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Refining the Democracy Canon

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REFINING THE DEMOCRACY CANON

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This Article responds to Professor Rick Hasen's important new work, The Democracy Canon. *Hasen identifies an intriguing and, until now, largely unnoticed practice in many state courts—to wit, the construing of election statutes with a strong thumb-on-the-scales in favor of easing voters' access to the polls and classifying ballots as eligible to be counted. Hasen defends this "pro voter" canon of interpretation and commends it to the federal courts. I argue that Hasen's Canon cannot stand on the normative foundation he has poured for it, and that the federal courts' adoption of the Canon would probably have significant costs (for example, weakened incentives for bipartisan compromise on electoral reform) that Hasen either overlooks or undersells. I propose three alternative "democracy canons," arguing that each would be more normatively defensible and less politically treacherous than Hasen's Canon. The first, the Effective Accountability Canon, would stand in for the Supreme Court's reluctance to directly enforce the constitutional principle (arguably embodied in the Guarantee Clause, Article I, and the Seventeenth Amendment) that electoral systems should render elected bodies responsive to the interests and concerns of the normative electorate, i.e., the class of persons entitled to vote. Representative voter participation and aggregate voter competence would be this canon's polestars. A second option, the* Carrington *Canon, counsels for narrowly construing voting requirements that were enacted on a substantially party-line vote. It could also negate the normal presumption of deference to administrative agencies—with respect to voting issues—if a political partisan heads the agency. The* Carrington *Canon would function as a means of indirectly enforcing an underenforced constitutional norm against ideological discrimination with respect to the franchise. The third option, the Neutrality Canon, weighs in favor of statutory interpretations that reduce the fact or appearance of judicial partisanship.*

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INTRODUCTION

Although the vast majority of legal disputes about the electoral process turn on the interpretation of statutes,[1] election law scholars tend to focus on constitutional questions. We work in the shadow of John Hart Ely.[2] For many, the holy grail remains an overarching account of democracy-enhancing or representation-reinforcing constitutional judicial review, one which could guide and limit the Supreme Court's textually dubious foray into the "political thicket."[3] The

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1 *See, e.g.*, Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 92 (2009).

2 *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (advancing "representation-reinforcing" theory of judicial review, in service of fair and effective democratic government).

3 *See, e.g.*, RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM *Baker v. Carr* TO *Bush v. Gore* 9–10 (2003); Yasmin Dawood, *The Antidomination Model and the Judicial Oversight of Democracy*, 96 GEO. L.J. 1411, 1443–47 (2008); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 668–70 (1998); Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734, 753–63 (2008); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 497–501 (1997); Jane S. Schacter, *The Pursuit of "Popular Intent": Interpretive Dilemmas in Direct Democracy*, 105 YALE L.J. 107, 160 (1995). *But see* Heather Gerken & Michael Kang, *Harnessing Politics to Fix Politics: The Institutional Turn in Election Law Scholarship*, *in* RACE, REFORM, AND REGULATORY INSTITUTIONS: RECURRING PUZZLES IN AMERICAN DEMOCRACY (Heather K. Gerken, Guy-Uriel E. Charles & Michael S. Kang eds., forthcoming 2010) [hereinafter RACE, REFORM, AND REGULATORY INSTITUTIONS] (arguing that election law scholarship should reconsider the heavy role of litigation in determining election law and instead seek out new means of regulation to achieve political reform).

entirely analogous and arguably more important question of whether there are field-specific principles that do or should inform the interpretation of election statutes has received virtually no attention.[4]

Professor Rick Hasen's important new article, *The Democracy Canon*, begins to rectify this imbalance. Hasen explains that the state courts have developed several "pro voter" interpretive maxims specific to election statutes, which he lumps under the heading, "the Democracy Canon." The Canon "favor[s] free and competitive elections."[5] It justifies otherwise-strained statutory readings that "give effect to the will of the majority and . . . prevent the disenfranchisement of legal voters."[6] It has been used, in the main:

(1) to ensure that ballots do not go uncounted "because of minor voter error, election official error, or a disputed reading of a relevant statute or set of statutes;"[7]
(2) to enable would-be voters "to cast a ballot that will be counted even though election officials have determined that they cannot register or vote because of minor voter error, election official error, or a disputed reading of a relevant statute or set of statutes;"[8] and to some extent,
(3) to enable would-be candidates or political parties "to run in an election or appear on an election ballot, even though election officials have excluded the candidate or party from the ballot because of minor candidate or party error, election official error, or a disputed reading of a relevant statute or set of statutes."[9]

Hasen's article begins as a descriptive piece, but it quickly turns normative. Hasen applauds the Democracy Canon. Going further, he urges the federal courts to adopt it.[10] There is every reason to hope—or fear—that at least some federal judges will do as he urges.[11] The treasure trove of precedents that Hasen has unearthed from the state court reporters could provide a varnish of legality for far-fetched inter-

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4 Much ink has been poured over particular problems arising under particular statutes (such as the Voting Rights Act), but until now, no one has focused on whether there are any principles that courts ought to apply more generally when interpreting election-related statutes.

5 Hasen, *supra* note 1, at 77 (quoting State *ex rel.* White v. Franklin County. Bd. of Elections, 598 N.E.2d 1152, 1154 (Ohio 1992)).

6 *Id.* (quoting Montgomery v. Henry, 39 So. 507, 508 (Ala. 1905)).

7 *Id.* at 83.

8 *Id.* at 84.

9 *Id.*

10 *Id.* at 73.

11 Hasen reaches a wide audience through his excellent blog, *see* Election Law Blog, http://electionlawblog.org (last visited Feb. 17, 2010), and some of his earlier work has been featured prominently in judicial opinions. *See, e.g.*, Stewart v. Blackwell, 444 F.3d 843, 874–76, 887–89 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (discussing Hasen's analysis of *Bush v. Gore* at length in both majority and dissenting opinions).

pretations of the federal election statutes. For judges who have extralegal (partisan or ideological) motivations to excuse an error made by particular voters, candidates, or political parties, the Democracy Canon could provide legalistic cover for decisions made on other grounds.

This risk does not warrant dismissing the Democracy Canon out of hand, but it does provide good cause to think carefully about the Canon and possible alternatives before rushing to adopt it. To that end, this Article makes several contributions: it draws out some overlooked costs of the Democracy Canon; it calls into question Hasen's account of the Canon's benefits, and it sketches three plausible alternatives to Hasen's Canon. These alternatives would be more normatively defensible than the Canon in its current form. There is also some basis for thinking that the alternatives would be less politically treacherous for the courts to apply.

Part I fleshes out the probable costs of Democracy Canon usage. Hasen expresses some concern that particular applications of the Canon may appear lawless to the general public but concludes that it should be possible to allay such suspicions by educating the public about the Canon's vintage (it has been used for over a century) and ordinariness (it resembles other substantive canons).[12] Undertaking to inform the public about the nuances of statutory construction strikes me as quixotic, but on the other hand, I do not see much reason to think that the public will discern and respond to the reasoning of judicial opinions in election cases.[13] Of greater concern to me are the risks that judicial recourse to the Canon (1) will increase the "partisan gap"—the distance between the expected rulings from Democratic and Republican judges—in election cases, (2) will undermine incentives for bipartisan compromise when the legislature addresses itself to the ground rules of political competition, and (3) will have the effect of displacing important, nonelectoral matters from the legislative agenda.

Part II of this Article turns to Hasen's affirmative case for the Canon, which builds on two influential schools of thought about the proper role for substantive values in the interpretation of statutes. One school holds that judges should interpret ambiguous statutes with an eye towards bringing the fabric of the law into better alignment with constitutional norms that the courts cannot or will not fully enforce in constitutional cases. Statutory interpretation becomes an

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12 *See* Hasen, *supra* note 1, at 107–14.

13 The general public knows very little about even Supreme Court opinions. *See generally* VALERIE J. HOEKSTRA, PUBLIC REACTIONS TO SUPREME COURT DECISIONS 2 (2003) (noting that "[i]n any given term, only one or two of the Court's decisions, if any, will generate significant national controversy and attention").

indirect means of judicially implementing otherwise underenforced constitutional norms. The other school holds that judges should interpret ambiguous statutes to conform to the "enactable preferences" of the current legislature. When courts cannot reliably ascertain current enactable preferences, they may justifiably issue contrapreferential interpretations with the goal of eliciting a legislative response and thereby bringing about a better fit between positive law and enactable preferences than would have resulted had the court merely resolved the statutory ambiguity in accordance with its best guess about current enactable preferences.

Neither of these schools of thought can justify the Democracy Canon in its present form. One wonders whether the true reason that Hasen favors the Democracy Canon is because he personally subscribes to the values the Canon embodies. Hasen does not defend the Canon on "good results" grounds, however, and probably for good reason. The difficulty with a pragmatic, results-based argument for the Canon is that there are many dimensions of value relevant to evaluating a system of election laws. The Democracy Canon privileges a couple of these values to the exclusion of the others, and it does so in a manner that risks at least the appearance of judicial partiality toward one of the two major political parties, specifically the Democrats.[14] In light of the plurality of values at play and the existence of reasonable disagreement over priorities, a "good results" approach to the interpretation of election statutes cannot be realized—consistent with the judicial aspiration to neutrality—unless the courts limit their pragmatic interventions to those rare circumstances in which a broad consensus of informed opinion would concur in the court's policy judgment.

Despite my skepticism of his proposal, I share Hasen's intuition that a "democracy canon" of some sort could do useful work in cases where courts must interpret ambiguous election codes. Part III suggests several alternative democracy canons. The first, the Effective Accountability Canon, would stand in for the Supreme Court's reluctance to directly enforce the constitutional principle—arguably embodied in the Guarantee Clause, Article I, and the Seventeenth Amendment—that electoral systems should render elected bodies responsive to the interests and concerns of the normative electorate, i.e., the class of persons entitled to vote.[15] Whether an electoral re-

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14 In recent decades, the Democratic Party has made the removal of barriers to voter participation one of its legislative priorities; the Democrats' contributions to the National Voter Registration Act and the Help America Vote Act exemplify this commitment. For more on these two statues, see *infra* notes 26 and 28.

15 *See* U.S. CONST. art. IV, § 4, cl. 1; *id.* art. I; *id.* amend. XVII. In some respects, Philip Frickey anticipated my argument for a canon-based approach to the Guarantee Clause. He argued that courts should narrowly construe laws created through ballot initiatives because

form promotes effective accountability depends on (1) whether it causes the voting public (persons who turn out to vote) to become more or less representative of the normative electorate, (2) whether it improves or undermines the aggregate competence of the voting public in apportioning blame retrospectively and in identifying candidates who are likely to act as the voters—if fully informed—would wish them to act, and (3) whether it facilitates or hinders coordination by like-minded voters.

A second option, the *Carrington* Canon, counsels for narrowly construing voting requirements that were enacted on a substantially party-line vote. It could also negate the normal presumption of deference to administrative agencies (with respect to voting issues) if the agency is headed by a political partisan. The *Carrington* Canon would function as a means of indirectly enforcing the underenforced constitutional norm against ideological discrimination with respect to the franchise. The Supreme Court embraced this norm in *Carrington v. Rash*,[16] but its recent decision in *Crawford v. Marion County Election Board*[17] renders the norm underenforced.

Third, a plausible argument can be made for the Neutrality Canon, pursuant to which the courts would interpret election codes with an eye to reducing the fact or appearance of judicial partisanship. This canon would be similar to but not coextensive with the prudential strand of the political question doctrine. Traces of support for it are present in the Supreme Court's interpretations of the Help America Vote Act[18] and the Voting Rights Act.[19]

I
THE COSTS OF THE DEMOCRACY CANON

Hasen acknowledges that judicial recognition of the Democracy Canon would probably add a degree of indeterminacy to the interpretation of election codes, and that judicial decisions applying the Canon may appear politically motivated.[20] But he undersells the risk of Democracy Canon–induced judicial partisanship (or its appearance), and he overlooks the likelihood that judicial use of the Canon will

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of the "tension" between initiated legislation and republican government. *See* Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1996 ANN. SURV. AM. L. 477, 510–26 (1996). I shall argue, however, that the proper balance between the popular and antipopular elements in republican theory—the source of the alleged "tension" between initiated legislation and republican government—is an issue the courts should not address. *See infra* Part III.A.1. If I am right about this, then the courts ought not to narrowly construe initiated legislation on account of the Guarantee Clause.

16 380 U.S. 89, 93–97 (1964).

17 553 U.S. 181, 197–204 (2008).

18 42 U.S.C. §§ 15301–15545 (2006).

19 *See infra* text accompanying notes 222–50.

20 Hasen, *supra* note 1, at 106–13.

discourage bipartisan legislative compromises and occasionally displace important, nonelectoral matters from the legislative agenda.

A. Legitimacy and the Partisan Gap in Election Law Adjudication

The Democracy Canon is likely to exacerbate the partisan gap in judicial decision making in election cases.[21] This could undermine public confidence in the courts' political neutrality and ultimately in the fairness of the electoral system.

These conjectures must be ventured cautiously. The empirical study of statutory interpretation is in its infancy, and the early results concerning the relationship between interpretive methods and ideologically polarized outcomes are somewhat counterintuitive.[22] Research on partisan and ideological influences on judicial decision making in election cases is similarly scant,[23] and none of the work to

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21 By "partisan gap," I mean the difference in expected outcome depending on whether a case is assigned to a Democratic or Republican judge, or, with respect to multi-judge courts, the extent to which the expected outcome varies with the partisan composition of the panel.

22 For example, judicial recourse to legislative history—even in its less reliable forms—is not associated with more ideological results; also, statutory "plain meanings" seem to be read in a highly ideological fashion, contradicting a central postulate of textualism. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 19–22, 24–30 (2009); *cf.* Ward Farnsworth, Dustin F. Guzior & Anup Malani, *Ambiguity About Ambiguity: An Empirical Inquiry into Legal Interpretation*, 2 J. LEGAL ANALYSIS (forthcoming 2010), *available at* http://ssrn.com/abstract=1441860 (reporting experimental results which show that law students' policy preferences bias their judgments about the existence of statutory ambiguity when asked to give their personal opinion about ambiguity but not when asked whether an ordinary reader of the English language would deem the statute ambiguous).

23 There have been a few studies of judicial decision making in reapportionment cases that test for partisan bias. *See generally* GARY W. COX & JONATHAN N. KATZ, ELBRIGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION 77–81 (2002) (finding, in an analysis of reapportionment decisions involving partisan redistricting in the 1960s, that although "friendly" courts—those dominated by judges of the same party as the party then in control of legislative line drawing—were no more likely than "hostile" courts to find a partisan redistricting plan constitutionally valid, "friendly" courts were more likely than hostile courts to allow a plan found invalid to be used at the next election); Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413, 417–19 (1995) (studying malapportionment decisions from 1964–1983 and finding that Democratic judges were more likely than Republican judges to invalidate districting plans that departed from perfect population equality (an ideological effect) and that judges were more likely to vote against "opposite party" than "own party" plans (a partisan effect), though judges also voted to uphold own-party plans less frequently than bipartisan plans); Mark Jonathan McKenzie, Beyond Partisanship? Federal Courts, State Commissions, and Redistricting 117–49 (Aug. 2007) (unpublished Ph.D. dissertation, University of Texas) (on file with author) (examining reapportionment cases from 1981–2006 and finding that federal judges are more likely to vote to strike down opposite-party plans than own-party or bipartisan plans).

Another researcher has looked at cases in which the major political parties participate as litigants in a case. *See* Eddie Loyd Meaders, Partisanship and Judicial Decision Making in U.S. Courts of Appeal 4–6 (Dec. 2002) (unpublished M.A. Thesis, University of North Texas) (on file with author). He found that judges favor their party when their party is the

date investigates whether judicial recognition or use of the Democracy Canon is correlated with partisan decision making. Moreover, the ultimate consequences of ideological or partisan decision making in election cases for judicial or systemic legitimacy are to a large extent unknown.[24] All that said, there is reason to be worried.

The Democracy Canon, in Hasen's formulation, is meant to ensure that voters "not morally at fault" are able to participate and have their ballot counted correctly.[25] Yet what qualifies a voter as innocent depends on normative judgments about what the state may reasonably demand from citizens as a prerequisite to voting. This question divides the Democratic and Republican parties in the current access versus integrity debate,[26] echoing earlier divides between liberals and conservatives in clashes over literacy, tax-paying, and property qualifications for voting.[27] Given this intellectual schism and its apparent

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defendant, but party considerations do not otherwise appear to affect them. *See id.* at 47–49.

A study of state-court litigation concerning Ralph Nader's access to the ballot during the 2004 Presidential election found no evidence of judicial partisanship, though the sample size was quite small. *See* Kyle C. Kopko, *Partisanship Suppressed: Judicial Decision-Making in Ralph Nader's 2004 Ballot Access Litigation*, 7 ELECTION L.J. 301, 302 (2008).

Finally, researchers have found large differences in the votes of federal judges (for or against liability), depending on the party of the appointing president, in cases arising under Section 2 of the Voting Rights Act. *See* Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Act Jurisprudence*, 75 U. CHI. L. REV. 1493, 1493–94 (2008); Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 3 (2008). Cox and Miles discovered that judges appointed by Democratic presidents are more likely to vote for liability under Section 2 of the Voting Rights Act than judges appointed by Republican presidents. *See id.* at 3. It is not clear from their studies, however, whether this has anything to do with the pursuit of partisan advantage or whether it instead reflects a party-correlated difference in judicial ideology.

24 If the public response to *Bush v. Gore* is any indication, isolated instances of judicial partisanship (or its appearance) do not appear to cause lasting damage to public confidence in the courts. *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, 545–56 (2003). Whether recurrent instances of judicial partisanship (or its appearance) would do more damage remains to be seen.

25 Hasen, *supra* note 1, at 79 (quoting Carr v. Thomas, 586 P.2d 622, 624 (Alaska 1978)).

26 The debates playing out in many states over "voter ID" legislation aptly illustrate this point of partisan disagreement, as does the legislative history of the National Voter Registration Act (NVRA) and the Help America Vote Act (HAVA). With respect to the NVRA, the majority and minority statements in Senate Report 102–60 are quite illuminating. *See* S. REP. No. 102-60, at 1–4, 59–65 (1991) (Conf. Rep.). Among other things, Senate Democrats blasted a Republican representative who had argued that voter registration at public agencies would result in voters who had not thought out their vote. "[T]he purpose of our election process," the Democratic majority responded, "is not to test the fortitude and determination of the voter, but to discern the will of the majority." *Id.* at 3. The legislative debates over HAVA are well summarized in Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 426–28 (2004).

27 On this history, see generally ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 9–13, 33–52, 141–46 (2000) (discuss-

correspondence with narrow partisan interests,[28] it would be quite surprising if Democratic and Republican judges were able to converge on shared understandings about when the Canon is properly triggered (i.e., whether a voter is "innocent") and how heavily it weighs in many cases.[29] This would be so even if judges were completely unmoved by the consequences of their election law decisions for the relative fortunes of their preferred political party, and the preliminary evidence suggests that judges fall short of this ideal.[30]

In an era in which the two major parties are locked in combat over whether barriers to voter participation or opportunities for vote fraud represent the greater threat to democracy, a tool of statutory interpretation that amounts to a thumb on the scale, of indeterminate magnitude, in favor of voter participation seems likely to increase both the partisan gap in judicial decision making and the media drumbeat concerning judicial partisanship in election cases.[31]

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ing the evolution of voting in the U.S., including both expansion of the right to vote and restriction of the right through imposition of literacy tests).

28 During the debates over NVRA, Republicans accused Democrats of trying to make voter registration selectively easy for core Democratic constituencies and putting political advantage ahead of good government. Congressman Canady (R-FL), for example, called the pending bill "an ugly partisan attempt to skew the results of elections by corrupting the system for registering voters," complaining more specifically that the Democrats sought partisan advantage by requiring only certain public agencies (those which serviced likely Democrats) to register voters. 139 CONG. REC. H510 (daily ed., Feb. 4, 1993) (statement of Rep. Canady). Conversely, it has been standard fare for Democrats to accuse Republicans of promoting voter ID as a means of keeping likely Democrats (the poor, the disabled, etc.) from voting, rather than as a bona-fide measure to guard against fraud. *See, e.g.*, Press Release, The Democratic Party, DNC Statement on Indiana Voter ID Law Ruling by the Supreme Court (Apr. 28, 2008), *available at* http://www.democrats.org/a/2008/04/dnc_statement_o_34.php ("This [law] has never been about securing the right to vote. Instead, it has confirmed the lengths Republicans will go to in their attempts to limit voting rights in order to win elections.").

29 Questions about "voter fault" not infrequently arise in constitutional (equal protection) challenges to administrative burdens on the franchise, and the leading cases suggest that liberal and conservative jurists have divergent intuitions about when would-be voters are properly faulted for failing to comply with voting regulations. *Compare* Rosario v. Rockefeller, 410 U.S. 752 (1973) (regarding voter fault and advance enrollment requirements for voting in party primaries), *and* O'Brien v. Skinner, 414 U.S. 524 (1974) (regarding whether persons who have been incarcerated outside their county of residence pending trial and who are therefore disqualified from voting absentee are properly to blame for their incarceration and by extension their inability to vote), *with* Stewart v. Blackwell, 444 F.3d 843, 869–72 (6th Cir. 2006) (regarding whether voters are to blame for the higher "error rate" associated with voting technology that does not notify the voter of apparent overvotes or undervotes). At oral argument during *Bush v. Gore*, Justice O'Connor had this to say about the failure of certain Florida voters to fully "punch through" the chad on punch-card ballots: "Well, why isn't the standard [for counting ballots] the one that voters are instructed to follow, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?" Transcript of Oral Argument at 57–58, Bush v. Gore, 531 U.S. 98 (2000) (No. 00–949).

30 For a review of the relevant literature, see *supra* note 23.

31 *See infra* Part I.B (explaining how the Democracy Canon might bear on recent cases concerning the Help America Vote Act).

Citizens who know nothing of the particulars of judicial decision making (e.g., whether an interpretive canon on which a court relied was of old or recent vintage) may nonetheless assimilate, particularly from media reports on the partisan lineup of judges in high-profile election cases, a vague sense that courts are partisan actors that cannot be trusted to apply the law fairly in election cases.[32] Courts that lack the public's confidence in this regard may not be able to resolve election disputes authoritatively.[33]

Of course, judicial recourse to the Democracy Canon will not always favor Democrats. In postelection litigation, for example, whichever candidate trails in the vote count stands to benefit from a canon whose application qualifies more ballots to be counted.[34] But I do not see how the Canon, once recognized, can be walled off from cases that implicate the partisan tussle over promoting voter access and retarding vote fraud. Hasen notes that courts have declined to apply the Canon "when there are serious allegations of fraud,"[35] but judicial recognition of a "serious fraud" exception to the Democracy Canon will not keep partisans in the access versus integrity debate from deploying the Canon.[36] Questions about the seriousness and form of the vote-fraud problem are precisely what separate Democrats and Republicans in this debate. Republican judges will no doubt be inclined to

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32 *Cf.* David P. Redlawsk, *You Must Remember This: A Test of the On-Line Model of Voting*, 63 J. POL. 29, 29–35 (2001) (reviewing and extending research on the hypothesis that voters, in forming affective judgments about candidates and institutions, assimilate much more information than they are able to recollect when questioned by survey takers).

33 By "authoritative" dispute resolution, I mean a resolution which the public believes to be an even-handed application of the law and which accordingly confers legitimacy on the declared winner of the election.

34 This occurred in the recent litigation between Republican senatorial candidate Norm Coleman and Democratic candidate Al Franken. *See In re* Contest of Gen. Election Held on Nov. 4, 2008, for the Purpose of Electing a United States Senator from the State of Minn., 767 N.W.2d 453, 460–62 (Minn. 2009) (rejecting Coleman's argument for a "substantial compliance" rather than "strict compliance" standard for the counting of absentee ballots). Note, however, that insofar as errors are more often made by low-income or poorly educated voters, one might expect that Democratic candidates will generally stand to "gain more votes" from judicial recourse to the Canon than Republican candidates, regardless of who is in the lead following the initial vote count.

35 Hasen, *supra* note 1, at 85 (emphasis omitted).

36 To be sure, the Canon could be excluded from access versus integrity debates if the "fraud exception" is defined in a very broad and rigidly formal manner, but this would render the Canon largely pointless. To illustrate, imagine a court holding that the Canon does not apply with respect to any voting requirement whose purpose, arguably, is to ensure that only eligible voters cast ballots or to ensure that ballots, once cast, are not susceptible to manipulation at the vote-tabulation stage. Such a gaping and formal "fraud exception" would render the Canon largely pointless because almost any election law that requires voters to fulfill certain requirements in casting a ballot can be characterized as a law that serves to limit voter fraud or to reduce the likelihood that the voters' ballot will be subject to manipulation by vote counters. Anything that reduces the discretion of election administrators concerning whether a ballot should be counted can be said to deter fraudulent—e.g., outcome minded—decisions by persons involved in vote tabulation.

credit the allegations made by their co-partisans in the legislative branch and vice versa for Democrats on the bench.

Indeed, recognition of a fraud exception may well exacerbate judicial partisanship in Democracy Canon application. Most election administration statutes arguably serve the dual purpose of facilitating voting by eligible persons while preventing fraud and otherwise keeping the ineligible from voting. A judge who, for partisan or ideological reasons, wishes *not* to apply the Democracy Canon in any given case will often have a colorable basis for doing so—if the Canon includes a fraud exception. The judge may characterize the requirement at issue as one meant to ensure that only persons eligible to vote have their preferences included in the tally.

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Hasen acknowledges that the Democracy Canon could increase the fact or appearance of judicial partisanship in election cases.[37] He sees this, however, as the unexceptional byproduct of the discretion that substantive canons give to judges to read statutes contrary to their plain meaning.[38] He overlooks the partisan valence of the Democracy Canon itself.

Hasen's answer to the risk of seemingly partisan Democracy Canon applications is for courts to "educate the public both on the long-standing nature of the Canon and . . . on the ability of the legislature to avoid court reliance on the Canon through clear statements."[39] This response is unsatisfactory. It supposes that the problem is public skepticism about the legitimacy of the Canon as a tool of statutory construction rather than public perceptions about the impartiality of judicial decision makers.

Though I am aware of no empirical research directly on point, I am skeptical of the idea that the public will deem judicial decisions in election cases illegitimate simply because the courts departed from the ordinary meaning of the statutory language at issue. By way of comparison, studies of how the public expects judges to decide constitutional cases suggest that the public strongly supports intent-based modes of judicial reasoning; researchers have also found "reasonable public support for the Court basing decisions on public opinion or on the justices' sense of what is best for the public."[40]

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37 Hasen, *supra* note 1, at 106–13.

38 *See id.* at 112.

39 *Id.* at 114.

40 John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181, 186 (2001).

In any event, the general public pays little attention to the courts and their decisions[41] and is unlikely to make evaluations of judicial decisions that require significant cognitive effort. To be sure, in exceptionally high-profile cases where the court seems to disregard the plain meaning of a statute, such as *New Jersey Democratic Party v. Samson*,[42] the losers may lob grenades at the court's reasoning.[43] But such attacks seem unlikely to inflict damage unless the court *also* splits on partisan/ideological lines, creating the appearance that the departure from statutory plain meaning was politically motivated.[44] It takes much less cognitive effort to assimilate the partisan lineup of votes in an election case—when that is reported in the press—than to judge the substantive reasonableness of a court's reading of a statute.

Hasen seems to believe that clear legislative drafting can and would cure any problem of judicial partisanship in the Democracy Canon's application. For this fix to work, the legislature must anticipate *ex ante* the potentially ambiguous applications of its statutes and have both the capacity and the will to replace vague or ambiguous language with clear, detailed instructions to the courts. This is entirely unrealistic. Legislators are not omniscient, and they draft statutes under terrific time pressures (a problem of capacity).[45] Many are surely more interested in their own reelection than in the courts' reputation (a problem of will).[46] Moreover, statutory vagueness and ambiguity—even when it is seen and understood ex ante—is often instrumentally useful to the legislators who create it (a further problem of will):[47] ambiguities serve to paper over disagreements among

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41 *See* Hoekstra, *supra* note 13, at 52 (noting that "most accounts paint a discouraging picture of national public attentiveness to the Supreme Court and its activities").

42 814 A.2d 1028, 1038–39 (N.J. 2002).

43 *See* Hasen, *supra* note 1, at 110–11 (discussing public criticism of the *Samson* decision because it "went against the apparently clear words of the statute").

44 *Cf.* James R. Zink, James F. Spriggs II & John T. Scott, *Courting the Public: The Influence of Decision Attributes on Individuals' Views of Court Opinions*, 71 J. POL. 909, 910–11, 919–20, 922–23 (2009) (reporting survey-experiment results, based on mock newspaper stories, showing that citizens are more likely to agree with and to accept judicial decisions on high-profile and ideologically freighted issues if the decisions are unanimous and follow, rather than overturn, precedent).

45 *See, e.g.*, Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575, 594–96 (2002) (describing how politically determined time constraints lead to ambiguities in drafting within the Senate Judiciary Committee).

46 *See id.* at 595 ("'Necessity' sometimes meant 'political' necessity: A particular member 'needed' a bill for reelection purposes, and it was therefore rushed through committee or the floor.").

47 *See* Joseph A. Grundfest & A.C. Pritchard, *Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation*, 54 STAN. L. REV. 627, 637–42 (2002); *see also* Nourse & Schacter, *supra* note 45, at 596–97 (explaining that one situation "likely to produce a willful lack of clarity was the absence of consensus on a particular point in a bill" and that staffers knew that "the principal effect of deliberate ambiguity was to leave it to the courts to decide").

legislators and can therefore enable the enactment of legislation on a bipartisan or transideological basis; they allow legislatures to delegate politically sensitive matters to courts or administrative agencies; and they build in flexibility for the law to evolve with changing circumstances. In light of this, judicial recognition of the Democracy Canon is most unlikely to result in a wave of clear legislative drafting sufficient to deprive the Canon of much operative force, which is what it would take to obviate the risk of judicial partisanship in Canon application.

B. Incentives for Bipartisan Legislation

From a dynamic perspective, a Democracy Canon that licenses strained, "pro voter" statutory interpretations would undermine incentives for bipartisan legislative compromises. A little reflection on the politics and litigation surrounding the Help America Vote Act (HAVA)[48] will illustrate the point. Adopted on a bipartisan basis in the wake of the 2000 presidential election, HAVA was and remains a halting effort to phase out the worst forms of voting technology while honoring both Democrats' desire to make voting systems more accessible and Republicans' stated wish to make the mechanics of voting less pervious to fraud.[49]

HAVA's delicate balance is exemplified by the manner in which it addresses provisional voting and voter identification. HAVA requires the states to make provisional ballots available to all would-be voters whose names do not appear on the list of persons registered to vote[50] (this is part of the Democratic agenda), but it does not spell out substantive conditions under which provisional ballots must be counted (because Republicans in the Senate rejected a substantive conception of the provisional voting right).[51] As for identification, HAVA requires first-time voters who register by mail to provide some evidence of their identity when they go to the polls, but it does not mandate photo ID or proof of citizenship or establish any identification requirements that would apply to all voters (measures that Republicans favor but Democrats abhor).[52]

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48 42 U.S.C. §§ 15301–15585 (2006).

49 For an overview of the Act, as well as the partisan conflicts surrounding its enactment, see Shambon, *supra* note 26, at 428–37 (quoting Rep. Hoyer's description that "'[e]veryone agrees that we should make it easier to vote . . . and we should make it hard to cheat. . . . You can do things that make it easier to vote, but also make it easier to cheat. Or you can do things that make it harder to cheat, but can also impede voting'").

50 *See* 42 U.S.C. § 15482.

51 *See* Edward B. Foley, *HAVA's History Sheds Light on Provisional Voting Dispute*, ELECTION LAW @ MORITZ, Oct. 5, 2004, at http://moritzlaw.osu.edu/electionlaw/ebook/part5/procedures_rules10.html.

52 *See* 42 U.S.C. § 15483(b). Partisan conflict over identification requirements nearly derailed the bill that became HAVA. *See* Shambon, *supra* note 26, at 442–43.

Since HAVA was enacted, there has been much litigation over provisional voting and the import of the first-time voters ID requirement.[53] Voting rights advocates have contended for interpretations of HAVA that would (1) require the states to count all provisional ballots cast by persons who meet the substantive qualifications for voting (e.g., age, citizenship, residency), regardless of whether the voter had properly registered, and (2) preempt state-imposed ID requirements that are more stringent than HAVA's first-time voter rules.[54] HAVA's text suggests, and its legislative history confirms, that these interpretations contradict the expectations of HAVA's enacting coalition.[55] Most courts have respected the enactors' understanding.[56] But if the federal courts were to recognize the Democracy Canon, there would be a respectable doctrinal basis for left-leaning judges to unravel HAVA's bipartisan compromise.

This would be problematic because, as Daniel Rodriguez and Barry Weingast have convincingly argued, "expansionist" statutory interpretations make it more difficult for legislation to be enacted in the first place.[57] Republicans' willingness to sign on to the HAVA compromise no doubt depended on their belief that the courts would enforce the gist of the deal. If Republican Senators and Representatives knew that there was a special "pro voter" canon of interpretation that

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53 *See, e.g.*, Sandusky County Democratic Party v. Blackwell, 397 F.3d 565, 578 (6th Cir. 2004) (holding that HAVA does not require states to count votes cast by provisional ballot except insofar as the vote is a legal vote pursuant to state law); Wash. Ass'n of Churches v. Reed, 492 F. Supp. 2d 1264, 1270–71 (W.D. Wash. 2006) (finding HAVA to be violated by a state law which required, as a condition of voter registration, that the name of the would-be registrant be matched against the Social Security Administration database or the Department of Licensing database); Fla. Democratic Party v. Hood, 342 F. Supp. 2d 1073, 1082–83 (N.D. Fla. 2004) (considering whether under HAVA a voter has the right to cast a provisional ballot, and to have that ballot counted, despite voting at the wrong polling place).

54 *See* cases cited *supra* note 53.

55 Regarding provisional ballots, see Foley, *supra* note 51. As to voter identification, HAVA requires the states to assign a unique identifying number to every registered voter. 42 U.S.C. § 15483(a)(1). It says nothing about voter identification, except under the caption, "Requirements for voters who register by mail," where the Act stipulates that voters who registered by mail and who did not provide proof of identity upon registering (the Act lists a number of permissible types of identifying documents) must provide that information when they vote for the first time. *Id.* § 15483(b). The Act nowhere refers to identification requirements for any other kinds of voters, which implies that it left this matter to the states (the front-line regulators of the voting process). Republicans in Congress wanted HAVA to include a strict ID requirement that covers all voters, and it is unimaginable that they would have signed onto the bill (with its weak and partial ID requirement) if they had understood the bill to preempt stricter state requirements.

56 *See, e.g.*, *Blackwell*, 397 F.3d at 575 (citing HAVA's legislative history); *Hood*, 342 F. Supp. 2d at 1079 (discussing "[t]he purpose of HAVA's provisional voting section"). *But see Reed*, 492 F. Supp. 2d at 1268–69 (reading HAVA to preempt state law requiring a successful "match" to a state or federal database as a condition for valid voter registration).

57 Daniel B. Rodriguez & Barry R. Weingast, *The Paradox of Expansionist Statutory Interpretations*, 101 Nw. U. L. Rev. 1207, 1225–26 (2007).

could be trotted out by liberal judges to construe the inevitable imperfections of legislative drafting in a manner that undermines the legislative deal, they would fight tooth and nail against bills that even modestly liberalize the terms of voter participation insofar as such liberalization might be thought to benefit traditional Democratic constituencies.

The harder it is to enact electoral legislation under conditions of divided government, the more justification there will be—due to the accumulation of unaddressed issues—for enacting reforms when the planets align and one party finds itself in control of the House, the Senate, and the Presidency. Supporters of the out-of-power party are likely to see controversial electoral reforms enacted under unified government as measures to secure partisan advantage, even if those reforms also have plausible, neutral rationales. If the minority party then loses the next election or elections, its supporters' consent to the legitimacy of the winners' rule will be that much harder to secure.[58] Over time, a two-party system in which the rules of electoral competition are regularly updated in a generally bipartisan fashion seems likely to be more stable than a system in which the rules remain static for long periods and are updated in partisan bursts whenever one party controls the legislative and executive branches.

C. Agenda-Displacement Costs

It has become commonplace to criticize substantive canons for their "hidden" antidemocratic costs.[59] Though statutory interpretations are, in principle, subject to a majoritarian legislative override, and therefore less vulnerable to the countermajoritarian critique often levied at controversial constitutional rulings, the costs of legislative action sometimes make this possibility of override more theoretical than real. In such circumstances, the argument goes,

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58 It is well established that the major political parties play a prominent role in organizing and focusing public opinion on policy questions as to which citizens have weak priors—which is to say, across most of the public policy domain. *See, e.g.*, Gabriel S. Lenz, *Learning and Opinion Change, Not Priming: Reconsidering the Evidence for the Priming Hypothesis*, 53 AM. J. POL. SCI. 821, 822 (2009) (finding that "exposing individuals to campaign and media messages on an issue informs some of them about the parties' or candidates' positions on that issue," and that these "newly informed individuals often adopt their party's or candidate's position as their own"); *cf.* Larry M. Bartels, *Beyond the Running Tally: Partisan Bias in Political Perceptions*, 24 POL. BEHAV. 117, 137–38 (2002) (showing that partisan preferences color voters' retrospective perceptions and evaluations of objective phenomena). Thus, if party leaders decry an electoral reform as oppressive, or as an invitation to fraud, party members probably will come to see the reform in the same way.

59 *See* WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 919, 945–50 (4th ed. 2007).

countermajoritarian statutory constructions are just as "antidemocratic" as countermajoritarian constitutional decisions.

It is equally true, but much less emphasized in the literature, that judicial recourse to substantive canons has a democratic cost even if a legislative override ensues. The cost takes the form of agenda displacement. The energy that lawmakers devote to orchestrating the override—moving the issue onto the legislature's agenda, holding hearings, commissioning reports, sussing out the interests and views of fellow legislators, and forging an enactable compromise—is energy diverted from other pressing questions of the day. Do we really want Congress to be spending its time fixing strained judicial interpretations of, for example, HAVA, when Congress could instead be working on health care reform, national security, education policy, stabilization of the banking sector, or the long-term solvency of entitlement programs?[60]

The problem of agenda-displacement costs is not unique to the Democracy Canon. To a first approximation, any principle of statutory interpretation that, across the run of cases, diminishes the number of judicial decisions aligned with the current enactable preferences of the legislature may be said to result in agenda-displacement costs.[61] That the problem of agenda-displacement costs is one

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60 To be sure, legislative agenda setting in the absence of legislature-provoking judicial decisions is somewhat haphazard. *See generally* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES (2d ed. 1995) (exploring how "streams" of input from interest groups, political parties, entrepreneurial legislators, and the mass media together determine the governmental agenda). It does not necessarily result in the legislature allocating its energies to those issues that dispassionate policy analysts might judge "most important," but it still seems reasonable to expect that there will be a net cost (in terms of foregone legislative output) to statutory interpretations that divert the legislature from what it otherwise would have attended to, unless (1) the doctrine that licenses counterpreferential statutory interpretations instructs the courts to weigh the relative importance of the issue it would push onto the legislative agenda as against the issues that the legislature would otherwise be addressing and (2) courts are competent to make this judgment of relative importance. Suffice it to say that there are reasons to doubt the latter, and that, as to the former, neither the Democracy Canon nor any other substantive canon calls for this sort of weighing.

61 Agenda-displacement costs also depend on the importance to lawmakers and powerful interest groups of the questions decided against current legislative preferences. If the issue at hand is trivial, a court's contrapreferential statutory interpretation is unlikely to divert the legislature from other matters.

For a theory of statutory interpretation that privileges the current enactable preferences of the legislature, see EINER ELHAUGE, STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION 41–65, 70–74 (2008). Einer Elhauge's supposition that "enactable preferences" are relatively determinate and identifiable has come under criticism. *See* Elizabeth Garrett, *Preferences, Laws, and Default Rules*, 122 HARV. L. REV. 2104, 2129–35 (2009) (arguing that the range of "enactable preferences" is vast because of logrolling possibilities and the wide range of legislative vehicles through which a reform might be enacted). Elizabeth Garrett's point about the breadth of potentially enactable preferences suggests that a method of statutory interpretation designed to realize such preferences will leave judges with lots of discretion, but it does not detract from my point that

that the Democracy Canon shares with other substantive canons does not immunize the former from critique. Courts that do not yet recognize the Canon (e.g., the federal courts) must weigh these costs when they consider its adoption. The costs must also be weighed when courts face questions about the meaning of the Canon or about whether it should be trimmed back in some respect. The law's partiality to tradition may be enough to preserve the existing substantive canons—even if they nowadays seem misguided—but it hardly follows that a new substantive canon should be recognized simply because it is no worse than the existing ones.[62]

D. A Concluding Note

It is not my view that recognition of Hasen's Democracy Canon by the federal courts would be disastrous. The number of cases that implicate the Canon is no doubt quite small, and most judges would probably apply the Canon with a good salting of common sense. This Part has identified some risks of Democracy Canon usage, but at this juncture, establishing the severity of these risks with any certainty is difficult. Whether and to what extent use of the Canon increases the partisan gap in judicial decision making, for example, is a question best approached through empirical studies and laboratory simulations of judicial decision making. That said, generalist judges often have little choice but to rely on somewhat speculative, hard-to-quantify accounts of the costs and benefits of proposed doctrines when deciding whether to adopt them. My aim here has been to provide such grist for the judicial mill.

II
DOES THE DEMOCRACY CANON HAVE AN UPSIDE?

The downside risks of the Democracy Canon would be worth incurring if the Canon promised commensurately hefty benefits. Hasen argues that the Canon gives effect to constitutional norms that the judiciary cannot or will not fully enforce in constitutional cases and that it performs a valuable function in eliciting legislative preferences concerning the rules of electoral competition. These claims are doubtful at best.

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judicial interpretations that fall outside the broad range of what is enactable are likely to trigger an attempted override (particularly if they go against the preferences of an influential agenda setter) and to displace other issues from the legislative agenda.

62 At various places in his article, Hasen tries to defend the Democracy Canon on the ground that the "problems" it poses are no greater than the problems with other substantive canons. *See* Hasen, *supra* note 1, at 110–11 (comparing the Democracy Canon application in *New Jersey Democratic Party v. Samson*, 814 A.2d 1028 (N.J. 2002), with the federalism canon application in *Gregory v. Ashcroft*, 501 U.S. 452 (1991)). For the reasons stated in the text, I do not agree with this approach to the normative case for the Canon.

A. The Underenforcement Argument

"Underenforcement" arguments for canons of statutory interpretation conventionally rest on what Mitchell Berman has helpfully labeled the "two-output thesis" about the nature of constitutional adjudication.[63] This thesis holds that in making constitutional law, judges first determine the meaning of the relevant constitutional "operative proposition" and then translate that operative proposition into a workable "decision rule" for courts to follow in deciding cases.[64] Any number of pragmatic or institutional considerations can give rise to gaps between operative proposition and decision rule. If the considerations that weigh in favor of an underenforcing decision rule with respect to a particular issue of constitutional law do not apply with equal force when judges are interpreting statutes, then the fact that the corresponding operative proposition is underenforced in constitutional cases may weigh in favor of a substantive canon of statutory interpretation that helps to give effect to the proposition.[65]

Hasen's underenforcement argument for the Democracy Canon does not follow this script. As best as I can tell, it rests on the curious notion that when the Supreme Court *errs* in interpreting the Constitution, that error should be corrected or counterbalanced through constitutionally informed statutory interpretations *that rest on a different understanding of the relevant operative proposition or its proper application* (given a fully enforcing decision rule). His argument is premised on constitutional misinterpretation, not underenforcement.

This is apparent from Hasen's two examples of putative underenforcement. He points, first, to the Supreme Court's failure to treat the right to vote as a per se constitutionally protected right.[66] The Court has held that the Equal Protection Clause protects the citizen's right to vote on equal terms with others once the state extends the

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63 Mitchell N. Berman, *Aspirational Rights and the Two-Output Thesis*, 119 HARV. L. REV. F. 220, 220–22 (2006). The seminal contribution to this line of thinking is Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978). The many distinguished writings developing and refining this thesis are too numerous to list here, but for a recent sampling, see RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION (2001); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) [hereinafter Berman, *Constitutional Decision Rules*]; Kermit Roosevelt III, *Constitutional Calcification: How the Law Becomes What the Court Does*, 91 VA. L. REV. 1649 (2005).

64 This terminology is from Berman, *Constitutional Decision Rules*, *supra* note 63, at 9–13.

65 William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 629–36 (1992) (describing this approach to the constitutional avoidance canon and criticizing the Rehnquist Court for using the avoidance canon to protect certain federalism norms without explaining why the factors that account for the underenforced status of those norms in constitutional cases do not have equal force in statutory cases).

66 *See* Hasen, *supra* note 1, at 96–100.

franchise but does not impose an affirmative obligation on the state to make any offices elective.[67] Here, Hasen clearly objects to the Court's understanding of the operative propositions associated with the individual right to vote, not the decision rules that the Court has prescribed for adjudicating alleged deprivations of the right.

Hasen next turns his attention to *Bush v. Gore*'s maxim that, "[h]aving once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."[68] Hasen asserts that "the promise of . . . equal protection in voting rights embodied in this sentence . . . has not been realized."[69] Until recently, there was a strong basis for believing this proposition to be underenforced. Governing doctrine held that severe burdens on the right to vote resulting from the mechanics of the electoral process were subject to strict scrutiny, whereas lesser burdens received more deferential review.[70] Whether the standard of review for lesser burdens was equivalent to the "anything passes" rational basis test applied to ordinary social and economic legislation was an open question. Several lower courts adopted this equivalence position.[71] The rational basis test is, of course, the canonical underenforcing judicial decision rule.[72] A court applying this test to the question of whether the state has "arbitrar[ily] and disparat[ely] . . . value[d] one person's vote over that of another"[73] will almost universally con-

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67 *See* Christopher S. Elmendorf, N.Y. State Bd. of Elections v. Torres*: Is the Right to Vote a Constitutional Constraint on Partisan Nominating Conventions?*, 6 ELECTION L.J. 399, 403 (2007) (explaining how the Supreme Court has treated the right to vote as, in effect, a springing right, and why this counseled for reversal of the Second Circuit's decision in *López Torres v. N.Y. State Bd. of Elections*, 462 F.3d 161 (2d Cir. 2006), in which the circuit court extended constitutional voting rights jurisprudence to a nonelectoral stage in the process of nominating major party candidates for office). The Supreme Court did in fact reverse the Second Circuit and, in doing so, emphasized that the *electoral stage* of the nominating process at issue was sufficiently open to competition from challenger candidates. New York State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 203–06 (2008).

68 Hasen, *supra* note 1, at 100 (quoting Bush v. Gore, 531 U.S. 98, 104–05 (2000)).

69 *Id.*

70 I explore this framework at length in Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 329–30 (2007). *See also* Christopher S. Elmendorf & Edward B. Foley, *Gatekeeping vs. Balancing in the Constitutional Law of Elections: Methodological Uncertainty on the High Court*, 17 WM. & MARY BILL RTS. J. 507, 512–17 (2008) (discussing the Supreme Court's application of "gatekeeping categorization" in its pre-2007 decisions).

71 Illustrative lower court decisions include *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (holding that "defendants need only show that the enactment of the regulation had a rational basis," given that the burden at issue is "relatively minor"), and *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) ("[T]he appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further. . . .").

72 *See* Sager, *supra* note 63, at 1215–18 (treating rational basis review under the Equal Protection Clause as the leading illustration of the underenforcement thesis).

73 Hasen, *supra* note 1, at 100 (quoting *Bush v. Gore*, 531 U.S. at 104–05).

clude that the state's action was permissible because the rule of decision is not whether, all things considered, *the judge herself* thinks the challenged state action represents an arbitrary and disparate valuation of one person's vote over another's but rather whether *any person could rationally believe* that the challenged state action is not so arbitrary. And we all know that rational people are capable of hugely varying judgments about what is reasonable, predicated in part on their varying—but not irrational—beliefs about the relevant facts and in part on their disparate values.

In the 2008 case of *Crawford v. Marion County Election Board*,[74] the Supreme Court took a major step toward full enforcement of the individual right to vote on equal terms with others. Though *Crawford* yielded no opinion for the Court, six Justices agreed that assertedly unequal burdens on voter participation are subject to a kind of open-ended reasonableness review with bite; there is no rational-basis free pass for nonsevere burdens.[75] After *Crawford*, judges hearing Equal Protection challenges to election procedures must satisfy themselves that, all things considered, the procedure at issue does not unreasonably value one person's vote over another's. Like any other observer, Hasen will disagree with many judicial applications of this standard. It could hardly be otherwise, given the standard's subjectivity, but disagreement does not an underenforcement prove.[76] There is no longer a de jure gap between operative proposition and decision rule.[77]

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74 553 U.S. 181 (2008).

75 This point is explained in Elmendorf & Foley, *supra* note 70, at 523–25.

76 Hasen complains that the *Crawford* lead opinion's evidentiary demands and its preference for as-applied challenges will make it more difficult for advocacy groups to bring colorable voter participation claims under the Equal Protection Clause. Under Hasen's preferred alternative, the courts would make an all-things-considered, overall assessment of the voting requirement at issue, considering the full range of applications and settling the requirement's constitutionality once and for all in the initial suit challenging its permissibility. *See generally* Brief for Professor Richard L. Hasen as Amicus Curiae Supporting Petitioners, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008). It is true that *Crawford*'s evidentiary demands and preference for as-applied challenges represent important developments in the black-letter law governing constitutional challenges to voting requirements and procedures. *See* Elmendorf & Foley, *supra* note 70, at 523–25; Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644, 1667–72 (2009). In addition to having the arguable disadvantages that Hasen identifies, the *Crawford* framework also makes antivoter judicial mistakes both much less likely (because plaintiffs are encouraged to delay bringing suit until they amass a good evidentiary record) and much less devastating (because judicial rulings are specific to a particular record and plaintiff or plaintiff class, leaving it open to others to show that the requirements are unreasonably burdensome as applied to them). On balance, *Crawford* does not seem to be underenforcing or overenforcing so much as differently enforcing (relative to Hasen's preferred approach) the constitutional norm against unreasonably disparate burdens on voter participation.

77 The open-ended balancing contemplated by *Crawford* appears to be tantamount to using a conventional preponderance-of-the-evidence standard to judge whether the state

Whether the Court will remain committed to *Crawford*-style balancing in future cases brought by voters challenging allegedly arbitrary and disparate burdens on the franchise is uncertain.[78] The Court employed different analytic approaches in other constitutional election law cases decided during the very same term as *Crawford*.[79] For the time being though, *Crawford* is the law for purposes of voter challenges to administrative burdens on the franchise, and Hasen's underenforcement argument therefore amounts to an argument that the courts should, through statutory interpretation, offset or counterbalance what Hasen views as the Supreme Court's misapplication of the operative proposition in *Crawford*.

Hasen's argument for correcting the Supreme Court's constitutional errors using canons of statutory interpretation seems to me neither useful nor legitimate. For cases before the Supreme Court, the argument seems incongruous: why would the Justices accept for purposes of a statutory case a reading of the Constitution they have just rejected in a constitutional case? For cases in the state and lower federal courts, the argument seems insubordinate, as these courts have a duty to abide by the Supreme Court's reading of the Constitution.

In Part III, I shall argue that there are constitutional norms with respect to the electoral process that positive constitutional doctrine underenforces. These might justify a tailored democracy canon, but not the generic "pro voter" canon that Hasen wishes to defend.

B. The Preference-Elicitation Argument

Moving beyond the underenforcement argument, Hasen suggests that the Democracy Canon is independently justified by virtue of its propensity for eliciting legislative preferences. Hasen's preference-elicitation argument for the Canon runs together three ideas: (1) an empirical claim that the costs of Canon usage, as measured by the displacement of legislative preferences, are likely to be modest because legislators monitor the ground rules of electoral competition hawkishly and will update the law quickly in response to statutory interpretations they dislike;[80] (2) Einer Elhauge's normative argument for interpreting statutes against the grain of contemporary legislative preferences in certain circumstances;[81] and (3) a notion that the De-

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has "arbitrar[ily] and disparat[ely] . . . value[d] one person's vote over that of another." *Bush v. Gore*, 531 U.S. at 104–05. The preponderance-of-the-evidence standard is a full-enforcement decision rule. *See* Berman, *Constitutional Decision Rules*, *supra* note 63, at 9–12, 96–97.

78 *See* Elmendorf & Foley, *supra* note 70, at 524.

79 *See id.* at 517–28 (summarizing election law decisions from the October 2007 term).

80 *See* Hasen, *supra* note 1, at 102–03.

81 *See id.* at 100–01 n.168.

mocracy Canon can promote public accountability for disenfranchising voting requirements by requiring lawmakers to speak clearly and directly when they mean to keep people from voting.[82] The last of these arguments perhaps affords a plausible rationale for a democracy canon, but it is not clear that this is how the extant Democracy Canon is typically used or that courts understand the Canon to reach only those statutes that appear to be designed for disenfranchisement.[83]

Hasen's empirical claim about legislative responsiveness to judicial constructions of election laws cannot justify the Canon. If correct,[84] it only goes to show that the countermajoritarian costs of Democracy Canon usage may be lower than the costs associated with other substantive canons.[85] It does not establish that the Canon has any substantive benefits.

Might the good of the Canon be preference elicitation as described and defended by Elhauge? This too is implausible. On Elhauge's account of statutory interpretation, the courts' first and foremost responsibility is to give effect to the bargains that the enacting legislature struck and codified.[86] When faced with an ambiguity—a question that the enacting legislature did not resolve—the courts should try to construe the statute so as to give effect to the enactable preferences of the current legislature. If the court cannot reliably ascertain these preferences, the next step is to estimate the preferences

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82 *See id.* at 103.

83 Hasen makes the accountability-for-disenfranchising-enactments argument in passing, *see id.*, and he does not explore the argument's implications for when the Canon should be deployed. His quotations from judicial opinions establish that some judges realize that a *consequence* of the Democracy Canon is that voters may not be disenfranchised absent a "clear and unmistakable" directive from the legislature. *Id.* at 79 (quoting Carr v. Thomas, 586 P.2d 622, 626–627 (Alaska 1978)). But this is not the same as using the Canon to target those requirements that are likely to have arisen from a purpose to disenfranchise. One of the Democracy Canon alternatives I shall present in Part III—the "*Carrington* Canon"—would likely be a better fit with the goal of promoting legislative accountability for requirements meant to keep eligible citizens from voting.

84 I am skeptical that the legislature will quickly and reliably respond to Democracy Canon–informed statutory interpretations *except* in cases where (1) there is unified party government and the decision in question works against the governing party's interests or (2) where the decision disadvantages incumbents of all stripes vis-à-vis challengers. In other circumstances, it will likely be quite difficult for the legislature and the executive to agree on how to change the law in response to the court's decision.

85 I put "countermajoritarian" here in scare quotes, because a judicial decision that displaces legislative preferences with respect to voting systems is not necessarily countermajoritarian. Incumbent lawmakers may have self-interested or partisan reasons to go against majority rule, and as Ely famously argued, the courts may have a role in counteracting this. *See* ELY, *supra* note 2, at 73–103. Nonetheless, absent an agreed-upon account of the "right" ("most democratic") ground rules of political competition, it is still sensible to speak of judicial decisions that displace legislative preferences with respect to the ground rules as having a "democratic" cost because of the legislature's closer connection to the citizenry.

86 This paragraph summarizes the argument developed at length in ELHAUGE, *supra* note 61.

of the enacting legislature. If those preferences cannot be reliably gauged, the best remaining option may be for the court to construe the statute in a manner that runs against the interests of powerful, agenda-setting interest groups. The interest groups will force the issue onto the legislative calendar and thereby reveal where current enactable preferences (which the courts were unable to ascertain) actually stand. Preference-eliciting constructions are defensible only as a last resort.

The Democracy Canon as described by Hasen does not appear to work in this way. By its terms, it does not play second fiddle to the ascertainable preferences of the current or enacting legislature,[87] and it does not seem calibrated to upset powerful interest groups in any systematic way.[88] Occasional applications of the Canon may work against the electoral interests of the then-dominant faction in the legislature (most likely if the legislature is under Republican control), but there is nothing in the substantive content of the Canon to make this occurrence other than fortuitous. Alternative "democracy canons" could be consistently preference eliciting—for example, a canon which held that election laws should be construed in favor of challenger candidates and minor parties—but this is not the Canon as Hasen presents it to us.

Even if the Canon were reliably preference eliciting, there would be costs to its use. Preference-eliciting statutory interpretations entail agenda-displacement costs.[89] A judge should be cautious about imposing agenda-displacement costs on the legislative branch unless she is confident that the benefits of further legislative action on the issue that the court would serve up outweigh these costs. Moreover, it seems probable that the interpretations of election laws most likely to elicit legislative action will be those that substantially disfavor incumbents or that seriously disadvantage the then-dominant political party. The legislative response—given its motivation—will probably be self-serving. Whether courts should try to elicit such self-seeking preferences is questionable.

C. A Pragmatic Argument from Consequences?

I suspect that Hasen likes the Democracy Canon because of the substantive values it embodies, not because of its arguable role in giv-

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87 At least, Hasen and the courts that he quotes do not describe it this way. Hasen presents the Canon as embodying substantive values that effectively override the preferences of the current and enacting legislatures in cases where the statute does not speak "clearly" to the issue before the court. *See* Hasen, *supra* note 1, at 78–79.

88 Contrast this to the rule of lenity (treated by Elhauge as preference eliciting), which systematically advantages the least powerful of "interest groups" (criminals) and works against the interests of a well-organized lobby (public prosecutors).

89 *See supra* Part I.C.

ing effect to otherwise underenforced constitutional operative propositions or because of its posited preference-elicitation effects. But he does not make an explicit, results-based argument. An argument from "good results" for the Canon would face two objections: first, that it is illegitimate for courts to interpret statutes in a results-oriented way because doing so inevitably requires courts to resolve disputed questions of value on the basis of the judge's personal policy preferences; second, that courts lack the technical expertise to predict the consequences of the available statutory interpretations and that results-based approaches to the interpretation of election (or any other) statutes would therefore misfire.

The latter objection is probably overstated. So long as judges are sensitive to the limitations imposed by their lack of expertise, there is little reason for them to ignore those consequences that can be ascertained or reliably estimated if there is a sound normative basis for attending to them. The first objection is more vexing. It is one thing for judges to adopt an avowedly results-oriented approach to statutory interpretation in domains where there is broad societal agreement about what constitutes a good result.[90] It is quite another where reasonable people fiercely disagree about what represents a good result.

To be sure, the domain of shared values with respect to electoral system performance is probably quite large. Shared values likely include (1) making it easy for eligible voters to cast a valid ballot, (2) minimizing the frequency of ballots cast by ineligible voters, (3) ensuring that valid ballots are correctly tabulated, (4) generating a majority-vote winner (in single-member-district elections), (5) minimizing the turnaround time between Election Day and the final determination of who won the election, (6) achieving representative voter turnout (so that the election can fairly be said to represent a choice by the normative electorate as a whole), (7) fostering collective competence on the part of the voting public (in Condorcet terms, a lack of "correlated error terms" among voters[91]), (8) securing losers' acceptance of the

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90 Antitrust is arguably such a domain. The Sherman Act has been interpreted in a notably purposive, results-oriented manner. *See* Daniel A. Farber & Brett M. McDonnell, *"Is There a Text in this Class?" The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 624–27 (2005).

91 The Condorcet Jury Theorem holds, roughly speaking, that a group deciding a question by majority vote will converge on the correct answer as the size of the group increases, provided (1) that each member of the group has a better than 50 percent chance of guessing the right answer and (2) that the errors made by each member of the group are "independent" (i.e., not correlated) of one another. For an introduction to the theory as applied to mass democracy, see Krishna K. Ladha & Gary Miller, *Political Discourse, Factions, and the General Will: Correlated Voting and Condorcet's Jury Theorem*, *in* COLLECTIVE DECISION-MAKING: SOCIAL CHOICE AND POLITICAL ECONOMY 393 (Norman Schofield ed., 1996).

legitimacy of the electoral process, and (9) reducing the fiscal costs of election administration.

The fly in the ointment is not a lack of broad agreement about the value of these things but that there are real or perceived tradeoffs among them.[92] Reasonable people will strike the balance differently, and all the more so if their judgments are influenced by expectations about the consequences of reform for candidates and political parties they favor. Consider the familiar debate between Republicans and Democrats over whether electoral reforms should ease voters' access to the polls or make it harder for ineligible persons to cast a ballot. Each side trumpets an uncontroversial value, and yet huge controversies result due to the existence of real or perceived tradeoffs in the pursuit of these uncontroversial goods.

In this context, a results-oriented approach to the interpretation of election statutes would seem hard to square with the ideal of judicial neutrality unless (1) the courts take into account the full sweep of broadly recognized goods and (2) the courts define "good results" using a Pareto-like or "substantial-consensus-of-informed" opinion standard.[93] Hasen's Democracy Canon does not satisfy either of these criteria. The Canon privileges a subset of the relevant values and rarely acknowledges tradeoffs.[94] As for the occasional easy case in

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92 In his Reply to this paper, Hasen trivializes the problem by suggesting that the relevant tradeoff is between "the enfranchisement of voters" and "reducing the fiscal costs of election administration." Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173, 1179 (2010). There are many other and more weighty values that may be in tension with enabling more voters to participate or counting more ballots, including (1) enabling elections to be quickly concluded so that offices may be filled and the government can get on with the business of governing (compare the treatment of *Bush v. Gore* in David Schleicher, *"Politics as Markets" Reconsidered: Natural Monopolies, Competitive Democratic Philosophy and Primary Ballot Access in American Elections*, 14 SUP. CT. ECON. REV. 163, 196 n.106 (2006)) and (2) achieving representative voter turnout (*see* Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471, 471–72 (2005)).

93 The Pareto standard, familiar from economics, treats a policy as normatively desirable if it improves at least one person's welfare without making anyone worse off. One can say that an electoral reform satisfies a "Pareto-like" standard if it improves system performance on one dimension of value without worsening performance on any other.

94 Hasen does note that "courts will not apply the Canon when there are serious allegations of *fraud*." Hasen, *supra* note 1, at 85. This is the only values-level tradeoff that he acknowledges. One wonders whether the fraud exception is anything more than an ad hoc "out" for judges who personally dislike the result that the Canon seems to support. As recent debates over electoral reform have shown, the existence and extent of fraud can be hard to ascertain with much confidence, yet the specter of fraud can be invoked by opponents of most any reform that would make it easier for citizens to cast a ballot (and by proponents of reforms that would make it harder to vote). *Cf.* Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007) (Posner, J.), *aff'd*, 553 U.S. 181 (2008) (speculating, in upholding a photo-ID requirement for voting, that the lack of evidence of in-person voter fraud is explained by "the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator").

which there really is no colorable, policy-based objection to the "pro voter" interpretation, it is doubtful that a special Democracy Canon is needed to reach the right result. An old standby—the canon against absurd results—already covers this terrain.

III
REFINING THE DEMOCRACY CANON: THREE FUTURES

Despite my skepticism about the Democracy Canon as formulated by Hasen, I share his intuition that special rules of statutory construction ought to apply in the election law domain. There are important constitutional norms concerning the electoral process that go underenforced as a matter of positive constitutional law—albeit not the individual right to vote free from arbitrary and disparate burdens. There is also a plausible basis for grounding a democracy canon on the distinctive risks to the courts' reputation for political neutrality that election cases are thought to present.

This Part shows how either set of concerns—the protection of underenforced constitutional norms or the preservation of the courts' reputation for impartiality—could support a canon of statutory construction specific to election cases. My purpose here is not to work out a comprehensive counterpoint to Hasen's Democracy Canon but rather to offer a rough sketch of what I deem to be the most promising alternatives. The alternatives I present in this Part are not "cost free." For example, as with any canon of construction not calibrated to the preferences of currently serving legislators, the use of these canons would sometimes result in agenda-displacement costs. Whether their benefits would outweigh their costs cannot be said with much certainty. There is, however, a reasonable basis for thinking that their benefits would be more substantial and their costs less significant than those of Hasen's Democracy Canon.

A. The Effective Accountability Canon

The very idea of democracy presupposes a normative electorate to which public officials are ultimately accountable. The normative electorate must be defined in a manner that gives it a fair claim to speak for the citizenry as a whole, but reasonable people may disagree about the propriety of certain voter qualifications (consider, for example, the status of felons). There is also ample room for debate about which offices should be elective, the frequency of elections, the separation or consolidation of governmental powers, the scope for directly democratic lawmaking, the constitutional entrenchment of preferred rights, and more. Bracketing these large normative questions, however, we can say that *the electoral component* of a political order is more or less effective vis-à-vis the objective of popular accountability de-

pending on (1) the degree to which the persons who turn out to vote are representative of the normative electorate as a whole; (2) the aggregate competence of the voting public in apportioning blame retrospectively, and, arguably, in identifying those candidates who are most likely to act as the voters—if fully informed—would wish for them to act; and (3) the extent to which the electoral system facilitates or retards effective coordination among like-minded voters.[95]

Thus, given a choice between two regimes of election law, there should be a presumptive preference for the regime under which the demographics of the persons whose votes better mirror those of the entire normative electorate. Similarly, if two electoral systems differ in terms of the extent to which they enable like-minded voters to make good use of limited information and coordinate their ballot-box decisions, a democrat should presumptively favor the system under which voters are less likely to err. A democratic constitution ought to establish an effective accountability norm along these lines: "An election law, or suite of election laws, is unconstitutional if there are practicable alternatives that would result in substantially more effective accountability to the normative electorate at reasonable cost."

In this subpart, I shall argue (1) that the Constitution is fairly read to embody this norm (at the very least with respect to elections for one legislative chamber in each state, as well as congressional elections), (2) that the effective accountability norm is now underenforced in the Supreme Court's constitutional election law jurisprudence, (3) that the factors weighing in favor of underenforcement or nonenforcement in constitutional cases do not preclude indirect enforcement using canons of statutory construction, and (4) that an Effective Accountability Canon would be less likely to induce judicial partisanship (or its appearance) than Hasen's Democracy Canon.

1. *Locating the Effective Accountability Norm in the United States Constitution*

Article I and the Seventeenth Amendment lay out the Constitution's scheme for congressional elections. Representatives and Sena-

95 For an example of a system that does not facilitate effective coordination, imagine a ballot-access regime (for a single-member district, plurality-winner election) that resulted in two strong moderate-conservative candidates and one strong moderate-liberal candidate appearing on the general-election ballot. Absent a system of rank-choice voting, this would likely result in conservatives splitting their vote (failing to coordinate as between the two moderate-conservative candidates) and the moderate liberal emerging as the runaway winner—even if, in a head-to-head race, either of the conservative candidates would have beaten the liberal. On the potential for choice voting systems to elect so-called "Condorcet winners"—the candidate, if any, who would win a head-to-head contest with every other candidate on the ballot—see Bernard Grofman & Scott L. Feld, *If You Like the Alternative Vote (a.k.a. the Instant Runoff), Then You Ought to Know About the Coombs Rule*, 23 ELECTORAL STUD. 641 (2004).

tors are to be "chosen . . . by the People of the several States."[96] The electors who participate in this choice "shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature."[97] Congress and the state legislatures are assigned concurrent jurisdiction to prescribe by law the "Times, Places and Manner" of holding these elections, with congressional enactments superseding state laws.[98] Article IV, Section 4 further specifies that the United States "shall guarantee to every State . . . a Republican Form of Government."[99]

I submit that Article I and the Seventeenth Amendment should be understood to incorporate the effective accountability norm vis-à-vis congressional elections and that the Guarantee Clause of Article IV should be read as embodying this norm vis-à-vis elections for state office (at least for one legislative chamber). The interpretations I propose are hardly compelled by constitutional text or contemporary constitutional politics, but they do respect the text and honor Founding-era ideas about republican government, while maintaining the Constitution as a working charter of government that citizens can identify with and courts can use today.[100] What follows is a brief sketch of the argument, which centers on the Guarantee Clause.

Historians broadly agree that in the Framers' era, "republican government" was understood to be government that is nonmonarchial, that draws its authority from the citizenry, and that employs a filtered-majoritarian system of rule—one that provides for popular accountability while checking the citizenry's passions and naked self-interest.[101] Filtering mechanisms familiar to the Framers in-

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96 U.S. CONST. art. I, § 2 (describing the election of members of the House of Representatives). Regarding the Senate, see U.S. CONST. amend. XVII, § 1 ("The Senate . . . shall be composed of two Senators from each State, elected by the people thereof . . . .").

97 *Id.* art. I, § 2 (regarding the House of Representatives); *see also id.* amend. XVII, § 1 ("The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.").

98 *Id.* art. I, § 4. This provision excepts "the Places of chusing Senators" from congressional jurisdiction, but it cannot be doubted that that exception was impliedly removed by the Seventeenth Amendment, which shifted control over the selection of Senators from state legislators to state voters.

99 U.S. CONST. art. IV, § 4.

100 My thinking about constitutional interpretation is largely congruent with the strain of originalism that Jack Balkin articulated. *See* Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 551–52 (2009) (proposing a theory of originalism under which "interpreters must be faithful to the original meaning of the constitutional text and to the principles that underlie the text" but not to "original expected application").

101 For the canonical treatments, see generally BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT (1975); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 (1969). Professor Arthur Bonfield observes that "[t]he 1786 edition of Samuel Johnson's Dictionary defined 'Republican' as 'Placing the government in the people,' and 'Republick' as 'a

cluded the separation of legislative and executive authority, indirect elections (e.g., as reflected in the original Senate and Electoral College), substantial intervals of time between elections, qualifications for holding elective office, and the constitutional entrenchment of privileged rights. Republican government entailed a balancing act: too much filtering or filtering of the wrong kind would sacrifice popular accountability;[102] too little, and the government would end up raw-majoritarian ("democratic") rather than republican. A two-chamber legislative branch was central to the balance struck under the original design for the national government. One chamber was highly filtered (chosen by state legislatures at six-year intervals); the other was filtered very little ("chosen by the People" at two-year intervals).

The early public meaning of the Guarantee Clause was contested in many particulars.[103] About republican government, John Adams is said to have quipped, "there is not in lexicography a more fraudulent word"[104]—the underlying concept being "so loose and indefinite" as to defy comprehension by himself or anyone else.[105]

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state in which the power is lodged in more than one.'" Arthur E. Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 527 (1962). Akhil Amar has argued, to the contrary, that the "central meaning" of the Guarantee Clause is simply that a popular majority, acting through lawful means, must be allowed to revise a state's constitution. Amar styles this as "the people's right to alter or abolish" the existing governmental arrangements. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 749–50 (1994). Amar's majoritarian/populist gloss on the Guarantee Clause has, however, been harshly criticized by other historians as anachronistic. *See* G. Edward White, *Reading the Guarantee Clause*, 65 U. COLO. L. REV. 787, 789–92 (1994).

102 Thus, James Madison remarked during the Constitutional Convention that the right of suffrage was "one of the fundamental articles of republican Government" and that it could be destroyed not only through direct exclusions from the franchise but also by restrictions on who may be elected to office. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 203, 249–50 (Max Farrand ed., 1911). Likewise, Patrick Henry stressed that Republican Government could be undermined by too long an interval between elections. 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 396 (Jonathan Elliot ed., 2d ed. 1891).

103 The historical record is heterogeneous enough for its modern-day scourers to claim, variously, that the Guarantee Clause demands (1) majority control over the constitution of state government, *see* Amar, *supra* note 101, at 782–86; (2) limitations on direct democracy, *see* Hans A. Linde, *When Initiative Lawmaking Is Not "Republican Government": The Campaign Against Homosexuality*, 72 OR. L. REV. 19, 22–24 (1993); (3) state autonomy from the federal government with respect to basic governmental processes (so long as the state government is nonmonarchial), *see* Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 25 (1988); or (4) constraints on the delegation of public power, especially to private groups, *see* Thomas C. Berg, Comment, *The Guarantee of Republican Government: Proposals for Judicial Review*, 54 U. CHI. L. REV. 208, 231–35 (1987).

104 WILLIAM M. WIECEK, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 13–14 (1972) (quoting JOHN ADAMS, 1 A DEFENSE OF THE CONSTITUTIONS OF GOVERNMENT IN THE UNITED STATES OF AMERICA 160–61 (Da Capo Press 1971)).

105 *Id.* at 72 (quoting letter from John Adams to Mercy Warren (July 20, 1807)).

Constitutional politics since the Founding have not produced anything approaching a settled construction of the Guarantee. In the 1860s, radical Republicans treated the Guarantee Clause as textual authority for Reconstruction and the congressional conferral of voting rights on freed slaves.[106] Some even saw the Guarantee Clause as a hook for "universal public education sufficient to qualify the people for self-government."[107] Southerners and northern conservatives responded that any governmental structure consistent with the "form[s]" taken by the states in 1789 was in compliance.[108] The Supreme Court in dicta voiced its approval of the Radicals' broad reading of congressional authority under the Clause.[109] A few years later, however, the Court construed the meaning of republican government in a static fashion: *Minor v. Happersett* held that the denial of the franchise to women was compatible with Article IV because women generally were not allowed to vote when the Constitution was adopted, and the structure of state government at the time of ratification affords "unmistakable evidence of what was republican in form, within the meaning of [Article IV]."[110]

The Court's nineteenth-century equivocation about the Guarantee Clause was never resolved. Instead of fleshing out the Clause's meaning, the Court took refuge in the political question doctrine and ducked case after case that presented claims under Article IV.[111] In this, it was helped by the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, and the post–New Deal understanding of congressional powers under the Commerce Clause, which alleviated practical pressures (felt so acutely during the early stages of Reconstruction) for a theory of congressional authority under the Clause.[112]

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106 *See* Bonfield, *supra* note 101, at 538–48 ("It was from that provision, [the Committee on Reconstruction] concluded, that Congress derived the power to reconstruct the southern states and assure equal rights for all [freed slaves].").

107 *Id.* at 542.

108 *See id.* at 543 ("Subsequent events cannot change that meaning, and therefore what was a republican form of government when the Constitution was adopted by the American people, and went into operation in 1789, is, in contemplation of that instrument, a republican form of government now." (quoting CONG. GLOBE, 41st Cong, 2d sess. 1218 (1870))).

109 *See id.* at 544–46 (quoting Texas v. White, 74 U.S. (1 Wall.) 700, 730–31 (1868)).

110 Minor v. Happersett, 88 U.S. (21 Wall.) 162, 176 (1875).

111 *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962) (reiterating the holding of *Colegrove* with respect to the Guarantee Clause, while allowing malapportionment claims to be brought under the Equal Protection Clause); Colegrove v. Green, 328 U.S. 549 (1946) (holding that malapprortionment claims are nonjusticiable under the Guarantee Clause); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118 (1912) (holding that the alleged incompatibility between the ballot initiative and Republican Government presents a nonjusticiable political question).

112 *But see* Ethan J. Leib, *Redeeming the Welshed Guarantee: A Scheme for Achieving Justiciability*, 24 WHITTIER L. REV. 143, 147 (2002) (arguing that recent limitations on congressional authority established via the Supreme Court's federalism jurisprudence could and should induce Congress to test its authority under the Guarantee Clause).

Modern commentators have filled the judicial and congressional void with speculative readings of the Guarantee Clause as variously guaranteeing majoritarianism,[113] limits on direct democracy,[114] fairly apportioned legislative districts,[115] federalism,[116] rights of influence for racial and ethnic minorities,[117] congressional power to enact anticorruption legislation[118] or legislation to promote deliberative democracy,[119] political parties' associational rights,[120] and even natural rights.[121] The historian G. Edward White does not exaggerate when he writes that "the course of interpretation of the [Guarantee] Clause over time has revealed an utter inability on the part of its interpreters to resist expanding or contracting its meaning on the basis of their current political assumptions."[122]

Given this history, and given the exposure to charges of politicization and favoritism that the courts risk whenever they adjudicate cases that bear on the distribution of political power, it is no surprise that the Supreme Court has treated the Guarantee Clause as nonjusticiable. I would submit, however, that much of the seeming intractability of the Clause reflects a failure to disaggregate the popular and antipopular elements in republican political theory. Separating these elements may not result in a justiciable Guarantee Clause, but it does yield a picture of the Clause's meaning that in some respects is clear enough for judicial enforcement through canons of statutory construction.

The intractable questions about republican government largely concern the proper balance between the popular/majoritarian and antipopular/elite elements. To say whether a State is adequately "republican" in this sense requires a global assessment of its constitution as it works in practice and a normative judgment that, for want of objective standards, would probably turn on the observer's sentiments

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113 *See* Amar, *supra* note 101, at 761–62.

114 *See* Linde, *supra* note 103, at 22–24.

115 *See* Arthur Earl Bonfield, Baker v. Carr*: New Light on the Constitutional Guarantee of Republican Government*, 50 CAL. L. REV. 245, 257–60 (1962); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL'Y 103, 114–15 (2000).

116 *See* Merritt, *supra* note 103, at 2, 25–26.

117 *See* Kathryn Abrams, *No "There" There: State Autonomy and Voting Rights Regulation*, 65 U. COLO. L. REV. 835, 841–42 (1994).

118 *See* Adam H. Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. CAL. L. REV. 367, 375 (1989).

119 *See* Leib, *supra* note 112, at 151–52.

120 This is suggested, though not argued with conviction, in Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 308–10 (2001).

121 *See* Bonfield, *supra* note 101, at 550, 558 ("[A republican] government was considered limited both by its own terms and by natural justice.").

122 White, *supra* note 101, at 803.

toward populism or his satisfaction with the outputs of state government. The courts have properly abstained from this inquiry because of its scale, its political sensitivity, and its subjectivity. The appropriate balance between populism and antipopulism is anyone's guess.

If one focuses, however, on how the mechanics of the popular element work—without asking whether the popular element is properly counterbalanced—the Guarantee Clause inquiry becomes less daunting. Two questions would arise. First, is the distribution of the franchise broad enough for the qualified voters to have a fair claim to speak on behalf of the whole People (the true sovereign, in republican theory)?[123] The Constitution's scheme for congressional elections foregrounds this question. As noted above, Members of Congress are to be "chosen . . . by the People of the several States," and the voters who participate in this choice are to have the requisite qualifications for voting in the most numerous house of the state legislature.[124] The first condition will be satisfied only if voter qualifications in elections for the most numerous chamber of the state's legislature are liberal enough for the qualified persons to have a fair claim to speak for the state's citizenry as a whole. I would argue that this question is suited to judicial resolution,[125] but whether I am right is moot because the Supreme Court has already constitutionalized the normative electorate under (dubious) Equal Protection auspices.[126]

The second question that must be asked about the mechanics of the popular element is whether they enable or hinder the meaningful expression of popular will at those moments when "the People" are asked to speak. To be sure, some questions about the authenticity or

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123 As Madison observed, "[t]he definition of the right of suffrage is very justly regarded as a fundamental article of republican government." THE FEDERALIST No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961). For a probing exploration of the "denominator problem"—who is entitled to the franchise—in republican theory, see Amar, *supra* note 101, at 766–73.

124 U.S. CONST art. I, § 2.

125 Voter qualifications represent a limited, discrete issue of positive law that can be judged without trying to get a handle on the entirety of state government. The guiding norm—that the franchise be distributed widely enough to give the persons eligible to vote a fair claim to speak on behalf of "the People" as a whole—is intelligible. To be sure, what it requires at any point in time probably depends on the heterogeneity of the citizenry, the extent to which citizens fathom one another's interests and concerns, and the balance of self-interested and other-minded voting. But it does not follow that the judicial inquiry would amount to an entirely subjective judgment call. Given the discrete nature of the issue, the courts could probably develop an "evolving practices of the states" approach, under which the permissibility of a voter qualification would depend on a substantial consensus among the states (or lack thereof) about who belongs in the normative electorate.

126 An Equal Protection predicate for the right to vote is dubious because, at the time of its enactment, the Equal Protection Clause was clearly understood to protect only civil rights, not political rights. *See generally* Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222–41 (1995) (discussing the historical relationship between Fourteenth and Fifteenth Amendments).

meaningfulness of an electoral expression of popular will lie beyond principled resolution. Consider the debate between proponents of proportional representation, who emphasize that such regimes better represent the ideological range of citizenry in the legislature, and proponents of two-party systems, who privilege the forging of compromises within the electorate and clearer ex post accountability.[127] Other questions are more straightforward. Election law supports a more meaningful expression of popular will to the extent (1) that it results in voter turnout that is representative of the normative electorate as a whole, (2) that it fosters aggregate competence in the voting public (e.g., by helping qualified voters to become informed about the issues, by enabling poorly informed voters to make preference-conforming choices despite their lack of information, or by reducing the likelihood that voters will make correlated errors), and (3) that it facilitates coordination by like-minded voters, enabling them to vote out of office government officials whose performance they deem subpar. These are the concerns of the effective accountability norm.

What elections does the Constitution subject to this norm? There are two plausible approaches to this question. The constitutional text clearly designates three elected bodies as popular: the House of Representatives,[128] the Senate,[129] and by implication of Article I, the "most numerous" branch of each state's legislature.[130] It may be inferred that elections for these and only these bodies are subject to the norm. Alternatively, one could presume that a state's decision to establish broad-franchise elections for choosing *any* public actor (e.g., an attorney general or governor, Electoral College delegates, members of a city council, and so forth) reflects a judgment about the proper reach of the popular element in that state's republican scheme. The federal courts—again without passing on the proper balance between popular and antipopular elements—should therefore understand the effective accountability norm to cover those elections.[131]

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127 For an introduction to this debate, see Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 109–12 (2004).

128 *See* U.S. CONST. art. I, § 2.

129 *See id.* amend. XVII.

130 *See id.* art. I, § 2; *supra* notes 124–26 and accompanying text.

131 The Supreme Court has similarly deferred to the states in defining what offices are subject to the right to vote on equal terms with others under the Equal Protection Clause. *See* Bush v. Gore, 531 U.S. 98, 104–05 (2000) ("*Having once granted* the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another." (emphasis added)); *see also supra* note 67 and accompanying text.

2. *Underenforcement of the Effective Accountability Norm in Constitutional Cases*

Though the Guarantee Clause has long been treated as nonjusticiable,[132] and though the "chosen . . . by the People"[133] language of Article I and comparable language in the Seventeenth Amendment have been little more than bit players in the development of constitutional election law,[134] there were inklings from the Warren and early Burger courts that an effective accountability norm would be enforced under the guise of voters' Equal Protection rights and candidates' and political parties' First Amendment associational rights. In *Reynolds v. Sims*,[135] the Equal Protection case establishing the rule of "one person, one vote,"[136] the Court stated:

> Full and effective participation by all citizens in state government requires . . . that each citizen have an *equally effective voice* in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.[137]

"[I]n a society ostensibly grounded on representative government," the *Reynolds* Court continued, "it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators."[138]

The *Reynolds* line about "full and *effective*"[139] democratic participation played out across a number of fronts in the 1960s and early 1970s. Relying on *Reynolds*, the Supreme Court in *Harper v. Virginia Board of Elections*[140] and *Bullock v. Carter*[141] invalidated voting and candidacy requirements whose burden fell disproportionately on poor voters.[142] In *Williams v. Rhodes*,[143] the Court gave third-party candidates access to

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132 *See, e.g.*, Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 151 (1912) (dismissing for lack of jurisdiction because the Guarantee Clause controversies before the Court are "political and governmental" and therefore are not "within the reach of judicial power").

133 U.S. CONST. art. I, § 2.

134 Article I figured prominently in an early malapportionment decision, *Wesberry v. Sanders*, 376 U.S. 1, 17–18 (1964), but since then, the Supreme Court has hung its constitutional voting rights jurisprudence largely on the Equal Protection Clause and, to some extent, the First Amendment.

135 377 U.S. 533 (1964).

136 *Id.* at 558 (citing Gray v. Sanders, 372 U.S. 368, 381 (1963)).

137 *Id.* at 565 (emphasis added).

138 *Id.*

139 *Id.* (emphasis added).

140 383 U.S. 663 (1966).

141 405 U.S. 134 (1972).

142 *See Bullock*, 405 U.S. at 143–44, 149 (applying strict scrutiny to candidate filing fees because the fees "substantially limited [voters'] choice of candidates" in a manner that "obvious[ly] . . . fall[s] more heavily on the less affluent segment of the community"); *Harper*, 383 U.S. at 667–68 (determining that "the principle [of *Reynolds*] . . . by analogy bars a system which excludes those unable to pay a fee to vote or who fail to pay [the fee]").

143 393 U.S. 23 (1968).

the ballot as a means of enabling citizens to cast an effective vote.[144] In *Whitcomb v. Chavis*[145] and *White v. Regester*,[146] the effective participation idea led the Court to hold multimember and at-large electoral structures unconstitutional insofar as they operated to "minimize or cancel out" the political strength of racial groups excluded from the normal give-and-take of pluralist politics.[147] Conversely, in *Gordon v. Lance*,[148] the Court rejected a *Reynolds*-based challenge to a state constitutional requirement that certain bonds be issued only when approved by a two-thirds majority in a referendum election. The plaintiffs had argued that the two-thirds requirement was tantamount to weighting "no" votes twice as heavily as "yes" votes, but the Court upheld the supermajoritarian rule, reasoning that there was "no independently identifiable group or category [of voters] that favor[ed] bonded indebtedness over other forms of financing."[149]

The abovementioned cases treated the right to vote on equal terms with others as, at least in part, a device by which the courts may reform electoral arrangements to make the government more answerable to the normative electorate as a whole. Since then, the Supreme Court has backed away from this understanding of the right.[150] In

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144 *Id.* at 30–34 (grounding political parties' rights of ballot access on, inter alia, "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively . . . [which] rank[s] among our most precious freedoms"); *cf. Bullock*, 405 U.S. at 142–43, 144 (noting that while the Court had "not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review," strict scrutiny of the candidate filing fees at issue was nonetheless appropriate because the fees "substantially limited [voters'] in their choice of candidates" in a manner that "obvious[ly] . . . fall[s] more heavily on the less affluent segment of the community").

145 403 U.S. 124 (1971).

146 412 U.S. 755 (1973).

147 *Whitcomb*, 403 U.S. at 141–43 (recognizing, per *Reynolds*, that "'each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies,'" and that at-large elections and multimember districts are therefore vulnerable if they "'operate to minimize or cancel out the voting strength of racial or political elements of the voting population'" (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965))); *see White*, 412 U.S. at 765–70 (striking down a multimember district arrangement on these grounds); Burns v. Richardson, 384 U.S. 73, 88 (1966).

148 403 U.S. 1 (1971).

149 *Id.* at 5.

150 In an earlier article, I argued that much of the Supreme Court's "electoral mechanics" jurisprudence is best understood as an effort to ensure "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)." Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 322 (2007). I have since come to doubt that claim, at least with respect to the Court's election law jurisprudence as a whole. My revised view, expressed in this Article, reflects (1) my consideration of cases (such as racial vote-dilution cases) that the Court has not approached through its generic electoral mechanics framework, which I therefore did not consider in my earlier article, *see infra* text accompanying notes 151–52; (2) my newfound appreciation for certain individualistic strains in the ballot-access cases, to which I did not pay enough attention in my earlier article, *see infra* text accompanying notes 153–59; and (3) what the Court said (and failed to say) in several

Mobile v. Bolden,[151] the Court, over a dissent by Justice Thurgood Marshall, denied *Reynolds*' parentage of *Whitcomb* and *Regester*, portraying the latter cases as applications of the constitutional prohibition against intentional discrimination on the basis of race, rather than as outgrowths of a fundamental right to full and effective political participation.[152] In *Storer v. Brown*,[153] the Court, in providing a measure of protection for independent candidates' access to the ballot, emphasized the dignitary interests of the candidate who is not a "party man."[154] Earlier cases about candidates' access to the ballot had focused on the "extent and nature of [the candidacy restrictions'] impact on voters,"[155] treating candidacy as not of "such fundamental status . . . as to invoke a rigorous standard of review."[156] Subsequent ballot-access cases suggest that the Court will uphold virtually any barrier to the general-election ballot so long as independent and third-party candidates have reasonably liberal access to *some* ballot.[157] This makes sense if one understands the constitutional law of ballot access to be centrally about serious candidates' dignitary interest in having a ballot-connected platform through which to communicate their true convictions. But it is hard to square with the idea that candidates' and parties' rights of ballot access derive from voters' rights to "equally effective voice" or "full and effective participation"[158] because it is at the general election that the normative electorate expresses its satisfaction or discontent with incumbents' performance.[159]

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important decisions that postdate my earlier article, *see infra* text accompanying notes 160–75.

151 446 U.S. 55 (1980).

152 *See id.* at 75–79 (responding to Justice Marshall's dissent).

153 415 U.S. 724 (1974).

154 *Id.* at 745–46.

155 Bullock v. Carter, 405 U.S. 134, 143 (1972).

156 *Id.* at 142–43.

157 Thus, in *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986), the Court stressed that the "blanket primary" regime under attack gave the plaintiff political party liberal access to "a statewide ballot" (specifically, the blanket-primary ballot) and that this substantially obviated the constitutional problem that might otherwise exist by virtue of barriers to the general-election ballot. *See id.* at 197–99. Similarly, in *Burdick v. Takushi*, 504 U.S. 428 (1992), the Court upheld a ban on write-in voting at the general election because the state's ballot-access regime established only minimal barriers to getting onto primary-election ballots. *See id.* at 434–39. As such, the write-in ban represented at most a "very limited" burden on candidates and voters who wanted to "associate" with one another through the ballot. *Id.* at 437, 439. However, in *New York State Board of Elections v. López Torres*, 552 U.S. 196 (2008), the Court did suggest that its ballot-access cases guarantee to all candidates "an adequate opportunity to appear on the general-election ballot" (at least if they are willing to run as independents), but this remark was made in passing. *Id.* at 207.

158 Reynolds v. Sims, 377 U.S. 533, 565 (1964).

159 For a discussion on the centrality of the general election to theories of minor-party rights concerned with systemic political accountability and effective choice, see, for example, Nathaniel Persily & Bruce E. Cain, *The Legal Status of Political Parties: A Reassessment of Competing Paradigms*, 100 COLUM. L. REV. 775, 807–08 (2000) (proposing a "principle of [potential] electoral influence" to govern minor parties' access to the general-election bal-

Three recent cases illustrate the absence of the effective accountability norm from the Supreme Court's current understanding of Equal Protection and First Amendment rights of political participation. In *Washington State Grange v. Washington State Republican Party*,[160] the Court upheld a phased voting process in which the field of candidates is first pared to two in a quasi-nonpartisan primary, with the top two vote-getters then competing in the general election.[161] The State permitted candidates to designate their political party preference on the ballot, but the parties were given no rights to control the use of their brand by candidates.[162] From an effective accountability perspective, the central problem with Washington's scheme is that it muddies the informational value of party cues.

The Washington primary system is likely to erode the cue's informational content in two ways. First, candidates whom a party or its leadership does not support (or supports much less than another candidate who did not make it to the general election) will be associated through the ballot with the party. What voters understand a party to stand for will probably be influenced by what they *see* on the ballot, even if voters *say* they appreciate that the "party label" on the ballot is but a statement of candidate preference.[163] If this was not the case, it would be hard to understand why corporations spend great sums on advertising to associate their brand with celebrities.[164] Second, as happened during the fall of 2008, candidates may be able to disguise their party affiliation and thereby undermine retrospective accountability. Some Republican candidates listed their party preference on the ballot as "GOP" rather than "Republican Party," apparently in the hopes

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lot). *See also* Schleicher, *supra* note 92, at 168–74 (arguing that ballot-access rights should be defined so as to funnel dissent into the two major parties, promoting the systemic values of responsiveness and decisiveness).

160 552 U.S. 442 (2008).

161 *See id.* at 447–48.

162 *See id.*

163 The *Washington Grange* Court appears to suggest that if a party could show that the Washington law as applied led voters to think that the candidate's stated party preference was in fact a statement of endorsement by the party, the law would be unconstitutional in that circumstance. *Cf. Washington Grange*, 552 U.S. at 452–59 (finding that because the challenge brought was a facial challenge, the Court "cannot strike down [the law] on its face based on the mere possibility of voter confusion" and "must await an as-applied challenge").

164 To be sure, there is an asymmetric information rationale for "burning money" on advertising, but this does not explain why purchased celebrity associations are such a common form of advertising. *See generally* Benjamin Klein & Keith B. Leffler, *The Role of Market Forces in Assuring Contractual Performance*, 89 J. POL. ECON. 615, 629–33 (1981) (discussing the relationship between investment in advertising and consumers' perception of quality of production).

of avoiding the appearance of an association with the party of discredited President George W. Bush.[165]

Consider also *New York State Board of Elections v. López Torres*,[166] which held unanimously that the Constitution permits state-mandated partisan nomination procedures that deny candidates disfavored by the party leadership a fair shot at competing for their party's nomination.[167] Because "outsider" candidates were able to qualify for the ballot as independents, the Court saw no First Amendment basis for invalidating a major-party nominating procedure that strongly favored insiders.[168]

Leadership-controlled party nomination procedures are not necessarily a bad thing, but if particular leadership-dominated procedures have proven to be dysfunctional, as was arguably the case in New York,[169] it is risible to suggest that the solution is for locked-out candidates to challenge the party machine by running as independents. This completely disregards the role of party cues in voting, particularly in down-ballot races such as judicial elections.[170] Because of the dominant role of party cues, "outsider" candidates cannot reasonably hope to be agents of accountability unless they have a fair shot at competing for major-party nominations.

Most telling of all is *Crawford v. Marion County Election Board*,[171] the Court's first decision on the merits about voting procedures since the early 1970s. If the Court had understood the right to vote on

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165 *See* Gregory Roberts, *Governor Can Keep 'GOP' Label; Judge Rejects Democrats' Demand for Ballot Change*, SEATTLE POST-INTELLIGENCER, Sept. 27, 2008, at B1 (reporting on the judicial decision in a lawsuit challenging use of the GOP label); Curt Woodward, *Governor's Race: Nastier, More Costly*, LEWISTON MORNING TRIB., Oct. 21, 2008 (reporting on the Washington Governor's race, the Republican candidate's attempt to disguise his party affiliation using the GOP moniker, and the Democratic candidate's efforts to link her opponent to President Bush). A copy of the August 19, 2008 primary ballot in King County, Washington (which shows that some Republican candidates chose "GOP," while others opted for the conventional party label) is available from the author.

166 552 U.S. 196 (2008).

167 *See id.* at 204–07. I am indebted to David Schleicher for refining my understanding of this case; what follows here is largely his take on it. *See generally* Schleicher, *supra* note 92 (advancing a general theory of primary-election ballot-access rights).

168 This point is suggested in the majority opinion, *see López Torres*, 522 U.S. at 207, and is absolutely central to Justice Anthony Kennedy's concurrence (joined by Justice Breyer), *see id.* at 209–11.

169 The process by which party insiders choose judicial nominees appears to have been rife with corruption, reflecting larger failings in the major parties in New York. *See generally* James A. Gardner, *New York's Judicial Selection Process Is Fine—It's the Party System That Needs Fixing*, N.Y.S.B.A. J., Sept. 2007, at 42, 42–43 (describing New York's party system as "utterly moribund" and arguing that the dysfunctional judicial selection is "a symptom of a much more deeply rooted problem: the dysfunction of New York's political parties").

170 *See* Brian F. Schaffner & Matthew J. Streb, *The Partisan Heuristic in Low-Information Elections*, 66 PUB. OPINION Q. 559, 578–79 (2002) (finding partisan cues useful to voters in low-information races).

171 553 U.S. 181 (2008).

equal terms with others to be a right in service of effective accountability, it would have stated that the measure (or at least a measure) of the constitutional "burden" of a voting requirement is the impact of the requirement on the representativeness of voter turnout.[172] The Justices instead conceptualized the burden of Indiana's voter ID law in terms of how much of a hassle or inconvenience it presented for the affected voters.[173] This frame of reference is appropriate if the right to vote is purely an individual right, analogous, for example, to the abortion right.[174] But if the right derives content from the effective accountability norm, the "burden" inquiry should be addressed not to the height of the hurdle, as it were, but to the comparative political demographics of the population that surmounts it and the population that falls short.[175]

3. *The Comparative Manageability of Direct and Canon-Based Enforcement of the Effective Accountability Norm*

By enforcing the effective accountability norm through statutory construction while continuing to treat the Guarantee Clause as nonjusticiable, the courts could avoid some of the difficulties that would attend direct implementation in constitutional cases.[176]

Direct implementation would make virtually every aspect of the electoral process a potential target of constitutional attack on the theory that some other mechanism would result in a better informed electorate or more representative voter participation. Turnout or information-based arguments might be used to attack the timing of

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172 In an amicus brief coauthored with Dan Tokaji, I argued for this approach. *See* Brief for Christopher S. Elmendorf & Daniel P. Tokaji as Amici Curiae Supporting Petitioners, Crawford v. Marion County Election Bd., 553 U.S. 181 (2008) (No. 07–21 & 07–25).

173 *See Crawford*, 553 U.S. at 196–200 (plurality opinion of Stevens, J., joined by Roberts, C.J., and Kennedy, J.); *id.* at 210–18 (dissenting opinion of Souter, J., joined by Ginsburg, J.).

174 *See* Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 659–67 (2008) (explaining the shape of the burden inquiry under an individualistic conception of the right to vote).

175 *See id.* at 675–86 (explaining how such an approach would work).

176 In my view, direct implementation is in fact possible. The difficulties described in this section could be overcome, in substantial part, if the courts were to treat typical state practices as presumptively justified. *See id.* at 675–86 (arguing for a turnout-based approach to "burden" analysis in constitutional challenges to voting requirements, in which typical state practices would provide the regulatory benchmark).

elections;[177] the drawing of electoral districts;[178] the use of nonpartisan elections;[179] the choice between districted and at-large elections;[180] the provision (or lack thereof) of information to voters on the ballot, in ballot pamphlets, or in other pre-election mailings;[181]

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177 Turnout in local government and other "down ballot" elections is lower when held in odd years rather than even years. *See, e.g.*, Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URBAN AFFAIRS REV. 645, 655–57 (2003) (reporting empirical results which suggest that the most effective way of raising and equalizing turnout in local elections is to hold those elections on the same day as national elections); *cf.* Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515, 517–18 (2005) (showing that voter turnout is much more demographically skewed in local than national elections). Researchers in England have also demonstrated a seasonality effect on voter turnout. *See* C. Rallings, M. Thrasher & G. Borisyuk, *Seasonal Factors, Voter Fatigue and the Costs of Voting*, 22 ELECTORAL STUD. 65, 69–73 (2003) (finding voter turnout rises in the spring).

178 It has been shown that the correspondence between district lines and media markets affects challengers' ability to achieve name recognition. For a brief introduction to this literature in relation to congressional candidates, see Jennifer Wolak, *The Consequences of Concurrent Campaigns for Citizen Knowledge of Congressional Candidates*, 31 POL. BEHAV. 211, 213–24 (2009). Likewise, more competitive races—and competitiveness is affected by district design—result in more informed voters, *see id.* at 219, and higher rates of voter participation, *see* Indridi H. Indridason, *Competition & Turnout: The Majority Run-off as a Natural Experiment*, 27 ELECTORAL STUD. 699, 703–07 (2008) (exploiting natural experiment to corroborate predicted effect of competitiveness on turnout); Matthew J. Streb, Brian Frederick & Casey LaFrance, *Voter Rolloff in a Low-Information Context: Evidence From Intermediate Appellate Court Elections*, 37 AM. POL. RES. 644, 647 (2009) (citing studies on the effects of electoral competition on voter participation in elections for various offices).

179 Nonpartisan elections suffer from less-informed voters and higher rates of voter "roll-off" (failure to vote in a down-ballot race). *See* Schaffner & Streb, *supra* note 170, at 568–70; Brian F. Schaffner, Matthew J. Streb & Gerald White, *Teams Without Uniforms: The Nonpartisan Ballot in State and Local Elections*, 54 POL. RES. Q. 7, 20 (2001) (analyzing data from partisan and nonpartisan elections); Streb, Frederick & LaFrance, *supra* note 178, at 646, 661–62 (showing that voter roll-off is much higher in nonpartisan than partisan elections for intermediate court of appeals judges and concluding that "if states insist on electing judges, then the tide toward holding nonpartisan elections may need to be reversed for voters to participate meaningfully").

180 There is a small pool of literature investigating whether roll-off in down-ballot races is greater in districted rather than at-large elections. The results so far are mixed and nuanced. *See* William K. Hall & Larry T. Aspin, *The Roll-Off Effect in Judicial Retention Elections*, 24 SOC. SCI. J. 415, 420 (1987) (finding larger roll-off effect in districted than at-large retention elections); Melinda Gann Hall, *State Supreme Courts in American Democracy: Probing the Myths of Judicial Reform*, 92 AM. POL. SCI. REV. 315, 316 (2001) (arguing that the effect found by Hall and Alpin is conditioned by nature of race as partisan or nonpartisan); Streb, Frederick & LaFrance, *supra* note 178, at 657 (finding that voter roll-off increases in down-ballot judicial races when a presidential race is at the top of the ballot if the judicial election is at large but not if the judicial election is districted).

181 Regarding ballot cues and voter competence, see generally Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1540–50 (1999) (making a case for ballot notations as a way to simplify the decision-making process and increase voter competence). Ballots in California designate candidates' occupations; this has been shown to increase both voter participation (less roll-off) in down-ballot races and to shift voters' support toward candidates with relevant work experience in such races. Monika L. McDermott, *Candidate Occupations and Voter Information Shortcuts*, 67 J. POL. 201, 210–12, 214–15 (2005).

ballot design;[182] state policies that bear on the privacy or publicity of voting behavior;[183] the variety and extent of campaign finance restrictions;[184] the location of voting precincts and the provision (or lack thereof) for county-level vote centers;[185] the permissibility of national parties fielding candidates for local office;[186] and perhaps even the use of "full electorate" elections (as opposed to enfranchising a randomly selected subset of the normative electorate at each election, on

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On the effects of various types of pre-election mailings on voter turnout (especially among low-turnout populations), see Alan S. Gerber, *New Directions in the Study of Voter Mobilization: Combining Psychology and Field Experiments*, in RACE, REFORM, AND REGULATORY INSTITUTIONS, *supra* note 3 (reviewing generally modest effects of pre-election informational mailings but showing large effect for mailing designed to inform and facilitate party registration in advance of a closed presidential primary election), and Raymond E. Wolfinger, Benjamin Highton & Megan Mullin, *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 ST. POL. & POL'Y Q. 1, 14–16 (2005) (estimating that the establishment of policies such as mailing voters a sample ballot and information about their polling places, extending the hours that polls are open, and requiring employers to give workers time off to vote, can increase turnout of registered voters by about three percentage points with a disproportionate increase among the young and less well-educated).

182 *Cf.* Martin P. Wattenberg, Ian McAllister & Anthony Salvanto, *How Voting Is Like Taking an SAT Test: An Analysis of American Voter Rolloff*, 28 AM. POL. Q. 234 , 239–41 (2000) (reporting that ballots that present candidates in columns by party result in lower roll-off than ballots that organize candidates in "blocs" by office).

183 Gerber, *supra* note 181 (reporting experimental results showing that persons who know that their voting behavior will be revealed to their neighbors become substantially more likely to vote).

184 On campaign spending as an influence on voter knowledge, see generally GARY C. JACOBSON, THE POLITICS OF CONGRESSIONAL ELECTIONS 41–48 (1983) (explaining that statistical analysis shows that "how much money a nonincumbent candidate spends has a large effect on the proportion of votes he receives" but that "[f]or incumbents, spending a great deal of money on the campaign is a sign of weakness rather than strength"); KIM FRIDKIN KAHN & PATRICK J. KENNEY, THE SPECTACLE OF U.S. SENATE CAMPAIGNS 163–73 (1999) (using polls to study the effects on competition of media coverage and increased campaign spending by the challenger); John J. Coleman & Paul F. Manna, *Congressional Campaign Spending and the Quality of Democracy*, 62 J. POL. 757, 782–83 (2000) (finding that campaign spending increases voter knowledge). On lack of information as the driving force behind voter roll-off with respect to down-ballot races, see Wattenberg, McAllister & Salvanto, *supra* note 182, at 236–37. Putting these themes together, Shaun Bowler, Todd Donovan & Trudi Happ, *Ballot Propositions and Information Costs: Direct Democracy and the Fatigued Voter*, 45 W. POL. Q. 559, 564–66 (1992), show that the level of spending in the campaign for and against ballot propositions partly explains aggregate roll-off in voting on the proposition.

185 *Cf.* J.G. Gimpel & J.E. Schuknecht, *Political Participation and Accessibility of the Ballot Box*, 22 POL. GEOGRAPHY 471, 481–82 (2003) (demonstrating effects of polling-place location on patterns of voter turnout); Robert M. Stein & Greg Vonnahme, *Engaging the Unengaged Voter: Vote Centers and Voter Turnout*, 70 J. POL. 487, 491–92 (2008) (finding that the establishment of Election Day vote centers in Larimer County, Colorado significantly boosted voter turnout relative to the control county, especially among low-turnout populations).

186 David Schleicher has argued, originally and persuasively, that elected local government officials (particularly city councilpersons) would be more effectively accountable to the electorate if national parties were precluded from sponsoring candidates in local elections, thereby inducing the formation of locally oriented parties and two-party competition at the local level. David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 460–73 (2007).

the theory that the selected citizens would have stronger incentives to become informed because of the likelihood that their votes would prove decisive).[187] In resolving these constitutional challenges, the courts would have to wade through and adjudicate disputes among political scientists about the actual or likely effects of alternative institutional arrangements. The Court has repeatedly signaled that it is uncomfortable with social scientific approaches to constitutional political rights[188]—perhaps because it fears making embarrassing mistakes or because it does not want constitutional requirements to vacillate with the latest research findings and counterfindings.

A canon-based approach to the effective accountability norm would not expose the courts to these perils—at least not to such an extent. Judges would not have to worry about finding limiting principles to defeat constitutional arguments for radical reform because implementation of the effective accountability norm would occur only through the interpretive tweaking of legislative enactments. The courts would be building on the legislature's handiwork rather than displacing it.

The "empiricism problem" would also be less acute. The legislature or an implementing agency could correct judicial mistakes,[189] and the norm of super strong statutory stare decisis would excuse the courts from the potentially embarrassing task of revisiting past decisions that allegedly were premised on misreadings of the social scientific literature.[190]

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187 This hypothesis would seem to follow from the basic rational-choice models of voting, according to which a citizen's willingness to invest in voting increases monotonically with the likelihood that his or her vote will prove decisive. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 36–50 (1957) (explaining that the rational voter makes a decision "[b]y comparing the stream of utility income from government activity he has received under the present government . . . with those streams he believes he would have received if the various opposition parties had been in office").

188 *See* Elmendorf, *supra* note 150, 377–80. A number of the Court's most recent decisions may, however, bespeak a somewhat greater willingness to make empirical evidence doctrinally relevant in constitutional election law cases. *See* Elmendorf & Foley, *supra* note 70, at 528–29 (analyzing the Court's recent equivocation about empirical approaches).

189 *Cf.* Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 1000–03 (2005) (holding that the federal courts' statutory interpretations may be displaced by subsequent administrative agency interpretations when the statute in question is ambiguous, the agency interpretation is reasonable, and the agency has authority to issue binding rules).

190 The Supreme Court has long recognized that stare decisis has greatest force in statutory cases. *See, e.g.*, John R. Sand & Gravel Co. v. United States, 552 U.S. 130, 139 (2008) ("[*S*]*tare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.'" (quoting Patterson v. McLean Credit Union, 491 U.S. 164, 172–73 (1989))).

4. *The Comparative Manageability of Hasen's Democracy Canon and the Proposed Effective Accountability Canon*

The Effective Accountability Canon would overlap in some respects with Hasen's Democracy Canon. For example, the state supreme court's decision in *New Jersey Democratic Party v. Samson*,[191] which Hasen presents as an exemplar of the Democracy Canon in action,[192] is also justifiable under the Effective Accountability Canon. An election in which one of the two major parties is legally barred from fielding a candidate would undermine voters' ability to secure representation for their interests and to hold the governing party to account. Statutes that disproportionately hinder voter registration or turnout by low-participation demographic groups are also candidates for effective-accountability informed constructions, and some of the resulting tweaks might resemble those effected under the Democracy Canon principle that voters "not morally at fault" should be excused from compliance with legal technicalities.[193]

But there are also significant differences between Hasen's Democracy Canon and the proposed Effective Accountability Canon, and these differences probably render my alternative less prone to eliciting judicial partisanship or its appearance. For one, judicial recourse to the effective accountability norm would neither require nor encourage courts to pass judgment on the "moral fault" of affected voters, a question sure to divide liberals and conservatives.[194] Second, the Effective Accountability Canon would not have much purchase in postelection ballot-counting disputes. (Recall Hasen's observation that the large plurality of Democracy Canon applications involve ballot-counting disputes.)[195] From an accountability perspective, who wins a razor-thin election is unimportant; the leading vote-getters have proven themselves more or less equally satisfactory to the voters. Because postelection litigation tends to be highly visible, with clear partisan stakes, the fact that the Effective Accountability Canon would not license strained statutory readings in this context should count as a benefit for anyone worried about the courts' reputation for political neutrality.[196]

To be sure, liberal judges may be inclined to emphasize the "representative participation" side of the effective accountability coin,

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191 814 A.2d 1028 (N.J. 2002).

192 *See* Hasen, *supra* note 1, at 108–11.

193 *See supra* text accompanying note 25.

194 *See supra* text accompanying notes 25–30.

195 Hasen, *supra* note 1, at 83.

196 That said, if one were to treat the Effective Accountability Canon as an "effective governance" canon, the canon might end up licensing strained statutory constructions that bring postelection recounting to a close—so that a winner may be declared, the office filled, and the business of government continued with minimal interruption.

while their conservative counterparts focus on voter competence.[197] That the canon legitimizes both concerns, however, provides some basis for hoping that an equilibrium would emerge in which liberal and conservative judges honor one another's concerns in cases that implicate the canon.

In his Reply to this Article, Hasen argues that his Canon has an important manageability advantage over the effective accountability alternative: it is simple and easy to apply.[198] A judge applying the Democracy Canon need only figure out which interpretation of the statute renders the plaintiff-citizen eligible to vote or her ballot eligible to be counted or the plaintiff-candidate eligible to appear on the ballot.[199] By contrast, a judge applying the Effective Accountability Canon must make difficult predictive judgments about the consequences of alternative interpretations for aggregate voter participation and competence.[200]

This criticism contains a kernel of truth, but it overstates the practical difficulty of implementing the Effective Accountability Canon, and it overlooks the need for predictive judgments under the Democracy Canon lest the Canon become self-defeating. Consider a suit brought by a voter who showed up at the wrong precinct, cast a provisional ballot, and now wants that ballot to be counted.[201] The "simple" Democracy Canon cuts in favor of counting this voter's ballot, yes? Only if the Canon is applied in a simple-minded fashion—without considering the dynamic consequences of vindicating the plaintiff's claim. From a dynamic perspective, requiring citizens to vote at their designated precincts may make it easier for election administrators to predict turnout at each precinct and to allocate voting personnel and machines accordingly. If so, an "anti-plaintiff-voter" interpretation of the precinct requirement may well conduce to shorter average wait-times at polling stations, and as such be "pro voter" from an aggregate and dynamic perspective. It would be odd indeed for courts to adopt a canon of construction that counsels for resolving statutory ambiguities in favor of the plaintiff-voter without considering the consequences for other voters not before the court. Once these consequences are part of the calculus, the application of Hasen's Democracy Canon requires empirically minded judging, much like applications of the Effective Accountability Canon.

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197 *Cf. supra* Part I.A (discussing ideological and political differences between liberals and conservatives concerning the distribution of the franchise and the reasonableness of barriers to voting).

198 *See* Hasen, *supra* note 92, at 1187–88.

199 *See id.* at 1187.

200 *See id.* at 1187–88.

201 *See, e.g.*, Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 568 (6th Cir. 2004).

It bears noting too that just as there are some easy cases under the Democracy Canon (for example, counting a ballot marked with an "X" when the voter was instructed to designate her choice with a checkmark),[202] so too are there easy cases under the Effective Accountability Canon. *Samson* is one example: effective accountability is not possible when one of the two major parties is unable to put a candidate on the ballot. For another, imagine a case challenging election officials' statutory authority to implement an experimental program that provides voters with ballot-based voting cues in nonpartisan elections. Given the reams of evidence showing that voters have difficulty making preference-conforming choices in nonpartisan elections,[203] and that this causes many low-income, low-education voters not to vote in nonpartisan elections,[204] any doubts about the officials' authority to establish such a program should be resolved in favor of the program.

I readily concede that many cases will arise in which the preferred interpretation from an effective accountability perspective is uncertain. Relevant data may be unavailable or unconvincing, or the underlying goals (promoting voter competence and coordination, as well as representative voter participation) may be in tension with one another in the circumstances of the case. But in my view, the proper response is to give the effective accountability norm little or no weight in these cases, rather than to use the existence of such cases as a reason not to adopt the Effective Accountability Canon.

B. The *Carrington* Canon

In addition to the effective accountability norm, there is one other constitutional norm that is presently underenforced in constitutional cases: the norm against ideological discrimination with respect to the franchise.

In 1965, when the Supreme Court was just starting to flesh out the meaning of the fundamental right to vote on equal terms with others, the Court held in *Carrington v. Rash* that "'[f]encing out' from the franchise a sector of the population because of the way they may vote is constitutionally impermissible."[205] Other cases from the late 1960s and early 1970s suggest that the Court was laboring to establish prophylactic rules against ideologically motivated burdens on the

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202 *See* Hasen, *supra* note 92, at 1173.

203 *See supra* note 179.

204 *See, e.g.*, Schaffner & Streb, *supra* note 170, at 565–78 (finding that voters with low levels of educational attainment are at a comparative disadvantage in nonpartisan elections).

205 380 U.S. 89, 94 (1965).

franchise.[206] The Court then took a thirty-plus-year break from constitutional challenges to voting requirements. When it returned to the fray, in *Crawford v. Marion County Election Board*,[207] the Court came face-to-face with a voting requirement that had been enacted on a straight party-line vote[208] and was portrayed by opponents—including the petitioners and a dissenting judge in the court below—as a "not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[209] This time around, however, the Supreme Court downplayed the motive issue. Justice John Paul Stevens's lead opinion said that the fact of a partisan-exclusionary purpose would have no bearing on the outcome of the case so long as there was some imaginable public justification for the law.[210] Put more starkly: the *Carrington* principle is now to be "enforced" in constitutional cases using a rational-basis decision rule. If the operative proposition of the Equal Protection Clause in fact protects voting-age citizens against barriers to participation that would not have been imposed but for "the way they may vote," then, following *Crawford*, it may be said that *this command* of the Equal Protection Clause is underenforced.[211]

Institutional considerations probably explain the Court's reluctance to robustly enforce the *Carrington* principle vis-à-vis highly partisan voting requirements. The Justices do not want the federal courts to referee partisan brouhahas over who has acted in bad faith with respect to core democratic values. Vindicating one side's claim of bad faith is probably more polarizing than simply holding that certain voting requirements impose burdens out of proportion to their benefits,

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206 This can be seen in (1) the Court's extreme skepticism toward arguments that one or another voting restriction was justified as a means of ensuring "intelligent" voting, a goal that the Court described as "elusive" and "susceptible of abuse," *see Dunn v. Blumstein*, 405 U.S. 330, 356 (1972); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 630–33 (1969); *Cipriano v. City of Houma*, 395 U.S. 701, 704–06 (1969); and (2) the Court's establishment of bright-line rules to distinguish permissible from impermissible restrictions, *see* Elmendorf, *supra* note 150, at 338–57.

207 553 U.S. 181 (2008).

208 *See id.* at 183–87, 202–03.

209 *See* Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008).

210 *See Crawford*, 553 U.S. at 204 ("[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.").

211 Doctrinally, this is a very plausible understanding of the operative proposition, given (1) that the Court has both said that the right to vote is individual and personal in nature, *see* Elmendorf, *supra* note 174, at 643 n.1 (reviewing the case law), and that it does not treat the right as a means of implementing the effective accountability norm, *see supra* Part III.A.2; and (2) that the Court has squarely held that citizens have a right to be free from intentional discrimination which deprives them of personal benefits (such as a job) on the basis of their political beliefs, *see Elrod v. Burns*, 427 U.S. 347, 350 (1976) (sustaining First Amendment challenge to ideological discrimination in patronage hiring).

and judges asked to rule on claims of partisan bad faith are themselves likely to defend the bona fides of their respective political parties,[212] widening the partisan gap in judicial decision making and drawing the courts' political neutrality into doubt.

In the absence of direct enforcement, canons of construction could be used to give some teeth to the *Carrington* principle. A *Carrington* Canon might hold, for example, that voting requirements enacted under conditions of unified party government should be narrowly construed.[213] Alternatively, or in addition, the courts might reverse the normal presumption of deference to administrative agencies in voting cases if the agency's governing body is partisan in structure, rather than bipartisan or neutral. Only a clear statement from the legislature would suffice to delegate interpretive authority to such an agency.

A canon-based approach to the *Carrington* principle would be somewhat less likely than direct constitutional enforcement to enmesh the courts in drawn out, potentially delegitimating conflicts over partisan bad faith. The courts would not have to impugn anyone's motives in applying the canon,[214] and conflicts could be brought to a close by a statutory response from the legislative branch.

Notice too that the *Carrington* Canon, unlike Hasen's Democracy Canon, would have little, if any, bearing on voting requirements enacted on a bipartisan basis.[215] As such, it would not work against the formation of bipartisan legislative compromises on voting reform.[216]

The case for the *Carrington* Canon is weaker, however, than the case for the Effective Accountability Canon. The former has a smaller upside because burdens on the franchise (whether ideologically motivated or not) can be struck down under the *Crawford* balancing test if

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212 *Cf.* McKenzie, *supra* note 23, 117–49 (finding, in a study of redistricting litigation, that judges are no more likely to uphold "own party" than "bipartisan" plans, but that they are more likely to strike down "opposing party" plans than either of the above); Meaders, *supra* note 23, at 47–49 (finding that judges are more likely to "vote for their party"—in cases where political parties are parties to the litigation—when the political party is the defendant rather than the plaintiff). Both of these studies suggest that judicial partisanship, as it were, is most pronounced when the judge senses that his or her party is under attack—a feeling that seems especially likely to be engendered when the party's legislators have allegedly acted in bad faith.

213 This narrow-construction principle would also be triggered if one party held a veto-proof majority in the legislative branch at the time of enactment.

214 This assumes, as the previous paragraph suggested, that the Canon would be triggered by circumstances in which partisan-exclusionary motives are likely (such as enactment of a voting requirement on a substantially party-line vote) rather than by judicial findings concerning the presence of such motives.

215 There may be rare circumstances in which the two major parties conspire to prevent an ideologically minded group of citizens from voting, but this seems unlikely given the tendency of two-party systems to result in broad, encompassing left-of-center and right-of-center parties.

216 *See supra* Part I.B.

the burden is substantial and its justification weak. If the burden is not substantial, then the individual-right deprivation may not be worth fussing over. By contrast, there is no constitutional voting-rights doctrine focused on accountability.

It would also be harder to build a transideological judicial consensus for the *Carrington* Canon than for the Effective Accountability Canon because these days Republican lawmakers are more likely than their Democratic counterparts to establish burdensome voting requirements under conditions of unified party government. Though the Effective Accountability Canon favors, *ceteris paribus*, the liberal agenda of increasing political participation by low-turnout demographic groups, it is concerned with much more than this, and conservative jurists who worry about the aggregate competence of the voting public should also be able to get behind it.

C. The Neutrality Canon

The Supreme Court has long been concerned with the appearance of judicial partiality—most especially partiality to political parties.[217] The risk of such partiality, in fact or appearance, has become an explicit part of the "manageable standards" prong of the political question doctrine,[218] and the formalism of much of the Supreme Court's constitutional election law jurisprudence is commonly attributed to the justices' anxiety about perceptions of judicial partisanship.[219]

A court that wished to guard against judicial partisanship or its appearance in statutory election cases might adhere to the following

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217 For a review of the Court's thinking in this regard (with an emphasis on election law), see Christopher S. Elmendorf, *Empirical Legitimacy and Election Law*, *in* RACE, REFORM, AND REGULATORY INSTITUTIONS, *supra* note 3 (noting that "even when the Court *says* it is applying an open-ended balancing test in election law cases, it tends to *produce* fairly crisp rules for the lower courts to apply").

218 *See* Vieth v. Jubelirer, 541 U.S. 267, 286, 301 (2004) (Scalia, J., plurality opinion) (arguing that the subjective standards proposed by the dissenters for adjudicating partisan gerrymandering claims were "unmanageable" within the meaning of the political question doctrine because judicial application of fuzzy tests in cases with high partisan stakes would bring "partisan enmity . . . upon the courts"); *id.* at 307 (Kennedy, J., concurring) (arguing that clear "rules to limit and confine judicial intervention" are necessary in partisan gerrymandering cases so that the courts do not end up "assuming political, not legal, responsibility for [the design of electoral districts] that often produces ill will and distrust"); Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1281–97 (2006) (discussing *Vieth* as part of a larger exploration of how political and legal context affects the "manageable standards" inquiry under the political question doctrine).

219 *See, e.g.*, Elmendorf, *supra* note 150, at 333–34 (discussing judicial preference for clear rules in the "electoral mechanics" cases); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1559–61 (2002) (discussing judicial preference for clear rules in vote-dilution cases under the Voting Rights Act).

rules of thumb, which I shall lump together as the Neutrality Canon. First, construe election laws to avoid finding a private right of action that could be exploited by candidates or political parties—particularly if the right would lend itself to litigation near the apex of the election cycle, when the public is tuned in. Second, convert vaguely worded statutory standards into crisp judge-made implementing doctrines, absent a very clear statement to the contrary from the legislature. Third, presume that agencies charged with the administration of elections have authority to issue rules with the force of law.[220] Fourth, in cases where a bipartisan or difference-splitting construction of the statute can be reliably identified, treat it as presumptively correct.[221]

There are some indications that the first and second rules of thumb are already recognized by the Supreme Court, though the Court has yet to label and canonize them. Just weeks before the 2008 presidential election, for example, a unanimous Court in *Brunner v. Ohio Republican Party*[222] summarily reversed a decision of the Ohio Supreme Court (which had split on party lines) holding that the state Republican Party was unlikely to prevail on the merits of its argument that HAVA creates a private right of action that would enable litigants to force the state to "match"—and release to the public—voter registration files with the database of the state's motor vehicle authority.[223] The Party no doubt sought this information for the purpose of challenging voters' eligibility on Election Day and for contesting provisional ballots afterwards (if the initial vote tally was close).

For another example, consider the Supreme Court's interpretations of the "results test" adopted by Congress in the 1982 amendments to Section 2 of the Voting Rights Act.[224] Under revised Section 2, legal liability attaches if the challenged election law "results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."[225] Congress underscored that this was not to be read as a mandate for proportional representation by race,[226] but Congress did not lay out a clear conception of what it meant by "abridgment of the right . . . to vote on account of race or

220 Recognizing this authority in the agency would allow the courts to take a back seat to the agency in the implementation of the statute because, at least under federal administrative law, the agency's reasonable statutory interpretations would take precedence over those of judges'. *See supra* note 189.

221 This might be achieved through deference to a bipartisan advisory tribunal. *See* Edward B. Foley, *Let's Not Repeat 2000: A Special Political Tribunal Could Help Resolve Election Conflicts Without Mistrust*, LEGAL TIMES, Apr. 21, 2008.

222 129 S.Ct. 5 (2008).

223 *Id.* at 6.

224 Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131 (1982).

225 42 U.S.C. § 1973(a) (2006).

226 *Id.* § 1973(b) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.").

color." The text of revised Section 2 merely instructs that courts are to inquire into the "totality of [the] circumstances," and gauge whether "the political processes leading to nomination or election . . . are not equally open to participation by members of a class of citizens [defined by race or color]" in that they "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[227]

This explanatory language was lifted from two constitutional vote-dilution cases that the Supreme Court decided in the early 1970s, *Whitcomb v. Chavis*[228] and *White v. Regester*.[229] *Whitcomb* and *Regester* are best understood as drawing a line between circumstances in which a racial minority lacks political influence because it is a numerical minority like any other and cases in which a racial minority lacks political influence either (1) because racism within the electorate, or within political party or candidate-slating organizations, makes it uniquely difficult for racial minorities to build coalitions with other voters and interest groups; and/or (2) because the lingering effects of past de jure discrimination lead racial minorities to participate (e.g., vote) in disproportionately low numbers or otherwise render the minority group substantially incapable of influencing the political process commensurate with the influence wielded by other numerical political minorities.[230] Because the text of revised Section 2 quotes directly from *Whitcomb* and *Regester*, because the text does not otherwise define a substantive conception of race-based abridgement, because the legislative history shows unequivocally that the sponsors of the Section 2 amendments wanted to reverse a recent Supreme Court decision[231] and return to the vote-dilution analysis used in *Whitcomb* and *Regester*,[232] and because the text instructs that Section 2 claims are to be resolved on the basis of the "totality of the circumstances,"[233] the fairest reading of the new "results test" is as a directive to the courts to distinguish between ordinary and extra-ordinary lack of influence for

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227 *Id.*

228 403 U.S. 124 (1971).

229 412 U.S. 755 (1973).

230 This interpretation is justified by (1) the vehemence with which the *Whitcomb* Court insisted that a total lack of representation for a distinct political minority (due to the use of multimember districts or at-large elections), without more, does not violate the Constitution, *see Whitcomb*, 403 U.S. at 149–53; and (2) the fact that the facts of *Whitcomb* and *Regester* are extremely similar but for the evidence of current intentional discrimination and lingering effects of past intentional discrimination in *Regester*, *see* 412 U.S. at 768–70, suggesting that this factor led the Court to find unconstitutional vote dilution in *Regester*.

231 Mobile v. Bolden, 446 U.S. 55 (1980).

232 For a balanced review of the legislative history, see Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

233 42 U.S.C. § 1973(b) (2006).

racial minorities (in the above-mentioned sense) using an open-ended inquiry.

But the Supreme Court has never interpreted Section 2 in this way. Liberals and conservatives alike have sought to draw reasonably clear lines that limit the scope of judicial involvement and that regularize and simplify the judicial inquiry in cases where the courts do get involved. In its first decision interpreting the new Section 2, the Supreme Court in *Thornburg v. Gingles*[234] created a threshold test that plaintiffs must satisfy (concerning racial polarization in voting and the feasibility of drawing majority-minority districts) in certain challenges to multimember districts and at-large elections.[235] Downplaying the statutory instruction concerning the "totality of circumstances," the *Gingles* plurality indicated that when plaintiffs satisfy the threshold test, they are generally entitled to a single-member district remedy.[236] A few years later, in *Johnson v. De Grandy*,[237] the Court revisited Section 2's "totality of the circumstances" language and indicated that the most important "circumstance" to consider is whether the minority group enjoys a roughly proportional number of electoral districts in which it may elect its candidates of choice.[238]

In subsequent cases, the Court has extended the *Gingles* threshold test and created new limits on the types of remedies that may be ordered in Section 2 cases. *Holder v. Hall*[239] determined that the size of a governing body (i.e., the number of elected officials) could not be challenged as dilutive under Section 2 because there exists no "objective and workable" benchmark to guide the judicial inquiry in such cases.[240] *Holder* reads like a political question decision. There is much in the opinion about objective (read, manageable) standards, or the

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234 478 U.S. 30 (1986).

235 The so-called "*Gingles* test" is as follows: (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) "the minority group must be able to show that it is politically cohesive"; and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . — usually to defeat the minority's preferred candidate." *Id.* at 50–51.

236 This was the conventional reading of *Gingles* in its immediate aftermath. For a leading contemporaneous account, see Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1850–53 (1992). For leading contemporaneous criticism, see Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24. HARV. C.R.-C.L. L. REV. 173 (1989) (explaining the incongruity of the *Gingles* framework vis-à-vis the text and legislative history of the 1982 amendments to Section 2).

237 512 U.S. 997 (1994).

238 *Id.* at 1010–21 (treating proportionality as central to the vote-dilution inquiry, while allowing—without elaboration—that "the degree of probative value assigned to proportionality may vary with other facts").

239 512 U.S. 874 (1994).

240 *Id.* at 880–81; *see also id.* at 887–90 (O'Connor, J., concurring).

lack thereof, and very little about the text of Section 2 or the congressional purposes behind it.

Some years later, in *League of United Latin American Citizens (LULAC) v. Perry*,[241] the Court held that a lack of "influence districts" cannot be the predicate for a Section 2 claim.[242] Liberal and conservatives on the Court converged on this result, with liberals emphasizing manageability and conservatives suggesting that Section 2 might be unconstitutional for "unnecessarily infuse[ing] race into virtually every redistricting" unless its scope were limited in this way.[243] Manageability and constitutional avoidance concerns also carried the day in *Bartlett v. Strickland*,[244] where the Court held that the "compact, majority-minority district" prong of the *Gingles* threshold test is to be read literally rather than functionally.[245] Notwithstanding Section 2's command to evaluate the "results" of challenged electoral structures on minority political participation, taking account of the "totality of circumstances," the Court per Justice Kennedy held that minority voters who had the potential to elect their candidate of choice in a single-member district without dominating it numerically could not bring a Section 2 claim.[246] The Court "f[ound] support" for its textually implausible majority-minority requirement "in the need for workable standards and sound judicial and legislative administration."[247]

The decisions in *Gingles*, *Holder*, *LULAC*, and *Bartlett* substantially circumscribe the reach of Section 2 in ways that have nothing to do with the distinction apparently made by Congress (between the "ordinary" shortage of influence suffered by any numerical political minority under a highly majoritarian electoral system and the "special" lack of influence suffered by racial minorities who face current discrimination in the political process or suffer the lingering effects of past de jure discrimination). And each of these decisions may be seen as institutionally helpful to the judiciary, given the intense partisan stakes of

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241 548 U.S. 399 (2006).

242 *Id.* at 443–47. An influence district is one where the minority population is numerous enough to wield some influence, but not enough to reliably elect its candidate of choice. The definition comes from *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003).

243 *Compare League*, 548 U.S. at 445–46 (Kennedy, J., joined by Roberts, C.J. and Alito, J., plurality opinion) (raising constitutional avoidance concerns), *with id.* at 485–86 (Souter, J., joined by Ginsburg, J., dissenting) ("To have a *clear-edged rule*, I would hold it sufficient satisfaction of the first gatekeeping condition to show that minority voters in a reconstituted or putative district constitute a majority of those voting in the primary of the dominant party, that is, the party tending to win in the general election." (emphasis added)).

244 129 S.Ct. 1231 (2009).

245 *See id.* at 1239, 1245–46.

246 *See id.* at 1247–49.

247 *Id.* at 1244. It further added that "[t]o the extent there is any doubt whether § 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause." *Id.* at 1247.

vote-dilution claims (which typically concern the design of legislative districts and rules for translating votes into seats) and the ever-fraught politics of race. The Court's constructions of Section 2 have operated to limit the sheer number of colorable potential claims, to reduce the scope for subjective judicial judgments in merits determinations, and to curtail judicial discretion at the remedy stage.

That said, although the Section 2 cases suggest an implicit "democracy canon" concerned with the appearance of judicial neutrality, one must be careful not to read too much into them. The Supreme Court's limiting constructions of Section 2 are clearly informed as well by the conservative bloc's antipathy to effects-based civil rights law. And in one prominent recent case under Section 5 of the Voting Rights Act, the conservative bloc adopted an open-ended and arguably "unmanageable" test that gave the states more leeway not to draw majority-minority districts.[248] The most one can say with confidence is that political-question-like manageability concerns are part of the story of the Section 2 cases.

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I have said little about normative justifications for the Neutrality Canon. One might suppose that the case for this canon rests on the same normative foundations as the prudential strand of the political question doctrine. If it is a good thing for the courts to be able to issue decisions that the general public treats as authoritative, then just as the courts will sometimes be justified in declining to pass on the merits of a politically sensitive constitutional case, so too may they be justified in departing from the best reading of a legally authoritative text when doing so helps to preserve the courts' reputation in the public eye.[249]

It is worth observing that use of the Neutrality Canon in statutory cases might also be defended as a means of *freeing* the courts to take greater risks in constitutional cases. It is not far-fetched to think that Article III courts should use statutory election cases to build political capital and constitutional cases to expend it (construing the political question and related prudential doctrines narrowly). The judiciary's most important job, the argument goes, is to decide constitutional cases correctly and in a manner that the public believes to be legiti-

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248 *See* Georgia v. Ashcroft, 539 U.S. 461, 479–85 (2003). The dissenting Justices launched a forceful "manageability" critique of the standard propounded by the majority opinion. *See id.* at 495–97 (Souter, J., dissenting).

249 *Cf.* Baker v. Carr, 369 U.S. 186, 267 (1960) (Frankfurter, J., dissenting) (arguing that the Court's judicial authority "ultimately rests on sustained public confidence in [the Court's] moral sanction," which "must be nourished by the [Supreme] Court's complete detachment, in fact and in appearance, from political entanglements").

mate. This is a higher priority than reaching the right result in statutory cases because if the courts do a bad job in some domain of statutory interpretation, the legislature can respond by setting up a specialized agency or statutory court to give effect to the legislature's purposes in that domain. If the courts do a bad job in constitutional cases, a suitable legislative fix is less likely to be forthcoming, either because the court's decision precludes it or because the Constitution's purposes are at odds with the legislature's.[250] It is therefore appropriate for courts to construe ambiguous election statutes with an eye to minimizing the likelihood that the courts will be called upon to resolve high-profile, high-stakes *statutory* election cases under conditions that present a significant risk of discrediting appearances of judicial partisanship, even if this comes at some cost to the statute's purposes.

CONCLUSION

Professor Hasen dubs the Democracy Canon the "Rodney Dangerfield" of canons, complaining that it gets no respect.[251] His terrific article shows that the Canon deserves attention as well as respect. Though he does not succeed in making the normative case for adoption of the Canon in jurisdictions that do not presently recognize it (most prominently, the federal courts), Hasen has nonetheless performed a great service in bringing the Canon to the attention of legal academics and election law practitioners. In this Article, I have sought to advance the ball a little further by explaining the limitations of Hasen's normative defense of the Canon, by highlighting likely costs of Canon usage that Hasen undersells or overlooks, and by outlining some alternative models for a democracy canon. One of these alternatives, the Neutrality Canon, already has some traction in the federal courts, though it has yet to be formally recognized. Another, the Effective Accountability Canon, would partially enforce Article IV's guarantee of republican government, which is at once the Constitution's most significant democratic commitment and one which has long been treated as nonjusticiable in constitutional cases.

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250 It is of course a basic premise of our constitutional order that the legislature cannot be trusted to respect the outer limits on its constitutionally conferred authority absent judicial enforcement.

251 Hasen, *supra* note 1, at 75.