*, 489 U.S. at 230.  
55 *Id.* at 230 n.20.  
57 *Twin Cities Area New Party v. McKenna*, 73 F.3d 196, 197-99 (8th Cir. 1996) (discussing the history of fusion candidacies in the United States). (A fusion ban prevents political parties from nominating candidates who have agreed to serve as another party's nominee.)  
58 *Id.* at 199.  
59 *Timmons*, 520 U.S. at 359-63 (citing *Eu*, 489 U.S. at 223).  
60 *Id.* at 371 (Stevens, J., dissenting).  
61 *Id.*  
62 *Id.* at 373.
necessarily grave. Like Rehnquist’s, Stevens’s reasoning was basically axiomatic; the difference is that Stevens would recognize an additional class of severe-in-kind burdens.

Once one sees the category of severe-in-kind burdens, it becomes easy to assimilate Warren Court strict scrutiny precedents into the Burdick “sliding scale” paradigm. To illustrate, imagine a law that conditions participation in democratic self-government upon payment of a fee or ownership of property. Every time the Supreme Court has confronted such a law, the Court has struck it down. The Court has ruled that citizens may not be required to pay a fee or tax for the privilege of voting; that impecunious candidates may not be required to pay a fee for access to the ballot; and that appointive offices may not be reserved for the propertied classes. These holdings all predate Burdick, but there is little reason to think that they wouldn’t be followed today. And the easiest way to explain—using the language of Burdick—why strict scrutiny properly applies in such cases is to posit

---

103 Id. at 371-72 (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 224 (1989)). Stevens’s opinion displays no interest in the empirical question of whether minor parties’ second-choice nominees (i.e., the nominees chosen under a fusion ban) tend to less effectively represent the views of party members. There is something almost disingenuous about Stevens’s reasoning: the New Party objected to the fusion ban not because it prevented the party from finding candidates who would represent the views of party members as effectively as would the Democratic nominees, but rather because the fusion ban deprived the New Party of a way of building electoral support for its “brand” and platform without calling upon voters to waste their votes on an unelectable candidate.

104 It also becomes feasible to rehabilitate certain post-Warren Court but pre-Burdick electoral mechanics cases, such as La Follette, in which the Court said the magnitude of the burden was irrelevant. Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 134 (1981).


107 Quinn v. Millasp, 491 U.S. 95 (1989); Chappelle v. Greater Baton Rouge Airport Dist., 431 U.S. 159 (1977); Turner v. Fouche, 396 U.S. 346 (1970). Nominally, the Court applied rational basis review in these appointments decisions—but that pretense is just silly. These cases are much better understood as reflecting a virtually categorical rule against state efforts to condition political participation upon ownership of property or payment of a fee.
that the character of the burden (a direct, monetary condition on political participation) demands it.

What drives the classification of certain election laws as severely burdensome in kind? I am not sure that there is a generic answer; there is certainly not a doctrinally settled one. In cases like Eu, involving associational rights of political parties, the Court may have acted on the basis of an ill-considered analogy between political parties and private clubs. That is the view of Richard Pildes. Daniel Lowenstein sees some of these cases differently, as an effort by the Court to constitutionalize the "responsible party government" school of thought about the electoral arrangements that best conduce to government accountability. David Schleicher suggests that Eu, Timmons, and other political party cases have a hidden structural logic, with the Court promoting values of representation and electoral decisiveness while taking as a given the fact of single-member districts and first-past-the-post elections.

The Court was more transparent about its purposes in striking down poll taxes and other economic conditions on the franchise: protecting the political equality of poor citizens. A bright-line rule against conditioning participation upon payment of a fee or ownership of property represented a convenient, judicially manageable way of advancing the egalitarian agenda.

---

111 See, e.g., Lubin, 415 U.S. at 717-18 ("[E]ven if the filing fee is more moderate, as here, impecunious but serious candidates may be prevented from running ... Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status."); Bullock, 405 U.S. at 144 ("Not only are voters substantially limited in their choice of candidates [by the candidate filing-fee requirement], but also there is the obvious likelihood that this limitation would fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system."); Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667-68 (1966) ("The Equal Protection Clause demands . . . substantially equal state legislative representation for all . . . . The principle that denies the State the right to dilute . . . vote[s] on account of . . . economic status or other such factors by analogy bars a system which excludes those unable to [or who fail to] pay a fee to vote . . . ." (quoting Reynolds v. Sims, 387 U.S. 553, 568 (1964))).
B. Cutoffs: From Best Practices Strict Scrutiny to Structural Presumptions

The "severe in kind" strategy for reversing the presumption of constitutionality papers over problems of degree. Yet problems of degree are pervasive in the regulation of politics. A filing-fee requirement of a couple hundred dollars, for example, probably has a negligible impact on the recruitment of candidates, whereas a fee in the tens of thousands for a local office might have major consequences for who decides to run.

In a number of electoral mechanics cases, the Court has sought to address problems of degree by choosing a simple, verifiable proxy for the underlying problem, and then subdividing the relevant regulatory continuum with bright-line cutoffs. Laws that are less demanding than the cutoff generally receive deferential review while laws above the cutoff will typically be struck down.\(^{112}\)

To appreciate the distinctive nature of the Storer-Burdick jurisprudence, it is important to distinguish between cutoffs that result from the application of strict scrutiny in ordinary fundamental rights adjudication, and cutoffs that are chosen on other grounds for the purpose of determining the standard of review. The former is illustrated by the pre-Storer case of Dunn v. Blumstein.\(^{113}\) Dunn concerned Tennessee's one-year durational residency requirement for voting, which the state defended as, inter alia, an antifraud device.\(^{114}\) Applying strict scrutiny, the Court struck down the one-year requirement, while suggesting that a thirty-day period would pass muster.\(^{115}\) Dunn stressed that because state election administrators in Tennessee and elsewhere had learned to live with a congressionally prescribed thirty-day cap on residency requirements for presidential elections, and because Tennessee allowed long-time residents to register to vote up to thirty days before an election, the year-long durational residency requirement for

\(^{112}\) Perhaps the ultimate example of this judicial strategy in the election law area is the Court's malapportionment jurisprudence (which predates Storer-Burdick, but reflects some of the same impulses). Cf. Charles, Democracy and Distortion, supra note 39, at 671-72 (noting certain bright-line features of the equipopulation cases that make sense on a structural view, but are hard to understand vis-à-vis the putative dignitary interest of individual voters).

\(^{113}\) 405 U.S. 330 (1972).

\(^{114}\) See id. at 345 ("The main concern is that nonresidents will temporarily invade the State or county, falsely swear that they are residents to become eligible to vote, and, by voting, allow a candidate to win by fraud. Surely the prevention of such fraud is a legitimate and compelling government goal.").

\(^{115}\) Id. at 345-48.
newcomers could not be necessary to advance the state's compelling interest in preventing fraud.\textsuperscript{116}

\textit{Dunn} represents an application of what I shall term \textit{best practices strict scrutiny of individual rights infringements}. The Court begins with an individualistic understanding of the right to vote: each bona fide citizen resident of a jurisdiction is presumptively entitled to cast a ballot—voting is among her constitutionally protected liberty interests. The Court then asks whether the plaintiff's exercise of that right has been materially burdened or curtailed. In \textit{Dunn}, the answer was unambiguous: Tennessee's durational residency requirement deprived the plaintiff of his right to vote in the first general election following his move to Tennessee.\textsuperscript{117} Therefore, it was incumbent on the state to demonstrate the necessity of the law.\textsuperscript{118} In scrutinizing the state's justification, the Court asks whether the challenged law approximates the "best" or least burdensome version of its type that has proven workable in other jurisdictions. Only if it does is the law sustained.

\textit{Storer} and its progeny use cutoffs in an importantly different way, which I shall term the model of \textit{structural presumptions}. The Court begins with an idea, perhaps inchoate, of certain qualities that a normative regime of election law should exhibit. If those qualities would be hard for judges to measure directly and consistently, the Court then dreams up an easily observed proxy, and defines a cutoff in terms of that proxy. Laws that fall to one side of the cutoff are presumptively constitutional and receive generally deferential review; laws on the other side are presumptively impermissible. The resulting jurisprudence is structural rather than individualistic in the following sense: it aims to create regimes of election law that display certain properties in the aggregate, rather than to ensure that state-created burdens on the individual citizen's fundamental political liberties are justified in

\textsuperscript{116} \textit{Id.}

\textsuperscript{117} Though this exclusion is unambiguously significant on an individualistic understanding of the right to vote, it might not be judged important on an aggregative, representation- or governance-oriented conceptualization of the right to vote. The significance of the "burden" on such views might be thought to depend on (1) the number of newcomers, (2) whether newcomers have less information about the subject of the election than old-timers, (3) whether newcomers share distinct political views or interests, or (4) whether some groups of citizens move more frequently than other groups over the course of their lifetimes. \textit{Cf.} Adam B. Cox, \textit{The Temporal Dimension of Voting Rights}, 93 VA. L. REV. 361 (2007).

\textsuperscript{118} For what our constitutional practice ultimately guarantees is not the citizen's right to exercise fundamental rights, but rather the citizen's entitlement to make the state provide a substantial justification for limitations on her exercise of fundamental rights.
light of the feasible or imaginable alternatives. The language of "burdens" remains, but it is little more than window dressing for conclusions reached on other grounds.\footnote{Cf. Charles, Democracy and Distortion, supra note 39, at 655-64 (arguing that much of the Supreme Court's malapportionment and racial gerrymandering jurisprudence reflects a similar effort to pursue structural objectives while using the language of individual rights).}

Picking cutoffs is an audacious undertaking for the Supreme Court. In some areas, the Court has simply propounded a cutoff, presumably on the basis of the Justices' hunches. More recently, the Court has looked to the practices of the states, and has begun to lay a doctrinal foundation for dynamic cutoffs that could vary as the states' practices change over time.


As in so many areas of election law, the Court's ballot-access jurisprudence began with a couple of vague and indefinite decisions, followed by a much more ambitious and prescriptive effort to structure judicial review by the lower courts.\footnote{Regarding this pattern in other areas of the Supreme Court's election law jurisprudence, see HASEN, THE SUPREME COURT AND ELECTION LAW, supra note 39, at 47-72.} The two early cases, \textit{Williams v. Rhodes}\footnote{393 U.S. 23 (1968).} and \textit{Jenness v. Fortson},\footnote{403 U.S. 431 (1971).} established that ballot-access laws could not be used to "freeze the political status quo,"\footnote{Id. at 438 (contrasting the facts of \textit{Williams}, in which minor parties and independents had been frozen out, with the facts of the instant case, which revealed the "open quality" of the electoral regime at issue).} but that states were free to require a "preliminary showing of a significant modicum of support before printing the name of a . . . candidate on the ballot."\footnote{Id. at 442.} Some such showing was thought appropriate to protect the state's "important" interest in "avoiding confusion, deception, and even frustration of the democratic process at the general election."\footnote{Id.} \textit{Williams} struck down a medley of Ohio ballot-access regulations that, taken together, had made it "virtually impossible for a new political party . . . to be placed on the [presidential] ballot."\footnote{\textit{Williams}, 393 U.S. at 24.} Among other things, Ohio required third parties "to obtain petitions signed by
qualified electors totaling 15% of the number of ballots cast in the last preceding gubernatorial election.\textsuperscript{127} In \textit{Jenness}, the Court upheld Georgia's requirement that independent candidates procure signatures from 5\% of the electorate to qualify for the ballot.\textsuperscript{128} The Court noted that Georgia gave candidates a generous six-month period in which to comply with the signature requirement; that Georgia did not impose many of the disabling restrictions found elsewhere; and, perhaps most important, that the recent track record of independent candidate success demonstrated that the Georgia system's "open quality" was "far from merely theoretical."\textsuperscript{129}

At issue in \textit{Storer} were California ballot-access laws which, inter alia, imposed a one-year disaffiliation requirement on independent candidates;\textsuperscript{130} required independent candidates to gather signatures from registered voters totaling 5\% of the number who had voted in the last general election; and disqualified anyone who had voted in a primary election from signing an independent's petition for the corresponding general election ballot.\textsuperscript{131}

If the Court had been doing \textit{Dunn}-style fundamental rights adjudication in \textit{Storer}, the inquiry would have begun with the observation that the disaffiliation requirement and the 5\% signature rule both limited the ability of bona fide independent candidates and their supporters to associate through the ballot. If this form of association were deemed to fall within the ambit of the First Amendment, the Court would next have asked whether the state had evidence that the signature and disaffiliation requirements advanced the policy objectives invoked on their behalf, and whether other states had managed to protect similar interests in less burdensome or more narrowly tailored ways. The challenged requirements would be struck down unless California could show that they materially advanced the state interests asserted in their defense, and that they better served those interests than the less burdensome or better tailored alternatives in use elsewhere.\textsuperscript{132}

\begin{enumerate}
\item\textsuperscript{127} \textit{Id.} at 24-25.
\item\textsuperscript{128} \textit{Jenness}, 403 U.S. at 438.
\item\textsuperscript{129} \textit{Id.} at 438-39.
\item\textsuperscript{130} That is, independent candidates were required to sever their political party ties a full year before running as independents.
\item\textsuperscript{132} The reasoning of the \textit{Storer} dissenters largely follows the \textit{Dunn} model. \textit{See id.} at 755-66 (Brennan, J., dissenting).  
\end{enumerate}
But the analysis in *Storer* unfolded rather differently. The Court made short work of the challenge to the disaffiliation requirement, remarking, "It appears obvious to us that the . . . disaffiliation provision furthers the state's interest in the stability of its political system."\(^{133}\) The Court did not require the state to come forward with supporting evidence, nor did the Court explore the feasibility of less burdensome alternatives, much to the dissent’s dismay.\(^{134}\)

Then the Court turned to the signature requirement. With a nod to *Jenness*, the Court began by observing that the "percentage [5%] . . . does not appear to be excessive."\(^{135}\) However, "to assess realistically whether the law imposes excessively burdensome requirements," it would be necessary to know the size of the "available pool of possible signers."\(^{136}\) Because California disqualified primary voters from signing independent candidate petitions, a candidate who set out to gather the requisite number of signatures (5% of the total vote in the last election) might have to sign up "substantially more than 5% of the eligible pool."\(^{137}\) That would make the constitutional claim "not frivolous."\(^{138}\) But it wouldn't be the end of the story either; the ultimate "question for judgment" would be: "[I]n the context of California politics, could a reasonably diligent independent candidate be expected to satisfy the signature requirements, or will it be only rarely that the unaffiliated candidate will succeed in getting on the ballot?"\(^{139}\) Lest answering this question prove too difficult, however, the Supreme Court advised on remand that "if the required signatures approach 10% of the eligible pool of voters," the lower court should assess the feasibility of modifying California's signature-gathering rules, or even strike down the rules *tout de suite*.\(^{140}\) In effect, the Court dictated that a 10%-of-the-available-pool requirement would be presumed to prevent reasonably diligent independent candidates from qualifying more than rarely.

*Storer* is emblematic of the model of structural presumptions in two respects. First, the Court constitutionalized an end-state (a per-
formance standard, as it were) for the electoral system as a whole. It sought to ensure that the system was open enough for independent candidates to get on the ballot more than rarely. If the aggregate property of adequate openness was satisfied, the Court would not further concern itself with whether the remaining burdens on the right to associate through the ballot were truly justified. Storer is also emblematic in that the Court set forth cutoffs (using a simple proxy) to reduce the need for empirical inquiry into complicated questions about the actual openness of ballot-access regimes. Signature requirements (measured as the share of the “available pool”) were treated as a proxy for openness; requirements of 5% or less were deemed presumptively adequate; and requirements of 10% or more were deemed presumptively excessive.

The foregoing structural interpretation of Storer helps to make sense of some otherwise perplexing features of Munro v. Socialist Workers Party, Norman v. Reed, and Burdick v. Takushi, the Court’s most recent forays into ballot access.

At issue in Munro was a 1977 enactment of the Washington State Legislature that made it much more difficult for minor parties to get on the general election ballot. Prior to 1977, any convention-nominated, minor party candidate could obtain a place on Washington’s general election ballot by filing a certificate signed by one hundred registered voters who had participated in the convention and refrained from voting in the primary election. Under the new regime, all candidates who sought to appear on the general election ballot had to participate in a blanket primary, and only those who received at least 1% of the vote were awarded a slot on the general election ballot. Before the change in the law, numerous minor parties qualified

---

141 Unless, perhaps, the burden was created for patently discriminatory reasons or is utterly arbitrary. See infra Part II.C.2.

142 Storer’s chosen proxy is highly imperfect. For example, it ignores questions about the timing of the signature requirement. But Storer’s proxy-based presumption is not conclusive: a plaintiff might still prevail if she can demonstrate empirically that, say, a state’s 5% signature requirement, in conjunction with other features of the state’s ballot-access regime, makes independent access to the ballot a practical impossibility. Conversely, a state might forestall meaningful judicial scrutiny of, say, a 10% signature requirement, by demonstrating that independent candidates have, in fact, qualified frequently under the 10% regime.

143 479 U.S. 189 (1986).
146 Munro, 479 U.S. at 191.
147 Id. at 191-92.
for the ballot in nearly all general elections; afterwards, minor party ballot appearances became much rarer. Relative to pre-1977 ballot-access rules, the burden of the new law was, as the Ninth Circuit said, "dramatic." Accordingly, the Ninth Circuit applied exacting scrutiny and struck down the law.

The Supreme Court reversed. Notwithstanding the law's "dramatic" impact, the Court judged the associated burden "slight." "Comparing the actual experience before and after 1977," wrote the Court, "tells us nothing about how minor parties would have fared in those earlier years had Washington conditioned ballot access to the maximum extent permitted by the Constitution." That may be true, but the Court's notion of measuring the scrutiny-level-determining burden of an election law by comparison to the "maximum restriction that the Constitution permits" is conceptually incoherent under the rights/justification model of constitutional adjudication. The reason for measuring burdens is to identify the correct scrutiny level, and the choice among scrutiny levels has huge consequences for what "the Constitution permits," so it would be circular to measure burdens by comparison to the "maximum restriction that the Constitution permits." Indeed, under the rights/justification model, there should be no such thing as a generic, unvarying "maximum restriction that the Constitution permits." What ought to be allowed (in any given case)

---

148 See the Ninth Circuit's explanation in Socialist Workers Party v. Secretary of State:

Prior to 1977, candidates of minor parties qualified for the general election ballot in contests for statewide office with regularity. At least one minor party appeared on the general election ballot in every Washington gubernatorial election from 1896 to 1976 except 1952. Two or more minor party candidates qualified in all but two of these elections. Forty minor party candidates appeared on the general election ballot for statewide offices in the five general elections between 1968 and 1976.

The 1977 amendment to Wash.Rev.Code section [sic] 29.18.110 worked a striking change. According to the affidavit of Washington's Supervisor of Elections, since 1977 minor parties "have not been successful at qualifying candidates for the state general election ballot for statewide offices." Although one or more minor parties nominated candidates in each of the four statewide elections held between 1978 and 1988, none qualified for the general election ballot. In 1984 one of four minor party candidates nominated qualified for the general election ballot.

765 F.2d 1417, 1419 (9th Cir. 1985).

149 Id.

150 Id. at 1420-22.

151 Munro, 479 U.S. at 199.

152 Id. at 197.
will depend on a weighing of the burden, the degree to which the challenged requirements advance substantial state interests, and the feasibility of less burdensome alternatives. 153

The notion of a "maximum restriction that the Constitution permits" (independent of evidentiary showings by the state, etc.) is more sensical, however, if one understands the ballot-access jurisprudence in the structural terms presented above. The maximally restrictive regime conditions third parties' and independents' access to the ballot on large showings of popular support, without being so demanding that "reasonably diligent candidates" qualify "only rarely." 154 The Munro Court was correct—in the sense of being faithful to Storer—to describe as "slight" the burden of Washington's new ballot-access law, not because the burden on the plaintiff political party was trivial in any material sense, but because burdens labeled "slight" receive highly deferential review under the sliding-scale standard. In other words, the label was shorthand for saying that rational-basis-like review was in order. The proper reason for deference, however, was that the 1% threshold showing of support required by Washington was less than the 5% deemed presumptively permissible in Storer, and the evidence in the record did not establish an exclusion of minor party candidates sufficiently complete to overcome this presumption. 155

153 Of course, there is no way to say what the "magnitude" of the burden is without a baseline for comparison. Cf. Charles, Democracy and Distortion, supra note 39, at 653-55 (arguing that rights claims are predicated on structural baseline assumptions). But I do not think that the "baseline problem" necessarily poses significant conceptual or practical difficulties for the traditional rights/justification model of fundamental-rights adjudication. For example, the courts could allow plaintiffs to measure the burden of a challenged electoral requirement with reference to the least burdensome alternative presently in use in another state. (This is essentially the tack that the plaintiffs pursued, unsuccessfully, in ACORN v. Bysiewicz, 413 F. Supp. 2d 119 (2005). See supra text accompanying notes 19-24.) This approach would seem practicable so long as the alternative that would be "least burdensome" for the plaintiffs would not present greater burdens (compared to the status quo) for some other class of participants in the political process.

154 In the interest of precision, though, it would be better to describe this not as the "maximum restriction that the Constitution permits," but as the "maximum restriction that will receive deferential review." Thanks to Floyd Feeney for suggesting this refinement.

155 See Munro, 479 U.S. at 196-97 ("Much is made of the fact that...since 1977 only 1 out of 12 minor-party candidates has appeared" on the ballot, while prior to 1977, virtually every minor party candidate did. However, "[s]uch historical facts...prove very little in this case, other than the fact that [the new law] does not provide an insuperable barrier to minor-party ballot access.").
of burdens tends to obscure this (witness the Ninth Circuit’s decision).\textsuperscript{156}

A few years after \textit{Munro}, in \textit{Norman v. Reed},\textsuperscript{157} the Supreme Court made short work of a new political party’s argument that the ballot-qualifying show of support (25,000 signatures) it had made in one political subdivision should also qualify it for the ballot in an adjoining subdivision. (The state required an additional 25,000 signatures from voters in the adjoining subdivision.\textsuperscript{158}) The Court, per Justice Souter, observed that 25,000 signatures represented only 2\% of the pool of prospective petition signers.\textsuperscript{159} Accordingly, the plaintiff’s argument was deemed “foreclose[d]” by precedents upholding 5\% requirements.\textsuperscript{160} Enough said. The Court did not even bother to remark that on a sufficient evidentiary record, the presumptively “open” character of a ballot-access regime with a 2\% signature requirement might be rebutted. \textit{Burdick},\textsuperscript{161} decided the same year as \textit{Norman}, involved a challenge to Hawaii’s ban on write-in ballots. The ban was one component of a larger system of ballot-access laws that advantaged the then-dominant Democratic Party.\textsuperscript{162} The plaintiff’s lawyers might have attacked the ballot-access law directly, but in light of \textit{Storer}, that route was unpromising (similar attacks had been launched and failed in Hawaii’s state courts).\textsuperscript{163} So they went after the write-in ban instead. The Supreme

\textsuperscript{155}Socialist Workers Party v. Sec’y of State, 765 F.2d 1417, 1421 (9th Cir. 1985).


\textsuperscript{158}Id. at 295.

\textsuperscript{159}Id.

\textsuperscript{160}Id.

\textsuperscript{161}504 U.S. 428 (1992).

\textsuperscript{162}Issacharoff & Pildes, supra note 39, at 670-72 (explaining how the state’s ballot-access laws discouraged voters from supporting independent candidates).

\textsuperscript{163}It perhaps bears noting that one feature of Hawaii’s ballot-access regime was, in my view, quite vulnerable under \textit{Storer}. To qualify for the general election ballot, independent candidates had to run in an open primary in which they appeared on a designated “nonpartisan” ballot; only those independents who won at least “10 percent of the primary vote, or the number of votes that was sufficient to nominate a partisan candidate, whichever number [was] lower,” qualified for the general election. \textit{Burdick}, 504 U.S. at 436. Recall that in \textit{Storer}, the Court said that “[i]f the required signatures approach 10\% of the eligible pool of voters,” serious judicial scrutiny of the necessity of the signature requirement would be in order. \textit{Storer} v. Brown, 415 U.S. 724, 743 (1974); see also supra text accompanying notes 136-141. The 10\%-of-the-primary-vote requirement in \textit{Burdick} is relevantly analogous to a 10\% signature requirement; cf. \textit{Munro} v. Sociality Workers Party, 479 U.S. 189, 197-98 (1986) (treating Washington’s 1\% vote requirement in a blanket primary as equivalent to a signature requirement of 1\% of the available pool). Indeed, it might be considerably more “extreme” in prac-
Court had little patience for this, concluding that because of the "adequate ballot access afforded under Hawaii's election code," the burden of the write-in ban was necessarily "limited" and "slight." On this view, writing in a candidate's name is just another form of ballot access, so if the principal route of access comports with the Court's basic structural demands, any asserted problems with the secondary routes are not of constitutional concern.

*Burdick* has been harshly criticized by Samuel Issacharoff and Richard Pildes, the leading academic proponents of a structural approach to judicial review of election laws. They portray the Court as having glossed the plaintiff's claim in "narrow, individualistic, nonsystemic" terms. They take the Court to task for seeing only an asserted "right to cast a protest vote," rather than a challenge to the Democratic Party's "partisan lockup" of Hawaiian elections. This criticism goes too far. It was the petitioner who framed the case in "narrow, individualistic, nonsystemic terms," setting it up as a matter of state infringement on the plaintiff-voter's liberty of conscience and freedom of expression. The Court declined
this invitation to find an expressive element in the right to vote, explaining:

[T]he function of the election process is "to winnow out and finally reject all but the chosen candidates," not to provide a means of giving vent to "short-range political goals, pique, or personal quarrel[s]." Attributing to elections a more generalized expressive function would undermine the ability of States to operate elections fairly and efficiently.\(^{170}\)

Accordingly, the Court analyzed the write-in ban in terms of structural ballot-access precedents. The Court should not be blamed for overlooking the putative "partisan lockup." The issue was not fairly presented in the petitioner's brief, and, as we shall see, there is precedent within the _Storer-Burdick_ jurisprudence for flipping the presumption of permissibility in cases involving electoral mechanics that were designed to discriminate against groups of citizens with common political interests.\(^{171}\)

2. Qualitative Cutoffs: On _Kusper v. Pontikes_ and Advance Enrollment for Voting in Partisan Primaries

_Storer_ set a fixed, numerical cutoff to deal with a problem of degree: signature requirements of less than 5% are presumptively permissible, whereas requirements approaching 10% are presumptively impermissible.\(^{172}\) In _Rosario v. Rockefeller_\(^ {173}\) and _Kusper v. Pontikes_,\(^ {174}\) two cases decided about the same time as _Storer_, the Court policed a similar problem of degree in a more qualitative fashion, tying the presumptive permissibility of advance-enrollment requirements for participation in primary elections to the interval of time between elections.

_Rosario _sustained New York's requirement that primary voters "enroll in the party of [their] choice at least 30 days before the [preceding] general election." New York held its presidential primaries in

\(^{170}\) _Burdick_, 504 U.S. at 438 (alteration in original) (citation omitted) (quoting _Storer v. Brown_, 415 U.S. 724, 735 (1974)); see also Karlan, _supra_ note 6, at 1722 (arguing that the Court treated _Burdick_ as a case about the aggregation of votes, rather than about the individual right to participate in the first instance).

\(^{171}\) See _infra_ Part II.C.


\(^{173}\) 410 U.S. 752 (1973).


\(^{175}\) 410 U.S. at 754.
June and nonpresidential primaries in September, so the statute created effective advance-enrollment requirements of eight and eleven months, respectively. A five-Justice majority of the Court opted for kid-gloves scrutiny, nominally because New York had "merely imposed a time deadline on . . . enrollment" rather than "absolutely disenfranchis[ing] the class to which the petitioners belong."

Kusper came out differently. The Illinois Election Code provision at issue barred anyone from "voting in the primary election of a political party if he has voted in the primary of any other party within the preceding 23 months." The petitioner, who had voted in a Republican primary in February 1971, was therefore unable to participate in the Democratic primary of March 1972. As the Court saw it, this was no "mere[] . . . time limit on enrollment." Rather, the statute operated to "lock[] a voter into an unwanted party affiliation from one election to the next": "[u]nlike the petitioners in Rosario, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary. In short, Illinois "absolutely precluded" citizens who had participated in one primary election from switching parties and voting in the next. The Illinois enrollment rule therefore received no presumption of constitutionality, and was struck down on the theory that "less drastic means"—such as those employed in New York—could be used to guard against raiding.

The Court’s rhetoric notwithstanding, I fail to see any plausible deontic basis for distinguishing among advance enrollment requirements based on whether the advance period exceeds the interval of time between primary elections. Every advance enrollment requirement has the effect of absolutely precluding from participation in the upcoming primary those new, bona fide party adherents whose

---

176 Id. at 760.
177 As the dissent observed, "The Court’s formulation . . . resembles the traditional equal protection 'rational basis' test." Id. at 767 (Powell, J., dissenting).
178 Id. at 757.
179 Kusper, 414 U.S. at 52.
180 Id. at 52-53.
181 Id. at 60.
182 Id. (internal quotation marks omitted).
183 Id.
184 Id.
185 Id. at 61.
change-of-partisan-heart occurred after the enrollment deadline. A failure to enroll in advance of the deadline is only voluntary for those citizens who knew, prior to the deadline, that they would want to vote in the party primary at issue. Earlier advance enrollment deadlines naturally exclude more bona fide party switchers than later deadlines, but this is a difference of degree, not of kind—and a difference that only matters if the right to vote is cashed out in aggregate/structural rather than individualistic terms. True, if the length of the advance-enrollment period exceeds the interval of time between primaries, some party switchers may be required to sit out two rounds of primaries. Yet it seems to me that the only difference of degree that is also a difference in kind in this context is the difference between requiring the bona fide party switcher to sit out one primary or none, not two primaries as opposed to one.

None of this goes to say that the Court was wrong to draw the line where it did in *Kusper.* The chosen line is much more intelligible, however, on a structural rather than an individualistic rights/justification account of the Court's role with respect to election law. On the individualistic account, the threshold questions should be: (1) whether the plaintiff has a constitutionally protected interest in voting in the election at issue; and if so, (2) whether the state has prevented her from voting in that election, or materially burdened her effort to vote. The Court has indicated that the right to vote includes the right to vote in primary elections if primaries are used to winnow the field for the general election ballot. So, on the individualistic account, any citizen who can show that her genuine, subjective change in party affiliation occurred after the enrollment deadline ought to be able to march into court and force the state to demonstrate the practical necessity of the deadline.

---

186 I am assuming, here, that the Court meant to draw a firm line in *Rosario* and *Kusper,* and that that line continues to have force today. I suppose that a bona fide party-switcher whose decision to switch parties postdated an enrollment deadline shorter than the interval of time between primary elections could mount a challenge to the deadline on the theory that her exclusion was not voluntary. But I doubt her claim would succeed, given the Court's penchant for bright lines in this area, and given the ramification of her argument for any enrollment deadline.

187 See, e.g., Gray v. Sanders, 372 U.S. 368, 381 (1963) (applying the "one person, one vote" principle to a primary election); United States v. Classic, 313 U.S. 299, 313-20 (1941) (holding that the right to vote for members of Congress includes the right to vote in primary elections when the primary has been made "an integral part of the procedure for ... popular choice").
On the structural account, by contrast, it is of no particular moment that a bona fide member of the relevant electorate was prevented from voting. What matters, at the threshold stage, is whether there is some basis for thinking that the aggregate constitutional costs of the challenged law (or the class of laws to which it belongs) substantially exceed the benefits. With respect to lengthy advance-enrollment periods, one might count as constitutional costs the diminished responsiveness of the nomination process to the wishes of the citizenry (might the party old guard capture the nomination process by excluding new adherents?), and disaffection or loss of confidence in the political process on the part of citizens who find themselves excluded. Then again, advance enrollment requirements may have real benefits in terms of discouraging opportunistic raiding. Over time, raiding could cause political parties to lose their ideological distinctiveness. The cue provided by the party label would become less useful for voters, and the electorate as a whole might become more confused and manipulable.\textsuperscript{188}

On the structural view, what the Court needed in \textit{Rosario} and \textit{Kusper} was an easy way to distinguish extreme and potentially abusive advance-enrollment requirements from ordinary and potentially salutary requirements. The standard that the Court effectively promulgated—that such requirements are presumptively permissible if shorter than the interval of time between primaries, and presumptively impermissible if longer—is rather arbitrary.\textsuperscript{189} But the Court had to draw a line somewhere and the line drawn in \textit{Kusper} has the advantage of appearing less arbitrary than a fixed numerical cutoff. And, importantly, it lends itself to consistent application in the lower courts, obviating the need for messy empirical inquiries into both the number of voters affected by a given enrollment protocol and the practical necessity of enrollment limitations that affect significant numbers of voters.

Like the 10%-of-the-available-pool cutoff in \textit{Storer}, the line drawn in \textit{Kusper} illustrates the Court's penchant for formalism in setting scrutiny levels. The Court identified an easily verified property that advance-enrollment requirements either have or do not have, and on

\footnote{These are basic tenets of the “responsible party government” school of thought. On this school and its influence on the Court’s political party jurisprudence, see Lowenstein, supra note 109.}

\footnote{Note that it's even more arbitrary from an individual-rights perspective. Why should the party switcher who "converts," say, six months before an election, be treated as having a lesser interest in that election than the party switcher whose conversion experience took place twenty-four months before that election?}
this basis lumped the requirements into “presumptively permissible” and “presumptively impermissible” categories. What *Kusper’s* rhetoric hides from sight is that the line the Court drew is more plausibly defended in structural rather than rights-based terms—for *Kusper’s* line does not assure the bona fide party switcher excluded by an advance-enrollment rule that she will be able to haul the state into court and make it demonstrate the necessity of her exclusion.

3. Dynamic Cutoffs: On *Randall v. Sorrell, Norman v. Reed, and the Emergence of Cutoffs Tied to the Legal Landscape*

The cutoffs drawn in *Storer* and *Kusper* seem to rest on little more than stab-in-the-dark guesses about how best to define constitutional limits on the law of democracy. In lieu of sheer guesswork, the Justices might have tried to set limits based on features of the larger legal landscape. Such limits could evolve dynamically, as the states update their election laws over time. There are some nascent indications that the *Burdick* jurisprudence may evolve in this direction.

a. Randall: *The National Landscape*

*Randall v. Sorrell,* 190 issued in 2006, was the Court’s first decision to strike down a campaign contribution limit as unconstitutionally low. Although the Court has never treated campaign finance law, as such, as part of the ordinary run of electoral mechanics (and hence subject to the sliding-scale or no-litmus-test scrutiny of *Storer/Burdick*), it is nonetheless appropriate to view the Court’s recent contribution limit jurisprudence as substantially informed by—and ready to feed back into—the electoral mechanics case law.

The pivotal case was *Nixon v. Shrink Missouri Government PAC,* 191 in which the Court per Justice Souter finally interred the notion that contribution limits were subject to strict scrutiny. 192 *Shrink* prescribed a species of sliding scale scrutiny, under which “[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility

---

192 See id. at 386-88 (examining *Buckley v. Valeo*, 424 U.S. 1 (1976), and noting that “[w]hile we did not then say in so many words that different standards might govern expenditure and contribution limit affecting associational rights, we have since then said so explicitly”).
of the justification raised. This is nominally different from Burdick's version of sliding scale scrutiny, under which the level of scrutiny is supposed to vary with the burden created by the law rather than with the plausibility of the state's justifications for it. But if the overarching argument of this Article is correct, the difference is only nominal. The Storer-Burdick jurisprudence is not burden-centric in any meaningful sense; rather, it simply establishes a baseline presumption of permissibility for a large class of constitutionally significant laws, and a rather ad hoc collection of moves for flipping this presumption in cases where certain readily verified indicators suggest that something is seriously amiss.

Justice Breyer, concurring in Shrink, made the analytic connection to Storer more explicit. Breyer began by postulating that when the state regulates contribution limits, "constitutionally protected interests lie on both sides of the legal equation." In light of this, "a presumption against constitutionality is out of place." What the Court must do instead is "balance[] interests," judging "whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others." And in doing this balancing, courts generally should defer to "empirical legislative judgments," be-

---

193 Id. at 391.

194 Looking to the novelty or plausibility of the justifications asserted on behalf of a challenged law might serve as one more means of flipping the presumption of constitutionality. If a law is so peculiar that the state's lawyers cannot dredge up a traditional justification for it, something may well be awry.

195 Id. at 400 (Breyer, J.). Breyer explained the problem as follows:

On the one hand, a decision to contribute money to a campaign is a matter of First Amendment concern . . . because [money] enables speech. . . . Both political association and political communication are at stake.

On the other hand, restrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. . . . Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process. Cf. Reynolds v. Sims, 377 U.S. 533, 565 (1964) (in the context of apportionment, the Constitution "demands" that each citizen have "an equally effective voice"). In doing so, they seek to build public confidence in that process and broaden the base of a candidate's meaningful financial support, encouraging the public participation and open discussion that the First Amendment itself presupposes.

Id. at 400-01 (some citations omitted).

196 Id. at 401.

197 Id. at 402.
cause of the legislature's "significantly greater institutional expertise."\textsuperscript{198} This approach, said Breyer—citing \textit{Storer} and its progeny—is precisely what is found in the Court's jurisprudence concerning "the integrity of the electoral process."\textsuperscript{199}

In \textit{Randall}, deference to the legislature's empirical judgments reached a limit; \textit{Shrink}'s presumption of constitutionality for contribution limits was neutralized. Justice Breyer, writing the plurality opinion for himself, Justice Alito, and Chief Justice Roberts, began by reiterating \textit{Shrink}'s teaching that judicial deference to legislative judgments concerning the level of contribution limits is ordinarily called for.\textsuperscript{200} But the courts "must recognize the existence of some lower bound," because "contribution limits that are too low can . . . harm the electoral process by preventing challengers from mounting effective campaigns against incumbent office-holders, thereby reducing democratic accountability."\textsuperscript{201} Instead of prescribing a presumptive numerical floor on contribution limits, however, Breyer wrote that courts should look for "strong indication in a particular case, i.e., 'danger signs,' that . . . risks [to the democratic process] exist (both present in kind and likely serious in degree)."\textsuperscript{202} Only then should courts "review the record independently and carefully with an eye toward assessing the . . . proportionality of the restrictions."\textsuperscript{203}

On the facts of \textit{Randall}, Breyer found such "danger signs" in the disparity between Vermont's contribution limits and "the contribution limits upheld by the Court in the past, and with those in force in other States."\textsuperscript{204} "Considered as a whole," he wrote, "Vermont's contribution limits are the lowest in the Nation."\textsuperscript{205} This warranted heightened scru-
tiny, and, after perusing the record, Breyer concluded that while the ultimate impact of Vermont's low limits remained uncertain, the risks to political accountability were too great to justify the restrictions.206

Notice the many commonalities between the Randall plurality's approach to contribution limits and Storer's take on ballot access. Each opinion deals with a domain in which implementation of the Constitution's purposes depends on supportive legislation; there is no satisfactory libertarian alternative.207 Each opinion recognizes, however, that legislation enacted in the name of high purposes may in fact create structural harms: a ballot-access regime in which third-party or independent candidates qualify "only rarely," depriving the electorate of an adequate range of choices, or a system of contribution limits that privileges incumbents and mutes challengers, undermining democratic accountability. Each opinion treats the potential for these structural harms as the basis for judicial intervention.208 Yet each

206 See id. at 2494-2500 (noting, first, that "the record suggests though it does not conclusively prove, that Act 64's contribution limits will significantly restrict the amount of funding available for challengers to run competitive campaigns"; second, that "Act 64's insistence that political parties abide by exactly the same low contribution limits that apply to other contributors threatens harm to a particularly important political right, the right to associate in a political party"; third, that the Act's failure to exclude from the definition of contribution "the expenses [that] volunteers incur, such as travel expenses, in the course of campaign activities" "aggravates the problem"; fourth, that "Act 64's contribution limits are not adjusted for inflation"; fifth, that there were no exceptional circumstances in the record that might provide "special justification" for Act 64's limits). It is worth observing that even in the application of heightened scrutiny, Justice Breyer did not rely in the main on evidence concerning the asserted negative impact of Act 64's limits. Rather, he inferred that such "risks" were significant based on the law's low limits (relative to other states) and suspect formal properties (lack of indexing, lack of preferential treatment for political party contributions, lack of exemptions for volunteer expenses).

207 To be sure, this premise, while true for Breyer, is contested by others who believe that a free flow of money to political campaigns is not only consistent with the Constitution's purposes, but required by it. See, e.g., BRADLEY A. SMITH, UNFREE SPEECH: THE FOLLY OF CAMPAIGN FINANCE REFORM 109-20 (2001) (arguing that campaign finance regulation violates the First Amendment right to free speech).

208 Rick Hasen argues that the Randall plurality's putative concern with structural harm to political accountability is disingenuous. See Hasen, The Newer Incoherence, supra note 39, at 873-77. I am not so sure. A big part of Hasen's argument is that the Court has declined other invitations to regulate the political process in the interest of more competitive elections, as exemplified by the recent partisan gerrymandering cases (Vieth v. Jubelirer, 541 U.S. 267 (2004), and League of United Latin American Citizens v. Perry (LULAC), 126 S. Ct. 2594 (2006)), and the holding in Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997). See Hasen, The Newer Incoherence, supra note 39, at 870-72. However, the Court's reluctance to intervene in the partisan gerrymandering cases is plausibly due to uncertainty about how to intervene productively, not to a lack of concern about representative and accountable legislatures. See infra note 277 and accom-
opinion also recognizes, tacitly, that a jurisprudence that required proof of the feared structural harm may create more difficulties than it solves. (Under such a regime, for example, unconstitutional laws might have to be left in place for many years before sufficient evidence of the structural injury has accumulated. And courts would be required to make the sort of empirical judgments that, on Breyer’s legal process view, are best left to legislatures.) Accordingly, each opinion elaborates a doctrine under which the presumption of constitutionality may be flipped on a fairly mechanical showing: in Storer, that the signature requirement approaches 10% of the available pool; in Randall, that the contribution limit is an outlier relative to the limits employed in other states.

It is because of these commonalities, and not just the Randall plurality’s citing of Storer, that I expect the danger-signs/outlier-among-the-states methodology to be deployed (by some Justices at least) in future electoral mechanics cases.

b. Norman: State/Local Disparities

Norman v. Reed involved a challenge to various Illinois requirements for third-party ballot access in local elections. As noted above, the Court quickly dismissed the petitioner’s argument that gathering a sufficient number of signatures to qualify for the ballot in an urban district should also ballot-qualify the petitioner in the adjoining suburban district. The number of signatures required to field candid
dates in the suburban district was well below Storer’s 5% threshold, and thus presumptively permissible.\textsuperscript{212}

The petitioner prevailed, however, on her challenge to a rule that tied the fate of a new political party’s effort to qualify a candidate for any elective office within a districted local government to the party’s success or failure in gathering signatures on behalf of candidates for other offices.\textsuperscript{213} To field a candidate in any one district, the political party had to gather 25,000 signatures from voters in that district.\textsuperscript{214} But if the party failed to gather 25,000 signatures in each district where it sought to field candidates, all of the party’s candidates for the local government in question were disqualified.\textsuperscript{215} This rule increased the effective signature requirement for qualifying candidates within a single district to “some multiple of” 25,000. Yet only 25,000 signatures were required to ballot qualify a slate of candidates for statewide elected office.\textsuperscript{216} As the Court saw it, once the state had concluded that 25,000 signatures represented a sufficient “modicum of support” to warrant a place on statewide ballots, the state could not insist on a higher number for local offices.\textsuperscript{217} The Court based this holding on Illiniois State Board of Elections v. Socialist Workers Party,\textsuperscript{218} a 1979 decision striking down an earlier law that had the effect of increasing the signature requirement for certain municipal offices beyond the 25,000 required of statewide candidates.

Socialist Workers Party is an aberrational case. The opinion, written by Justice Marshall, applies Dunn-style strict scrutiny on the premise that all ballot-access “restrictions” and “classification[s]” are unconstitutional unless “necessary to serve a compelling interest.”\textsuperscript{219} That premise is in considerable tension with Storer (where Marshall dissented), and untenable after Munro, Burdick, and Clingman.

Read narrowly, Norman’s holding on the all-offices-or-none rule merely gives stare decisis effect to an otherwise outmoded decision, and its principle ought not be extended to other contexts. Read more

\textsuperscript{212} See Norman, 502 U.S. at 295.
\textsuperscript{213} Id. at 291-94.
\textsuperscript{214} Id. at 282.
\textsuperscript{215} Id. at 286.
\textsuperscript{216} Id. at 293.
\textsuperscript{217} Id. at 293-94 (“[T]he State’s requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster.”).
\textsuperscript{218} 440 U.S. 173 (1979).
\textsuperscript{219} Id. at 184.
broadly, *Norman* might be reinterpreted as a nascent effort at the Breyerian danger-signs approach.\(^{220}\) On this view, if the state requires more signatures to qualify for a local office than for a statewide office, something is probably awry with the cost-benefit balance, and the courts should take a closer look at the substantive reasonableness of the local requirement—even if the plaintiffs are unable to show that third parties and independents have been required to gather signatures from close to 10% of the available pool.\(^{221}\)

**C. Legislative Purpose**

When the Court has reversed the presumption of constitutionality concerning electoral mechanics regulations, it has usually employed severe-in-kind\(^{222}\) or structural presumption\(^{223}\) strategies. Another option, invited but not yet fully embraced in the *Burdick* era, is to rely on legislative intent or purpose.\(^{224}\) The electoral mechanics jurispru-

---

\(^{220}\) See *Randall v. Sorrell*, 126 S. Ct. 2479, 2492 (2006) (suggesting that where there are strong indications of "danger signs" of electoral unfairness, courts must assess the statute's tailoring).

\(^{221}\) For a recent example of a voter participation case in which state/local disparities might have been used in setting scrutiny levels, but were not, see *ACLU of New Mexico v. Santillanes*, No. Civ. 05-1136, 2007 WL 782167, at *36-37 (D.N.M. Feb. 12, 2007) (enjoining an Albuquerque photo ID requirement for voting, which was substantially more restrictive than the ID requirements established under state law).


\(^{224}\) The courts and the law review literature sometimes distinguish between "legislative intent," corresponding to the actual, subjective intentions of the lawmakers who enacted a bill, and "legislative purpose," an objective standard corresponding to what a reasonable observer would assume to be the intended effect of the bill. Given the epistemic difficulties and intrusive discovery that ascertaining legislative intent would entail (even assuming that the concept has meaning in the context of a multimember body), both courts and commentators increasingly favor purpose-based rather than intent-based inquiries. For a recent, prominent example, see *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 859-74 (2005) (using purpose analysis to resolve an Establishment Clause challenge). See also Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 730-31 (1998) (defending doctrinal approaches that turn on social meaning of legislative actions); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 793-97 (2001) (distinguishing purpose and intent, and defending judicial reliance on purpose); Gil Seinfeld, *The Possibility of Pretext Analysis in Commerce Clause Adjudication*, 78 NOTRE DAME L. REV. 1251, 1301-03 (2003) (explaining that "the process of judicial review stands on considerably firmer ground" when courts in pretext cases search for objective purpose rather than subjective legislative intent). In this Article, however, I will use "intent" and "purpose" interchangeably; the role of intent (or purpose) in electoral mechanics adjudication is not yet well enough developed to necessitate distinguishing between the two concepts.
vidence has openings for three types of purpose-based arguments. First, election laws may be presumed to have their intended effects, at least absent compelling evidence to the contrary. If the effect intended is "severe," no more need be shown. Second, burdens conceded not to be severe might nonetheless be characterized as presumptively impermissible, or at least not presumptively permissible, if created for illegitimate reasons. Third, and going further, it may be argued that the very reason that burdens of great magnitude are supposed to trigger heightened scrutiny is that the size of the burden bespeaks exclusionary or anticompetitive intent. If so, any equally probative indicator of bad intent should also obligate the state to demonstrate the substantive reasonableness of the law or otherwise to rebut the presumption of illicit purpose.

On the other hand, in some election law contexts, the Supreme Court has pointedly held that illicit purposes do not, without more, give rise to a presumption of unconstitutionality. How the lower courts are supposed to deal with bad intent in electoral mechanics cases is not altogether clear. It would be healthy for the courts to begin to wrestle with it.

1. Inferring Effects from Purpose

*California Democratic Party v. Jones*\(^225\) invalidated California's blanket primary system. Under the stricken regime, all California voters participated in a single primary election in which they could vote for candidates of any party.\(^226\) The top vote-getter within each pool of major-party candidates advanced to the general election.\(^227\)

After a bench trial full of expert testimony, the district court carefully sifted through the evidence of crossover voting and weighed the probability that the blanket primary would result in the nomination of partisan candidates disliked by their party's members or committed to political positions disfavored by the party.\(^228\) The court ultimately concluded that the burden on the party's associational rights was not severe, and that it was justified by state interests in enhancing "the democratic nature of the election process and the representativeness of

\(^{225}\) 530 U.S. 567 (2000).

\(^{226}\) Id. at 569-70.

\(^{227}\) Id.

elected officials." The Supreme Court reversed. Working within the Burdick framework, the Court, per Justice Scalia, judged the blanket primary severely burdensome.

On one reading, the gist of Jones is that the "forced association" of a political party with primary voters who decline to enroll in the party constitutes a severe-in-kind burden. Cutting against this interpretation is the fact that Justice Scalia devoted two pages of his opinion to discussing empirical studies of crossover voting. Such evidence is immaterial on the severe-in-kind theory of burden. So perhaps Jones bespeaks a new readiness on the part of the Court to link scrutiny levels to empirical evidence of impact. In my view, however, the critical line in Jones comes right after Scalia describes (or, as the dissent would have it, misdescribes) the evidence. He continues: "It is unnecessary to cumulate evidence of this phenomenon [of party nominees changing their positions in order to survive the blanket primary], since, after all, the whole purpose of Proposition 198 was to favor nominees with 'moderate' positions." The import of this line is unmistakable. The admitted purpose of the law made it unnecessary for the plaintiffs to prove, as a precondition for strict scrutiny, that the law had the intended (severe) effect of causing party nominees to adopt positions substantially at odds with the views of the party membership. The Court presumed an efficacious state.

---

229 Id. at 1300-01.
230 Jones, 530 U.S. at 572-82.
231 See id. at 577 ("Proposition 198 forces political parties to associate with—to have their nominees, and hence their positions, determined by—those who, at best, have refused to affiliate with the party, and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary." (emphasis added)); id. at 581 ("There is simply no substitute for a party's selecting its own candidates.").
232 Id. at 578-79.
233 See id. at 599-600 (Stevens, J., dissenting).
234 Id. at 580 (majority opinion) (first emphasis added). The Court summarized the problem with Proposition 198 as follows:

Proposition 198 forces petitioners to adulterate their candidate-selection process—the basic function of a political party—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the intended outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom.

Id. at 581-82 (internal quotation marks omitted) (citation omitted).
2. Heightened Scrutiny for Discriminatory but Nonsevere Burdens?

Recall that *Burdick* counterposed "severe restrictions" (presumptively impermissible) against "reasonable, nondiscriminatory restrictions" (presumptively permissible). How should courts approach the category in the middle—the discriminatory restriction that is conceded not to be severely burdensome? There are really two questions here: (1) What types of discriminatory purposes are constitutionally troublesome in the electoral mechanics context? (2) Does the existence of such a purpose, without more, suffice to neutralize or reverse the presumption of permissibility? The Supreme Court has had more to say about the first question than the second.

The Court has been very clear that the word "discriminatory" encompasses more than the traditional suspect classes when it comes to voting. The foundational case is *Carrington v. Rash*.\(^2\)\(^3\)\(^6\)\(^3\)\(^6\) At issue was a provision in the Texas constitution that prohibited "[a]ny member of the Armed Forces of the United States who moves his home to Texas during the course of his military duty from ever voting in any election in [Texas] so long as he or she is a member of the Armed Forces."\(^2\)\(^3\)\(^7\) The state defended this franchise denial as, inter alia, an appropriate measure to "immuniz[e] its elections from the concentrated balloting of military personnel, whose collective voice may overwhelm a small local civilian community."\(^2\)\(^3\)\(^8\) As described by the Court:

> A base commander, Texas suggests, who opposes local police administration or teaching policies in local schools, might influence his men to vote in conformity with his predilections. Local bond issues may fail, and property taxes stagnate at low levels because military personnel are unwilling to invest in the future of the area.\(^2\)\(^3\)\(^9\)

The Supreme Court would have none of this:

> "Fencing out" from the franchise a sector of the population *because of the way they may vote* is constitutionally impermissible. The exercise of rights so vital to the maintenance of democratic institutions cannot constitu-

---

the application of balancing tests to rights infringement claims, on the theory that "the legislature's goals are [commonly] a reliable indicator of a statute's effect".


\(^{237}\) *Carrington*, 380 U.S. at 89 (alteration in original) (internal quotation marks omitted).

\(^{238}\) Id. at 93.

\(^{239}\) Id. at 94.
tionally be obliterated because of a fear of the political views of a particular group of bona fide residents. 240

Also instructive is Gordon v. Lance,241 which sustained a supermajority voting rule for bond referendum elections. The plaintiffs, proponents of the bond issue, argued that the supermajority requirement impermissibly weighted their votes less than the votes of bond opponents. The Court disagreed, stating that the law did not discriminate on the basis of "some extraneous condition, such as race [as in Gomillion242]; wealth [as in Harper243]; tax status [as in Kramer244]; or military status [as in Carrington245]."246 "[W]e can discern no independently identifiable group or category," the Court continued, "that favors bonded indebtedness over other forms of financing."247

An even broader understanding of what it means for election laws to discriminate illicitly can be seen in U.S. Term Limits, Inc. v. Thornton248 and Cook v. Gralike.249 The technical question in these cases concerned the outer limits on "Manner" regulations under the Elections Clause of the U.S. Constitution,250 not what types of electoral regulations merit a presumption of constitutionality under Storer and its progeny. But both cases draw from and shed light upon the electoral mechanics jurisprudence. In U.S. Term Limits, the Court nullified an Arkansas law that "prohibit[ed] the name of an otherwise-eligible candidate... from appearing on the general election ballot if that candidate has already served three terms in the House of Representatives or two terms in the Senate."251 The state characterized this ballot-access regulation as a "Manner" regulation, but the Court disagreed, calling it an impermissible attempt to "favor or disfavor a class of can-

240 Id. at 94 (citations omitted) (internal quotation marks omitted).
241 403 U.S. 1 (1971).
246 Gordon, 403 U.S. at 5.
247 Id. (emphasis added).
250 U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").
251 U.S. Term Limits, 514 U.S. at 783.
didates." The Court drew a contrast with the laws upheld in the *Storer* line of cases, which were said to have "regulated election *procedures*" and not to have "even arguably impose[d] any substantive qualification rendering a class of potential candidates ineligible for ballot position."

At issue in *Gralike* was a Missouri constitutional amendment that "prescribe[d] that the statement, 'DISREGARDED VOTERS' INSTRUCTION ON TERM LIMITS,' be printed on all primary and general ballots adjacent to the name of a Senator or Representative who fails to take any one of eight legislative acts in support of the proposed [Congressional Term Limits Amendment]." The Court again rejected the state's effort to shoehorn its requirement into the category of "Manner" regulations. Rather than being an ordinary "procedural regulation" of elections, this ballot notation law was "plainly designed to favor candidates who are willing to support the particular form of a term limits amendment set forth in its text and to disfavor those who either oppose term limits entirely or would prefer a different proposal." That made it quite unlike the "generally applicable and even-handed [ballot-access] restrictions" upheld in *Storer* and its progeny.

*U.S. Term Limits* and *Gralike* carry the idea of discrimination well beyond the intentional disadvantaging of a group of citizens defined by common interests or traditional political ideologies. The Court did not find, for example, that the term-limit measures were intended to disadvantage liberals or conservatives, the rich or the poor, soldiers or peaceniks, environmentalists or industrialists, or what have you. A state purpose to disadvantage a class of candidates defined only by

---

252 *Id.* at 833-34.
253 *Id.* at 835.
254 531 U.S. at 514.
255 *Id.* at 523-24. Though the opinion is not altogether clear on this, it appears that part of the Court's objection to the ballot notation law was that the state was attempting to improperly elevate the salience of a single issue (term limits), in addition to "taking sides" on that issue. See *id.* at 525 ("[B]y directing the citizen's attention to the single consideration of the candidates' fidelity to term limits, the labels imply that the issue 'is an important—perhaps paramount—consideration in the citizen's choice, which may decisively influence the citizen to cast his ballot...'." (internal citations omitted) (quoting Anderson v. Martin, 375 U.S. 299, 402 (1964))).
256 *Id.* at 524 (alteration in original) (quoting Anderson v. Celebreeze, 460 U.S. 780, 788 n.9 (1983)); see also Burson v. Freeman, 504 U.S. 191, 212-13 (1992) (Kennedy, J., concurring) (arguing that polling-area speech restrictions are constitutionally permissible if enacted for the narrow purpose of protecting the integrity of the ballot against fraudsters, and not with the aim of limiting political speech for other reasons).
their long incumbency apparently was enough to classify these laws as discriminatory.\textsuperscript{257}

Although the Court has defined discrimination broadly for purposes of voting and associational rights, it remains uncertain whether discriminatory intent, without more, is enough to negate the presumption of permissibility for electoral mechanics.\textsuperscript{258} An affirmative argument may be constructed, however, using a few key data points. First, the Court has sometimes grounded the right to vote in worries about legitimacy and public confidence in government.\textsuperscript{259} If the right to vote was constitutionalized so that the Court may steer the ship of state, as it were, in a manner that enables all citizens (or the largest possible number of citizens) to feel secure in their berth, then the policing of election laws transparently designed to minimize the political strength of factions not then in power should be a matter of first importance. The other data points come from \textit{Storer} and its companion case, \textit{American Party of Texas v. White},\textsuperscript{260} both of which suggest that certain discriminatory restrictions may be struck down even if the burden is not large or the law otherwise passes muster under the applicable structural presumption (at least in cases where the restriction is also hard to defend on the merits).

The ballot-access law at issue in \textit{Storer} had been interpreted to disqualify anyone who voted in the primary election from signing an independent candidate’s petition, “whether or not he confined his [primary] vote to nonpartisan offices and propositions.”\textsuperscript{261} The Supreme Court responded that while it had “no doubt about the validity of disqualifying [from signing petitions] . . . all those registered voters who voted a \textit{partisan} ballot in the primary[,] . . . it would be difficult

\textsuperscript{257} See \textit{Gralike}, 531 U.S. at 525; \textit{U.S. Term Limits}, 514 U.S. at 836. This idea is elaborated by Judge Fletcher in her dissent in \textit{Bates v. Jones}, 131 F.3d 843, 870-72 (9th Cir. 1997) (en banc). As she reads \textit{U.S. Term Limits} and \textit{Gralike}, any state effort to allocate ballot access on grounds other than popular support within the electorate is impermissibly discriminatory.

\textsuperscript{258} Similarly, a severe-in-kind burden triggers strict scrutiny, even if its effects are trivial.


\textsuperscript{260} 415 U.S. 767 (1974).

to ascertain any rational ground, let alone a compelling interest, for disqualifying nonpartisan voters at the primary . . . ."262

The disqualification of nonpartisan primary voters from the signature gathering process, like the disqualification of partisan primary voters, constricts the "available pool" of potential petition signers. Although the Court was not entirely clear about this, it appeared willing to invalidate the disqualification of nonpartisan primary voters without reference to the relevant structural presumption (i.e., irrespective of whether the effective signature-gathering requirement approached 10% of the available pool).264 Even if the ballot-access code proved presumptively constitutional by dint of a numerically reasonable signature threshold, that would not altogether excuse from judicial scrutiny the other classifications in the law.

Storer's treatment of the disqualification of nonpartisan primary voters might be seen as an application of "rational basis plus" review, which is arguably the default standard of review for nonsevere burdens.265 Alternatively, one might hypothesize that the Court thought the disqualification rule so pointlessly overbroad as to bespeak a discriminatory motive.

American Party held unconstitutional Texas's practice of printing the names of ballot-qualified minor parties on in-person but not absentee ballots. Although the numerical signature requirement for minor-party ballot access was presumptively permissible, this did not excuse the disparate design of in-person and absentee ballots, which the Court called "obviously discriminatory."266 Did this discrimination substantially hinder citizens from associating into minor parties for political change? One might think not, given the in-person voting option. And certainly there was no intimation from the Court that a requirement of voting in-person (as opposed to absentee) would represent a "substantial" or "severe" burden on voting rights. Rather, what seems to have bothered the Court was the sheer hostility to minor parties reflected in the ballot-design disparity, as well as the pointlessness of that disparity.267

262 Id. at 740-41 (emphasis added).
263 That is, persons who "confined [their] vote [during the primary election] to nonpartisan offices and propositions." Id. at 741.
264 See supra text accompanying note 141.
265 See supra note 66.
267 I acknowledge that American Party's holding on the ballot-design disparity, like Storer's treatment of the disqualification of nonpartisan primary voters from signing
Whatever the merits of heightened scrutiny for discriminatory but nonsevere burdens, the litigant who would argue this position does have precedential hurdles to overcome. In some domains of election law, the Court has tolerated raw partisan purposes so long as the challenged law is not shown to have extremely grave effects. Under *Davis v. Bandemer*, for example, districting arrangements designed to minimize legislative representation for members of the political party not then in power were actionable only if they would have the effect of "substantially disadvantag[ing]" those voters over the course of several elections. Although a fractured Court gave up on *Bandemer*'s standard in *Vieth v. Jubelirer*, all of the Justices in *Vieth* appeared to accept that *some* partisanship in redistricting was acceptable. The constitutional question involved line drawing between "some" and "too much."

It bears emphasis too that in *U.S. Term Limits Inc. v. Thorton*, the Court held that the challenged ballot-access restriction was unconstitutional because it had the "sole purpose" and the "likely effect" of evading the limitations found in the Qualifications Clause. The state’s disallowance of ballot access for a disfavored class of candidates had made it "significantly more difficult for the barred candidate[s] to win." "Effects" rhetoric was not so prominent in *Gralike*, but the Court did say that the challenged ballot labels created "substantial political risk" for disfavored candidates, "handicap[ping them] 'at the most crucial stage in the election process—the instant before the vote is cast.'"

---

independents' petitions, could also be viewed as an application of rational basis-plus review of the substantive reasonableness of the classification. See id. ("The State offered no justification for the difference in treatment in the District Court, did not brief the issue here, and had little to say in oral argument to justify the discrimination.").

478 U.S. 109, 133 (1986) (plurality opinion).


See id. at 293 ("[A]n excessive injection of politics [into redistricting] is unlawful.")


*Id.* at 836 ("[W]e hold that a state amendment is unconstitutional when it has the likely effect of handicapping a class of candidates and has the sole purpose of creating additional qualifications indirectly.").

*Id.* at 831 (emphasis added).

Then again, proponents of a pure purpose test for heightened scrutiny might point to the Jones maxim that election laws may be presumed to have their clearly intended effects. It would be peculiar for lawmakers with a partisan-exclusionary purpose to seek anything less than the maximal exclusion achievable with the tools at hand. So even if "intent plus big effect" is the gold standard for presumptively impermissible electoral mechanics, intent (or "predominant intent") alone may warrant heightened scrutiny when one takes into account the epistemic and administrative limitations of the judiciary.

Far from being the paradigm case, then, partisan vote dilution through redistricting may be distinguished as an exception to the rule, on the theory that the courts had to demand more than a "purpose to dilute" in this context—either because of a Frankfurterian worry about excessive judicial involvement in a domain of incessant partisan conflict, or because of judicial anxiety about proportional representation as a remedy.

---

275 See supra Part II.C.1.

276 Because the Court's malapportionment jurisprudence requires that legislative districts be withdrawn following each census, redistricting (and redistricting litigation) presents "incessant" partisan conflict to a degree not found elsewhere in election law.

277 Cf. Charles, Democracy and Distortion, supra note 39, at 641-42 (arguing that the extreme effects test in Bandemer was motivated by concerns about proportional representation and "perpetual litigation of districting plans"); Pildes, supra note 108, at 76-78 (suggesting that "[w]hen manageable judicial remedies are readily at hand," courts are more willing to intervene in political process cases on the basis of exclusionary intent).

On more purely normative grounds, one might also argue that the Constitution should be read to bar discriminatory intent for purposes of voter participation claims (recall the Carrington principle), even if not for claims relating to the aggregation of votes into representation, or the autonomy of political parties. As Richard Pildes has remarked, "viewpoint discrimination is inevitable in the design of democratic institutions: substantive judgments about the desirable forms of elections and governance must be made." Pildes, supra note 108, at 108. See also Samuel Issacharoff, Fragile Democracies, 120 HARV. L. REV. 1405 (2007) (providing a comparative perspective on the regulation through election law of antidemocratic political parties). Pildes's point is certainly right with respect to many questions about, for example, the translation of votes into seats, and the balance among responsive, reflective, and technocratic institutions of governance. But it is not implausible to think that no viewpoint discrimination whatsoever should be tolerated with respect to the basic matter of the citizen's right to cast and record a vote.
3. What Is the Cart and What Is the Horse? Or, Are "Severe Burdens" Merely Indicia of Bad Intent?

If, as I have suggested, the whole point of the Burdick threshold inquiry is to sort challenged laws into the twin categories of "presumptively constitutional" and "presumptively unconstitutional," then illicit intent, where ascertainable, might well be a superior dimension for sorting than burden.278 Concurring in the recent case of Clingman v. Beaver,279 Justice O'Connor, joined by Justice Breyer, seemed to recognize as much. Indeed, she went so far as to hint that the very purpose of Burdick's nominal inquiry into burdens is to get at the likelihood that the challenged law was enacted for "exclusionary or anticompetitive" reasons (in which case, a presumption of constitutionality would be out of line):

Where the State imposes only reasonable and genuinely neutral restrictions . . . , there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions.280

278 A full examination of why intent criteria are plausibly superior lies beyond the scope of this Article. Suffice it to say, for now, that reliance on intent (1) would be conceptually better suited to screening for unjustified laws—if justification is understood in cost-benefit terms ("burden" is a cost-side measure, insensitive to benefits); (2) would have certain advantages of familiarity (courts look at intent all the time, in many contexts, but they are rarely asked to predict the consequences of alternative electoral arrangements); (3) could save the courts from getting mired in normative difficulties about burdens and baselines; and, related to this, (4) could simplify the problem of choosing a "frame" through which to assess the consequences of challenged state practices. Cf. Daryl J. Levinson, Framing Transactions in Constitutional Law, 111 Yale L.J. 1311, 1371-75 (2002) (arguing that constitutional adjudication turns on unspoken and often arbitrary premises about which portions of the ongoing relationship between government and citizen are properly at issue in the case).


280 Id. at 603 (O'Connor, J., concurring) (emphasis added). Cf. Evans v. Cornman, 398 U.S. 419, 422-23 (1970) ("The sole interest . . . asserted by appellants to justify the limitation on the vote in the present case is essentially to insure that only those citizens who are primarily or substantially interested in or affected by electoral decisions have a voice in making them. . . . However, it is clear that such a claim cannot lightly be accepted. . . . All too often, lack of a 'substantial interest' might mean no more than a different interest, and 'fencing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible." (quoting Carrington v. Rash, 380 U.S. 89, 94 (1965))).
A heavy burden, one might say, is a "danger sign" that the challenged law was enacted for exclusionary or anticompetitive reasons, which in turn should be reason enough to flip the presumption of permissibility.

If the burden-as-danger-sign theory is correct, it follows that the presence of other strong indicators of exclusionary or anticompetitive intent should be enough to negate the presumption of constitutionality. Rather than being required to prove bad intent by a preponderance of the evidence, plaintiffs should be able to trigger some form of heightened scrutiny by establishing a substantial likelihood of illicit purpose. The courts might implement this principle by crafting a burden-shifting framework to address allegations of exclusionary or anticompetitive intent. The plaintiff would be able to carry her prima facie case by pointing to a significant danger sign.

The Supreme Court has, however, decided two cases that offered opportunities for elaborating (or at least inviting) some such burden-shifting stratagem, and on neither occasion did the Court pursue this tack. In the first case, Tashjian, the Court struck down a statute that disallowed open primaries. Prior to the lawsuit, "the Republican leadership in the state legislature... proposed to amend the statute to allow independents to vote in primaries when permitted by Party

---


283 For one such proposal, see Christopher S. Elmendorf, Burdick or Carrington?: "Fencing Out" and the Voter ID Litigation, ELECTION LAW @ MORITZ, Sept. 12, 2006, http://moritzlaw.osu.edu/electionlaw/comments/2006/060912.php (proposing a burden-shifting framework under which a prima facie inference of exclusionary intent would arise if (1) the voting restriction were enacted substantially along partisan lines; (2) there were some evidence that the law will disproportionately inconvenience citizens who are statistically more likely to support the opposition party; and (3) the law were a permanent measure, rather than a time-limited experiment with provisions for independent evaluation of its impacts on electoral participation by the ostensibly disadvantaged classes). See also Daniel R. Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105, 1135-36 (1989) (showing that the Supreme Court has accommodated plaintiff-friendly, burden-shifting doctrinal frameworks to deal with the problems of illicit motive when fundamental political rights are at stake); cf. Crawford v. Marion County Election Bd., 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting from denial of petition for rehearing en banc) ("[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny.") (emphasis added).

rules.” But “[t]he proposed legislation was defeated, substantially along party lines, in both houses of the legislature, which at that time were controlled by the Democratic Party.”

Although the Court, per Justice Marshall, applied strict scrutiny, the fact that the open primary ban was (apparently) being maintained by Democrats in order to keep the Republican Party from becoming more competitive did not figure, overtly, into the setting of scrutiny levels.

(Then again, a litigant seeking to persuade the courts to adopt an “indicia of anticompetitive intent” theory might distinguish Tashjian as a case in which the Court had no need to consider intent, given that the majority thought strict scrutiny was in order regardless of the state’s purpose. Alternatively, a post-Clingman court might endeavor to save Tashjian—recall Clingman’s criticism of Tashjian’s burden analysis—by reinterpreting it as a case in which heightened scrutiny was impliedly warranted because the open-primary ban was being maintained for partisan reasons.)

The other puzzling case is Timmons, which sustained Minnesota’s ban on fusion candidacies. Fusion bans were enacted throughout the United States in the late nineteenth and early twentieth centuries for transparently anticompetitive reasons. One might think this history enough to defeat the presumption of permissibility that would otherwise accompany a cross-endorsement ban. But neither the majority nor the dissent in Timmons put much weight on this.

---

285 Id. at 212.
286 Id. at 212-13.
287 Rather, Marshall reasoned that “[t]he Party’s attempt to broaden the base of public participation in and support for its activities [was] conduct undeniably central to the exercise of the right of association.” Id. at 214. He further posited that the open-primary ban affected the Party’s “basic function” of selecting candidates. Id. at 216.
288 See supra notes 73-76 and accompanying text (describing Clingman’s criticism of Tashjian for failing to address the severity of the burdens imposed).
289 Note in this regard that toward the end of the opinion in Tashjian, the Court does suggest that when the state seeks to “protect[ ] the integrity of the Party against the Party itself[,] . . . [then] the views of the State, which to some extent represent the views of the one political party transiently enjoying majority power, . . . lose much of their force.” 479 U.S. at 224.
292 As noted above, the majority judged the burden “not severe” because the state had not interfered with the New Party’s organizational arrangements or endorsement decisions; the dissent took a similarly axiomatic approach, while recognizing a new category of severe-in-kind burdens. See supra notes 96-103 and accompanying text.
The dissent did touch on the issue, but its remarks were largely confined to a footnote.\(^{293}\)

In summary, the doctrinal opening for arguments from legislative intent in electoral mechanics cases is of an uncertain dimension. The Supreme Court has variously indicated that state purposes may be weighed in determining the standard of review, but the Court has done little to clarify when or why purpose is decisive, let alone to explain how illicit purposes that are not admitted may properly be inferred.\(^{294}\)

D. What Role Remains for Empirical Burden Analysis at Step One?

I have argued that the main stem of the Storer-Burdick jurisprudence invites the classification of challenged laws as presumptively permissible or presumptively impermissible on the basis of relatively simple, formal inquiries into (1) the type of burden produced, (2) proxies for impact (qualitative, numerical, and legal landscape cut-offs), and, somewhat more equivocally, (3) legislative purposes. Often, these threshold inquiries seem designed to pick out laws that threaten aggregate, structural harms to the political process—such as inadequate openness or loss of accountability—rather than to ensure that the individual citizen can make the state provide a substantial justification for its laws whenever they operate to exclude her from an election, or to substantially burden her participation. Laws that the Court deems presumptively permissible—and this is the default presumption—receive fairly lax rationality review.\(^{295}\) Laws deemed pre-

\(^{293}\) Here is what the dissent had to say:

[It is [not] irrelevant that when antifusion laws were passed by States all over the Nation in the latter part of the 1800's, these laws, characterized by the majority as "reforms," were passed by the parties in power in state legislatures . . . to squelch the threat posed by the opposition's combined voting force." Although the State is not required now to justify its laws with exclusive reference to the original purpose behind their passage, this history does provide some indication of the kind of burden the States themselves believed they were imposing on the smaller parties' effective association.

520 U.S. at 378-79 n.6 (Stevens, J., dissenting) (internal citations omitted).

\(^{294}\) As a general matter, the Court's evidentiary requirements for showing discriminatory purpose are right-specific. See Ortiz, supra note 283, at 138 (comparing cases involving economic benefits and fundamental rights).

\(^{295}\) It is at least arguable, however, that this species of rationality review, done properly, does have some bite vis-à-vis patently arbitrary classifications and standardless delegations. See supra note 66 (treating Bush v. Gore as a case applying "rational basis plus" review).
sumptively impermissible receive strict, though not necessarily fatal, scrutiny.296

It is clear that the Supreme Court prefers to address the Burdick threshold question in formal, nonempirical terms. This is evident from cases like Munro, Timmons, and Jones, in which social-scientific and historical evidence figured centrally in the lower courts' burden analysis but was largely absent from the Supreme Court's determination of scrutiny levels. Even the Justices who sometimes insist that “in assessing burdens on [the right to vote,] . . . we should focus on the realities of the situation, not on empty formalism,”297 have a tendency to slip back into formalism.298 It does not follow, however, that evidence of the ultimate workings of the challenged law will always be irrelevant in the setting of scrutiny levels.

Inquiries into the actual impact of election laws on voting or political association can occur in several circumstances. First, data may be used to rebut a structural presumption. Under Storer, a plaintiff may seek to show that a ballot-access law whose signature threshold is presumptively permissible (5% or less) nonetheless has the effect of completely thwarting third-party and independent candidates. Conversely, a state might establish that its presumptively impermissible signature requirement (10% or more) should receive lax scrutiny because third-party and independent candidates in the state have in fact qualified for the ballot at roughly the same frequency as in states whose signature requirements fall below the 5% threshold.299

296 Following Dunn, strict scrutiny may take the “best practices” form, which is not invariably fatal. See supra notes 113-118 and accompanying text.
298 Thus, in Clingman, the dissenters evaded addressing the extent of the burden by positng (implausibly) that “the impact of the Oklahoma statute on the voters' right to vote for the candidate of their choosing is not a mere 'burden'; it is a prohibition.” Id. When a political party wants the individuals in question to vote in its primary, the dissent continued, the state may not “deny them participation . . . absent a state interest of overriding importance.” Id. at 612. Stevens's brisk retreat into formalism perhaps indicates that the dissenting justices were not quite so comfortable assessing “the realities of the situation” as they had initially purported to be. (Stevens's dissent in Timmons also has a formalistic cast. See supra notes 100-103.)
299 Whether the presumptions established by other cutoffs, see supra Parts II.B.2-3, are similarly subject to rebuttal remains to be determined. In Storer, the Supreme Court invited attempts at rebuttal by defining both a proxy-based cutoff and an associated “ultimate question for judgment.” See supra Part II.B.1. In the other cutoff cases, however, the Court did not identify such ultimate questions, leaving considerable uncertainty regarding whether the applicable structural presumption is conclusive (like a severe-in-kind burden) or rebuttable.
Data might also be used to fill the gap where scrutiny levels are not otherwise determined by the in-kind nature of the burden, a structural presumption, or legislative purposes. Burdick's rhetoric invites this, although the Supreme Court has yet to model it. I expect the Court to resist such uses of data, however, except in cases where the social-scientific evidence of a troubling impact is overwhelming and irrefutable. If the Burdick threshold inquiry is to constrain and guide judicial intervention into the nuts and bolts of the political process, it will not do to have lower courts finding "severe" burdens here and there on the basis of "data" that amount to little more than hunch and anecdote.

300 See supra Part I.

A skeptic or cynic might argue that the Supreme Court itself has twice intervened in the Burdick era on the basis of hunch and anecdote, without recourse to in-kind burden characterizations, structural-presumption cutoffs, or legislative intent. In Part III.A of Norman v. Reed, the Court axed a provision of Illinois's ballot-access law that barred "candidates running in one political subdivision from... using the name of a political party established only in another." 502 U.S. 279, 289 (1992). The Court dealt with this summarily, stating that the provision "would obviously foreclose the development of any political party lacking the resources to run a statewide campaign." Id. (emphasis added). Apparently this allegedly self-evident truth was enough to dispatch the presumption of permissibility, as the Court struck down the prohibition after concluding that more narrowly drawn alternatives appeared feasible (e.g., requiring the candidate to get the party's permission before using the party label). Id.

In the second case, Buckley v. American Constitutional Law Foundation, Inc., 525 U.S. 182 (1999), the Court's burden analysis was a little more involved. Buckley addressed Colorado's regulation of the process by which ballot-initiative sponsors gather the requisite number of signatures to put their proposals on the ballot. The Court struck down the state's requirement that petition circulators be registered Colorado voters, and that they wear a badge displaying their name, their status as paid or volunteer, and the name and telephone number of their employer. Id. at 200.

The registered-voter requirement was deemed severely burdensome because it "drastically reduce[d]" the pool of potential circulators, given that 400,000 voting-age Coloradans were not registered to vote. Id. at 193. The Court also relied on testimony from two local activists, who averred that some people who were sympathetic to particular ballot initiatives declined to register as a form of protest. Id. at 194. However, as Justice O'Connor emphasized in her dissent, there was no evidence in the record that initiative proponents were materially hindered in their recruitment of circulators by the registered-voter requirement. See id. at 218 (O'Connor, J., concurring in part and dissenting in part). (For a reduction in the pool to have a material impact, it must be the case that the size of the pool is a limiting factor, and that unregistered would-be circulators are unwilling to register in order to qualify to circulate.) In short, although the majority's finding of a severe burden was nominally predicated on the challenged requirement's anticipated impact on the amount of petition-circulation speech, that impact, if any, was wholly a matter of judicial surmise. (Justice Thomas, concurring, ventured that strict scrutiny was in order because the circulation of initiative petitions involves "core political speech." Id. at 210. This in-kind approach to the characterization of burdens is entirely consistent with the main stem of Storer-Burdick.)
And there is every reason to think that the Justices of the Supreme Court will want to keep lower courts from intervening in political process cases on the basis of hunch and anecdote. If district judges are encouraged to rework election laws in accordance with their own sense of what is fair and right, it seems inevitable that the judges' own partisan sympathies will shine through. This would not be healthy for the reputation of the judiciary as a whole. Nor would it ensure that lawmakers have the space they need to test out new ways of organizing and administering elections. Nor would it build public confidence in the integrity of elections. Perhaps sensing these perils, a few lower court judges have themselves abjured reliance on intuition and anecdote at Burdick step one; they have taken the position that rational basis is the governing standard of review in electoral mechanics cases unless and until plaintiffs introduce hard evidence of a substantial exclusionary effect.

Consider also how the Justices dealt with the badge requirement. The majority, like the court below, found the burden severe because the requirement "forces circulators to reveal their identities at the same time they deliver their political message," exposing them to "heat of the moment" harassment. Id. at 198-99 (quoting Am. Constitutional Law Found., Inc. v. Meyer, 120 F.3d 1092, 1102 (10th Cir. 1997)). First-person anecdotes from a handful of political organizers provided the evidentiary basis for this conclusion. Justice O'Connor, who concurred on the badge issue, was on somewhat firmer footing. She stressed the manner in which the badge requirement affected speech, calling it a "direct" burden on "the one-on-one, communicative aspect of petition circulation." Id. at 215. This is a textbook illustration of in-kind burden analysis.

In the final analysis, Buckley is probably best seen as an instance of in-kind burden characterization (a reading adopted, albeit without my terminology, in Caruso v. Yamhill County, 422 F.3d 848 (9th Cir. 2005)), and Part III.A of Norman as perhaps an application of "rational basis plus" review. Alternatively, they might be seen as uncertain initial forays, addressing unfamiliar types of laws, merely preludes to the eventual promulgation of a more structured framework for reviewing such kinds of laws. Cf. supra note 120 and accompanying text (noting the Supreme Court's pattern of first treating a subject with vague standards, and later following up with a more structured framework after lower courts have had some time to explore the issue).

Particularly insofar as the Justices of the Supreme Court and the judges of the lower federal courts are ideologically out of sync.

Rick Hasen, among others, has suggested that this is one of the lessons, to date, of the voter ID litigation. See Richard L. Hasen, The Untimely Death of Bush v. Gore, 60 STAN. L. REV. 101, 139-40 (2007).

See, e.g., Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006); Gonzalez v. Arizona, No. 06-1268, slip op. at *7 (D. Ariz. Sept. 11, 2006); cf. Overton, supra note 29, at 665-66 (calling on judges to ground interventions in voter ID cases on empirical evidence, lest "personal political ideology" end up driving the analysis).
Empirical data may also play an important subdoctrinal role in electoral mechanics cases. Judges must be convinced that a serious problem exists before they will develop the law so as to remedy it. Empirical data may well motivate doctrinal development, even if the development itself takes the form of a new or refined structural presumption.

III. MAKING THE MOST OF FORMALISM: OPPORTUNITIES FOR DOCTRINAL ELABORATION

Assume I am right that the Supreme Court's electoral mechanics jurisprudence manifests a strong methodological preference for formalism at the threshold, scrutiny-level-determining stage of the judicial inquiry, and that the Court's threshold tests are often concerned with structural or aggregate properties of the political process (such as electoral accountability or adequate openness). How should this affect the thinking of district courts? What, if anything, should the Supreme Court do to acknowledge it? This Part offers some tentative suggestions. For concreteness, I shall use the recent litigation over Georgia's new photo ID requirement for voting as a starting point.

Let me emphasize that my goal in this Part is mainly to illustrate and concretize doctrinal possibilities, not to prescribe any particular approach. In subsequent work, I shall offer a more elaborate exposition and normative defense of some of the ideas sketched in bare outline below.

A. Suggestions for Lower Courts

In 2005, the Republican-controlled Georgia state legislature enacted House Bill 244 (H.B. 244), which required all in-person voters to show official, current photo ID issued by the State of Georgia or the federal government. The legislature also raised the fee for state-

---

305 Thanks to Floyd Feeney for suggesting this point.
issued ID cards, and authorized any voter who wished to do so to vote absentee, without showing ID.

Voters could obtain qualifying ID by appearing in person at any Department of Driver Services (DDS) customer service center, furnishing documentation, and paying a twenty dollar fee. First-time applicants were required to prove their identity with an original, state-issued birth certificate (or a certified copy), certificate of birth registration, certified naturalization records, INS immigration card, or valid passport. To assist financially strapped voters, H.B. 244 waived the photo ID fee for any Georgia citizen "who swears under oath that he or she is indigent and cannot pay the fee . . . , that he or she desires an identification card in order to vote . . . , and that he or she does not have any other [acceptable] form of identification." To moderate the burden on citizens unaware of the ID requirement, H.B. 244 permitted voters who showed up at the polls without qualifying ID to cast provisional ballots—but the provisional ballot would only count if the voter furnished photo ID within forty-eight hours.

The plaintiffs in Common Cause/Georgia I attacked this law as a poll tax and as an undue burden on the right to vote. As evidence of the burden, they submitted affidavits from thirty-five registered voters, many of whom were poor, disabled, elderly, or African-American, who attested to their lack of qualifying ID and the difficulties they would face in trying to obtain one (including cost, inconvenience, and lack of supporting documentation). The plaintiffs introduced no record

---

309 Id. at 1332-33, 1337-38.
310 Id. at 1338-39.
311 Id. at 1340.
312 Id. at 1337. In addition, to assist voters who would have difficulty getting to one of the then-existing fifty-eight DDS service centers statewide (none were located within the city limits of Atlanta), H.B. 244 provided for "a mobile issuance bus known as the Georgia Licensing on Wheels ('GLOW') Bus." Id. at 1338. The bus made scheduled stops around the state; also, "any group" could sponsor an appearance of the bus in their community "by making arrangements with the DDS." Id. However, GLOW was incapable of issuing ID to the wheelchair-bound and others who could not ascend the bus steps. Id. at 1338-39.
313 Id. at 1354.
314 Id.
315 More specifically, the affiants variously attested to some or all of the following:
• that they lacked an acceptable form of ID because (other than for voting) "they have no need" for it;
evidence, however, regarding the number of registered voters who lacked qualifying ID. Georgia had only recently begun collecting Social Security numbers from persons issued driver's licenses or non-driver photo ID cards, so it was not feasible to use state databases to determine the number of registered voters who lacked even these forms of ID.\footnote{316}

Federal district judge Harold L. Murphy granted the plaintiffs' motion for a preliminary injunction, applying strict scrutiny.\footnote{317} The court gave two independent bases for its level-of-scrutiny determination. It held, first, that the state's failure to provide free ID cards to anyone who lacked other qualifying ID was tantamount to a poll tax.\footnote{318} Second, relying on the plaintiffs' affiants, the court ruled that the ID requirement would represent a substantial burden for "many" low-income, disabled, elderly, and African-American voters.\footnote{319} Even apart from the poll tax characterization, the burden was severe enough to warrant exacting scrutiny under \textit{Burdick}.\footnote{320}

\begin{itemize}
\item that they were "not indigent," but did "not have $20 to spend for a Photo ID card that they [did] not need except for purposes of voting";
\item that they were African-American, elderly, or had "disabilities that [made] it difficult for them to travel to a DDS service center, to walk for long distances, or to stand in line";
\item that they would "have to rely on family members or friends for transportation, or [could not] obtain transportation to a DDS service center," or "would have difficulty taking off from work to go to a DDS service center";
\item that they "had problems obtaining necessary information, such as birth certificates," either because they would have difficulty getting to the health department and paying the $10 fee, or because "their legal names did not match the names they used for voter purposes or the names on their birth certificates," or because the bureaucrats in their state of birth "could not find" their birth certificates;
\item that they had had to travel as many as twenty miles to a DDS service center and wait in line for as long as two or three hours to renew or obtain a driver's license or photo ID.
\end{itemize}

\textit{Id.} at 1340-42.\footnote{316} \textit{Id.} at 1340. Note that these figures, if available, would represent an upper bound on the number of voters who lacked qualifying ID (because some voters without qualifying state ID may have qualifying ID issued by the federal government).\footnote{317} \textit{Id.} at 1362, 1366, 1376.\footnote{318} \textit{Id.} at 1366-69. While voters without ID could vote absentee under H.B. 244, the district judge held, \textit{id.} at 1367, that complying with the absentee voting procedures constituted a "material requirement" within the meaning of \textit{Harman v. Forssenius}, 380 U.S. 528, 540-42 (1965), which held that no state could save a poll tax by providing nonpaying voters with an alternative voting procedure, if that procedure amounted to a material requirement.\footnote{319} \textit{See Common Cause/Ga. I}, 406 F. Supp. 2d at 1362-66.\footnote{320} \textit{Id.} at 1366.
Judge Murphy's conclusion about the magnitude of the burden on vulnerable voters manifestly depended on hunch and anecdote. The personal experiences of a few dozen voters hand-picked by the plaintiffs' attorneys seem, at best, a doubtful basis on which to generalize about the effects of the ID requirement on low-income, disabled, elderly, and minority communities at large. Such generalizations will seem plausible only to the judge whose "common sense" they reinforce. Judge Murphy's hunch-based decision making was even more apparent in his response to the defendants' argument that because Georgia had authorized universal absentee voting and excused absentee voters from the ID requirement, the burden of the ID requirement was necessarily minimal. The judge replied:

Absent more information indicating that the State made an effort to inform Georgia voters concerning the new, relaxed absentee voting procedures, many Georgia voters simply may be unaware that the rules have changed.

The absentee voting process also requires that voters plan sufficiently enough ahead to request an absentee ballot, to have the ballot delivered from the registrar's office via the United States Postal Service, to complete the ballot successfully, and to mail the absentee ballot to the registrar's office sufficiently early to allow the United States Postal Service to deliver the absentee ballot to the registrar by 7:00 p.m. on election day. The majority of voters—particularly those voters who lack Photo ID—would not plan sufficiently enough ahead to vote via absentee ballot successfully.

The plaintiffs, however, had not produced evidence that ID-less voters were unaware of the absentee-voting alternative. Nor had the plaintiffs shown that absentee voters had or would have problems getting their ballots submitted on time. Judge Murphy seems to have gone on nothing more than surmise.

After Judge Murphy enjoined enforcement of H.B. 244, the Georgia legislature returned to the drawing board. The new ID bill, Senate Bill 84 (S.B. 84), retained its predecessor's requirement of current photo ID to vote at the polls (but not absentee), while purporting to ease the acquisition of qualified ID. Most notably, S.B. 84 provided for a new "Georgia voter identification card," which each county
board of registrars was to issue, free of charge, to any resident who furnished identity documents and who averred that he lacked other qualifying photo ID.\(^\text{324}\) No longer required to present a birth certificate or other costly documentation, applicants for the voter ID card were allowed to establish their identity with many types of supporting documentation—even as little as a completed voter registration form or voting precinct card.\(^\text{325}\)

The plaintiffs in *Common Cause/Georgia II* developed a much richer evidentiary record than they had in the litigation the previous year. They submitted several estimates indicating that hundreds of thousands of voting-age Georgians lacked driver’s licenses, with the elderly and African Americans disproportionately represented.\(^\text{326}\) A study of recent elections showed that voters without DDS-issued IDs were more likely to have participated in the Democratic than in the Republican primary.\(^\text{327}\) To demonstrate the supposed inadequacy of the absentee-voting alternative, the plaintiffs procured a declaration from a literacy expert, who ventured that “less than forty percent of adults in Georgia are capable of reading and comprehending the absentee ballot application.”\(^\text{328}\) Finally, the plaintiffs introduced evidence regarding the State Election Board’s recently initiated campaign to educate voters about the ID requirement.\(^\text{329}\) At the time of the plaintiffs’ motion for a preliminary injunction, a few weeks before the July 18, 2006, primary, the Board had just begun to air a series of public service announcements. The plaintiffs established that the stations on which the ads were running had a listenership of only 900,000 adults (not all

---


\(^\text{325}\) See *id.* at 1306-08. Technically, applicants were required to produce (1) an “identity document,” either photographic or, if not photographic, one with the applicant’s “full legal name and date of birth”; (2) “[d]ocumentation showing the person’s date of birth”; (3) evidence of registration to vote in the state of Georgia; and (4) “[d]ocumentation showing the person’s name and address of principal residence.” *Id.* at 1308. It was not disputed, however, that these requirements could all be fulfilled with a completed voter registration application or precinct card. *Id.* at 1329.

\(^\text{326}\) See *id.* at 1306.

\(^\text{327}\) In subsequent litigation, this study was ultimately deemed inadmissible, in part due to concerns about the underlying data and in part due to the judge’s belief that it was not relevant. See *Common Cause/Ga. v. Billups (Common Cause/Ga. III)*, 504 F. Supp. 2d 1333, 1370-71 (N.D. Ga. 2007) (granting defendants’ motion to exclude reports and testimony of plaintiffs’ experts).

\(^\text{328}\) *Common Cause/Ga. II*, 439 F. Supp. 2d at 1316. This expert’s testimony was later ruled inadmissible, after the court determined that being able to read the absentee ballot application was not necessary to vote absentee. See *Common Cause/Ga. III*, 504 F. Supp. 2d at 1379.

\(^\text{329}\) *Common Cause/Ga. II*, 439 F. Supp. 2d at 1312, 1313-14, 1317, 1329.
of them Georgians) and that the ads were broadcast at odd hours of the night and early morning.

As he had the previous year, Judge Murphy entered a preliminary injunction against the ID requirement, after concluding that the burden was severe enough to warrant strict scrutiny. He repeated his finding from Common Cause/Georgia I that "many voters"—especially African Americans, the elderly or disabled, and the poor—

have no transportation to a voter registrar's office or DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain Voter ID cards or Photo ID cards, or cannot travel to a registrar's office or a DDS service center during those locations' usual hours of operation because the voters do not have transportation available.

However, Judge Murphy rejected the plaintiffs' poll-tax argument, and he allowed that S.B. 84 might pass muster "if the State undertakes sufficient steps to inform voters of the... Act's requirements before future elections." It was the state's responsibility to give notice of the new ID requirement, in advance of the elections, in a manner "reasonably calculated to reach the voters who are most likely to lack a Photo ID."

A year later, following a bench trial, Judge Murphy lifted his injunction. He held that the plaintiffs had failed to prove that the new ID requirement would represent an "appreciable" hardship for any voter. The burden was not appreciable because, in the months since Judge Murphy's last order, the state had made "exceptional" efforts to contact voters and inform them of the new requirements, and because once informed, voters should not have had difficulty either obtaining a qualifying ID or arranging to vote absentee. The plaintiffs therefore lacked standing. Reaching the merits in the alternative, Judge Murphy stated that the same lack of proven, "appreciable"

---

330 Id. at 1314.
331 Id. at 1341.
332 Id. at 1358.
333 Id. at 1345.
334 Id. at 1355.
335 Id. at 1351.
336 Id. at 1346.
338 Id. at 1380 (quoting Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 822-23 (S.D. Ind. 2006)).
339 Id. at 1377-80.
340 Id. at 1371-74.
burdens meant that the standard of review was rational basis rather than strict scrutiny.\textsuperscript{341} At that point, the game was over.\textsuperscript{342}

Viewed as a whole, Judge Murphy's several opinions seem to rest on the following ideas about how the \textit{Burdick} burden inquiry is properly applied in voter participation cases. For openers, not all state-created impediments to the exercise of the franchise are constitutionally cognizable. Only burdens that a reasonable citizen would have some difficulty surmounting—would find "appreciable"—merit the courts' attention. (Reasonable citizens are not always aware of the latest legal developments, however, so if the state wants to add new voting requirements—even modest ones—it should make a reasonable, good-faith effort to give advance notice to the affected voters.) In addition, an appreciable burden on any one citizen is generally not enough to trigger strict scrutiny. Rather, "burden severity," for scrutiny level purposes, depends on the number and demographic distribution of citizens who face appreciable burdens. If these citizens are concentrated within politically identifiable groups, especially disadvantaged groups, the burden is more likely to warrant classification as severe.

\textbf{* \hspace{1em} * \hspace{1em} *}

In light of the Supreme Court's electoral mechanics jurisprudence, what can we say about Judge Murphy's reasoning? Both his cavalier attitude toward seemingly minor barriers to voting and his concern about the incidence of material burdens have counterparts in the Supreme Court's decisions.\textsuperscript{343} We certainly cannot say that his rulings lacked plausible foundations in precedent.

Yet, with the possible exception of the poll tax analysis in \textit{Common Cause/Georgia I}, Judge Murphy's reasoning should give us pause. Here

\textsuperscript{341} The judge did pause to distinguish his earlier rulings, stating that they reflected the "more relaxed evidentiary standards" appropriate to a preliminary injunction hearing. \textit{Id.} at 1379.

\textsuperscript{342} \textit{Id.} at 1380.

\textsuperscript{343} For a recent example of the former (a cavalier attitude toward putatively minor barriers to the exercise of the franchise), see Clingman v. Beaver, 544 U.S. 581, 592-93 (2005) (dismissing the notion that a requirement that voters enroll in a party before voting in its primary could warrant strict scrutiny). Attention to the likely incidence of burdens—even seemingly minor burdens—is displayed in the cases concerning the imposition of economic conditions on political participation. \textit{See supra} Part II.A; \textit{see also} Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) ("[T]his is especially difficult for the state to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.").
we have a district judge appointed by a Democratic president ruling on the constitutionality of an electoral reform, bitterly opposed by Democrats, that was a top priority for the Republican-controlled legislature of the State of Georgia. Under the governing precedents, the district court had to make a threshold inquiry to determine whether the photo ID requirement should receive the ordinary electoral mechanics presumption of permissibility. The judge—a Democrat—carried out that inquiry in a manner that was utterly dependent on the judge’s personal sense of what is fair and reasonable. Judge Murphy’s preliminary injunctions turned on sheer guesswork about the likely impact of the ID requirement. Later, ruling on the merits, Judge Murphy purported to hold the plaintiffs to a more demanding evidentiary standard, but the substance of his inquiry was no less dependent on his moral and policy intuitions. His burden determination boiled down to two open-ended judgment calls: whether the state had done enough to inform voters of the new requirements, and whether the protocol for obtaining voter ID was sufficiently lenient as to fall below the threshold of appreciability. These judgments were unanchored by anything approaching a clear-cut structural presumption.

As it happened, Judge Murphy did not toe the Democratic Party line in applying the “appreciable burden” standard. An observer who worries about the fact or appearance of judicial partisanship in election law cases may take some comfort in this. It is nonetheless disappointing—and, equally, a sign of the confusion created by Burdick’s statement of doctrine—that Judge Murphy wholly failed to consider the opportunities for setting scrutiny levels in a more regularized and less intensely subjective manner.

Judge Murphy did have other options, which he might have pursued had he understood how the Supreme Court uses the Burdick threshold test as an occasion for formal, presumption-guided inquiries into whether the constitutional costs (in terms of open, accountable democratic government) of the challenged requirements are likely to substantially outweigh their benefits.54

For example, Judge Murphy might have held in Common Cause/Georgia I that heightened scrutiny was in order because of H.B. 344.
244's incongruity with the larger legal landscape. At the time, Georgia was alone in requiring a current, government-issued photo ID for in-person voting. No other state required it; no other state had ever required it. This type of argument from the legal landscape is a bit different from Randall's relative-level comparison among states, and Norman's emphasis on state-local disparities, but that does not warrant rejecting it if the judge otherwise considers it a sound basis for negating the presumption of permissibility. Lower courts per-

---

345 See supra notes 306-313 and accompanying text (discussing H.B. 244).

346 For a discussion of state-by-state and historical variation in ID requirements for voting, see Overton, supra note 29, at 638-44.

347 See supra Part II.B.3.a. Of course, Randall had not been decided when Judge Murphy issued his opinion in Common Cause/Georgia I.

348 See supra Part II.B.3.b.

349 Though rare, there are a handful of voter participation cases in which lower courts have characterized burdens on the basis of innovative arguments from the legal landscape. See Greidinger v. Davis, 988 F.2d 1344, 1352-54 (4th Cir. 1993) (striking down a voter registration law requiring registrants to submit their Social Security number without protecting the number from subsequent disclosure, and relying upon various federal statutes' protection of the privacy interest in Social Security numbers to establish that the Virginia law at issue was "severely" burdensome by virtue of its failure to include analogous protections); Project Vote v. Blackwell, 455 F. Supp. 2d 694, 703 (N.D. Ohio 2006) (relying, in part, on the defendants' inability "to point to any other state that has enacted anything remotely similar" in characterizing the burden as severe); Bay County Democratic Party v. Land, 347 F. Supp. 2d 404, 434-35 (E.D. Mich. 2004) (sustaining under Burdick various state requirements for the casting and tallying of provisional ballots, after observing that the state requirements were patterned on federal requirements whose constitutionality the plaintiffs did not contest); Colo. Common Cause v. Davidson, No. 04-7709, 2004 WL 2360485, at *12-13 (Colo. Dist. Ct. Oct. 18, 2004) (sustaining state-law voter ID requirements, under Burdick, on the theory that they were only "marginally more intrusive than the already existing federal identification requirement under [the Help America Vote Act], which, significantly, Plaintiffs do not challenge").

Legal landscape arguments have also played a role in the litigation over New York's ballot-access laws for presidential primaries. In Rockefeller v. Powers, 917 F. Supp. 155, 160-65 (E.D.N.Y. 1996), aff'd, 78 F.3d 44, 45-46 (2d Cir. 1996), the district court and the Second Circuit made much of the fact that New York authorized political parties to choose between two ballot-access regimes. One regime, adopted by the Republican Party, was much more restrictive than the other, which had been adopted by the Democratic Party. In these opinions, it appears that the intrastate disparity in ballot-access regimes matters largely at the justification stage of the analysis, and does not, as such, warrant heightened scrutiny. However, the Second Circuit subsequently revisited the Rockefeller litigation, and in doing so treated the intra-state disparity as a reason for heightened scrutiny. See Prestia v. O'Connor, 178 F.3d 86, 89 (2d Cir. 1999) (describing the intrastate disparity in Rockefeller as a "special circumstance" that, in conjunction with other such circumstances, warranted strict scrutiny).

form a valuable service when they experiment at the doctrinal margins, generating new possibilities, broadly consistent with the Supreme Court's methodological preferences, that the Court can learn from and possibly adopt.

Judge Murphy might also have developed an argument based on legislative intent or purpose. One option would have been to engage in an Arlington Heights-like inquiry into the totality of the circumstances—包括 the substance of the law, the manner in which it was enacted, and any other potentially relevant background facts—and on this basis decide whether the law's proponents intended to reduce the number of votes cast by certain citizens "because of the way they may vote." That inquiry, while doctrinally available, is perhaps too incendiary and subjective for the courts safely to employ in regulating voting procedures. It is one thing for a Democratic judge to rule that a Republican legislature excessively encumbered the right to vote, or that the state should have given better notice of new voting requirements. It is quite another for the judge to proclaim that the law's proponents acted for wholly illegitimate reasons when the evidence that they did so consists of little more than partisanship-enactment combined with the judge's belief that the law is substantively unreasonable.

But arguments from intent or purpose need not be deployed in quite so perilous a way. Bearing in mind the "danger signs" meta-

---

350 See Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266-68 (1977) (noting that the determination of "whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including "[t]he impact of the official action"; "[t]he historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes"; procedurally or substantively aberrational decision making; and "legislative or administrative history").


352 Since Carrington was decided in 1965, there have been only a handful of judicial decisions striking down election laws on the ground that they were intended to "fence out" a politically identifiable segment of the electorate. See Equal. Found. of Greater Cincinnati v. City of Cincinnati, Inc., 860 F. Supp. 417, 433-34 (S.D. Ohio 1994) (declaring invalid a city charter amendment that purportedly fenced out homosexuals from the political process), rev'd, 128 F.3d 289 (6th Cir. 1997); Sloane v. Smith, 351 F. Supp. 1299 (M.D. Pa. 1972) (declaring invalid a county law restricting ballot access of university students); Castro v. California, 466 P.2d 244, 256 (Cal. 1970) (finding no compelling state interest to justify an English literacy requirement to vote); Keane v. Mihaly, 90 Cal. Rptr. 263 (Cal. Ct. App. 1970) (discussing the danger that a one-year residency requirement for voting would fence out a sector of the population).
phor, Judge Murphy might have negated the presumption of permissibility on the theory that certain indicators ("as objective as we can make them") of exclusionary intent were present. The court would not have had to say that the law actually was enacted for illegitimate reasons, only that a reasonable person might worry that it was (by dint of said indicators). This determination would be enough to trigger meaningful judicial assessment of the law's substance—without an ultimate pronouncement on the reason for the law's enactment.

In *Common Cause/Georgia II*, the danger signs included (1) the fact that the law was enacted substantially along partisan lines; (2) the fact that the law was a replacement for voting requirements previously struck down as unconstitutional, and was pushed through by the same coalition of lawmakers who had supported the unconstitutional predecessor; (3) the fact that the law did nothing to target absentee voting fraud, the one form of voting fraud whose existence was well documented; and, arguably, (4) some suggestive though hardly conclusive evidence of a disparate impact on voters who tend to support Democrats.

A district judge in Murphy's position might also have begun to sketch out, in dicta, a set of "safety signs" (the reverse of danger signs), both to assist the Georgia legislature when it next takes up the issue of ID requirements for voting, and to circumscribe the federal courts' involvement in heated partisan disputes over the ground rules of electoral competition. For example, the court might have hinted that voting requirements deemed suspect because of partisanship-enactment plus some evidence of exclusionary effects would nonetheless retain the normal presumption of permissibility if put in place on an experimental basis. Judicial implementation of this idea would require establishing structural presumptions about sunset provisions (e.g., for how many elections may a law designated experimental remain in force?), and might also necessitate substantive judicial review of the reasonableness of provisions for monitoring and evaluation. Doctrinally, a defense of the experiment-as-safety-sign approach would require some pretty imaginative judicial reasoning, but a colorable argument might be crafted.

---

353 See supra Part II.C.3.
355 In at least one context—the determination of what qualifies as "congruent and proportional" remedial legislation under Section 5 of the Fourteenth Amendment—the Supreme Court already treats sunset provisions as a relevant factor in assessing the
There are other safety-sign possibilities. On the right facts, a court might give a free pass to an otherwise suspect voting procedure because it was vetted and approved by a substantially nonpartisan or bipartisan institution, such as an electoral commission or “citizens’ assembly.” My point here is not to say that any particular safety-signs strategy is desirable, only that some such approach would be congruent with the Supreme Court’s use of threshold inquiries in electoral mechanics cases.

My broader point is this: when faced with unfamiliar cases about the voting process, the lower courts should look to the Supreme Court’s practice as well as its rhetoric. They would do well to appreciate the “danger signs” logic and structural ambitions of much of the Storer-Burdick jurisprudence. Over time, the lower courts stand to make much more lasting and significant contributions to the constitutional law of democracy if they can articulate and apply severe-in-kind, structural-presumption, and intent-based approaches to the Burdick threshold question, particularly if they keep the threshold inquiry simple and amenable to even-handed application by judges with varying ideological predilections.

B. Suggestions for the Supreme Court

The Supreme Court need not announce any radical about-face in order to encourage lower-court experimentation with the techniques


for choosing scrutiny levels I have discussed. A few small steps would suffice. First, the Court should expressly incorporate the "danger signs" metaphor into the electoral mechanics jurisprudence—not as a replacement for Burdick's language of burdens, but as a supplement. This should help lower courts see that the Burdick threshold inquiry need not entail ascertaining the actual impact of challenged laws on voting and political association. Second, the Court should acknowledge that the threshold inquiry is about more than keeping the federal courts from tying "the hands of States seeking to assure that elections are operated equitably and efficiently." It is also about managing the risk that the federal courts will end up assuming "political, not legal responsibility for a process that often produces ill will and distrust." (Risk management, not risk minimization: the day of Justice Frankfurter's minimization strategy—an expansive political question doctrine—has long since passed.) Once judges see the threshold test in this way, it becomes easier to appreciate the reasons for formalism, and also the importance of holding back except in cases where "clues, as objective as we can make them," suggest that the payoff from judicial intervention is potentially great.

Third, the Court should clarify that "burden severity," or, equivalently, the presence of danger signs, should be reviewed de novo on appeal. Doing so would signal that the threshold inquiry is about more than measuring the impact of the challenged law. De novo review would also give the circuit courts more control over district courts' level-of-scrutiny determinations, which is welcome if for no other reason than that the courts of appeal sit in panels, and decisions jointly made by three judges are less likely to be idiosyncratic than the decisions of single judges acting alone. Given the potential political ramifications of judicial interventions in electoral mechanics cases, this constraint on district court discretion is probably advisable.

One might also think that the Supreme Court should offer lower courts more direction about substantive norms to advance in developing and elaborating the threshold tests. It is a favorite sport of law professors to bash the Supreme Court for not having enough theory about what it is doing—and there is more to this than sport. Lower

---

357 Burdick, 504 U.S. at 493.
360 See supra notes 46-47 and accompanying text (quoting Vieth, 541 U.S. at 344 (Souter, J., dissenting)).
courts cannot be expected to design or evaluate methods of sorting electoral mechanics into presumptively permissible and presumptively impermissible categories without an underlying theory of what the Constitution should be read to achieve.\textsuperscript{361} I accept this much, yet I doubt that a narrowly directive theory would be appropriate. The constitutional goods that the courts should (plausibly) seek to protect in the domain of election law are irreducibly plural.\textsuperscript{362} Over the years, the Court has variously suggested that the right to vote serves to protect, among other things, the dignitary interests of citizens as individuals, the responsiveness of government to the citizenry as a whole (not just to privileged groups within the citizenry), and public confidence in and acceptance of the electoral process ("legitimacy").\textsuperscript{363} All of these are important values, and in the absence of clear textual guidance it is doubtful that there is a defensible basis for categorically prioritizing one of them. It may be enough for the Supreme Court to indicate that precisely because the Constitution does not express a clear design for the constitutional law of democracy, the courts should intervene mainly in situations where a broad consensus of informed opinion would support the intervention, or where the intervention seems necessary to maintain a political order that most citizens can accept as tolerably legitimate.


\textsuperscript{362} Cf. Richard H. Pildes, What Kind of Right Is "The Right To Vote"?, 93 VA. L. REV. IN BRIEF 43, 43 (2007) ("Not only does the right to vote protect several different core interests, but these interests are also qualitatively distinct. Put in other terms, there is not one right to vote. There are several.").

\textsuperscript{363} See Vikram David Amar & Alan Brownstein, The Hybrid Nature of Political Rights, 50 STAN. L. REV. 915 (1998) (addressing the dignitary, legitimizing, and good-government functions of the right to vote in Supreme Court doctrine as well as in public debates concerning the enactment of the Fifteenth and Nineteenth Amendments); Gerken, supra note 361, at 1419-27 (identifying four germinal purposes in the Court's early malapportionment decisions: preventing "lock-up" of the political process by a numerical minority, guarding against group-based animus, ensuring that each voter effectively exercises her "fair share" of political power, and protecting citizens' dignitary interests against "expressive harms"); Karlan, supra note 6, at 709-19 (distinguishing among participation, aggregation, and governance values, each of which the right to vote might be thought to protect).
CONCLUSION

It is by now well understood that burdens on the right to vote and the affiliated right to associate for political change need not trigger strict scrutiny. Rather, constitutional challenges to electoral mechanics are resolved using a nominal balancing test, under which the level of scrutiny purportedly varies with the "character and magnitude" of the associated burden. Although the Supreme Court has long said that "no litmus-paper test" separates valid from invalid electoral mechanics, and although the Court's rhetoric seems to command empirical inquiry into the "magnitude" of electoral mechanics burdens, this is misleading. The Court has, in fact, created or invited the creation of a number of "litmus-paper tests" for setting scrutiny levels in electoral mechanics cases—tests that involve assessing the type of burden created, simple proxies for impact (and associated numerical, qualitative, and legal-landscape cutoffs), and legislative purpose. Often, these tests manifest a concern for aggregate or structural properties of the electoral system, not just the defensibility of individuated burdens. In the hopes of facilitating the work of courts and litigants, particularly those faced with the new generation of voter participation claims, this Article has mapped and explained the legal terrain. I leave to future work the task of exploring what sort of threshold inquiry in electoral mechanics cases would be most appropriate.