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“THE DEMOCRACY CANON”

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THE DEMOCRACY CANON

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INTRODUCTION

*Are your honors of a mind now
 That we all be left behind now?
 That we all can have no ticket,
 Having been caught in legal thicket,
 And are lost in legal brambles,
 While the train we want to get on
 Rolls out straight for Armageddon?*

— “A [deservedly] obscure rhymester, whose verses will be remembered when Virgil is forgotten—and not till then”¹

In the heat of the 2008 election season—following the new tradition of the 2000 and 2004 elections²—candidates, political parties, and others filed new lawsuits practically every day over election law issues. The issues ranged from candidate ballot access³ to the allocation of voting machines by precinct⁴ to the accuracy of state voter registration databases.⁵ In mid-September 2008,

1. Nance v. Kearbey, 158 S.W. 629, 630 (Mo. 1913) (original emphasis and original bracketed material).

2. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 958 (2005) [hereinafter Hasen, *Beyond the Margin*]; Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 28-29 (2007) [hereinafter Hasen, *Untimely Death*].

3. See *In re* Substitute Nomination Certificate of Barr, 956 A.2d 1083 (Pa. Commw. Ct. 2008), *aff'd*, 958 A.2d 1045 (Pa. 2008); see also Ben Adler, *Nader, Barr Muscle onto the Nov. Ballots*, POLITICO, Sept. 19, 2008, <http://www.politico.com/news/stories/0908/13595.html> (“On Monday [Libertarian presidential candidate Bob] Barr defeated a court challenge from a Republican Party official in Pennsylvania who argued that the Libertarian Party had improperly substituted Barr’s name for another candidate’s who had been submitted earlier. It was the only state where Republicans have challenged him.”).

4. Complaint at 3, Va. State Conference of NAACP v. Kaine, No. 2:08CV508 (E.D. Va. Oct. 28, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/virginianaacpv.kaine.php>. The case was voluntarily dismissed after the election.

5. The case over the Ohio Secretary of State’s refusal to produce a list of mismatches

two Ohio controversies garnered national attention. In one case, Republicans filed suit to block first-time Ohio voters from registering to vote and casting an early in-person absentee ballot at the same time during an apparent five-day statutory overlap between the dates for voter registration and for early voting.⁶ In another case, Republicans sued the Democratic Ohio Secretary of State, Jennifer Brunner, for her refusal to accept absentee ballot requests submitted by voters who filled out a form sent to them by the McCain campaign unless the voter had checked a box confirming the voter was qualified to vote. The box, mistakenly added by the McCain campaign, was not required under Ohio law.⁷

My initial reaction to the lawsuits—before I had chance to examine the relevant Ohio statutes—was that Republicans should lose the first case and win the second. That is, I entered into the statutory analysis with a *thumb on the scale in favor of voter enfranchisement*, which could be overcome only by clear statutory language to the contrary or strong competing policy reasons. Eventually, the Ohio Supreme Court, relying on such a canon of construction favoring voters, indeed sided with the voters in both cases.⁸

This “Democracy Canon” of statutory construction, as I call it, has long and broad support in state courts, from cases in the 1800s through those decided in the 2008 election season. But it has been ignored by Legislation and Election Law scholars and appears to have no independent vitality in federal courts. Its origins trace back to at least 1885. In that year, the Supreme Court of Texas declared in *Owens v. State ex rel. Jennett* that “[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor.”⁹ The *Owens* court rejected an argument by one of the candidates in an election contest that ballots marked with information such as the name and address of the president and vice-president or the counties in which presidential electors resided should not be counted because they violated a state statute barring the counting of ballots containing pictures, signs,

between state voter registration databases and the statewide motor vehicle database went all the way to the United States Supreme Court a few days before Election Day. The Court held that the Ohio Republican Party could not sue the secretary for her alleged failure to follow a provision of the Help America Vote Act regarding database mismatches because the party was unlikely to be able to prove that the statute created a private right of action. *Brunner v. Ohio Republican Party*, 129 S. Ct. 5 (2008).

6. *State ex rel. Colvin v. Brunner*, 896 N.E.2d 979 (Ohio 2008). There was also a federal case, and the federal district court abstained from ruling on the issue following the Ohio state ruling. See *Ohio Republican Party v. Brunner*, No. 2:08-cv-00913 (S.D. Ohio Sept. 29, 2008), available at <http://moritzlaw.osu.edu/electionlaw/litigation/documents/ORP-Order2-9-29-08.pdf>.

7. *State ex rel. Myles v. Brunner*, 899 N.E.2d 120 (Ohio 2008).

8. See *infra* notes 45-48 and accompanying text. By “canon,” I mean an interpretive rule adopted by courts as a guide toward interpreting statutes. I am not using “canon” in the different sense to connote a body of cases that should be considered a representative core of a concept. On the latter meaning, see Richard H. Pildes, *Democracy, Anti-Democracy, and the Canon*, 17 CONST. COMMENT. 295 (2000).

9. *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at *7 (1885).

vignettes, stamp marks, or devices.¹⁰

Since *Owens*, the Democracy Canon has been applied primarily in three contexts: *vote counting cases*, in which someone relies upon the Canon to argue, following an election, for the counting of ballots that have not been counted because of minor voter error, election official error, or a disputed reading of a relevant statute; *voter eligibility/registration cases*, in which someone relies upon the Canon to argue, before an election, that a voter or certain group of voters who have been told they cannot vote should be allowed to cast a ballot that will be counted even though election officials have determined they cannot register or vote because of minor voter error, election official error, or a disputed reading of a relevant statute; and *candidate/party competitiveness cases*, in which a candidate or political party relies upon the Canon (and particularly upon the voters' right to vote in a competitive election) to argue, before an election, that a certain candidate or party should be allowed 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. Vote counting cases are the most prevalent type of cases relying on the Democracy Canon, but the Canon has been deployed in all three kinds of cases across a number of states over more than a century.

Despite its pedigree, controversy has surrounded the Democracy Canon, or at least surrounded the results of the Canon's application in some recent high-profile election law cases. In *New Jersey Democratic Party v. Samson*,¹¹ a unanimous New Jersey Supreme Court relied on the Democracy Canon to allow Democrats to replace the name of U.S. Senator Robert Torricelli on the general election ballot shortly before he was up for reelection to the Senate. The relevant New Jersey statute contained rules for the party to replace withdrawn candidates on the ballot when the withdrawal occurred at least fifty-one days before the election, but Torricelli, facing an ethics scandal, withdrew fewer than fifty-one days prior.

In *Palm Beach County Canvassing Board v. Harris*,¹² the Florida Supreme Court relied on the Democracy Canon to, among other things, extend the time for a manual recount of votes during the election protest brought by Al Gore against George Bush in the Florida 2000 presidential election. Bush appealed the decision to extend the time for the protest to the United States Supreme Court, which remanded the case for further proceedings to determine whether the Florida court's reliance on the Canon, embodied in the Florida constitution, violated Article II of the United States Constitution.¹³ The issue reemerged in

10. *Id.*

11. 814 A.2d 1028 (N.J. 2002).

12. 772 So. 2d 1220 (Fla. 2000).

13. As discussed in Part IV below, those proceedings were later mooted by the second U.S. Supreme Court decision on the Florida controversy, *Bush v. Gore*, 531 U.S. 98 (2000).

Bush v. Gore,¹⁴ when three concurring Justices determined that the Florida Supreme Court's interpretation of Florida election statutes in light of the Democracy Canon "impermissibly distorted [the statutes] beyond what a fair reading required, in violation of Article II."¹⁵

This Article defends the Democracy Canon and argues for its expansion to statutory interpretation cases in federal courts, or at least its acceptance in federal courts as a legitimate tool of statutory interpretation by state courts. This Article nonetheless recognizes that the Canon's use raises some dangers of exacerbating the actuality and appearance of the politicization of the judiciary and, in some cases, some knotty federalism questions. It suggests that state legislatures, rather than federal courts, are the institutional actors best situated to rein in potential state court overreaching.

Part I briefly traces the history of the Democracy Canon in state and federal courts. It explains that state courts have applied the Canon either as a tie-breaker or as a clear statement rule, and discusses a now-declining split in the courts over the Canon's application to absentee ballot statutes. It also considers the Canon's reach to the three types of cases described above. Part I concludes by noting the Canon's potential importance given the explosion of election law litigation, especially in state courts, since 2000. As my empirical analysis shows, the lion's share of state court election litigation raises issues of statutory interpretation.

Part II defends the Democracy Canon. It argues that many of the arguments against the use of substantive canons¹⁶ generally do not apply against the Democracy Canon. Moreover, the Canon serves two important purposes. First, as with some other substantive canons, the Democracy Canon can help protect an *underenforced constitutional norm*. In this case, the Canon protects constitutional equal protection rights in voting, rights which courts for various reasons have declined to protect directly through constitutional litigation. Second, the Democracy Canon is a *preference-eliciting* mechanism. A clear statement rule requires the legislature to take affirmative steps to express its intent to limit voter enfranchisement only when justified by other important interests. Part II concludes by arguing that both state and federal courts should rely on the Canon, despite the different institutional contexts.

Part III explores the politicization issue arising from use of the Democracy Canon through a closer examination of the New Jersey Supreme Court's *Samson* opinion. It contrasts the New Jersey Supreme Court's use of the Democracy Canon in *Samson* with the U.S. Supreme Court's use of a federalism canon in *Gregory v. Ashcroft*.¹⁷ Relying on a federalism canon, the *Gregory* Court refused to read the Age Discrimination in Employment Act as

14. 531 U.S. 98 (2000).

15. *Id.* at 115 (Rehnquist, C.J., concurring, joined by Scalia & Thomas, JJ.).

16. On the definition of substantive canons, along with various critiques, see *infra* Part II.

17. 501 U.S. 452 (1991).

trumping a Missouri state constitutional provision requiring state judges to retire at age 70. Both cases employed a substantive canon—and in particular a super-strong clear statement rule—to reach an interpretation that was not necessarily in line with the most natural reading of the statute under consideration but one, that is defensible on policy grounds, assuming acceptance of the underlying policy.

Part III uses *Samson* to illustrate that the use of canons in election law cases is bound to be more controversial and highly salient than their use in garden-variety statutory interpretation cases such as *Gregory*. Substantive canons may be employed regularly as a tool of statutory interpretation, but the public does not generally pay attention to, much less understand, the prevalence of their use. In the context of a hot-button election law case, a court's use of a substantive canon may appear illegitimate and result-oriented. Moreover, because of the political stakes, judges may subconsciously rely on the Canon in ways consistent with their political preferences. For this latter problem, this Article suggests that judges be sensitive to the problem, but not abandon the Democracy Canon. State legislatures, through the passing of clear rules, are best positioned *ex ante* to avoid judicial overreaching.

Finally, Part IV of this Article examines constitutional questions arising when a *federal* court is asked to overturn a *state* court's use of the Democracy Canon. When a state court construes a state statute on a question in a federal election (as in *Samson* or *Palm Beach County Canvassing Board*) it runs the risk of violating either Article II of the U.S. Constitution (vesting in each state *legislature* the power to set the rules for choosing presidential electors) or Article I, section 4 (vesting in each state *legislature* the power to set the rules for choosing members of Congress, at least to the extent Congress has not set such rules). In *Palm Beach County Canvassing Board*, the Court left open the issue whether broad interpretations of state statutes involving presidential elections could violate Article II, a point embraced by three concurring Justices in *Bush v. Gore*. The concurring Justices relied upon their own narrow views of proper interpretation to see a constitutional problem. Contrary to the position of the *Bush v. Gore* concurring Justices, this Article contends that use of the Democracy Canon to construe state statutes dealing with presidential or congressional elections does not violate Article II or Article I, section 4. Instead, the long-standing nature of the Democracy Canon and the values it supports give state courts ample authority to construe state election statutes covering federal elections in light of the Canon. Only when a state court relies upon the Canon in a way that counters longstanding practice should a federal court consider intervening in a state court election case on constitutional (likely due process) grounds. For the most part, concerns about overreaching should be addressed *ex ante* by the legislature: a state legislature concerned about state court application of the Democracy Canon in the context of federal elections can use clear statements to negate its application, as the *Samson* court illustrated in its opinion.

I. A BRIEF HISTORY OF THE DEMOCRACY CANON, ITS VARIATIONS, AND ITS LIKELY ROLE IN FUTURE ELECTION LAW DISPUTES

A. *A Brief History of the Democracy Canon*

The Democracy Canon is the Rodney Dangerfield of canons.¹⁸ Because of its use primarily in state courts rather than federal courts (and given the federal-centric nature of legislation courses), it is not on the Eskridge, Frickey, and Garrett list of the over two hundred canons employed by the Roberts and Rehnquist Courts.¹⁹ It did not make Llewellyn's list of canons and counter-canons,²⁰ nor did it make Eskridge's and Sunstein's aspirational lists of normative canons promoting public values.²¹ Nor is the Canon discussed in

18. That is, it "don't get no respect." RODNEY DANGERFIELD, *I DON'T GET NO RESPECT* (BMG Special Products 2001) (1980).

19. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* app. B at 39 (4th ed. 2007). The only election-law-related canon on the list is that the "Voting Rights Act should be interpreted in light of its core purpose of preventing race discrimination in voting and fostering a transformation of America into a society no longer fixated on race." *Id.* (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 339, 434 (2006); *Georgia v. Ashcroft*, 539 U.S. 461, 490 (2003)).

20. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About how Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401-06 (1950). Llewellyn actually does cite one of the germinal American cases recognizing the Democracy Canon, *Bowers v. Smith*, 20 S.W. 101 (Mo. 1892), but for a different canon of construction. Llewellyn, *supra*, at 402 & n.10 (citing *Bowers* for the "parry" that reliance on a foreign court's construction of a foreign statute "may be rejected where there is conflict with the obvious meaning of the statute or where the foreign decisions are unsatisfactory in reasoning or where the foreign interpretation is not in harmony with the spirit or policy of the laws of the adopting state"). *Bowers* rejected out-of-state authority construing laws similar to Missouri's regulating the "Australian" (or secret) ballot. 20 S.W. at 104. Michael Sinclair, reviewing Llewellyn's reliance on *Bowers*, notes *Bowers* "began with a statement of general policy in election cases, a very principled democratic policy, worthy perhaps of being called a canon." Michael Sinclair, "Only a Sith Thinks Like That": Llewellyn's "Dueling Canons," *One to Seven*, 50 N.Y.L. SCH. L. REV. 919, 964 (2005). Sinclair does not delve further into the Democracy Canon. The Democracy Canon also makes a cameo appearance in Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 966 (2006) (discussing the Canon and noting that in dealing with election statutes "state courts sometimes explicitly recognize that the legislature is operating within the area of constitutional values and, at least partly for that reason, become assertive in adjudicating election law cases").

21. William N. Eskridge, Jr., *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007, 1095-1104 (1989); Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405, 506-08 (1989). Eskridge discerns a pattern of interpretation in the Supreme Court, at least in an earlier era, applying the canon that "[s]tatutes affecting certain discrete and insular minorities—'Carolene groups'—shall be interpreted, where possible, for the benefit of those minorities." Eskridge, *supra*, at 1032. Similarly, Sunstein advocates for "[a]ggressive construction of ambiguous statutes designed to protect disadvantaged groups [to provide] a way for courts to protect the constitutional norm of equal protection in a less intrusive manner" than through constitutional adjudication. Sunstein, *supra*, at 473. *But see* ESKRIDGE ET AL., *supra* note 19, at 948-50 (noting either "no

any detail in the Election Law casebooks.²²

Nonetheless, the Canon has had long and consistent acceptance in state courts heretofore unnoticed by legislation scholars. The rule announced in 1885 by the Supreme Court of Texas in *Owens v. State ex rel. Jennett*, that “[a]ll statutes tending to limit the citizen in his exercise of [the right of suffrage] should be liberally construed in his favor,”²³ is often cited and has been followed by courts throughout the United States.²⁴ Interpretations of statutes in favor of a broad right to vote continued to be prevalent throughout the twentieth century,²⁵ and many of the same themes have carried through into modern cases,²⁶ with cases as recent as the 2008 election season relying on the

explicit support” or “implicit rejection” of a “Disadvantaged Groups” canon by the Rehnquist and Roberts Courts). There is some overlap between the proposed *Carolene* Groups Canon and the Democracy Canon, as discussed below in Part II. *Carolene* refers to the famous footnote four of *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

22. The latest edition of the Lowenstein, Hasen, and Tokaji casebook has a discussion of the *Samson* case in the context of “strict enforcement versus substantial compliance” of ballot measure requirements. DANIEL H. LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 398-99 (4th ed. 2008). The discussion does not cover the Canon explicitly. See also *id.* at 283 (mentioning the *Palm Beach County Canvassing Board* controversy). The latest edition of the Issacharoff, Karlan, and Pildes casebook briefly discusses the *Samson* case in the context of qualifications clause issues. It notes that despite the statutory language of the New Jersey statute, “[t]he New Jersey Supreme Court nonetheless held that because election laws should be construed ‘to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly, to allow the voters a choice on Election Day,’ the Democratic Party should be permitted to nominate a substitute and the state should be required to place the substitute’s name, on the general election ballot.” SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 948 (3d ed. 2007) (quoting *N.J. Democratic Party, Inc. v. Samson*, 814 A.2d 1028, 1036 (N.J. 2002)). Both casebooks contrast *Samson* with a recent questionable case in which the Fifth Circuit held that Texas law, read in light of the Constitution’s qualifications clause, barred Republicans from replacing Congressman Tom DeLay on the ballot in 2006, *Texas Democratic Party v. Benkiser*, 459 F.3d 582 (5th Cir. 2006). See ISSACHAROFF ET AL., *supra*, at 947-48; LOWENSTEIN ET AL., *supra*, at 399-400.

23. *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at *7 (1885).

24. See, e.g., *Montgomery v. Henry*, 39 So. 507, 508 (Ala. 1905); *State ex rel. Carpenter v. Barber*, 198 So. 49, 51 (Fla. 1940); *State ex rel. Law v. Saxon*, 12 So. 218, 224 (Fla. 1892); *Barr v. Cardell*, 155 N.W. 312, 314 (Iowa 1915); *Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky. 1955); *Silberstein v. Prince*, 149 N.W. 653, 654 (Minn. 1914); *Carson v. Kalisch*, 99 A. 199, 202 (N.J. 1916). These principles are sometimes stated in terms of accepting “substantial compliance” with election laws rather than strict compliance, or that election laws are “directory” (or advisory) only rather than mandatory.

25. *Mitchell v. Kinney*, 5 So. 2d 788, 792 (Ala. 1942); *Simpson v. Osborn*, 34 P. 747, 749 (Kan. 1893); *White v. Sanderson*, 76 N.W. 1021, 1022 (Minn. 1898); *Bowers v. Smith*, 20 S.W. 101, 103 (Mo. 1892); *Stackpole v. Hallahan*, 40 P. 80, 84 (Mont. 1895).

26. *Mo. Prot. & Advocacy Servs. v. Carnahan*, 499 F.3d 803, 806 (8th Cir. 2007) (applying Missouri law and relying on *Nance v. Kearbey*, 158 S.W. 629 (Mo. 1913)); *Carr v. Thomas*, 586 P.2d 622, 626 n.11 (Alaska 1978); *In re Nomination of Flaherty*, 770 A.2d 327, 331 (Pa. 2001).

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Canon.²⁷

The Canon's stated purposes usually are described in terms of its role in fostering democracy. Its purpose is "to give effect to the will of the majority and to prevent the disfranchisement of legal voters"²⁸ The canon plays a role in "favoring free and competitive elections"²⁹ It recognizes that the right to vote "is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state."³⁰ Liberal construction of election laws serves "to allow the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow voters a choice on Election Day."³¹

Here is a brief sampling of cases relying on the Canon from the nineteenth century to the present.³²

In the 1892 case of *State ex rel. Law v. Saxon*, the Supreme Court of Florida, following *Owens*, refused to disqualify ballots that contained writings on them such as "Free Suffrage Ticket," despite a state law barring the counting of ballots with "ornaments, designation, mutilation, symbol, or mark of any kind whatsoever, except the name or names of the person or persons voted for, and the office to which such person or persons are intended to be chosen"³³ The court declared:

It is . . . not to be lost sight of that a ballot will never be vitiated by anything which is not clearly within the prohibiting words and meaning of the statute. The elector should not be deprived of his vote through mere inference, but only upon the clear expression of the law.³⁴

The court refused to rely upon cases from other jurisdictions reading similar statutes strictly, finding that "in [our state] there is much more room for construction."³⁵

In 1914, the Supreme Court of Minnesota considered a challenge to some votes cast on ballots for the mayor of Duluth. On the same ballot, voters were asked to vote for city commissioners. For the commissioner race, the ballot employed an "anti-single shot" provision,³⁶ requiring voters to vote for a first

27. See *infra* notes 45-48.

28. *Montgomery*, 39 So. 507, 508 (Ala. 1905).

29. *State ex rel. White v. Franklin County Bd. of Elections*, 598 N.E.2d 1152, 1154 (Ohio 1992).

30. *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 905-06 (Ohio 1948).

31. *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991).

32. A separate controversial canon holds that legislation adopted by direct democracy deserves special deference. This topic, beyond the scope of this paper, receives careful treatment in Philip P. Frickey, *Interpretation on the Borderline: Constitution, Canons, Direct Democracy*, 1 J. LEGIS. & PUB. POL'Y 105, 122 (1997).

33. 12 So. 218, 218 (Fla. 1892).

34. *Id.* at 224.

35. *Id.* at 226.

36. On the use of such provisions in the context of racial discrimination in the South,

choice for as many candidates for commissioners as there were commissioners to be elected. The relevant election law declared that all ballots “shall be void” if they did not contain the requisite number of commissioner votes. The state Supreme Court rejected the argument that ballots not containing the requisite number of *commissioner* votes could not count for *mayor* either:

[I]t is a rule of universal application that all statutes tending to limit the citizen in the exercise of his right of suffrage must be construed liberally in his favor. Hence a literal and isolated reading of the vitiating words, upon which alone, if at all, contestant's position is tenable, cannot be adopted unless there is no other recourse³⁷

Thus, in this case, the Canon trumped the plain language of the statute declaring that those counted ballots “shall be void” and the votes for mayor were counted.

In a 1955 Kentucky case, *Queenan v. Mimms*, a minor political party, in the reasonable but mistaken belief that there were twelve open offices on a city council, submitted the names of twelve candidates to run for the offices. In fact, there were only six open offices. The minor party tried to withdraw the names of six of the twelve candidates, and the Court of Appeals of Kentucky held it could do so, despite a law stating that petitions naming more than one candidate for each open office were void. The court concluded that “the remaining six should be recognized” as candidates because of the “fundamental principle that the courts will construe election statutes liberally in favor of the citizens whose right to choose their public officers is challenged.”³⁸

In a 1978 case, the Supreme Court of Alaska held it was proper to count ballots cast by challenged voters who voted using punch card ballots, despite the fact that the relevant Alaska statute required challenged voters to vote using a “paper ballot.”³⁹ The court relied upon a particularly strong form of the Democracy Canon in reaching this result: “Courts are reluctant to permit a wholesale disfranchisement of qualified electors through no fault of their own, and [w]here any reasonable construction of the statute can be found which will avoid such a result, the courts should and will favor it.”⁴⁰ It announced a super-strong clear statement rule applicable “[i]n the absence of fraud”:⁴¹

The right of the citizen to cast his ballot and thus participate in the selection of those who control his government is one of the fundamental prerogatives of

see Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990, at 23-24 (Chandler Davidson & Bernard Grofman eds., 1994).

37. *Silberstein v. Prince*, 149 N.W. 653, 654 (Minn. 1914) (citation omitted).

38. *Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky. 1955).

39. *Carr v. Thomas*, 586 P.2d 622, 624 (Alaska 1978). Though punch card ballots “are constructed of paper, so that literally they are ‘paper ballots,’” *id.*, the argument was not frivolous: the Alaska Voter Handbook distinguished between paper ballots and punch card ballots. *Id.* at 625 n.8.

40. *Id.* at 626 (quoting *Reese v. Dempsey*, 153 P.2d 127, 132 (N.M. 1944)).

41. *Id.* at 626 n.11.

citizenship and should not be impaired or destroyed by strained statutory constructions. If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms.⁴²

The Democracy Canon has retained its vitality into the new century. In *Palm Beach County Canvassing Board v. Harris*,⁴³ discussed more fully in Part IV below, the Florida Supreme Court relied upon the Canon to extend the time for Al Gore to get the results of manual recounts of ballots during the disputed 2000 presidential election. In *New Jersey Democratic Party v. Samson*,⁴⁴ discussed more fully in Part III below, the New Jersey Supreme Court relied upon the Canon to allow Democrats to name a replacement for withdrawn Senator Robert Torricelli facing reelection.

Finally, in the two 2008 Ohio cases described in the Introduction, the Supreme Court of Ohio relied upon the Democracy Canon to side with voters. In *State ex rel. Colvin v. Brunner*,⁴⁵ the court relied upon the Democracy Canon and other tools of interpretation, including deference to the Secretary of State's interpretation of the relevant statute, to conclude that a voter need only be registered for thirty days before an election to be a qualified elector, and need not be registered for thirty days before applying for, receiving, or completing an absentee ballot.⁴⁶ In *State ex rel. Myles v. Brunner*,⁴⁷ the state high court rejected the Secretary of State's interpretation of absentee ballot application statutes as "unreasonable," and concluded that voters need not check an unnecessary box before their absentee ballot applications could be accepted by elections officials. The court held its decision was "consistent with 'our duty to liberally construe election laws in favor of the right to vote.'"⁴⁸

Though the Democracy Canon is usually the result of judicial declaration, it sometimes appears explicitly as a legislatively drafted rule of interpretation. For example, a provision of the Kansas statutes governing rules for regulating elections and voting provides that "[t]he provisions of this act shall be construed liberally for the purpose of effectuating its purposes."⁴⁹ Some state

42. *Id.* at 626-27.

43. 772 So. 2d 1220, 1237 (Fla. 2000).

44. 814 A.2d 1028, 1036 (N.J. 2002).

45. 896 N.E.2d 979 (Ohio 2008).

46. *Id.* at 992 ("[T]he secretary of state's construction is consistent with our duty to liberally construe election laws in favor of the right to vote.").

47. 899 N.E.2d 120 (Ohio 2008).

48. *Id.* at 124 (quoting *Colvin*, 896 N.E.2d at 992).

49. KAN. STAT. ANN. § 25-439 (2008); *see also* COLO. REV. STAT. § 1-1-103(1) (2008) ("This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections."); IOWA CODE § 48A.1 (1999) ("It is the intent of the general assembly to facilitate the registration of eligible residents of this state through the widespread availability of voter registration services. This chapter and other statutes relating to voter registration are to be liberally construed toward this end."); *id.* § 48A.5A(7) ("Residence requirements shall be construed liberally to provide homeless persons with the

statutes provide more specifically for liberal construction of laws affecting absentee voters,⁵⁰ military voters,⁵¹ or voters using provisional ballots.⁵²

Though the state courts have relied heavily on the Democracy Canon for well over a century, it has been cited much more rarely in federal courts. Federal courts have relied upon the Canon when they have been called upon to construe *state* election laws, and the relevant state courts have adopted a policy of liberal construction of their laws. For example, in the 2007 case, *Missouri Protection and Advocacy Services, Inc. v. Carnahan*,⁵³ the United States Court of Appeals for the Eighth Circuit considered a constitutional challenge to a Missouri law that disqualifies persons under court-ordered guardianship from voting. Before reaching the constitutional question whether the law violated the Equal Protection Clause of the Fourteenth Amendment, the court first had to consider the reach of the Missouri statute. The court concluded that the

opportunity to register to vote and to vote.”); NEB. REV. STAT. § 32-102 (2008) (“The Election Act shall apply to all elections held in the state unless otherwise specifically provided. The act shall be liberally construed so that the will of the registered voters is not defeated by an informality or a failure to comply with the act with respect to the giving of any notice or the conducting of any election or the certifying of the results of the election.”); S.D. CODIFIED LAWS § 12-6-64 (2009) (“The laws of this state pertaining to primary elections shall be liberally construed so that the real will of the voters may not be defeated by a mere technicality.”); UTAH CODE ANN. § 20A-9-401(1) (1953) (“This part shall be construed liberally so as to ensure full opportunity for persons to become candidates and for voters to express their choice.”) (applying to primary elections); VT. STAT. ANN. tit. 17, § 1821 (2009) (“The provisions of this chapter shall be liberally construed so that the real will of the voters shall not be defeated and so that the voters shall not be deprived of their right because of informality or failure to comply with provisions of law as to notice or conduct of the election or of certifying the results thereof.”); WIS. STAT. § 5.01(1) (2008) (“Except as otherwise provided, chs. 5 to 12 shall be construed to give effect to the will of the electors, if that can be ascertained from the proceedings, notwithstanding informality or failure to fully comply with some of their provisions.”).

50. See, e.g., CAL. ELEC. CODE § 3000 (West 2007) (requiring that code provisions on vote by mail voting “shall be liberally construed in favor of the vote by mail voter”); MASS. GEN. LAWS ANN. ch. 54, § 103Q (West 2009) (“No mere informality in the manner or carrying out any provision of law affecting voting by absent voting ballot at an election shall invalidate such election or constitute sufficient cause for the rejection of the returns thereof, and such provisions shall be construed liberally to effectuate their purposes.”); cf. R.I. GEN. LAWS § 17-20-34 (1956) (“This chapter shall be construed liberally to effect the purposes of maintaining the integrity and the secrecy of the mail ballot by assuring that only electors eligible to vote by mail ballot are allowed to utilize that method of voting, by assuring that the procedures set forth in this chapter controlling the application and balloting processes are strictly enforced, and by safeguarding the mail ballot voter from harassment, intimidation, and invasion of privacy.”).

51. See, e.g., IOWA CODE § 53.51 (1999) (“This division shall be liberally construed in order to provide means and opportunity for qualified voters of the state of Iowa serving in the armed forces of the United States to vote.”); N.Y. ELEC. LAW § 10-126 (McKinney 2009) (“The provisions of this article shall be liberally construed for the purpose of providing military voters the opportunity to vote.”).

52. See, e.g., CAL. ELEC. CODE § 14312 (West 2009) (“This article shall be liberally construed in favor of the provisional voter.”).

53. 499 F.3d 803, 806 (8th Cir. 2007).

Missouri law did not disqualify from voting any adult besides those who had been “adjudged incapacitated.” Reading the statute to restrict the voting rights of more individuals “would conflict with well-established principles [including the principle] that Missouri’s election laws ‘must be liberally construed in aid of the right of suffrage[.]’”⁵⁴ Other federal cases have employed the Canon similarly in construing state election laws.⁵⁵

But the Canon does not appear to have independent force in federal courts construing *federal* election statutes. Indeed, aside from the canon that the “Voting Rights Act should be interpreted in light of its core purpose of preventing race discrimination in voting and fostering a transformation of America into a society no longer fixated on race,”⁵⁶ I have not discovered any federal cases considering whether federal laws governing the casting and counting of ballots—such as the Help America Vote Act (“HAVA”),⁵⁷ the National Voter Registration Act (“NVRA”),⁵⁸ or the Uniformed and Overseas Citizens Absentee Voting Act (“UOCAVA”)⁵⁹—should be liberally construed in favor of the rights of voters. The omission is interesting because both the NVRA and UOCAVA include aspirational language recognizing the fundamental right to vote and have that vote counted. The NVRA includes the following findings:

The Congress finds that—

- (1) the right of citizens of the United States to vote is a fundamental right;
- (2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and

54. *Id.* at 806 (quoting *Nance v. Kearbey*, 158 S.W. 629, 631 (Mo. 1913)). The court held that the provision, as narrowly construed, did not violate the equal protection rights of the plaintiffs. *Id.* at 808-09.

55. *See, e.g.*, *Koehler v. Davidson*, No. 04-CV-01377, 2006 U.S. Dist. LEXIS 74328, at *4-5 (D. Colo. Oct. 12, 2006) (noting earlier unpublished federal district court case construing Colorado statute in light of Colorado liberal construction rule codified in COLO. REV. STAT. § 1-1-103(1) (2008)); *cf.* *Afran v. McGreevey*, 115 Fed. App’x 539, 545-46 (3d Cir. 2004) (refusing to apply New Jersey liberal construction canon to interpretation of state constitution in context of request to hold special gubernatorial election).

56. *ESKRIDGE ET AL.*, *supra* note 19; *see also* *Jeffers v. Clinton*, 730 F. Supp. 196, 204 (E.D. Ark. 1989) (three-judge court) (Arnold, J.) (finding that section 2 of the Voting Rights Act “should be construed liberally in favor of its object, which is to open up the electoral process to full participation”). A portion of the Voting Rights Act has very broad language that might be used to expand the Democracy Canon in federal courts. *See* 42 U.S.C. § 1971(a)(2)(B) (2006) (“No person acting under color of state law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.”); *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005) (finding a Georgia requirement that voting registrants disclose Social Security number before voting violated materiality provision of Voting Rights Act), *aff’d*, 439 F.3d 1285 (11th Cir. 2006).

57. Pub. L. No. 107-252, 116 Stat. 1666 (2002) (codified as amended in scattered sections of 42 U.S.C.).

58. 42 U.S.C. §§ 1973gg to 1973gg-10.

59. *Id.* §§ 1973ff to 1973ff-6.

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities.⁶⁰

Similarly, a 2001 amendment to UOCAVA includes the following “Sense of Congress:”

(a) Sense of Congress.—It is the sense of Congress that each person who is an administrator of a Federal, State, or local election—

(1) should be aware of the importance of the ability of each uniformed services voter to exercise the right to vote; and

(2) should perform that person’s duties as an election administrator with the intent to ensure that—

(A) each uniformed services voter receives the utmost consideration and cooperation when voting;

(B) each valid ballot cast by such a voter is duly counted; and

(C) all eligible American voters, regardless of race, ethnicity, disability, the language they speak, or the resources of the community in which they live, should have an equal opportunity to cast a vote and to have that vote counted.⁶¹

The Canon likely has not yet gained independent vitality in federal courts for two reasons. First, since the founding of the Republic, there has been much more state law rather than federal law governing the nuts and bolts of voting and registration thanks to the decentralized nature of elections in this country.⁶² Thus, federal courts until recently simply have not had the same opportunities to construe election administration statutes as states courts; there has not been much federal statutory election administration law to construe. Federal courts have certainly been active in election law cases, especially since the 1960s. But these have been primarily constitutional cases, not statutory cases involving the interpretation of federal statutes governing the nuts and bolts of election administration.

Second, the Canon has not spread to federal courts because Legislation courses and treatises tend to focus on canons in federal courts. As the

60. 42 U.S.C. § 1973gg. The statute also lists the following purposes:

(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;

(2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;

(3) to protect the integrity of the electoral process; and

(4) to ensure that accurate and current voter registration rolls are maintained.

42 U.S.C. § 1973gg(b).

60. Pub. L. No. 107-107, div. A, tit. XVI, § 1601, 115 Stat. 1274 (2001). Interestingly, there are no such findings in HAVA, which was passed as part of a political compromise and has been deeply contentious in the courts ever since. On HAVA generally, see Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424 (2004).

62. ALEC EWALD, *THE WAY WE VOTE: THE LOCAL DIMENSION OF AMERICAN SUFFRAGE* 3 (2009).

December 2009]

THE DEMOCRACY CANON

83

Democracy Canon's widespread and longstanding use in state courts becomes more widely known in the legislation and election law fields, federal courts are more likely to adopt it.

B. *The Scope of the Democracy Canon and Variations on Its Use*

Though the Canon's use in state courts is longstanding and broad, there is some variation in (1) the scope and reach of the Canon; (2) the strength of the Canon; (3) and when it is triggered. I briefly describe each of these in turn.

1. *The scope and reach of the Canon*

Though there is no question that courts since 1885 have applied a canon of liberally construing some election laws, it is more difficult to define concisely the scope and reach of the Canon. The Canon often is phrased in terms of statutes concerning the "right of suffrage" or the "right to vote," but it has not been applied across all election law cases, such as to campaign finance cases or vote dilution cases. Instead, the cases applying the Canon fall mostly into three categories, with the large plurality of cases (especially the earliest cases) falling into the first category:

a. *Vote counting cases*

In these cases, such as *Owens*,⁶³ someone relies upon the Canon to argue, following an election, for the counting of ballots that have not been counted because of minor voter error, election official error, or a disputed reading of a relevant statute or set of statutes.

b. *Voter eligibility/registration cases*

In these cases, such as *Myles*,⁶⁴ someone relies upon the Canon to argue, before an election, that a voter or certain group of voters who have been told they cannot vote should be allowed to cast a ballot that will be counted even though election officials have determined 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.

63. *Owens v. State ex rel. Jennett*, 64 Tex. 500, 1885 WL 7221, at *7 (Tex. Oct. 20, 1885).

64. *State ex rel. Myles v. Brunner*, 899 N.E.2d 120, 124 (Ohio 2008). In *Myles*, the question was less urgent. Under the Republican argument, these voters could still vote, but they would have to vote thirty days after they registered to vote.

c. *Candidate/party competitiveness cases*

In these cases, such as *Queenan*,⁶⁵ a candidate or political party relies upon the Canon (and particularly on the voters' right to vote in a competitive election) to argue, before an election, that a certain candidate should be allowed 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.⁶⁶

Taken together, these applications show the Canon historically has been relied upon for two principal purposes: (1) to expand opportunities for registered voters to vote and have their votes counted (voter access and enfranchisement); and, to a lesser extent, (2) to promote competitive elections by including more candidates or parties on the ballot (electoral competitiveness).

I located no cases in which courts have relied upon (or considered relying upon) the Democracy Canon to *limit* those who could register to vote or vote, or to limit candidates or parties on the ballot in the name of fraud prevention, prevention of vote dilution, promotion of orderly elections, or some other ostensible state purposes.⁶⁷ Though the "access vs. integrity" debate certainly plays out in current election law cases,⁶⁸ historically the Canon was not deployed (and still has not been deployed) in any way to limit the counting of votes.

The Canon's reach is subject to two important limitations. First, courts will not apply the Canon when there are serious allegations of *fraud*. Indeed, courts often go out of their way to make the point that the case it is considering does not involve fraud. For example, a 1910 New York election contest case, *Fallon v. Dwyer*,⁶⁹ concerned the counting of some disputed ballots that would affect the outcome of a local election. The statute required voters to mark choices for office with two "crossed" and "straight" lines. The court held that disputed

65. *Queenan v. Mimms*, 283 S.W.2d 380, 382 (Ky. 1955) (citing *Greene v. Slusher*, 190 S.W.2d 29, 32 (Ky. 1945)); see also *People ex rel. Dickerson v. Williamson*, 56 N.E. 1127, 1129 (Ill. 1900) (relying on the Canon to read state ballot access statute in a way to make it easier for candidates of qualified political parties to remain on the ballot).

66. For a recent example, see *Anchorage v. Mjos*, 179 P.3d 941, 943 n.1 (Alaska 2008) (relying on the Canon in concluding that term limits statutes should be interpreted to allow those serving partial terms to run for an additional term of office).

67. The closest case I could find is a 1932 Arkansas case in which a losing candidate sought to challenge an election on grounds that some voters were ineligible because they failed to pay a poll tax. The state supreme court relied upon the "rule of liberal construction applied to primary election laws in this state" to hold that the candidate's time to file his contest had not expired. *Nelson v. Parrish*, 53 S.W.2d 985, 986 (Ark. 1932). The case did not hold that the Canon required the exclusion of votes of those voters who did not pay a poll tax.

68. See the discussion in Hasen, *Untimely Death*, *supra* note 2.

69. 90 N.E. 942 (N.Y. 1910).

ballots must be counted when they have been marked by voters who did not draw lines perfectly straight. The court declared that votes should be counted when ballots were marked with

a tremulous line drawn by an infirm elector, or an irregular or curved line drawn by an elector with poor eyesight or with muscles untrained to the use of a pencil, or any single line but once crossing another single line in such a way as to substantially comply with the statute (even if it is somewhat hooked at the end, or the line has been retraced, and the pencil has not been kept exactly on the line at parts removed from the point where the lines cross)⁷⁰

The court emphasized that “[c]ounsel for the parties in open court stated that there is no claim on this appeal that the disputed ballots were marked by the voters with fraudulent intent.”⁷¹

Second, in those cases involving voter error or candidate/party error, courts tend to limit the reach of the statute to cases involving *minor* errors (what the courts often term “substantial compliance” with the relevant statute).⁷² For example, a court in a state with a voter registration requirement is not going to count the vote of an eligible voter who had an opportunity to register to vote but who declined to do so.⁷³ No court will consider failure to attempt to register to vote to be a “minor” defect allowing the non-registered voter to cast a vote that would be counted.

This second limitation necessarily involves the exercise of judicial judgment. An error that appears minor to one judge can appear more serious to another judge. One tool courts sometimes employ to decide whether a defect is minor enough to constitute “substantial compliance” is to examine the relationship between the voter error and the purpose of the statutory requirement. For example, in *Saxon*, the Florida Supreme Court held that election officials should accept for counting ballots marked by voters with the names of political parties, despite a statutory prohibition on counting ballots containing any “mark” or other such information. The court stated that the purpose of the statute was “to protect the voter against having the nature of his vote detected, before his ballot went into the box, through its color, or some distinguishing mark thereon, by other persons, who might be seeking to control him through intimidation or otherwise”⁷⁴ It held that ballots containing

70. *Id.* at 943.

71. *Id.*; see also *Wilbourn v. Hobson*, 608 So. 2d 1187, 1193 (Miss. 1992) (“If the integrity of a ballot is unquestioned, there is no good reason to disenfranchise a voter for some technical aberration beyond his control. . . . Of course, if there had been even a hint of unseemliness associated with the ballots at issue, then even a technical irregularity might have rendered them void.”).

72. The requirement that the error be minor does not apply to errors of election officials. Indeed, the greater the errors of election officials, the more likely courts seem to be willing to construe a statute in favor of enfranchisement.

73. *Cf. Buckner v. Lynip*, 41 P. 762, 765 (Nev. 1895) (“For instance, a law for the registration of voters, to be effectual, must provide that one not registered shall not vote”).

74. *State ex rel. Law v. Saxon*, 12 So. 218, 224-25 (Fla. 1892).

information on the ballot that would not “distinguish the ticket from others cast at the election” should be counted as substantially complying with the statute.⁷⁵

In recent years, courts have expanded the reach of the Canon. In earlier years, some courts held that the Democracy Canon does not apply to laws regulating absentee ballots, on grounds that absentee voting is a privilege rather than a right,⁷⁶ or that strict compliance with absentee ballot laws are necessary to prevent fraud.⁷⁷ The modern majority trend holds that the Canon applies to cases involving absentee ballot laws.⁷⁸ A recent counterexample is Minnesota, where the state supreme court recently rejected a “substantial compliance” standard for absentee ballots in the Coleman-Franken U.S. Senate election contest, stating that the proper treatment of ballots deviating from statutory absentee ballot requirements “is a policy determination for the legislature, not this court, to make.”⁷⁹

75. *Id.* at 225.

76. *Bell v. Gannaway*, 227 N.W.2d 797, 802 (Minn. 1975) (“Since the privilege of absentee voting is granted by the legislature, the legislature may mandate the conditions and procedures for such voting.” (citing *Wichelmann v. Glencoe*, 273 N.W. 638, 640 (Minn. 1937))).

77. *See, e.g., In re Baker*, 213 N.Y.S. 524, 528 (Sup. Ct. 1925) (“This absentee vote statute is in derogation of the general Election Law and should be strictly construed. Its provisions should be rigidly adhered to; otherwise the repeater, floater, and nonresident are given a free hand to gain results satisfactory to themselves. There are no presumptions or inferences in its favor.”).

78. *Adkins v. Huckabay*, 755 So. 2d 206, 216 (La. 2000) (“The majority of states . . . have concluded that absentee voting laws should be liberally construed in aid of the right to vote.”); M.C. Dransfeld, *Construction and Effect of Absentee Voters’ Laws*, 97 A.L.R.2d 257 § 5b (1964 and 2009 Supp.) (“In most jurisdictions absentee voting laws have been liberally construed so as to further their evident purpose of protecting and furthering the right of suffrage.”). As the Colorado Supreme Court explained:

We believe the time has come to interpret absentee voting legislation in light of the realities of modern life and the fundamental character of the right of suffrage. We live in a society which, to a great extent, depends upon mobility as an indispensable condition of progress. Many persons for legitimate reasons cannot be physically present at a polling place to cast their ballots on the day of election. These electors, no less than in-person voters, should be able to present their views on issues of public importance without being encumbered by an unyielding standard of statutory exactitude. Moreover, the right to vote is a fundamental right of the first order. Absentee voting legislation should not be construed in a manner that unduly interferes with the exercise of this right by those otherwise qualified to vote. Nor should the exercise of the voting right be conditioned upon compliance with a degree of precision that in many cases may be a source of more confusion than enlightenment to interested voters. A rule of strict compliance, especially in the absence of any showing of fraud, undue influence, or intentional wrongdoing, results in the needless disenfranchisement of absent voters for unintended and insubstantial irregularities without any demonstrable social benefit.

Erickson v. Blair, 670 P.2d 749, 754-55 (Colo. 1983) (citations omitted); *see also Adkins*, 755 So. 2d at 218 (“The weaknesses in strict compliance, however, are too unforgiving, attendant with harsh consequences. More often than not, electors would be unreasonably disenfranchised necessitating setting aside elections more frequently for the slightest good-faith error.”).

79. *In re Contest of Gen. Election Held on Nov. 4, 2008, for the Purpose of Electing a*

2. Canon strength

For some courts, such as the Ohio Supreme Court in its recent election law opinions,⁸⁰ the Democracy Canon functions as a “rule of thumb,”⁸¹ part of a “checklist” for a court to consider in construing an election law.⁸² For other courts, the Canon constitutes a clear-statement rule, requiring the legislature to speak clearly before a court will construe a statute contrary to the Canon. Some courts even view the Canon as a “super-strong clear statement rule.”⁸³ the Alaska Supreme Court appears to have gone the furthest, holding that the Democracy Canon applies to laws governing the right to vote unless the legislature indicates to the contrary in “clear and unmistakable terms.”⁸⁴

Many courts recognize that the Canon sometimes conflicts with other canons or interpretive principles. For example, the Canon may conflict with a rule of deference to the reasonable interpretation of the official charged with interpreting election laws.⁸⁵ Courts in construing election law statutes also must consider “important state interests, including orderly electoral processes”⁸⁶ and fraud prevention.⁸⁷ Perhaps most importantly in the case of federal elections, the Canon may conflict with federalism principles, an issue considered in Part IV below. In short, courts vary on how much weight to give to the Canon compared to other interpretive tools and policies.

3. Is the Canon triggered only by ambiguous statutes?

Some courts hold that the Canon does not come into play when the words of a statute are unambiguous,⁸⁸ but other courts do not appear to follow this

U.S. Senator from Minn., 767 N.W.2d 453, 462 n.11 (Minn. 2009).

80. See *supra* notes 45-48 and accompanying text.

81. See *Varity Corp. v. Howe*, 516 U.S. 489, 511 (1996) (describing canons of construction as “simply rules of thumb” (citing *Conn. Nat’l Bank v. Germain*, 503 U. S. 249, 253 (1992))).

82. See *ESKRIDGE ET AL.*, *supra* note 19, at 947 (“Perhaps the least ambitious defense of the canons is to posit that they are just a checklist of things to think about when approaching a statute.”).

83. Cf. *id.* at 934-35. Eskridge et al. describe the Supreme Court’s federalism canon in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), discussed in Part III below, as using a “super-strong clear statement rule.”

84. *Carr v. Thomas*, 586 P.2d 622, 627 (Alaska 1978) (quoting *Sanchez v. Bravo*, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)); see also *Montgomery v. Henry*, 39 So. 507, 508 (Ala. 1905) (“The courts, in order to give effect to the will of the majority and to prevent the disfranchisement of legal voters have uniformly held those provisions to be formal and directory merely which are not essential to a fair election, unless such provisions are declared to be essential by the statute itself.” (emphasis added)).

85. *State ex rel. Herman v. Klopfleisch*, 651 N.E.2d 995, 999 (Ohio 1995).

86. *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991).

87. *Carr*, 586 P.2d at 626 n.11.

88. See, e.g., *State ex rel. Brady v. Blackwell*, 857 N.E.2d 1181, 1189 (Ohio 2006) (O’Donnell, J., concurring) (stating that the liberal construction rule does not apply when

rule.

For example, in *Bowers v. Smith*, the Supreme Court of Missouri in 1892 held that election officials had to count votes cast for the sheriff of the city of Pettis even though the ballots, through a fault of the county clerk, incorrectly included some ineligible candidates' names.⁸⁹ Despite the fact that the relevant election law stated that ballots not complying with the rules "shall not be . . . counted,"⁹⁰ the *Bowers* majority, relying on the Democracy Canon, held they should be counted: "[The contrary] construction of a law as would permit the disfranchisement of large bodies of voters, because of an error of a single official, should never be adopted where the language in question is fairly susceptible of any other."⁹¹

Only eight years later, however, the Supreme Court of Missouri in *McKay v. Minner* expressly overruled *Bowers* on grounds that the *Bowers* court erred in reaching an interpretation that went against the plain meaning (what the court termed "the very teeth") of the relevant statute.⁹² The court did not discuss the Democracy Canon per se, but the *McKay* ruling implied that the Canon had no force in the face of an unambiguous statute.

By 1913, however, in *Nance v. Kearbey*⁹³ (the case providing the opening quotation for this Article), the Supreme Court of Missouri reaffirmed the Democracy Canon's vitality and resuscitated *Bowers*, noting that the case "has been cited with approval and followed by more courts of last resort than any other election case ever decided by this court, and the credit reflected on the distinguished jurist who then spoke for the court is shared by the court itself."⁹⁴ The upshot of these Missouri cases appears to be that the Democracy Canon is alive and well in Missouri, but it remains unclear whether the Canon may apply to construe an unambiguous statute.

statutory provisions are "patent and unambiguous").

89. 20 S.W. 101, 104 (Mo. 1892).

90. *Id.* at 109-10 (Gantt, J., dissenting) (quoting section 4772 of state elections code).

91. *Id.* at 103.

92. *McKay v. Minner*, 55 S.W. 866, 868 (Mo. 1900).

93. 158 S.W. 629, 631 (Mo. 1913).

94. *Id.* at 633.

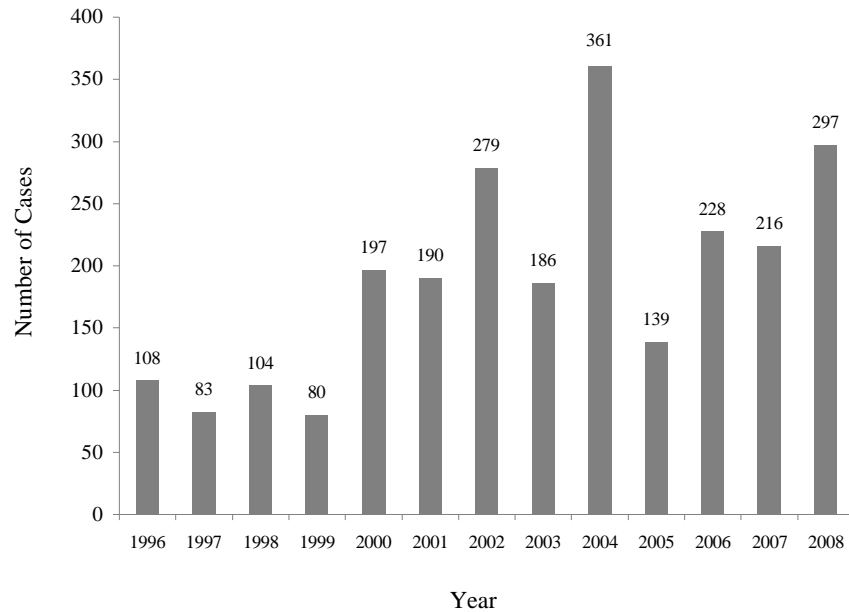


Figure 1: Election Challenge Cases by Year, 1996-2008

C. The Potential Importance of the Canon Given the Post-2000 Rise in Election Law Litigation

Before turning to a normative defense of the Canon, and a discussion of political and federalism issues surrounding its use, it is worth putting the debate over the Canon's application in perspective. Election law problems that existed in 1885 continue to exist today: clerks err in producing the format of the ballot; voters make mistakes in how ballots are cast; and legislatures continue to write election laws leaving holes and ambiguities that raise questions in litigation over whose votes should count, who is entitled to vote, and which candidates may be on the ballot. The difference between the past and now is that the stakes are much bigger, as election law has become more of a political strategy for candidates and parties seeking political advantage,⁹⁵ and as the rise of the Internet and especially the blogosphere has put every controversial judicial decision under a public microscope.

95. See generally Hasen, *Beyond the Margin*, *supra* note 2.

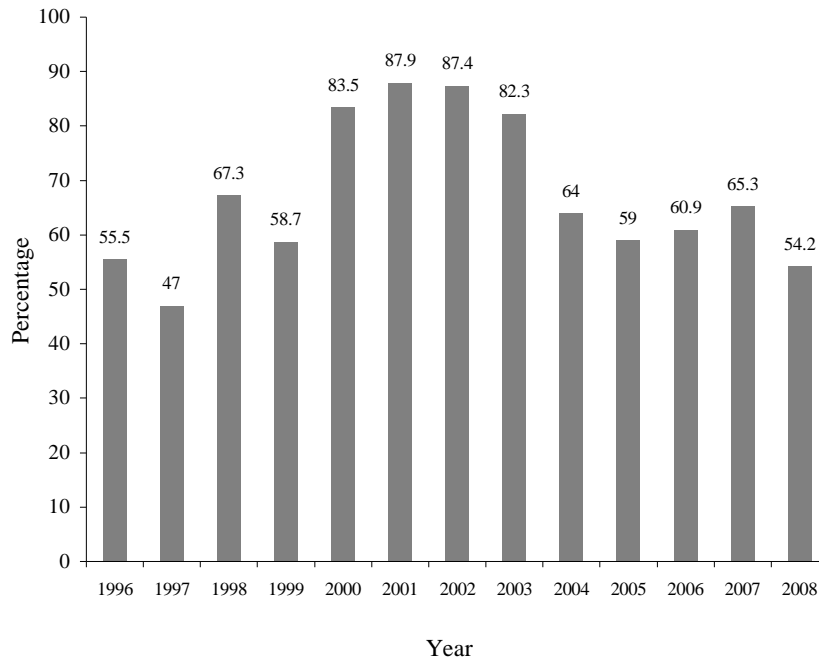


Figure 2: Percentage of Election Challenge Cases in State Courts, 1996-2008

Following up on some of my earlier work, I have updated the statistics regarding the amount of election litigation in the courts.⁹⁶ In the pre-2000 period, state and federal courts handled an average of about 94 election cases per year. In the 2000-2008 period, that number has more than doubled to an average of 237 election cases per year.⁹⁷ See Figure 1.

96. As with my last counts, this count is based upon a Lexis search of state and federal court databases using a year restriction and “election w/p challenge,” then culling out cases that are obviously inapplicable. *See id.* at 958; Hasen, *Untimely Death*, *supra* note 2, at 28 n.140. The cases cited and described are in an Excel spreadsheet posted at <http://electionlawblog.org/archives/Election%20Litigation%20Cases.xls>.

97. If it is any consolation for those hoping for a decline in the amount of election law litigation, the 2008 number, 297 cases, did not beat the 2004 number, 361 cases. *See* Figure 1.

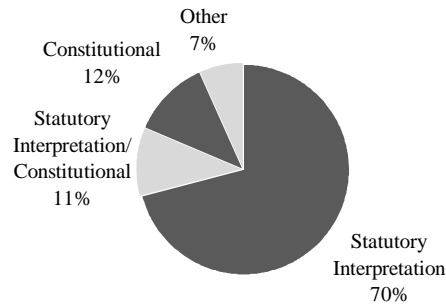


Figure 3: 2008 Election Challenge Cases in State Courts by Type of Case

Figure 1 includes both state and federal court cases, and all kinds of election law cases (not just election administration cases). As noted, the Democracy Canon has been applied mostly in state courts in state election administration cases. Most of the election cases in federal courts have not concerned election administration but instead involve election law issues such as campaign financing and voting rights. Given this Article's focus on the Canon, it is useful to consider the percentage of election cases heard in state courts. As Figure 2 shows, state court cases have made up a majority of election challenge cases heard in the courts in every year but one in the last twelve years. In the period of the early 2000s, over 80% of the election challenge cases were heard in state courts. The figure has dropped somewhat, standing at 54% of cases in 2008. See Figure 2.

Finally, *within* the class of state election law cases (including both election administration cases and other election law cases), statutory interpretation questions arise in the vast majority of cases. In 2008, for example, over 81% of cases involved either statutory interpretation questions (70.8%) or a mix of statutory and constitutional issues (10.6%).⁹⁸ See Figure 3.

Thus, the data in this Subpart show that the stakes are high over whether state courts should continue to apply the Democracy Canon and whether federal courts should begin to apply it in cases under HAVA, UOCAVA, NVRA, and future federal election administration statutes. The next Part argues in favor of its continued and expanded application.

98. A list of cases in each category is posted at <http://electionlawblog.org/archives/2008-state-demcanon.doc>.

II. DEFENDING THE DEMOCRACY CANON

A. *The Democracy Canon and General Criticisms of Substantive Canons*

This Part moves from description to prescription, offering a defense of the Democracy Canon. The Democracy Canon is a “substantive canon.” Substantive canons “are generally meant to reflect a judicially preferred policy position. . . . [They] reflect judicially-based concerns, grounded in the courts’ understanding of how to treat statutory text with reference to judicially perceived constitutional priorities, pre-enactment common law practices, or specific statutorily based policies.”⁹⁹ Among the most important substantive canons are the rule of lenity (a “rule against applying punitive sanctions if there is ambiguity as to underlying criminal liability or criminal penalty”¹⁰⁰); the avoidance canon (courts should “avoid interpretations that would render a statute unconstitutional *or* that would raise serious constitutional difficulties”¹⁰¹); and a host of “federalism” canons protecting state sovereignty against congressional intrusion.¹⁰²

Substantive canons stand in contrast to language canons, which consist of predictive guidelines as to what the legislature likely meant based on its choice of certain words rather than others, or its grammatical configuration of those words in a given sentence, or the relationship between those words and text found in other parts of the same statute or in similar statutes.¹⁰³

One of the most important language canons, discussed in Part III below, is the *expressio unius* canon: “expression of one thing suggests the exclusion of others.”¹⁰⁴

Substantive canons are quite controversial.¹⁰⁵ Eskridge and Frickey have defended them as part of an “interpretive regime” serving rule of law and

99. James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 13 (2005) (emphasis omitted).

100. ESKRIDGE ET AL., *supra* note 19, app. B at 32.

101. *Id.* at app. B at 29. On the canon generally, see Philip P. Frickey, *Getting from Joe to Gene (McCarthy): The Avoidance Canon, Legal Process Theory, and Narrowing Statutory Interpretation in the Early Warren Court*, 93 CAL. L. REV. 397 (2005). On the question of whether the executive branch should apply the avoidance canon in interpreting statutes, see Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006). On the inconsistent use of the avoidance canon by the Roberts Court, see Richard L. Hasen, *Constitutional Avoidance and Anti-Avoidance at the Roberts Court*, 2009 SUP. CT. REV. (forthcoming 2010), draft available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1436669.

102. ESKRIDGE ET AL., *supra* note 19, app. B at 30-32; see also *infra* Parts III, IV.

103. Brudney & Ditslear, *supra* note 99, at 12.

104. ESKRIDGE ET AL., *supra* note 19, app. B at 19.

105. See *id.* at 945 (describing “intellectual warfare” over the canons). This is true even of newly discovered canons. See Anita S. Krishnakumar, *The Hidden Legacy of Holy Trinity Church: The Unique National Institution Canon*, 51 WM. & MARY L. REV. (forthcoming 2009).

coordination functions.¹⁰⁶ That is, substantive canons can act as gap-filling devices that provide clarity for the law and allow courts to signal policy preferences to legislatures, who may draft around such preferences when desired.¹⁰⁷ Eskridge further defends them as a means for enforcing public values found in “the Constitution, in other statutes, or in the common law.”¹⁰⁸

It is not my intention here to provide a general defense of substantive canons. Instead, I argue that if *any* substantive canons are going to be used by the courts—and Anglo-American courts have accepted *some* substantive canons as legitimate for at least 400 years¹⁰⁹—the Democracy Canon should be. As I explain, the Canon serves important public purposes and some of the general criticisms of substantive canons do not apply to the Democracy Canon. This Subpart notes the main general criticisms of substantive canons and points out, where applicable, why the Democracy Canon is not subject to some of these criticisms. The next Subpart makes two affirmative arguments in favor of the continued use and expansion to federal courts of the Democracy Canon.

Justice Scalia, one of the most prominent critics of substantive canons, nicely states the oft-heard main objections. He argues against substantive canons, which he characterizes as “the use of certain presumptions and rules of construction that load the dice for or against a particular result.”¹¹⁰ Calling substantive canons “a lot of trouble” to “the honest textualist,”¹¹¹ Justice Scalia describes them as indeterminate,¹¹² leading to “unpredictability, if not arbitrariness” of judicial decisions. He also questions “where the courts get the authority to impose them,”¹¹³ doubting whether courts can “really just decree that we will interpret the laws that Congress passes to mean less or more than what they fairly say[.]”¹¹⁴

Justice Scalia surely is right that substantive canons “load the dice” or constitute a “thumb on the scale” as courts engage in statutory interpretation. And if courts were writing on a clean slate, it might be that the best course would be to recognize no substantive canons. But courts have long used substantive rules to color their interpretations of statutes, and few lawmakers in Congress or state legislatures appear to have questioned courts’ legitimacy in doing so as a general matter. Indeed, even Justice Scalia recognizes the validity of some traditional substantive canons. Discussing the avoidance canon, he

106. William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term, Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 66 (1994).

107. *Id.* at 66-69.

108. Eskridge, *supra* note 21, at 1018.

109. Brudney & Ditslear, *supra* note 99, at 8.

110. ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 27 (Amy Gutmann ed., 1997).

111. *Id.* at 28.

112. *Id.* (“[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight.”).

113. *Id.* at 29.

114. *Id.*

argues, without elaboration, that “constitutional doubt may validly be used to affect the interpretation of an ambiguous statute.”¹¹⁵ Concerning the rule of lenity, he “suppose[s] that [it] is validated by sheer antiquity” given that the canon “is almost as old as the common law itself.”¹¹⁶ (On this basis, the long-standing Democracy Canon also should fare quite well.) He also defends the clear statement rule for finding congressional abrogation of state sovereign immunity and for finding congressional waiver of its own immunity as “merely an exaggerated statement of what normal, no-thumb-on-the-scales interpretation would produce anyway.”¹¹⁷ In this context, he appears to view use of the federalism canons as a kind of harmless error. These views might explain why Justice Scalia has chosen to concur in a fair number of Supreme Court cases relying on substantive canons.¹¹⁸

In the end, despite his rhetoric Justice Scalia seems less disturbed by the use of substantive canons generally than by the use of *particular* substantive canons. He takes aim at canons that seem to him to be especially indeterminate or unwise, such as the rule that statutes in derogation of the common law should be strictly construed,¹¹⁹ and that “remedial statutes” should be liberally construed to achieve their purposes.¹²⁰

The fair question, given the ubiquity of substantive canons today, is whether a *particular* substantive canon is justified on strong policy grounds. More precisely, as Trevor Morrison argues, “the deployment of any particular canon should come only after careful consideration of the values it is meant to serve, as well as the fit between those values and the context of the interpretation.”¹²¹ Acceptance or rejection of the Democracy Canon, then, should be done on its own terms, regardless of criticism that might well apply to other substantive canons. The next Subpart offers compelling reasons for accepting the Canon.

The indeterminacy point about substantive canons is a more serious objection.¹²² In a path-breaking study, James Brudney and Corey Ditslear

115. *Id.* at 20 n.22.

116. *Id.* at 29.

117. *Id.*

118. According to the study by Brudney & Ditslear, *supra* note 99, at 50, Justice Scalia did not rely upon substantive canons in any of his written opinions on workplace law from 1989-2003. “Justice Scalia, however, does regularly join majority opinions that rely on the substantive canons, and he has not distanced himself from such reasoning in separate concurrence as he has often done with respect to legislative history reliance by the majority.” *Id.* at 51 n.180. He also has written opinions outside the context of workplace law relying on the avoidance canon. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

119. SCALIA, *supra* note 110, at 29.

120. *Id.* at 28. Justice Scalia laid out his attack on this particular canon in Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581-86 (1990). He notes that there is not even general agreement over what a “remedial statute” is. *Id.* at 583-84.

121. Morrison, *supra* note 101, at 1192 n.9.

122. William Popkin offers two reasons for the indeterminacy of the application of

examined more than six hundred Supreme Court cases on workplace law from 1969 to 2003 to see how the Supreme Court used language and substantive canons in opinions. They “discovered little evidence to support legal process scholars’ claims that the canons serve as consistent or predictable guides to statutory meaning.”¹²³ To the contrary, the authors found that majority opinions relying on language canons were met with dissents similarly relying on language canons, and majority opinions relying on substantive canons challenged by dissenting opinions similarly relying on substantive canons. “Such results suggest that the Justices themselves are inclined to disagree about the clarity or predictability of canon-based reasoning.”¹²⁴

Even worse, the authors found evidence that the canons were used “in an instrumental if not ideologically conscious manner.” Their empirical study found “that canon usage by Justices identified as liberals tends to be linked to liberal outcomes, and canon reliance by conservative Justices to be associated with conservative outcomes.”¹²⁵ Moreover, “[d]octrinal analysis of illustrative [workplace law] decisions indicates that conservative members of the Rehnquist Court are using the canons in such contested cases to ignore—and thereby undermine—the demonstrable legislative preferences of Congress.”¹²⁶ Other scholars have similarly argued that the canons are “a façade, useful to support decisions that reflect judicial policy preferences notwithstanding a different congressional intent.”¹²⁷

Given this evidence of indeterminacy, how can reliance on the Democracy Canon be justified? As discussed in Parts III and IV below, there is a danger that the Canon’s use can be politicized by the courts, leading to indeterminate results. However, in the event politicization and indeterminacy become problems, legislatures have tools to rein in the courts.

substantive canons. “First, the interaction of the canons with both the statute’s text and purpose varies too widely to provide much certainty. . . . Second, the canons cannot provide sufficient certainty in application because their weight varies over time.” WILLIAM D. POPKIN, *STATUTES IN COURT: THE HISTORY AND THEORY OF STATUTORY INTERPRETATION* 201 (1999); see also EINER ELHAUGE, *STATUTORY DEFAULT RULES: HOW TO INTERPRET UNCLEAR LEGISLATION* 2 (2008) (“[T]here appear to be no consistently followed rules about which canons to invoke in particular cases.”); Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 HARV. L. REV. 593, 653 (1994) (“Under the traditional approach, judges have the ‘power’ to choose between competing, reasonable interpretations of a statute, and to choose from among a long list of canons of construction that often embody highly contestable normative choices.”).

123. Brudney & Ditslear, *supra* note 99, at 6.

124. *Id.* at 6-7.

125. *Id.* at 6.

126. *Id.*

127. *Id.* at 10. Brudney and Ditslear cite Stephen F. Ross, *Where Have You Gone, Karl Lewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 562 (1992); Edward L. Rubin, *Modern Statutes, Loose Canons, and the Limits of Practical Reason: A Response to Farber and Ross*, 45 VAND. L. REV. 579, 590 (1992); and David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 958-59 (1992).

In sum, though the Democracy Canon could not survive a successful argument against *all* substantive canons on grounds they are indeterminate “dice loading” rules, that argument is outside the realm of the real world of adjudication in which substantive canons are routinely used by courts. Given the reality that courts have used and are likely to continue to use substantive canons for the foreseeable future, the question is how the Canon fares compared to other substantive canons. I turn to examine this question in more detail.

Before proceeding, I want to make clear that I am *not* arguing that the Democracy Canon should always trump other canons of construction or policy concerns. For example, in particular cases the Canon might be trumped by issues such as “fairness to candidates, avoiding voter confusion, efficiency in preparing and distributing ballots, and prevention of last-minute manipulation.”¹²⁸ Nor am I taking a position on whether the Canon should be deployed through a clear statement rule rather than as part of a “presumption” or something on the “checklist.” My argument is more modest: it is that the Democracy Canon deserves application in appropriate cases, and that courts that rely on the Canon should be seen as engaging in a legitimate act of statutory interpretation, and not—in the federal context—in improper result-oriented judging that usurps the power of state legislatures.

B. *Two Arguments for the Democracy Canon*

1. *Enforcing an underenforced constitutional right*

Sometimes the Supreme Court, “because of institutional concerns, has failed to enforce a provision of the Constitution to its full conceptual boundaries.”¹²⁹ Legislation scholars have long recognized that substantive canons can serve as a backdoor mechanism to enforce “underenforced” constitutional norms through statutory interpretation.¹³⁰ As Eskridge explains: “While a Court that seeks to avoid constitutional activism will be reluctant to invalidate federal statutes in close cases, it might seek other ways to protect constitutional norms. One way is through canons of statutory construction.”¹³¹

Frickey describes how the rule of lenity, for example, can serve this role.

128. ISSACHAROFF ET AL., *supra* note 22, at 948.

129. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1213 (1978).

130. See generally Eskridge, *supra* note 21; Eskridge & Frickey, *supra* note 106; Sunstein, *supra* note 21.

131. WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 286 (1994); see also Andrew C. Spiropoulos, *Making Laws Moral: A Defense of Substantive Canons of Construction*, 2001 UTAH L. REV. 915, 962 (“Reliance on substantive canons of construction provides a method for enforcing typically underenforced constitutional and political norms that does not require the Court to use judicial review, a power that should only be employed when it is absolutely necessary to vindicate the Constitution.”).

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He explains:

In a criminal justice system that provides essentially no meaningful constitutional limitations upon prosecutorial discretion, this canon provides a judicial justification for trimming expansive statutory language which might provide tempting opportunities to overzealous or improperly motivated prosecutors. It also helps implement the constitutional due-process value of fair notice, at a time when the “void for vagueness” notion in constitutional law is rarely invoked to terminate a prosecution on constitutional grounds.¹³²

The Democracy Canon similarly can serve to enforce underenforced constitutional norms of equality in voting. Courts that use the Democracy Canon to resolve election disputes can avoid deciding constitutional issues also raised by the cases.¹³³ For example, in *State ex rel. Myles v. Brunner*,¹³⁴ the 2008 absentee ballot application “check box” case described above,¹³⁵ the Ohio Supreme Court was able to avoid deciding a constitutional equal protection challenge to the Ohio statute through its statutory decision that voters did not need to check the qualifications box to be entitled to an absentee ballot.¹³⁶

Recall the purposes to be served by the Democracy Canon: “favoring free, competitive elections,”¹³⁷ recognizing that the right to vote “is a part of the very warp and woof of the American ideal and it is a right protected by both the constitutions of the United States and of the state,”¹³⁸ and allowing “the greatest scope for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day.”¹³⁹ It turns out that these rights, though constitutional in nature, are seriously underenforced.

It might seem odd to say that the right to vote is an underenforced right given the amount of election law litigation, especially in recent years. But these are not rights that have proven easy to vindicate through constitutional

132. Frickey, *supra* note 32, at 129. Frickey offers a similar justification for the federalism canons. *Id.* at 129-30.

133. Recall that in 2008, over 10% of state “election challenge” cases raised both statutory and constitutional issues.

134. 899 N.E.2d 120 (Ohio 2008).

135. *See supra* note 47 and accompanying text.

136. *Myles*, 899 N.E.2d at 124 n.2 (“Relators further claim that they are entitled to the requested writ of mandamus because the secretary’s instructions violated the Voting Rights Act and the Equal Protection Clause. Our holding renders these claims moot.” (citing *State ex rel. Barletta v. Fersch*, 791 N.E.2d 452, 456 (Ohio 2003) (“[W]e will not issue advisory opinions, and this rule applies equally to election cases.”); *State ex rel. DeBrosse v. Cool*, 716 N.E.2d 1114, 1119 (Ohio 1999) (“Courts decide constitutional issues only when absolutely necessary.”))).

137. *State ex rel. White v. Franklin County Bd. Of Elections*, 598 N.E.2d 1152, 1154 (Ohio 1992).

138. *State ex rel. Beck v. Hummel*, 80 N.E.2d 899, 905-06 (Ohio 1948).

139. *Catania v. Haberle*, 588 A.2d 374, 379 (N.J. 1991).

adjudication. The Supreme Court has held that “the Constitution does not confer the right of suffrage upon any one, and that the right to vote, *per se*, is not a constitutionally protected right.”¹⁴⁰ In *Bush v. Gore*,¹⁴¹ the Supreme Court reminded us that “[t]he individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college” and indeed that “[t]he State, of course, after granting the franchise in the special context of Article II, can take back the power to appoint electors.”¹⁴²

So despite the longstanding democratic ideals of this nation, one cannot constitutionally enforce a “right to vote.”¹⁴³ Instead, the claims must be grounded in a particular provision of the Constitution such as that guaranteeing equal protection,¹⁴⁴ or barring discrimination on the basis of race,¹⁴⁵ gender,¹⁴⁶ or age of at least eighteen years.¹⁴⁷

Yet even the broadest of these protections, the Equal Protection Clause, has not been fully enforced by the Supreme Court. The Court during the Warren years did use the Equal Protection Clause to end some of the structural barriers to voting.¹⁴⁸ It established the one person, one vote principle,¹⁴⁹ barred the use of poll taxes in state elections,¹⁵⁰ and made it difficult to deny the franchise to an otherwise eligible voter on grounds of lack of sufficient “interest” in the outcome of elections.¹⁵¹ But in the kinds of cases typically considered¹⁵² by courts applying the Democracy Canon—problems with the form of the ballot, or how voters have cast their ballots, or which candidates appear on the ballot—the Court has underenforced equal protection values.

This underenforcement has become clear in the wake of *Bush v. Gore*. In

140. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982) (internal quotation marks and citations omitted) (quoting *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 178 (1874); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 n.78 (1973)).

141. 531 U.S. 98 (2000).

142. *Id.*

143. For this reason, some have advocated that the Constitution be amended to include a right to vote, at least for the President. See Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America’s Structural Democracy Deficit*, 3 ELECTION L.J. 559 (2004).

144. U.S. CONST. amend. XIV.

145. U.S. CONST. amend. XV.

146. U.S. CONST. amend. XIX.

147. U.S. CONST. amend. XXVI.

148. For a general overview, see RICHARD L. HASSEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 14-56 (2003).

149. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964).

150. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966). Two years earlier, the Twenty-Fourth Amendment to the U.S. Constitution was ratified, ending the use of poll taxes in *federal* elections. U.S. CONST. amend. XXIV.

151. *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 631 (1969).

152. For examples, see *supra* Part I.A.

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that case, the Court declared that:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. 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.¹⁵³

But, despite this lofty and general language, the promise of constitutional protection of equal protection in voting rights embodied in this sentence of *Bush v. Gore* has not been realized.¹⁵⁴ Though some federal appellate courts have read the sentence in a broad manner, for example to protect voters against the use of inaccurate punch card voting machines in some parts of a jurisdiction but not in others,¹⁵⁵ those opinions have been reversed or mooted by en banc circuit courts that appear more skittish about fully enforcing equal protection rights in voting.¹⁵⁶ At least so far, the project of using *Bush v. Gore* in a “lemonade from lemons” litigation strategy to expand equal protection rights has been a failure.¹⁵⁷

The Supreme Court's recent opinion in *Crawford v. Marion County Election Board*¹⁵⁸ illustrates the difficult procedural hurdles faced by litigants raising equal protection challenges in the context of election administration cases. In the highly fractured decision, six Justices (the Stevens plurality and three dissenters) recognized that it could be an equal protection violation in certain contexts to require a voter to produce photo identification in order to vote. But in order to mount such a challenge, a voter would have to bring an “as applied” challenge to the law, a difficult and cumbersome process that likely will leave a good chunk of those whose rights have been violated without a constitutional remedy.¹⁵⁹

Crawford and another Supreme Court case decided in the October 2007

153. *Bush v. Gore*, 531 U.S. 98, 104-05 (2000).

154. Hasen, *Untimely Death*, *supra* note 2, at 2-3.

155. *Stewart v. Blackwell*, 444 F.3d 843, 859-60 (6th Cir. 2006), *rev'd en banc*, 473 F.3d 692 (6th Cir. 2007); *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 882, 894-96 (9th Cir. 2003), *rev'd en banc*, 344 F.3d 914 (9th Cir. 2003).

156. *Stewart*, 473 F.3d at 693-94; *Shelley*, 344 F.3d at 918. For a discussion, see Hasen, *Untimely Death*, *supra* note 2, at 9-15.

157. See Hasen, *Untimely Death*, *supra* note 2, pt. I. On the “lemonade from lemons” strategy, see Steven J. Mulroy, *Lemonade from Lemons: Can Advocates Convert Bush v. Gore Into a Vehicle for Reform?*, 9 GEO. J. ON POVERTY L. & POL'Y 357 (2002).

158. 128 S. Ct. 1610 (2008).

159. See Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635 (2009); Julien Kern, *As-Applied Constitutional Challenges, Class Actions, and Other Strategies: Potential Solutions to Challenging Voter Identification Laws After Crawford v. Marion County Election Board*, 42 LOY. L.A. L. REV. 629 (2009); 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 (2009).

term, the *Washington State Grange* case,¹⁶⁰ have made it more difficult for plaintiffs raising election law challenges to succeed in constitutional litigation in another way as well. Besides shunting many suits to “as applied” rather than facial challenges, the Court also imposed a tough anti-plaintiff, pro-state evidentiary standard. As I have explained, under these cases, the state need not provide any evidence supporting the state interests it posits as justifying its law. In contrast, plaintiffs challenging the law need to provide hard evidence that the statute imposes a heavy burden on them.¹⁶¹

More generally, given the relevant balancing tests articulated by the Supreme Court, and as refined by *Crawford*, constitutional adjudication over the “nuts and bolts” of elections leaves plaintiffs facing an uphill battle, but without clear constitutional rules from the Supreme Court.¹⁶² In this constitutional environment, statutory interpretation (and state constitutional law¹⁶³) remains a more useful tool to enforce underenforced equal protection rights in voting than straight-out constitutional adjudication.

2. *The Democracy Canon as a preference-eliciting mechanism for the legislature*

Legislation scholars have long recognized that substantive canons can serve as “preference-eliciting”¹⁶⁴ mechanisms for the legislature. Frickey notes that interpretations following substantive canons sometimes “amount to

160. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184 (2008).

161. See Rick L. Hasen, *About Face: The Roberts Court Sets the Stage for Shrinking Voting Rights, Putting Poor and Minority Voters Especially in Danger*, FINDLAW’S WRIT, Mar. 26, 2008, http://writ.lp.findlaw.com/commentary/20080326_hasen.html.

162. A recent article by Christopher S. Elmendorf and Edward B. Foley articulates the lack of guidance for lower courts:

Absent a Supreme Court precedent squarely on point, it is now open to a lower court working within this framework (1) to engage in unmediated, all-things-considered balancing, focusing either on the overall reasonableness of the challenged law or on the reasonableness of exempting or otherwise accommodating the plaintiff or plaintiff-class; (2) to apply strict scrutiny after determining that the law (relative to some practicable alternative) has a large, demonstrable adverse impact on voting, political association, or the competitiveness of campaigns; (3) to apply strict scrutiny after identifying a facial attribute of the law itself that renders it suspect in the judge’s eye; (4) to apply extremely deferential review because the law does not have attributes that the judge deems facially suspect and because the judge is leery of getting bogged down in empirical debates or indulging in the guess work of open-ended balancing; or (5) to reject the plaintiff’s claim after positing that it raises questions about democratic fairness concerning which there is no discernable historical consensus.

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, 536-37 (2008).

163. See *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (striking down Missouri photo identification law for voting under state constitutional equal protection clause and relying upon state constitution’s express “right to vote” provision).

164. The term appears in ELHAUGE, *supra* note 122, but the concept predates Elhaug’s work, as the discussion of Frickey’s and Eskridge’s points in the next two sentences of the text makes clear.

suspensive vetoes—‘remands’ to the legislature—that may foster legislative deliberation on important constitutional values but ultimately leave the legislature with the authority to override the judicial decision.”¹⁶⁵ Eskridge remarks that clear statement rules “[u]ltimately . . . may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.”¹⁶⁶ Thus, for example, the avoidance canon “makes it harder for Congress to enact constitutionally questionable statutes and forces legislators to reflect and deliberate before plunging into constitutionally sensitive issues.”¹⁶⁷

The major criticism of the preference-eliciting argument for substantive canons is that it assumes legislatures will have the time and will to overrule incorrect judicial interpretations of statutes. If in fact legislatures cannot go back and consider such issues on “remand,” then the use of a clear statement rule or presumption by the court essentially imposes the judicial rule on the polity.¹⁶⁸ However, there are a few reasons to be hopeful that use of the Democracy Canon will be preference-eliciting when necessary.

165. Frickey, *supra* note 32, at 131.

166. ESKRIDGE, *supra* note 21, at 287; *see also* William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992).

167. ESKRIDGE, *supra* note 21, at 286.

168. Vermeule argues against preference-eliciting (what he calls “democracy-forcing”) rules on grounds that the theory behind the rules assumes incorrectly that there will be “sustained judicial coordination on a particular interpretive approach or canonical regime.” ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 123 (2006). But it is unclear to me why sustained judicial coordination would be necessary for a “remand” to the legislature to be effective; the relevant question is whether there will be action in response to a particular statute.

One way to mitigate the problem of legislative inertia is to follow Elhauge’s suggestion that the judiciary choose preference-eliciting rules that *differ* from the likely political preferences of the legislature “in order to elicit a legislative response that makes it clearer precisely where enactable preferences lie.” ELHAUGE, *supra* note 122, at 12. For example, Elhauge explains a recent pro-Guantanamo detainee opinion of the Supreme Court in this manner: “Given the lack of political clout these detainees had, it was entirely predictable that this decision would, as it did, elicit a statutory override, which made clear precisely where enactable preferences lay on the trial rights of detainees in the war on terror.” *Id.* However, the danger of choosing deliberately provocative interpretations is that the provocation might fail, and then the polity would be stuck with an interpretation disfavored by the legislature and perhaps by the judiciary as well. *See* Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 YALE L.J. 64, 92 (2008) (arguing that given the reality that Congress rarely responds to judicial statutory interpretations, “clear statement canons, while purportedly leaving enforcement of norms to the political process, may simply provide ‘a backdoor way’ for the interpreter to proceed and resolve normative questions—and the underlying meaning of statutes—themselves”). For this reason, Elhauge advocates his preference-eliciting strategy only as a third resort. It should be used only when both “current” and “enactor” legislative preferences are unclear, and when “the chosen interpretation is more likely to elicit a legislative response, by a margin sufficient to outweigh a weak estimate that another interpretation is more likely to match enactable preferences.” ELHAUGE, *supra* note 122, at 12. For a general critique of Elhauge’s framework, *see* Elizabeth Garrett, *Preferences, Laws and Default Rules*, 122 HARV. L. REV. 2104 (2009) (book review).

First, election law cases are highly salient, and the rules governing who votes and how elections are conducted are of keen interest to legislators, who were elected under existing rules and have a vested interest in how the rules are being interpreted. States have not always passed laws expanding the franchise, and indeed legislators have no doubt sometimes been influenced by partisan considerations in the drafting of ballot access, voter registration, and other election laws. The Democracy Canon can flush out legislators who would hide an anti-enfranchisement provision in a vague statute.

Second, election law issues have been the site of increasing partisan warfare in legislatures, in secretary of state offices, and in the courts.¹⁶⁹ Legislators do not necessarily trust partisan election officials who run state elections, or the courts, which some see as being driven by partisan consideration in deciding election law cases. For this reason, legislatures are likely to pay keen attention to judicial (and administrative) determinations of the meaning of election law statutes to make sure there is not a partisan bias against the interests of the legislative majority.

Third, since 2000, the press and public have paid unprecedented attention to the nuts and bolts of elections, from the machinery of voting, to the rules of registration, down to apparently technical questions about how voters' names are purged from the voter rolls. Every state wants to avoid being the next "Florida." Legislators therefore have good reason to examine the statutory interpretation decisions of courts construing the state's election laws to make sure they will not lead to an embarrassing disaster.

Indeed, Florida itself reacted to the decisions of the Florida Supreme Court's interpretation of Florida statutes during the 2000 election controversy by (1) eliminating the "protest" phase for election challenges;¹⁷⁰ (2) changing the conditions for when a manual recount is triggered;¹⁷¹ (3) requiring recounts to be conducted jurisdiction-wide, with a look at both undervotes and overvotes;¹⁷² and (4) requiring the use of written standards for judging the intent of the voter in ballots examined during an election contest.¹⁷³

169. See Hasen, *Untimely Death*, *supra* note 2, at 18-20 (recounting election administration wars in the states).

170. FLA. STAT. ANN. § 102.166 (West 2008); Clifford A. Jones, *Out of Guatemala?: Election Law Reform in Florida and the Legacy of Bush v. Gore in the 2004 Presidential Election*, 5 ELECTION L.J. 121, 133 (2006).

171. Jones, *supra* note 170, at 127-28.

172. *Id.* at 133.

173. *Id.* at 127. To be sure, state legislators do not always react to solve such problems:

For example, given that there were over *twenty* lawsuits brought challenging one or another aspect of California recall law in 2003, the California legislature has done nothing to fix the obvious contradictions and problems with the California Elections Code. My favorite example is the internal code contradiction on the rules for nominating someone to be a replacement candidate in the event voters choose to recall a sitting governor. The recall rules state that the 'usual nomination rules shall apply' to recall elections. And the first of the 'usual nomination rules' provides that the rules do not apply to recall elections. The California Secretary of State then applied the rules (which normally apply to *primary* elections) requiring that candidates wishing to run for governor in the recall provide only 65

Though these three reasons suggest that judicial interpretation of election laws will be preference eliciting at least some of the time, there is one important counter-argument: legislatures might be deterred from reacting to election law statutory decisions that have misperceived legislative intent because legislators do not want to take heat for reversing a “pro-voter” decision of the courts. Consider how the Alaska Supreme Court put it in articulating a clear statement rule: “If in the interests of the purity of the ballot the vote of one not morally at fault is to be declared invalid, the Legislature must say so in clear and unmistakable terms.”¹⁷⁴ Who wants to pass a clean-up statute that could be viewed as going against the voting rights of those “not morally at fault”?

This concern that legislators will be reluctant to express their true preferences against the interests of at least some voters, however, is likely overstated. Consider the ongoing battles over voter identification rules. Republicans in the Texas Senate almost passed a voter identification rule on a party line vote in 2008, only to be stopped by a Democratic filibuster which required that a Democratic senator recovering from a liver transplant stay in a hospital bed at the state capitol.¹⁷⁵ In 2009, the Texas Senate, on another party line vote, changed its rules so that the voter identification rules could be passed by a simple majority and could not be filibustered.¹⁷⁶ In Missouri, despite the state supreme court decision that a photo identification law for voting violated the state constitution, state legislators are considering new identification legislation.¹⁷⁷ Legislators in the highly partisan battles over election administration have not shied away from what might be perceived by some as anti-voter positions. The Democracy Canon forces legislators to make their intent more visible to all, and experience tells us that legislators sometimes are willing to pay that price.

In sum, especially in our world of polarized politics and partisan mistrust, state court decisions applying the Democracy Canon are quite likely to elicit responses from legislators that disagree with such decisions.

signatures and \$3,000, leading to the unwieldy 2003 election and ballot featuring 135 candidates for governor, including the child actor Gary Coleman, a porn star, and a watermelon-smashing Gallagher.

Hasen, *Untimely Death*, *supra* note 2, at 18.

174. Carr v. Thomas, 586 P.2d 622, 626-27 (Alaska 1978) (quoting Sanchez v. Bravo, 251 S.W.2d 935, 938 (Tex. Civ. App. 1952)).

175. Mark Lisher, *Ill Senator Settles in for Voter ID Fight*, AUSTIN-AM. STATESMAN, May 22, 2007, at B1, available at <http://www.statesman.com/news/content/region/legislature/stories/05/22/22gallegos.html>.

176. Mike Ward, *Texas Senate Adopts Rules Change to Allow Voter ID Vote*, MARSHALL NEWS MESSENGER, Jan. 15, 2009, available at http://www.marshallnewsmessenger.com/news/content/region/legislature/stories/01/15/0115_senate.html.

177. Ian Urbina, *Missouri Legislature Ends Session with Voter ID Amendment Still on Agenda*, N.Y. TIMES, May 17, 2008, at A13, available at <http://www.nytimes.com/2008/05/17/us/politics/17missouri.html>.

C. The Context: State Courts and Federal Courts

Recall Trevor Morrison's argument that "the deployment of any particular canon should come only after careful consideration of the values it is meant to serve, as well as the *fit between those values and the context of the interpretation*."¹⁷⁸ Thus, Morrison argues that the avoidance canon should be used more broadly by the federal *judiciary* than by the federal *executive branch* because it serves purposes such as "judicial restraint" which do not apply to the executive branch.¹⁷⁹

Most discussion of substantive canons among legislation scholars assumes the context of an unelected, relatively unaccountable federal judiciary.¹⁸⁰ The institutional context of state courts, many containing judges who must run for election or reelection (at least in a retention election), should be taken into account in evaluating the use of the Democracy Canon.

For three reasons it is not surprising that state courts in particular have embraced the Democracy Canon. First, elected judges are likely to be sensitive to the rules for elections. They are also going to be careful in considering the opinions of voters—the "crocodile in the bathtub"¹⁸¹—whose voting rights should not be minimized, especially near judicial election time.

Second, in many states legislative history is slim or not easy to obtain.¹⁸² In the absence of reliable legislative history, courts may rely upon certain presumptions about the legislature's likely intentions—such as a desire to enfranchise voters—to interpret ambiguous statutes.¹⁸³

Third, in many states the Chief Elections Officer of the state is a partisan official, who may be tempted to interpret vague or ambiguous election law statutes not in the most reasonable way but in a way that will further the interests of the officer's political party.¹⁸⁴ Given the political leanings of many

178. Morrison, *supra* note 101, at 1193 n.9 (emphasis added).

179. *See generally id.* (making sustained argument along these lines).

180. *See, e.g., id.* at 1191 n.3 (noting that his article is confined to "interpretation by branches of the federal government" and does not "address statutory interpretation at the state level, where some judges are democratically elected"); Sunstein, *supra* note 21, at 468 (noting that constitutional norms are sometimes underenforced by courts with "limited fact-finding capability and attenuated electoral accountability"); *see also* Bamberger, *supra* note 168 (discussing how courts should consider substantive canons of interpretation in light of statutory interpretation by executive agencies).

181. Gerald F. Uelman, *Otto Kaus and the Crocodile*, 30 LOY. L.A. L. REV. 971, 974 (1997).

182. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 862-66.

183. *See* Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333, 356 (2004) (positing that a Restatement of Statutory Interpretation "might even be more helpful in construing state statutes because the lack of legislative history forces state courts to rely more frequently on rules of statutory construction").

184. *See* Hasen, *Beyond the Margin*, *supra* note 2, at 974-76 (noting that at least thirty-three state Chief Elections Officers (usually called the "Secretary of State") are elected in partisan elections and that some of the others are partisan appointees).

Chief Elections Officers, it seems wrongheaded to adopt deference, as suggested by Vermeule,¹⁸⁵ to the agency charged with administering statutes over canons as the primary interpretive rule. It is more sensible to adopt a presumption, such as that contained in the Democracy Canon, which can be applied regardless of the shifting partisan positions taken by the agency charged with interpreting state election laws.

In this regard, note how the Ohio Supreme Court recently deferred to the Secretary of State (a partisan elected position) when her interpretation (in the thirty-day window case) lined up with the Democracy Canon, but rejected her interpretation as “unreasonable” (in the check box case) when her interpretation conflicted with the Democracy Canon.¹⁸⁶

There are strong reasons to extend the Democracy Canon to federal courts as well as they consider more election administration cases. First, ideas consistent with the Democracy Canon are contained in the “purpose” language of the NVRA and in the “Sense of Congress” portion of UOCAVA.¹⁸⁷ Congress expressed its apparent intent for these voting statutes to be read broadly, consistent with an enfranchising purpose. Moreover, federal courts as much as state courts need to guard against partisan manipulation of the electoral process by elections officials. A rule of deference to state agencies for either *Chevron*-type reasons or federalism reasons is misplaced;¹⁸⁸ a thumb on the scale favoring the rights of voters is not. Moreover, the same arguments favoring the Canon generally—underenforcement and preference elicitation—apply equally to federal courts. The source of underenforcement is primarily the constitutional election law jurisprudence of the Supreme Court, which pertains equally to state and federal election law.

Second, Congress since 2000 has struggled with the appropriateness and scope of federal election reform. The Democracy Canon applied to federal election administration laws such as HAVA can induce Congress to be clearer about how strongly federal and state courts should apply the Canon in construing federal election administration statutes.

In sum, the evolution of the Democracy Canon in state courts is understandable, but should not be read as an argument against its extension to federal courts. The underenforcement and preference-eliciting reasons set forth earlier in this Part apply to both federal courts/Congress and state courts/state legislatures.

185. VERMEULE, *supra* note 168, at 201.

186. *See supra* notes 45-48 and accompanying text.

187. *See supra* notes 57-61 and accompanying text.

188. For a cogent argument on the latter point, see Case Note, *Election Law—Statutory Interpretation—Sixth Circuit Employs Clear Statement Rule in Holding that the Help America Vote Act Does Not Require States to Count Provisional Ballots Cast Outside Voters’ Home Precincts*.—*Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565 (6th Cir. 2004) (*per curiam*), 118 HARV. L. REV. 2461, 2468 (2005).

III. THE DEMOCRACY CANON AND CONCERNS ABOUT ACTUAL AND PERCEIVED POLITICIZATION OF THE JUDICIARY

A. Introduction

In Part II, I argued that there are virtues to the Democracy Canon, and that many of the arguments raised against substantive canons generally are not strong when applied to the Democracy Canon. But thus far I have set aside the strongest argument against the use of the Canon: it can play a role in the actual and perceived politicization of the judiciary. When judges decide cases using the Democracy Canon, there is a danger that their political preferences could subconsciously sway how “liberally” they read an ambiguous election statute.¹⁸⁹ Moreover, the public may view such actions as illegitimate activism by a court with a conscious or subconscious desire to help a particular political party or candidate. These are legitimate concerns, and ones that counsel for caution. But I argue that the danger of actual and perceived politicization should be met not with a jettisoning of the Democracy Canon, but with its consistent application and an effort to educate the public on the legitimacy and longstanding nature of court reliance on the Canon. It is also necessary for legislatures to act *ex ante* to prevent state court overreaching.

This Part explores the politicization issue arising from use of the Democracy Canon through a closer examination of the New Jersey Supreme Court’s *Samson* opinion. It contrasts the New Jersey Supreme Court’s use of the Democracy Canon in *Samson* with the U.S. Supreme Court’s use of a federalism canon in *Gregory v. Ashcroft*.

B. New Jersey Democratic Party v. Samson

*New Jersey Democratic Party v. Samson*¹⁹⁰ arose out of incumbent Democratic United States Senator Robert Torricelli’s decision to withdraw from his reelection campaign upon facing questions about campaign contributions.¹⁹¹ Torricelli withdrew thirty-six days before the general

189. See LOWENSTEIN ET AL., *supra* note 22, at 398 (“[W]hen a court decides important electoral questions on the basis of ‘substantial compliance’ rather than the rules, the judges face the serious danger that their judgment will be affected by their political preferences.”).

190. 814 A.2d 1028 (N.J. 2002).

191. *Democrats Seek Torricelli Replacement After Pallone Declines*, N.Y. TIMES, Oct. 1, 2002, <http://www.nytimes.com/2002/10/01/nyregion/01CND-JERS.html> (“The legal and political maneuvering came a day after Mr. Torricelli announced that he was ending his bid for re-election, acknowledging that his campaign had become overwhelmed by questions about improper gifts he accepted from a contributor.”). Torricelli was not charged with any crime. He later became a lobbyist and faced criticism for using his campaign money to donate to politicians with “influence over Mr. Torricelli’s, or his clients’, business interests.” Raymond Hernandez & David W. Chen, *Now a Lobbyist, an Ex-Senator Uses Campaign Money*, N.Y. TIMES, Aug. 24, 2007, at A1, available at <http://www.nytimes.com/2007/08/24/nyregion/24torricelli.html>. He later created a

election.¹⁹² Democrats wanted to name a replacement for Torricelli to run against the Republican Senate nominee, Douglas Forrester, along with two minor party candidates.

The relevant statute on party replacement of vacancies read:

In the event of a vacancy, howsoever caused, among candidates nominated at primaries, which vacancy shall occur not later than the 51st day before the general election, or in the event of inability to select a candidate because of a tie vote at such primary, a candidate shall be selected in the following manner:

a. (1) In the case of an office to be filled by the voters of the entire State, the candidate shall be selected by the State committee of the political party wherein such vacancy has occurred.

...

d. A selection made pursuant to this section shall be made not later than the 48th day preceding the date of the general election, and a statement of such selection shall be filed with the Secretary of State¹⁹³

The New Jersey Supreme Court held that even though the vacancy occurred fewer than fifty-one days before the election, and the Democratic Party's selection of a replacement was to be made fewer than forty-eight days before the election, the Democrats could still name a replacement. The decision was unanimous among the seven justices, which included four Democrats, two Republicans, and an independent.¹⁹⁴

The *Samson* court relied heavily on the Democracy Canon in reaching its ruling, and especially on a string of earlier New Jersey cases which had extended filing and other election law deadlines under the authority of the Canon. Especially important was the court's earlier decision in *Catania v. Haberle*,¹⁹⁵ in which the court extended a statutory deadline for filling a vacancy on the ballot in a special election:

Concerns have been expressed that by giving this deadline provision a directory, rather than mandatory, construction we will create doubts about many other sections of the election law, a law that is driven by deadlines. Our only response is that this Court has traditionally given a liberal interpretation to that law, "liberal" in the sense of construing it to allow the greatest scope

philanthropic foundation and donated \$1.6 million in campaign funds to it. Raymond Hernandez, *Torricelli Charity Gets Leftover Funds*, N.Y. TIMES, Apr. 30, 2008, at B5, available at <http://www.nytimes.com/2008/04/30/nyregion/30torricelli.html>.

192. *Democrats Seek Torricelli Replacement*, *supra* note 191.

193. N.J. STAT. ANN. § 19:13-20 (West 2009). The statute has been amended three times since *Samson*. The first time the statute was amended the reference to "Secretary of State" in section (d) was changed to "Attorney General." Act of June 16, 2004, 2004 N.J. Sess. Law Serv. ch. 26, § 2 (West 2004). In 2005 and 2009, the legislature made additional, non-substantive amendments to the statute. 2005 N.J. Sess. Law Serv. ch. 136, § 21 (West 2005), effective Jan. 1, 2006; 2009 N.J. Sess. Law Serv. ch. 135, § 5 (West 2009), effective Oct. 2, 2009.

194. David Kocieniewski, *New Jersey Court Lets Lautenberg into Senate Race*, N.Y. TIMES, Oct. 3, 2002, at A1.

195. 588 A.2d 374 (N.J. 1990).

for public participation in the electoral process, to allow candidates to get on the ballot, to allow parties to put their candidates on the ballot, and most importantly to allow the voters a choice on Election Day. Obviously, there will be cases in which provisions must be interpreted strictly, mandatorily, for in some cases it will be apparent that that interpretation serves important state interests, including orderly electoral processes. But those cases must be decided on their own facts, under the law involved. This Court has never announced that time limitations in election statutes should be construed to bar candidates from the ballot when that makes no sense and when it is obviously not the Legislature's intent. There are states that have such rules, but New Jersey is not one of them.¹⁹⁶

After discussing the Canon and these cases, the *Samson* court rejected an argument that the plain language of the statute precluded filling a vacancy fewer than forty-eight days before the election:

By its terms, [the statute] establishes an absolute right in a State committee to replace a candidate up to and including the forty-eighth day before the general election. Here, we confront a vacancy created outside of the statutory window. Nothing in [the statute] addresses the precise question whether a vacancy that occurs between the forty-eighth day and the general election can, in that circumstance, be filled.¹⁹⁷

The court contrasted New Jersey's vacancy statute with other vacancy statutes, including Colorado's, which stated that any vacancy occurring less than eighteen days before the general election shall not be filled before the general election.¹⁹⁸

The court, having concluded that the legislature did not intend to "limit voters' choice in a case where there is sufficient time to place a new candidate on the ballot *and* conduct the new election in an orderly manner,"¹⁹⁹ considered whether the election could still be conducted in such a manner. One concern was whether it would disenfranchise military and other overseas voters. The court satisfied itself that replacement ballots could be mailed out and returned in time, and generally that election officials could manage a change in the ballots in time for the election.²⁰⁰ It ordered the Democratic Party to pay any extra costs associated with the late change in candidates.

The main criticism of the New Jersey Supreme Court was that its decision went against the apparently clear words of the statute. New Jersey Republican Party Chairman Joseph M. Kyrillos called the ruling that a change could be made fewer than forty-eight days before the election "absurd."²⁰¹ U.S. Senator Bill Frist, then chairman of the Senate G.O.P. campaign committee, called the

196. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1036 (N.J. 2002) (quoting *Catania*, 588 A.2d at 379).

197. *Id.* at 1037 (footnote omitted).

198. *Id.* (citing COLO. REV. STAT. ANN. § 1-4-1002(2.5)(a) (West 2002)).

199. *Id.* at 1039.

200. *Id.* at 1039-40.

201. Kocieniewski, *supra* note 194, at B6.

argument to extend the time “a desperate grasp at getting around the law.”²⁰²

But did the New Jersey Supreme Court in *Samson* really “bend the rules” to achieve the “desirable goal” to “permit candidates from each of the major parties to appear on the ballot in a Senate election”?²⁰³ Did it employ a “legal fiction” in stating that the statute was silent on the question of filling vacancies in fewer than forty-eight days?²⁰⁴ No.

The court was surely right that the statute did not expressly bar a party from choosing a replacement candidate fewer than forty-eight days before the election. Indeed, Bill Baroni, one of Forrester’s lawyers, conceded in a law journal article written after the case ended that “[t]he statute is silent as to what would happen after the forty-eighth day.”²⁰⁵

To reach the conclusion that the statute barred a party from filling a vacancy in a time shorter than forty-eight days before the election, one had to (at least implicitly) apply the *expressio unius* linguistic canon of construction: the inclusion of one thing (the right to fill vacancies at least forty-eight days before the election) indicated the exclusion of the other (no right to fill vacancies in forty-eight days or fewer). As Justice Scalia put it in talking about the *expressio unius* canon generally: “What [the *expressio unius* canon] means is this: If you see a sign that says children under twelve may enter free, you should have no need to ask whether your thirteen-year-old must pay. The inclusion of the one class is an implicit exclusion of the other.”²⁰⁶

I concede that reading the New Jersey statute in light of the *expressio unius* canon *alone* leads to the conclusion that replacements are not allowed fewer than forty-eight days before the election. Indeed, this is the most natural reading of the statute purely as a linguistic matter. But as Professor Mullins has remarked, the reality of language in context is often more complex than “a simple matter of twelve-year-olds.”²⁰⁷ In the context of New Jersey statutory interpretation of election laws, the *Samson* interpretation followed the rules rather than bent them.

The New Jersey Supreme Court, which had consistently used the

202. Terence Neilan, *New Jersey Supreme Court Rules Torricelli Can Be Replaced*, N.Y. TIMES, Oct. 2, 2002, <http://www.nytimes.com/2002/10/02/nyregion/02CND-JER.html>.

203. See LOWENSTEIN ET AL., *supra* note 22, at 399.

204. David L. Evans, Jr., Case Note, *New Jersey Democratic Party, Inc. v. Samson: What Remains of New Jersey’s Election Deadlines?*, 32 STETSON L. REV. 897, 904-05 (2003). *But see id.* at 908-09 (noting lack of “explicit language [in statute] concerning whether a vacancy that occurs after the forth-eighth day, but before the general election can be filled”).

205. William E. Baroni, Jr., *Administrative Unfeasibility: The Torricelli Replacement Case and the Creation of a New Election Law Standard*, 27 SETON HALL LEGIS. J. 53, 61 (2002). He added that it was “presumed that nothing could” happen after the forty-eighth day. *Id.* at 61-62.

206. SCALIA, *supra* note 110, at 25.

207. Morell E. Mullins, Sr., *Tools, Not Rules: The Heuristic Nature of Statutory Interpretation*, 30 J. LEGIS. 1, 24 n.103 (2003).

Democracy Canon to extend deadlines for the benefit of voters, had long ago created a *de facto* clear statement rule when it came to statutory deadlines. The court essentially said that if the New Jersey legislature wanted a stricter statute, it needed to use unmistakably clear language like Colorado. As the *Samson* court observed:

Our cases repeatedly have construed the election laws liberally, consonant with their purpose and with practical considerations related to process. We are aware of only one instance in which the Legislature amended an election provision to prevent the filling of a vacancy, effectively overriding the decision of this Court²⁰⁸

Indeed, despite criticism of the *Samson* opinion, the New Jersey Legislature has not amended its vacancy statute to impose clearer language.²⁰⁹

C. *Gregory v. Ashcroft*

Not only was the result in *Samson* consistent with the New Jersey Supreme Court's earlier election law jurisprudence, its approach also mirrors the United States Supreme Court's approach in some of its own statutory interpretation cases. Accordingly, *Samson* is not "rule bending" in that it follows the United States Supreme Court in applying substantive canons with clear statement rules for policy reasons in appropriate cases.

Consider *Gregory v. Ashcroft*.²¹⁰ In *Gregory*, Missouri state judges challenged a provision of the Missouri state constitution imposing a mandatory retirement age of seventy for judges. The state judges argued that the retirement provision violated a federal statute, the Age Discrimination in Employment Act of 1967 ("ADEA").²¹¹ Though the ADEA expressly applied to state employees,²¹² Missouri argued that the state judges did not constitute "employees" as defined by the statute:

The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an *appointee on the policymaking level* or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office.²¹³

The State of Missouri argued that judges, appointed in Missouri but subject to retention elections, were appointees "on the policymaking level" and

208. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028, 1039 n.6 (N.J. 2002) (citing *Fields v. Hoffman*, 520 A.2d 751 (N.J. 1987)).

209. See *supra* note 193 (explaining non-substantive changes to statute since *Samson*).

210. 501 U.S. 452 (1991).

211. 29 U.S.C. §§ 621-634. The state judges also raised a federal constitutional claim under the Equal Protection Clause, but the Supreme Court rejected the Equal Protection claim. *Gregory*, 501 U.S. at 473. I ignore the constitutional claim in this analysis.

212. 29 U.S.C. § 630(b)(2).

213. *Id.* § 630(f) (emphasis added).

therefore exempt from the coverage of the ADEA.²¹⁴

A court might apply a number of language canons to decide whether judges should be considered “on the policymaking level” for purposes of the ADEA.²¹⁵ The result of such an analysis is not obvious. Indeed, in interpreting the statute, the Supreme Court conceded that “[i]t is at least ambiguous whether a state judge is an ‘appointee on the policymaking level.’”²¹⁶ But the Court held that in the circumstances of this case, it was appropriate to put a fat thumb on the scale to protect state sovereignty and federalism values:

[I]n this case we are not looking for a plain statement that judges are excluded [from coverage under the ADEA]. We will not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*. This does not mean that the Act must mention judges explicitly, though it does not. Rather, it must be plain to anyone reading the Act that it covers judges.²¹⁷

This “super-strong clear statement rule”²¹⁸ for federalism reasons functions just like the Democracy Canon in New Jersey. It allows courts to reach results in statutory interpretation cases on policy grounds that are not necessarily the most natural reading of a statute when considering only the language of the statute.

D. *The Danger of Actual and Perceived Politicization*

I am not arguing that either *Samson* or *Gregory* was correctly decided.²¹⁹ Rather, I argue that they are both part of a longstanding tradition in statutory interpretation cases to rely upon substantive canons and clear statement rules to put a “thumb on the scale” for particular policy reasons. “By their nature, [substantive] canons are judicial determinations that the words of a statute mean something different than the conventional understanding of the text would dictate.”²²⁰ The New Jersey Supreme Court’s reliance in *Samson* on the Democracy Canon was no less legitimate than the United States Supreme Court’s reliance in *Gregory* on federalism canons.

214. The Court did not reach the alternative question whether judges would be subject to exemption under the “person elected to public office” exemption. *Gregory*, 501 U.S. at 467.

215. For a thorough analysis, see ESKRIDGE ET AL., *supra* note 19, at 933-36.

216. *Gregory*, 501 U.S. at 467.

217. *Id.* (citation omitted).

218. Eskridge et al., noting the strength of the federalism canon in *Gregory*, ask: “Why create the canonical equivalent of a nuclear weapon when a fly swatter would have been sufficient?” ESKRIDGE ET AL., *supra* note 19, at 934. The answer seems to be that the Court calibrates the strength of the clear statement rule to its belief in the importance of the policy behind it.

219. See ISSACHAROFF ET AL., *supra* note 22, at 948 (citing “fairness to candidates, avoiding voter confusion, efficiency in preparing and distributing ballots, and prevention of last-minute manipulation” as potential arguments against the *Samson* court’s opinion).

220. FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 90 (2009).

Nonetheless, the two cases are different in that election cases raise greater dangers of actual and perceived politicization. In terms of actual politicization, “when a court decides important electoral questions on the basis of ‘substantial compliance’ rather than the rules, the judges face the serious danger that their judgment will be affected by their political preferences.”²²¹ Though there is no doubt that the use of the federalism canon in a case like *Gregory* is affected by each Justice’s *ideological* preference,²²² political preferences, even subconscious political preferences, do not seem all that germane to the decision’s outcome. To the extent we are worried about judges being swayed subconsciously by their party politics, we should encourage some judicial self-reflection before judges rely on the Democracy Canon to engage in liberal interpretations of election laws that favor the judge’s own political party. The more important protection comes *ex ante* from legislative drafting. Legislatures that write clear rules limit the reach of the Democracy Canon, which no doubt has its greatest strength when applied to statutes with large gaps or ambiguities. Legislatures can also instruct courts to more strictly construe election statutes.

Aside from the question of actual judicial bias is a perception problem. Substantive canons may be employed regularly as a tool of statutory interpretation, but the public does not generally pay attention to, much less understand the prevalence of, their use. In the context of a hot-button election law case, a court’s use of the Democracy Canon may appear illegitimate and result oriented. Recall the public statements of opponents of the New Jersey Supreme Court’s opinion in *Samson*.²²³

Indeed, for this reason some judges might be reluctant to rely explicitly on the Democracy Canon even when it is in play, if there is a more formal or technical way, such as through application of a textual canon, to reach the same result. That is, judges may be tempted to obfuscate: “Disputes over the meaning of abstract Latin phrases, or freestanding policy maxims, may seem relatively respectable and law-like not only to scholars but also to judges and the attorneys who argue before them.”²²⁴ To the contrary, courts should be honest and clear when the Canon plays a role, and educate the public both on the longstanding nature of the Canon and the on the ability of the legislature to avoid court reliance on the Canon through clear statements about the strength of deadlines and other election law rules governing voters and their choices at elections.²²⁵ I concede such education efforts may not be successful, especially

221. See LOWENSTEIN ET AL., *supra* note 22, at 398.

222. See generally Brudney & Ditslear, *supra* note 99 (noting correlation of ideology and Supreme Court Justice voting despite use of substantive canons).

223. See *supra* notes 201-202 and accompanying text.

224. Brudney & Ditslear, *supra* note 99, at 110.

225. In particular, courts should clearly state that it is fully within the legislature’s power to require strict adherence to statutory requirements in election cases. The recent Minnesota experience with strict construction of absentee ballots illustrates that courts can and will defer to a legislature when the legislature makes clear that the Democracy Canon

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among partisans on the wrong end of a judicial decision. But the more the courts are forthcoming about their policy choices and the more clearly courts invite the state legislature to override their decisions in the event of a disagreement about the construction of state election law statutes, the better chance most of the public will come to accept the decision of the court as legitimate. In the end, the legitimacy of the Canon depends a great deal upon the possibility of legislative override.

IV. THE DEMOCRACY CANON, STATE COURTS, AND FEDERAL COURT SUPERVISION

A. Introduction

In the arguments before the New Jersey Supreme Court in *Samson*, Republicans raised plain meaning and legislative intent arguments against allowing Democrats to fill the vacancy in the 2002 U.S. Senate race. After they lost at the state level,²²⁶ Republicans raised a new argument in the United States Supreme Court: the New Jersey Supreme Court, by allowing Democrats to fill the vacancy, had usurped the power of the New Jersey Legislature to set the rules for congressional elections given to them in Article I, Section 4 of the U.S. Constitution.²²⁷ The argument followed on the heels of similar arguments raised as part of the litigation over the disputed 2000 presidential election in Florida.

The Republicans were unsuccessful in the New Jersey case. The United States Supreme Court first denied a stay of the New Jersey Supreme Court's judgment,²²⁸ and then denied a writ of certiorari,²²⁹ both without comment or dissent.

This Part examines constitutional questions arising from the use of the Democracy Canon by state courts in the context of state statutes regulating *federal* elections. When a state court applies a state statute to a question in a federal election, it runs the risk of violating either Article II of the U.S. Constitution (vesting in each state *legislature* the power to set the rules for choosing presidential electors) or Article I, Section 4 (vesting in each state *legislature* the power to set the rules for choosing members of Congress, at least to the extent Congress has not set such rules). This Part argues that courts

should not apply. *See supra* note 79 and accompanying text. When courts make this point clear, the press can then explain this point to the general public.

226. N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J. 2002).

227. "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4.

228. Forrester v. N.J. Democratic Party, Inc., 537 U.S. 803 (2002).

229. Forrester v. N.J. Democratic Party, Inc., 537 U.S. 1083 (2002).

should reject arguments that reliance on the Democracy Canon raises Article I or Article II concerns. It recognizes, however, a potential due process claim that might be raised against state court decisions in a small class of cases where a state court relies on the Democracy Canon in an unexpected way not consistent with longstanding state jurisprudence or practice.

B. *The Florida 2000 Cases*

Briefly,²³⁰ in *Palm Beach County Canvassing Board v. Harris*,²³¹ the Florida Supreme Court reversed the Florida Secretary of State's decisions regarding whether to include the results of some of the recounts in electoral returns and whether to extend the time for some of the recounts. In reaching this decision, the court relied upon a number of principles, including the Democracy Canon:

Because election laws are intended to facilitate the right of suffrage, such laws must be liberally construed in favor of the citizens' right to vote . . . Courts must not lose sight of the fundamental purpose of election laws: The laws are intended to facilitate and safeguard the right of each voter to express his or her will in the context of our representative democracy. Technical statutory requirements must not be exalted over the substance of this right.²³²

The court also suggested that the Florida Constitution imposed limits on the ability of legislators to enact laws regulating the electoral process: "those laws are valid only if they impose no 'unreasonable or unnecessary' restraints on the right of suffrage."²³³

Republicans argued to the United States Supreme Court that the Florida Supreme Court's opinion, by relying on the state constitution and its liberal construction rule, usurped the power of the state legislature to set the rules for choosing presidential electors.²³⁴ The Supreme Court's per curiam decision, in *Bush v. Palm Beach County Canvassing Board*,²³⁵ did not confront the issue directly. The Court noted:

As a general rule, this Court defers to a state court's interpretation of a state statute. But in the case of a law enacted by a state legislature applicable not

230. For a more extended legal analysis, see ABNER GREENE, UNDERSTANDING THE 2000 ELECTION: A GUIDE TO THE LEGAL BATTLES THAT DECIDED THE PRESIDENCY (2001).

231. 772 So. 2d 1220 (Fla. 2000).

232. *Id.* at 1237 (citations omitted); *see also id.* at 1227 ("Twenty-five years ago, this Court commented that the will of the people, not a hyper-technical reliance upon statutory provisions, should be our guiding principle in election cases.").

233. *Id.* at 1236. According to Pamela Karlan, "the Florida Supreme Court relied on the Florida Constitution to provide a canon of construction" to liberally construe state election law. Pamela S. Karlan, *When Freedom Isn't Free: The Costs of Judicial Independence in Bush v. Gore*, 64 OHIO ST. L.J. 265, 276 (2003).

234. The next few paragraphs are drawn from Richard L. Hasen, *When "Legislature" May Mean More than "Legislature": Initiated Electoral College Reform and the Ghost of Bush v. Gore*, 35 HASTINGS CONST. L.Q. 599, 611-13 (2008).

235. 531 U.S. 70 (2000).

only to elections to state offices, but also to the selection of Presidential electors, the legislature is not acting solely under the authority given it by the people of the State, but by virtue of a direct grant of authority made under Art. II, §1, cl. 2, of the United States Constitution.²³⁶

The Court quoted from an 1892 Supreme Court case, *McPherson v. Blacker*,²³⁷ to the effect that the key words in Article II “operat[e] as a limitation upon the State in respect of any attempt to circumscribe the legislative power”²³⁸ to set the manner for choosing presidential electors. The Supreme Court then held that the Florida Supreme Court’s decision “may be read to indicate that it construed the Florida Election Code without regard to the extent to which the Florida Constitution could, consistent with Art. II, §1, cl. 2, ‘circumscribe the legislative power.’”²³⁹ The Supreme Court remanded the case “for . . . proceedings not inconsistent with this opinion”²⁴⁰ so that the Florida Supreme Court could consider “the extent to which [it] saw the Florida Constitution as circumscribing the legislature’s authority under Art. II, §1, cl. 2.”²⁴¹

Eight days after the Supreme Court decided *Bush v. Palm Beach County Canvassing Board*, it decided a second case arising from the Florida controversy. Al Gore by this point had contested the results of the election, and asked for additional manual recounts of votes in certain Florida counties. A Florida trial court judge denied the request for recounts, but the Florida Supreme Court reversed, ordering a statewide recount of all the undervotes cast in the state in the presidential election, along with other relief.²⁴² The Florida Supreme Court ruling depended upon several controversial interpretations of Florida’s election statutes, and drew a blistering dissent from the chief justice of that court.

As is well known, in *Bush v. Gore*²⁴³ the Supreme Court, by a 5-4 vote, reversed the Florida Supreme Court’s ruling, ending the recount process and leading to the choice of George W. Bush over Al Gore as president. A per

236. *Id.* at 76.

237. 146 U.S. 1, 25 (1892).

238. *Bush*, 531 U.S. at 76 (quoting *McPherson*, 146 U.S. at 25).

239. *Id.* at 77.

240. *Id.* at 78.

241. *Id.* The Court also directed the Florida Supreme Court on remand to explain “the consideration the Florida Supreme Court accorded to 3 U.S.C. §5.” *Id.* Stripped of the obtuse language, the point of the Supreme Court’s first Florida case appeared to be this: Article II of the Constitution vests the power for setting the manner of choosing presidential electors in the hands of the legislature. In *McPherson*, the Supreme Court wrote that Article II prevents the state from “circumscrib[ing] the legislative power” to set those rules. This principle might apply even to limits on legislative power contained in the state’s constitution. Because it was unclear whether the Florida Supreme Court read the Florida Constitution’s right to vote as trumping the Florida state legislature’s rules for choosing presidential electors, remand was in order.

242. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000).

243. 531 U.S. 98 (2000) (per curiam).

curiam opinion for five Justices held that the recounts ordered by the Florida Supreme Court failed to comply with the requirements of the Fourteenth Amendment's Equal Protection Clause, and that a remand for recounts under acceptable standards was inappropriate (with the result being that Florida's votes would be certified for candidate Bush and he would be declared President).²⁴⁴ Four Justices rejected the per curiam opinion.²⁴⁵

Three of the five Justices signing on to the majority opinion—Chief Justice Rehnquist, Justice Scalia, and Justice Thomas—wrote separately as well to argue that the Florida Supreme Court's opinion violated Article II. Whereas the Article II issue in the first Florida case concerned the question whether the state constitution was improperly trumping the state legislature, the question in the second Florida case concerned whether *the Florida Supreme Court itself* was improperly trumping the state legislature.

Chief Justice Rehnquist wrote that under Article II “the general coherence of the legislative scheme [for the appointing of Florida's twenty-five electors] may not be altered by judicial interpretation so as to wholly change the statutorily provided apportionment of responsibility among these various bodies.”²⁴⁶ “What we would do in the present case is . . . hold that the Florida Supreme Court's interpretation of the Florida election laws impermissibly distorted them beyond what a fair reading required, in violation of Article II.”²⁴⁷

The four *Bush v. Gore* dissenters took great issue with the view of Article II expressed in Chief Justice Rehnquist's concurrence. Justice Stevens wrote:

[N]othing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it. Moreover, the Florida Legislature's own decision to employ a unitary code for all elections indicates that it intended the Florida Supreme Court to play the same role in Presidential elections that it has historically played in resolving electoral disputes.²⁴⁸

Similarly, Justice Souter wrote that the Florida Supreme Court's interpretation was not “unreasonable to the point of displacing the legislative enactment” in violation of Article II.²⁴⁹

244. *Id.* at 110-11.

245. *Id.* at 123 (Stevens, J., dissenting); *Id.* at 129 (Souter, J., dissenting); *Id.* at 135 (Ginsburg, J., dissenting); *Id.* at 144 (Breyer, J., dissenting). Two of the Justices in dissent, Justices Breyer and Souter, agreed there were constitutional problems with the Florida Supreme Court order, but rejected the majority's decision to end the recounts. The other two Justices, Justices Ginsburg and Stevens, rejected the equal protection argument.

246. *Id.* at 114 (Rehnquist, C.J., concurring).

247. *Id.* at 115.

248. *Id.* at 124 (Stevens, J., dissenting joined by Ginsburg & Breyer, JJ.).

249. *Id.* at 131 (Souter, J., dissenting). Justice Ginsburg wrote that “[b]y holding that Article II requires our revision of a state court's construction of state laws in order to protect one organ of the State from another, The Chief Justice contradicts the basic principle that a State may organize itself as it sees fit.” *Id.* at 141 (Ginsburg, J., dissenting joined by Stevens, Souter & Breyer, JJ.). Justice Breyer wrote that

C. *The Meaning of the Florida 2000 Cases and Reliance on the Democracy Canon by State Courts*

Following the two Florida 2000 Supreme Court cases, there is a nonfrivolous argument that Article II of the Constitution prevents state courts from relying on the Democracy Canon in interpreting state statutes governing the rules that apply to presidential elections.²⁵⁰ The parallel Article I, section 4 argument (raised in the petition for certiorari in *Samson*) is that state courts cannot rely upon the Democracy Canon in interpreting state statutes governing congressional elections.

One threshold question, not addressed here, is whether the “legislature” described in these constitutional provisions really should be considered “independent” from the normal state processes of construing election laws.²⁵¹ But even if one concedes for purposes of argument that the legislature has the sole power to set the rules for presidential elections (or congressional elections, subject to congressional override), that does not mean that a state court’s reliance on the Democracy Canon is illegitimate. The *Bush v. Gore* concurrence does not claim that state courts are *without authority* to construe election laws affecting presidential elections. This would be an untenable position, rendering unreviewable decisions of state agencies (which notably also could be seen as usurping the power of the legislature through agency interpretation) on how to run a presidential or congressional election, and preventing even court supervision of recounts in presidential and congressional elections.²⁵² Instead, the concurrence’s argument is that state court interpretation cannot “impermissibly distort[] [legislatively drafted election laws governing the presidential or congressional election process] beyond what a fair reading require[s].”²⁵³

If the operative question is what constitutes “impermissible distortion,”

neither the text of Article II itself nor the only case the concurrence cites that interprets Article II, *McPherson v. Blacker* [], leads to the conclusion that Article II grants unlimited power to the legislature, devoid of any state constitutional limitations, to select the manner of appointing electors. . . . Nor, as Justice Stevens points out, have we interpreted the federal constitutional provision most analogous to Art. II, §1—Art. I, §4—in the strained manner put forth in the concurrence.

Id. at 148 (Breyer, J., dissenting joined by Stevens, Ginsburg & Souter, JJ.).

250. The Supreme Court has not addressed the meaning of Article II in this context since *Bush v. Gore*.

251. For an historical argument in the negative, see Hayward H. Smith, *History of the Article II Independent State Legislature Doctrine*, 29 FLA. ST. U. L. REV. 731 (2001).

252. Indeed,

the explicit delegation of authority to the [Florida] courts [by the Legislature] suggests the expectation that the customary judicial armamentarium will be employed, including reliance on a variety of interpretive methods and on all usual sources, including the state constitution. Such an inference seems at least as compelling as the contrary, that the legislature intended the judiciary to ignore the usual sources of law.

Robert A. Schapiro, *Conceptions and Misconceptions of State Constitutional Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 661, 687 (2001).

253. *Bush v. Gore*, 531 U.S. at 115 (Rehnquist, C.J., concurring).

federal courts should hold that state court reliance on the Democracy Canon is permissible as a legitimate means of statutory interpretation, at least in those states with a long history of reliance on the Democracy Canon.

Many critics of the *Bush v. Gore* concurrence, including the dissenting Justices, have ably argued that the Florida Supreme Court's interpretation of state election laws did not go beyond normal principles of statutory interpretation.²⁵⁴ Rick Pildes put it best when he characterized the dispute between the Florida Supreme Court and the three concurring *Bush v. Gore* Justices as a battle between textualists and purposivists:

Faced with ineptly drafted election laws, the Florida Supreme Court took what it considered a purposive approach and sought to adapt a statutory scheme, written with only state and local recounts in mind, to the context of a presidential election. As far as I can tell, this Florida Supreme Court regularly engages in purposive interpretation of statutes, in election and many other cases. On the other hand, several members of the United States Supreme Court fervently believe it is precisely these open-ended methods of purposive interpretation that allow courts to impose their own views of desired outcomes on statutory schemes; for that reason, these Justices strongly embrace textual interpretation. . . . So vehement were these textually committed Supreme Court Justices . . . that they excoriated the Florida Supreme Court in the most disparaging rhetoric: the Florida court's readings were "absurd," ones "[n]o reasonable person" would endorse, and "plainly departed from the legislative scheme."²⁵⁵

In the end, the concurring Justices relied upon their own narrow views of appropriate statutory interpretation to find a constitutional problem. This was in error. The Supreme Court should defer to a state court's use of longstanding statutory interpretation tools such as the Democracy Canon when faced with an Article I or Article II challenge.

D. *A Narrow Federal Role? When State Court Reliance on the Democracy Canon Achieves Results Inconsistent with Longstanding Jurisprudence or Practice*

Critics of the New Jersey Supreme Court in *Samson* and of the Florida Supreme Court in the 2000 presidential recount argue that federal court intervention was necessary to prevent political overreaching by state supreme courts.²⁵⁶ However, neither court should be seen as overreaching because each

254. See Harold J. Krent, *Judging Judging: The Problem of Second-Guessing State Judges' Interpretation of State Law in Bush v. Gore*, 29 FLA. ST. U. L. REV. 493, 528 n.202 (2001) ("Even under the concurrence's standard of 'beyond what a fair reading required,' the dissenting Justices were on firm terrain in finding that the Florida Supreme Court's interpretations were grounded in the statutory language.").

255. Richard H. Pildes, *Judging "New Law" in Election Disputes*, 29 FLA. ST. U. L. REV. 691, 721 (2001).

256. See, e.g., RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION AND THE COURTS* (2001). For a critique, see Richard L. Hasen, A

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relied upon *longstanding interpretive traditions of the state* to construe an ambiguous statute or set of statutes either consistent with past practice (as in New Jersey) or writing on an essentially blank slate (Florida's contest provisions). Given these longstanding traditions, the better institutional check on state court judicial overreaching comes not from the Supreme Court (or other federal courts), but from state legislatures themselves. A state legislature concerned about state court application of the Democracy Canon in the context of federal elections can use clear statements *ex ante* to negate its application, as the *Samson* court illustrated in its opinion.²⁵⁷

But what if a state court, in the context of a deeply partisan election dispute, suddenly relies upon the Democracy Canon when it has never done so before, or relies upon the Democracy Canon to reverse a longstanding practice of a state? In such circumstances, whether involving federal, state, or local elections, the concern is that the state court is using the Democracy Canon, consciously or subconsciously, to reach a particular political outcome. At least one federal court, in a troubling case, has held that the practice can violate the federal constitutional due process rights of voters or candidates.

*Roe v. Alabama*²⁵⁸ involved contested elections for chief justice and state treasurer in Alabama. In both of those races, the results were close. Election officials, citing Alabama law,²⁵⁹ refused to count the ballots of absentee voters who failed to have their ballots notarized or witnessed by two people. Two absentee voters who failed to meet this affidavit requirement sued in state court to have their votes counted; there were enough of these ballots at stake to potentially affect the outcome of both races. A Democratic state court judge ordered otherwise complying absentee ballots to be counted despite the failure to meet the affidavit requirement.²⁶⁰

The Republican candidates for chief justice and state treasurer, along with other plaintiffs, then filed suit in *federal* court seeking a preliminary injunction

"*Tincture of Justice*": *Judge Posner's Failed Rehabilitation of Bush v. Gore*, 80 TEX. L. REV. 137 (2001).

257. Already, the potential Article II issue may drive honest interpretation underground. Following the Supreme Court's decision in the first Florida case, the Florida Supreme Court reached the same conclusions about the statutory scheme on remand, but excised the portions discussing the Democracy Canon and the state constitution. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273 (Fla. 2000). Issacharoff et al. ask: "Does the fact that the Florida Supreme Court reached the same result on remand suggest that state constitutional principles had played a role in informing that court's statutory interpretation, but that those principles had not played a decisive role? Or is it a testament to the plasticity of legal reasoning?" ISSACHAROFF ET AL., *supra* note 22, at 1058.

258. 43 F.3d 574 (11th Cir. 1995).

259. ALA. CODE § 17-11-7 (1975).

260. The state circuit court judge was Eugene W. Reese. *Hornsby v. Sessions*, 703 So. 2d 932, 936 (Ala. 1997) (noting that Judge Reese presided over state court case of *Odom v. Bennett*). Judge Reese ran for judicial office in Alabama as a Democrat. Ala. Sec'y of State, 2002 Candidate List—All Candidates, <http://www.sos.state.al.us/vb/election/2002/allcandidates.aspx?soffice=allcontests&focus=2> (last visited Aug. 29, 2009).

barring Alabama election officials from complying with the state court order. The federal district court judge, a Republican appointee, granted the injunction, citing the fact that the past practice of Alabama election officials was not to count such ballots. A three judge panel of the United States Court of Appeals for the Eleventh Circuit, made up of three judges appointed by Republican presidents, voted 2-1 to affirm the grant of the preliminary injunction, holding that the counting of such ballots could violate the constitutional due process rights of the plaintiffs. The panel wrote:

[A] post-election departure from previous practice in Alabama . . . would dilute the votes of those voters who met [the affidavit requirement] as well as those voters who actually went to the polls on election day. Second, the change in the rules after the election would have the effect of disenfranchising those who would have voted but for the inconvenience imposed by the notarization/witness requirement.²⁶¹

It then certified to the Alabama Supreme Court the question whether absentee ballots not fulfilling the notary or two-witness requirement counted as legal ballots.²⁶²

The Alabama Supreme Court, made up of a majority of Democratic judges, accepted the case for certification after protesting the federal courts' intrusion into its case.²⁶³ "For over 70 years, decisions of this Court have consistently construed Alabama's election laws liberally, where possible, to permit Alabama citizens to express their will at the polls."²⁶⁴ The court cited some of the history of use of the Democracy Canon in Alabama, including in cases involving non-complying absentee ballots.²⁶⁵ Noting that a majority of jurisdictions apply a substantial compliance standard to similar voting laws,²⁶⁶ and noting that the case contained "[n]o evidence of fraud, gross negligence, or intentional wrongdoing,"²⁶⁷ the state supreme court concluded that the ballots should be considered legal so long as they contained "the place of residence of the person casting the ballot," "the reason for voting by absentee ballot," and "the signature of the voter."²⁶⁸

After receiving the answer from the Alabama Supreme Court, the Eleventh Circuit panel nonetheless remanded the case to the federal district court to take evidence on prior practice in Alabama regarding the treatment of absentee ballots lacking an affidavit.²⁶⁹ The district court conducted a trial, and concluded that the prior practice in all but one of Alabama's electoral

261. *Roe*, 43 F.3d at 581.

262. *Id.* at 583.

263. *Roe v. Mobile County Appointment Bd.*, 676 So. 2d 1206, 1217 (Ala. 1995).

264. *Id.* at 1221.

265. *Id.* at 1224-25.

266. *Id.* at 1225; *see also id.* at 1227 (Appendix A: Majority Jurisdictional Survey).

267. *Id.* at 1225.

268. *Id.* at 1226.

269. *Roe v. Alabama*, 52 F.3d 300 (11th Cir. 1995).

jurisdictions was not to count such ballots.²⁷⁰ The Eleventh Circuit then held that given this prior practice, the failure to count such ballots could not deny the absentee voters their due process or equal protection rights.²⁷¹ It further stated that the Alabama Supreme Court never passed on the question whether the counting of such ballots, in the face of uniform practice not to do so, violated the constitutional rights of those voters who complied with the law and objected to the counting of non-conforming ballots.²⁷² At that point, the case ended with the non-conforming ballots remaining uncounted and the challenge to the election rejected.

What to make of this tortured history? To the federal court and supporters of the federal lawsuit, the state courts were engaged in politicized judging: a Democratic court helping out Democratic candidates by changing the counting rules after the fact. To opponents of federal court intervention, a Republican district court judge and Republican panel on the Eleventh Circuit were sticking their noses into state court business, and were themselves engaged in politicized judging contrary to the longstanding policy of the Alabama courts to read election code provisions liberally in favor of the voters.

Though I am sympathetic to the federal court's point that changing the rules after an election raises real due process concerns, the question is whether the state courts indeed "changed the rules."²⁷³ If in fact Alabama courts had a long tradition of relying on the Democracy Canon to use "substantial compliance" to enfranchise more voters who failed to meet technical requirements, then arguably the Alabama courts applied a consistent interpretive rule. The difficulty created by the case is that state election administration *practice* and Alabama state *jurisprudence* did not necessarily line up: the practice was never (or almost never) to count non-conforming absentee ballots; but the Alabama Supreme Court opinion in *Roe* implicitly assumed that this longstanding practice could be overturned by courts if asked to do so under the courts' consistent application of the Democracy Canon.²⁷⁴

Though the federal court intervention may well have been warranted in these circumstances—any time an election rule goes against voters' and candidates' settled expectations and universal practices, it raises legitimate

270. *Roe v. Mobile County Appointing Bd.*, 904 F. Supp. 1315, 1335 (S.D. Ala. 1995).

271. *Roe v. Alabama*, 68 F.3d 404, 407-08 (11th Cir. 1995). For more context on the case, see Edward Felsenthal, *Justice Delayed: A Year After Election, Alabama's Chief Judge and His Foe Battle On—As Vote Counts and Rulings Come and Go, Real Issue Is Policy on Tort Reform—'Everyone is Just Disgusted.'* WALL. ST. J., Oct. 16, 1995, at A1.

272. *Roe*, 68 F.3d at 409.

273. For a case in which a state supreme court changed the rules to *exclude* absentee ballots that voters had an expectation would be counted, see *Griffin v. Burns*, 570 F.2d 1065, 1075-76 (1st Cir. 1978). Pildes discusses the Eleventh Circuit's *Roe* opinions and *Griffin* in the context of federal courts reviewing "new law" created by state courts. See Pildes, *supra* note 255, at 701-13.

274. At least I am assuming it is a consistent application of the Democracy Canon. If, instead, the court showed a pattern of applying the Canon inconsistently to reach partisan results, this would present a more forceful case for federal court intervention.

fairness concerns—ex ante action by the state legislature would have been far superior. A legislature worried about judicial overreaching could pass election statutes that not only clearly state their mandatory and non-waivable nature, but also indicate that such statutes should be strictly construed against expansive voter rights. In the end, the federal court intervention may have made the entire episode even more politicized than it was initially. But it does suggest the legitimacy of a narrow federal role in policing use of the Democracy Canon when state court reliance on the Canon is inconsistent or in violation of settled expectations.

CONCLUSION

In the 2004 mayoral race runoff in San Diego, California, incumbent mayor Dick Murphy defeated his opponent, Ron Roberts, and write-in candidate Donna Frye. Murphy beat Frye by an official difference of 2108 votes out of 450,000 votes cast.²⁷⁵ After the election, a review of the ballots turned up thousands of ballots in which voters wrote in the name of Donna Frye but that were not counted for Frye because those voters did not also fill in a “bubble” on the optical scan ballot indicating they were casting a write-in vote.²⁷⁶ If all of the Frye votes were counted, she would have defeated Murphy by 3443 votes.²⁷⁷

Supporters of Frye brought suit, arguing that the election should be overturned in Frye’s favor. A state trial court disagreed,²⁷⁸ citing a provision of the California Elections Code stating that “[f]or voting systems in which write-in spaces appear directly below the list of candidates for that office and provide a voting space, no write-in vote shall be counted unless the voting space next to the write-in space is marked or slotted as directed in the voting instructions.”²⁷⁹ Frye’s supporters pointed out that the San Diego municipal code, in contrast, did not provide that voters had to fill in a “bubble” for the vote to count; it was enough to write in the name of the write-in candidate.²⁸⁰ Moreover, San Diego had recently adopted this new voting technology following lawsuits over its electronic voting system; voters were unfamiliar with the means of filling in the bubbles and some argued that the instructions on how to cast a write-in vote were not clear.²⁸¹

Frye’s supporters eventually dropped their appeal when Murphy resigned

275. Greg Moran, *Re-Election of Murphy Will Stand, Judge Rules*, SAN DIEGO UNION-TRIB., Feb. 3, 2005, at A1.

276. *Id.*

277. *Id.*

278. *Id.*

279. CAL. ELEC. CODE § 15342(a) (West 1998).

280. Moran, *supra* note 275.

281. See Richard L. Hasen, *The Mayoral Election: Off to Court We Likely Go*, SAN DIEGO UNION-TRIB., Dec. 17, 2004, http://www.signonsandiego.com/uniontrib/20041217/news_lz1e17hasen.html.

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for reasons unrelated to the lawsuit.²⁸² Had the case gone to appeal, the appellate court should have seriously considered applying the Democracy Canon because the state elections code provision was ambiguous. True, it did provide that filling in the bubble is mandatory (“no write-in vote shall be counted unless . . .”). But it also stated that the bubble must be filled in “as directed in the voting instructions.” If the voting instructions were not clear, there would be ample room to liberally construe the law in favor of the voters. Moreover, a court facing this kind of issue should consider applying the contrary municipal law. In considering the statutory issues, the court should at least consider reading the statutes as expressing “the intention . . . to obtain an honest expression of the will or desire of the voter.”²⁸³

The Democracy Canon will not resolve all election law disputes. But it says that at least when a statute is not clear, the law should favor the voters and their enfranchisement. Voters should not be “lost in legal brambles.”²⁸⁴ This is a venerable principle, and one that all courts should embrace as a legitimate canon of construction in election law cases. At the very least, when state courts embrace the principle in a consistent and longstanding way, federal courts ordinarily should not interfere.

282. Greg Moran, *Court Case on Behalf of Frye Votes is Dropped*, SAN DIEGO UNION-TRIB., May 13, 2005, at A1.

283. State *ex rel.* Carpenter v. Barber, 198 So. 49, 51 (Fla. 1940). Even if the statutory interpretation argument failed, Frye supporters could have raised a state constitutional argument. After *Bush v. Gore*, California voters enacted a constitutional amendment guaranteeing the right to vote. CAL. CONST. art. II, § 2.5 (“A voter who casts a vote in an election in accordance with the laws of this state shall have that vote counted.”).

284. Nance v. Kearbey, 158 S.W. 629, 639 (Mo. 1913).

