From: Law-election on behalf of Levitt, Justin
To: Rick Hasen
Cc: Election Law Listserv
Subject: [External] [EL] Citizenship and the census
Date: Wednesday, June 5, 2019 9:21:43 AM
Attachments: image001.png
image004.png
image005.png
image008.png
image010.png
ATT00001.txt

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There was one and only one reason (VRA enforcement) cited in the Dec. 2017 DOJ letter to the Census Bureau. Any other redistricting-related motivation DOJ might have had in asking for the change would have been beyond the mandate of the Civil Rights Division's enforcement authorities under federal law. (DOJ has no capacity to enforce the equal population requirement at issue in Evenwel, and so has no official interest in requesting that the Census Bureau take action facilitating state decisions on the matter.) And there was one and only one reason (VRA enforcement, at the DOJ's request) cited by Sec. Ross in _his_ 2018 decision letter for making the change.

If DOJ personnel had other motivations — acknowledged in depositions or recently revealed in third-party documents or otherwise — that makes things worse, not better, for the DOJ.

The basis of the APA is that agencies have plentiful discretion to change policy direction based on different interpretations of the evidence, but they have to show real evidence and have to give the real reasons for their actions.

--
Justin Levitt
justin.levitt@lls.edu

On Jun 4, 2019, at 5:10 PM, Rick Hasen <rhasen@law.uci.edu> wrote:

> ## DOJ's John Gore Said in His Deposition That One of the Purposes of Collecting Citizenship Data on the Census Forms is To Let States Draw Districts with Equal Numbers of Eligible Voters (Which Hurts Hispanics and Democratic Voters)
>
> Posted on June 4, 2019 2:10 pm by **Rick Hasen**
> The other day I tweeted this:
> <image002.jpg>
> **Rick Hasen**
> @rickhasen

This is a key point and shows that whether or not DOJ borrowed from Hoefeller, the motivation was to allow states to engage in redistricting based on voter eligible persons, which would dilute the votes of Hispanic voters---precisely the opposite of what government has said.

Tierney Sneed
@Tierney_Megan
Replying to @Tierney_Megan

DOJ is now suggesting that Evenwel is where Gore turned for help w/ the request, which is probably a clue that the underlying issue in that case (excluding noncitizens from redistricting) was the chief motivation for adding a citizenship question <image003.jpg>

51
5:51 PM - Jun 3, 2019
Twitter Ads info and privacy
28 people are talking about this

I've since been pointed to pages 180-81 of John Gore's deposition in the census case, where he appears to acknowledge that one of DOJ's purposes early on in asking for the citizenship question to go on the census was to allow jurisdictions to draw districts with equal numbers of voter eligible persons (as opposed to total population, which would hurt Hispanic voters and Democrats). Look especially at the last sentence of the excerpt below:

<image004.png><image005.png>

With all the debate over the Hofeller stuff, let's not forget that there is really no credible evidence DOJ wanted the question added to the census to help Hispanic voters in Voting Rights Act section 2 cases (which the Trump DOJ has never brought). The intention is only to hurt Hispanic voters, whether or not the Hofeller evidence ever gets before the Supreme Court.

<image001.png>
Posted in census litigation, Supreme Court

From: Law-election on behalf of Levitt, Justin
To: Election Law Listserv
Subject: [External] [EL] ELB News and Commentary 1/1/20
Date: Wednesday, January 1, 2020 6:31:50 PM
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A Happy New Year to All

Posted on December 31, 2019 2:11 pm by **Justin Levitt**

You're not writing checks, but if you were, you'd be crossing out the year you just wrote down wrong.

May your '20s be even better than you allow yourself to imagine.

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Posted in Uncategorized

Federal court issues preliminary injunction against 2018 NC voter ID law

Posted on January 1, 2020 3:21 pm by **Justin Levitt**

The law, enacted over the Governor's veto, usually requires a qualifying photo ID to vote. As compared to the previous ID law passed in the wake of *Shelby County* and invalidated in 2016, it expands the list of acceptable IDs (to a list of 10 different types, though with limits on student and government employee IDs) and the means of getting a free ID, applies to absentee as well as in-person ballots, and allows for a voter with a reasonable impediment to getting a photo ID to say so at the polls in order to vote a ballot that should count … if the administrative process works smoothly.

The court enjoined the law as the product of discriminatory intent, but found that the proven impact was (at least at the preliminary stage) insufficient to make out a "results" violation of section 2 of the Voting Rights Act. Stay tuned for the inevitable appeal.

Coverage of the federal court's decision is here, here, and here. The order itself is here.

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Posted in The Voting Wars, voter id

Chief Justice Roberts's year-end report on the judiciary

Posted on January 1, 2020 3:20 pm by **Justin Levitt**

It starts with a tie between the Federalist Papers and the danger of fake news (which started a riot which earned John Jay a rock to the head), and includes a brief paean to the independence of the judiciary from the gentleman about to preside over an impeachment trial. 7 pages, but there's a fair amount of there in there.

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Posted in Election Meltdown

"We can't assume Virginia Democrats will keep their promise on redistricting reform"

Posted on January 1, 2020 3:19 pm by **Justin Levitt**

The Post's editorial board laments the potential change of heart after the change in electoral fortunes.

Share / Save

Posted in political parties, redistricting

"New York Dems Are Redrawing Congressional Districts and It Could Put Alexandria Ocasio-Cortez Out of a Job"

Posted on January 1, 2020 3:18 pm by **Justin Levitt**

The Daily Wire ties the census, redistricting, and (perhaps) a bit of wish fulfillment. They're not wrong about legislative leadership use of redistricting to enforce party discipline, though.

It'll be interesting to see the extent to which New York's new redistricting structure mitigates the iron fist of party leadership in redistricting season.

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Posted in census litigation, political parties, redistricting

"The Constitution in 2020" in 2020"

Posted on January 1, 2020 3:16 pm by **Justin Levitt**

Josh Blackman, at the Volokh Conspiracy, offers a timely reminder of the 2009 ACS essay compilation — "The Constitution in 2020" – with a progressive vision of future constitutional law. The compilation included, among others, a piece by Pam Karlan on voting rights and one by Larry Kramer on political organization and mobilization.

The future, naturally, is now. And Josh flags the value in evaluating the blueprint vision against the present reality. I'll be looking forward to the continuing discussion.

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Posted in election law and constitutional law, political parties

“Cash, claims of illegality already flying in Michigan’s Senate race”

Posted on January 1, 2020 3:15 pm by **Justin Levitt**

Here come the allegations of unlawful coordination.

And with it, your reminder that, as Dan Tokaji and Renata Strause explained years ago, in assessing the legality of campaign coordination, there’s often a “gap between the line the law draws and the line outside observers expect it to draw.”

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Posted in campaign finance, political parties

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Primary voting begins today …

Posted on January 2, 2020 1:38 pm by **Justin Levitt**

… in the Oscars race. It's an alternative voting system for nominations (and in a few categories, for the final result):

In the nominations voting, the marking and tabulation of all ballots shall be according to the preferential, weighted average, or reweighted range voting system. Votes for achievements in motion pictures not on the Reminder List will not be counted in the nominations balloting. Tabulation of final ballots shall be according to the plurality or preferential system. No "write-in" votes shall be counted on the final ballot.

There's a good explanation here using last year's Best Actress contenders, and FairVote (among others) will periodically put out explanations of its own.

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Posted in alternative voting systems, primaries

"Voting Rights Restoration Backlog Leaves Iowans with Felony Convictions Waiting"

Posted on January 2, 2020 1:37 pm by **Justin Levitt**

Iowa Public Radio previews an issue with increased urgency given the February 3 primaries.

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Posted in primaries

Unaffiliated voters and the California primaries

Posted on January 2, 2020 1:37 pm by **Justin Levitt**

Jessica Levinson forecasts coming confusion in California, a heavily absentee-voting state where voters have now been trained on a "top two" state primary (in which voters can vote on all candidates, no matter their party registration). But the top two system doesn't apply to the presidential primary.

This year, the California vote is likely to be quite meaningful in the presidential nominating contest … and voters not already registered in the Democratic party (among others) will have to request a partisan absentee ballot in order to vote in the primary. That's an extra step that local election officials are doing their best to highlight, but still likely to cause some confusion come election day itself.

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Posted in political parties, primaries

"Conservatives seek immediate purge of voters in Wisconsin"

Posted on January 2, 2020 1:36 pm by **Justin Levitt**

The latest on this saga is a motion seeking to hold the members of the Wisconsin Elections Commission in contempt for failing to remove 200,000 voter registrations pending an appeal of a state trial court's order. More here.

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Posted in The Voting Wars, voter registration

"'Alabama Counts': How one Republican state bucks national trends and boosts Census awareness"

Posted on January 2, 2020 1:35 pm by **Justin Levitt**

Alabama is *right* on the brink of losing a congressional seat – under most projections, it's the state that would get the 436th seat if that were a thing. (And that's if the Census count is actually accurate.)

And so perhaps it's not surprising that Alabama is one of the few conservative states apparently spending substantially on Census outreach.

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Posted in redistricting

"Census 2020 Tests Social-Media Giants' Ability to Combat Disinformation"

Posted on January 2, 2020 1:34 pm by **Justin Levitt**

The Wall St. Journal highlights the social media fight against disinformation ahead of the 2020 census.

Share / Save

Posted in chicanery, Election Meltdown, social media and social protests

"Americans wary of 2020 census; more than $1 trillion hangs in balance"

Posted on January 2, 2020 1:34 pm by **Justin Levitt**

The Washington Times on census response.

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Posted in Uncategorized

"Cyber attacks and electronic voting errors threaten 2020 outcome, experts warn"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

The Guardian reports.

Cybersecurity is exceedingly important. And now your reminder that at least in the past, we have been more prone to hacking than the voting systems.

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Posted in chicanery, voting technology

"Election Security at the Chip Level"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

Semiconductor Engineering reports on some of the challenges confronting manufacturers of secure accessible voting systems, and some of the industry efforts to meet those challenges.

That's right, *Semiconductor Engineering*. You're welcome.

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Posted in voting technology

"Under Trump, voter turnout surges in Virginia's off-year elections"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

The WaPo headline is absolutely accurate.

And the "surge" they're describing reached 48 percent turnout in 2017, and 43 percent in 2019 – far more than most off-year elections, and still less than a majority of the eligible electorate.

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Posted in voting

The Year in Recall Elections

Posted on January 2, 2020 1:32 pm by **Justin Levitt**

Apropos for the holiday season, the Recall Elections Blog summarizes some of the "returns and exchanges" of 2019.

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Posted in recall elections

"Commission on Appellate Court Appointments in Spotlight as Redistricting Fight Nears"

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

In Arizona, the commission on appellate court appointments is also the screening body for applicants to the state's independent redistricting commission. And with tomorrow's deadline on applications to the commission, KJZZ has a story on some of the upstream impact on the bodies designated to choose those drawing the lines.

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Posted in redistricting

"Virginia was home to the first gerrymander. It should also be the home of its solution."

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

Sam Wang urges the new unilateral Democratic majority in Virginia to follow through on redistricting reform.

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Posted in legislation and legislatures, political parties, redistricting

“Paralysis Grips U.S. Election Overseer While Complaints Pile Up”

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

Bloomberg (the press entity, not the candidate) reviews the FEC docket.

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Posted in campaign finance

“A Century of Votes for Women”

Posted on January 2, 2020 1:30 pm by **Justin Levitt**

Christina Wolbrecht and J. Kevin Corder with a new book on the 100th anniversary of the 19th Amendment. The abstract:

> *How have American women voted in the first 100 years since the ratification of the Nineteenth Amendment? How have popular understandings of women as voters both persisted and changed over time? In A Century of Votes for Women, Christina Wolbrecht and J. Kevin Corder offer an unprecedented account of women voters in American politics over the last ten decades. Bringing together new and existing data, the book provides unique insight into women's (and men's) voting behavior, and traces how women's turnout and vote choice evolved across a century of enormous transformation overall and for women in particular. Wolbrecht and Corder show that there is no such thing as 'the woman voter'; instead they reveal considerable variation in how different groups of women voted in response to changing political, social, and economic realities. The book also demonstrates how assumptions about women as voters influenced politicians, the press, and scholars.*

Should be an interesting read.

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Posted in 19th Amendment, political equality

Quantitative election administration studies: early voting and polling place location

Posted on January 2, 2020 1:30 pm by **Justin Levitt**

Two studies newly published in the latest issue of the *American Economic Journal: Applied Economics* series:

Ethan Kaplan and Haishan Yuan, Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio

> *We estimate effects of early voting on voter turnout using a 2010 homogenization law*

> *from Ohio that forced some counties to expand and others to contract early voting. Using voter registration data, we compare individuals who live within the same 2×2 mile squareblock but in different counties. We find substantial positive impacts of early voting on turnout equal to 0.22 percentage points of additional turnout per additional early voting day. We also find greater impacts on women, Democrats, independents, and those of child-bearing and working age. We simulate impacts of national early day laws on recent election outcomes.*

Enrico Cantoni, A Precinct Too Far: Turnout and Voting Costs

> *I study the effects of voting costs—specifically, distance to polling location—using geographic discontinuities. Opposite sides of boundaries between voting precincts are observationally identical, except for their assigned polling locations. This discontinuous assignment produces sharp changes in voters' travel distance to cast their ballots. In nine municipalities in Massachusetts and Minnesota, a 1 standard deviation (0.245 mile) increase in distance reduces ballots cast by 2 to 5 percent across four elections. During non-presidential elections, effects are three times larger in high-minority areas than in low-minority areas. Finally, I simulate the impact of various counterfactual assignments of voters to polling places.*

I look forward to reading these.

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Posted in election administration, legislation and legislatures, political equality, The Voting Wars

"On Va. Democrats' 2020 to-do list, voting rights seem to top campaign finance reform"

Posted on January 2, 2020 1:28 pm by **Justin Levitt**

The Virginia Mercury looks at the legislative session ahead.

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Posted in campaign finance, election administration, The Voting Wars

"In ancient Athens, ostracism did the job of impeachment"

Posted on January 2, 2020 1:27 pm by **Justin Levitt**

The Economist seriously shifting the Overton window for impeachment, with a review of ancient Athenian exile.

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Posted in Uncategorized

Federal court issues preliminary injunction against 2018 NC voter ID law

Posted on January 1, 2020 3:21 pm by **Justin Levitt**

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Posted in The Voting Wars, voter id

Chief Justice Roberts's year-end report on the judiciary

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It starts with a tie between the Federalist Papers and the danger of fake news (which started a riot which earned John Jay a rock to the head), and includes a brief paean to the independence of the judiciary from the gentleman about to preside over an impeachment trial. 7 pages, but there's a fair amount of there in there.

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Posted in Election Meltdown

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Election-related options still to come at AALS

Posted on January 3, 2020 4:47 pm by **Justin Levitt**

Rick already mentioned a few of the exceptional election-related events at AALS so far.

There are still several to come, including my stint tomorrow at 8:30 as least valuable player on a 2020 census panel with Dale Ho, Christina Mora, and Franita Tolson, moderated by Rachel Moran.

Then stick around for a 10:30 panel on the 15th and 19th Amendments with Atiba Ellis, Catherine Powell, Camille Gear Rich, Jorge Roig, Ciara Torres-Spelliscy, and Sarah Catherine Walker, moderated by Marc-Tizoc Gonzalez. And a 1:30 program on partisan politics and our democratic order, with andré douglas pond cummings, Emma Jordan, Yvonne Lindgren, and Gerald Torres, moderated by Steven Ramirez. And another 1:30 program on litigating voting rights remedies in the Trump era, with Elise Boddie, Guy-Uriel Charles, John Harrison, and Pam Karlan, moderated by Alexandra Lahav. And a 3:30 program on discussing socioeconomic issues in the context of a polarized and polarizing election season, with Natalie Gomez-Velez, Susan Kuo, and Bertrall Ross, moderated by Deleso Alford and June Rose Carbone.

And the big presidential program tomorrow at 1:30, on representation, voting, and sustainable constitutional democracy, with Guy, Pam, Michael Morley, and Kim Lane Scheppele, moderated by Thomas Ginsburg.

Among (many) others. If you're in the Wardman Park area, come join!

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Posted in census litigation, election law and constitutional law, The Voting Wars, theory, voting

Posted on January 3, 2020 4:45 pm by **Justin Levitt**

The New York Times lede:

> *A federal judge on Friday allowed a Rudy Giuliani associate indicted on campaign finance charges to turn over documents to Congress as part of the impeachment proceeding against President Donald Trump.*
>
> *U.S. District Court Judge Paul Oetken granted Lev Parnas' request to turn over to the House intelligence committee documents and data seized by federal investigators when Parnas was arrested in October.*

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Posted in chicanery

"A deceptively edited video of Joe Biden illustrates a big problem in 2020"

Posted on January 3, 2020 4:44 pm by **Justin Levitt**

Rick's been writing up a storm about dirty tricks like deepfakes in American elections, including in his new book.

But the sort of deceptive selective editing at play in the video described here is much more accessible, and has been for a while now.

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Posted in chicanery, Election Meltdown

"America Won't Give Up Its Hackable Wireless Voting Machines"

Posted on January 3, 2020 4:43 pm by **Justin Levitt**

This Bloomberg piece on Web-connected election machines scapegoats the public craving for instant results.

> *"The pressure to promptly transmit results to news organizations –- and ultimately voters — is so great that election officials have no choice but to briefly connect voting systems to the internet at the end of the night, said Paul Lux, the elections supervisor of Okaloosa County, Florida and a member of the EAC advisory committee that develops technical guidelines."*
>
> *"If everyone would just be patient on election night and let us produce the results, then there's no real debate here about wireless transmission," Lux said.*

I've thought for a while now that we'd all actually be a lot better served, substantively, by some election-day self-restraint with the preliminary results and the pre-preliminary reults and the pre-pre-preliminary results. And that's as unrealistic as the hope that the media reporting on the security vulnerabilities caused by the promise of the instant results they offer might lead that charge.

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Posted in voting technology

Here come the latest purge demands

Posted on January 3, 2020 4:42 pm by **Justin Levitt**

Looks like Judicial Watch released another tranch of NVRA demand letters.

Also looks like they're still identifying allegedly non-compliant jurisdictions at least in part by comparing point-estimate registration data on legal domicile to trend-estimate ACS data on physical CVAP presence.

When I wrote about this particular comparison in 2017, it was bad science. It's still bad science. Just to recap a few of the problems:

- These metrics measure different things. Registration is about domicile, Census estimates of CVAP are about where you lay your head. You can still be legally registered in a jurisdiction even if you're not physically present there. Two obvious examples, but there are plenty more:
  - Any member of Congress who sleeps most of the time in DC is probably registered in their home district but probably counted for Census purposes in DC.
  - And members of the military may be counted for Census purposes where they're stationed, but can also be registered at "home." Any jurisdiction that sends a lot of people to the military, but doesn't have a base, may well have more lawfully registered people than Census CVAP estimates show. Not so kind to the troops to purge them while they're serving.
- These metrics are different types of measures. Registration is a hard count of individuals, Census estimates of CVAP are survey estimates and projections. Among other things: the latter comes with a margin of error.
- These metrics cover different time periods. The CVAP estimates are estimates over a (usually) multi-year period, often several years behind any current snapshot of a registration count.
- And if the measure of registration entries includes inactive voters, those are voters heading off the list if they don't interact with election officials in the near future – but that interim period is a safeguard to make sure that eligible voters aren't kicked off the rolls by mistake.

> To be abundantly clear: accurate list maintenance is good hygiene, and beneficial. Inaccurate list maintenance based on flawed measures of problems is medical malpractice.

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Posted in The Voting Wars, voter registration

“Florida legislators’ PACs amass hundreds of millions of dollars”

Posted on January 3, 2020 4:39 pm by **Justin Levitt**

I missed this last week:

> *Direct donations to campaigns for the Florida Legislature are limited to $1,000. . . . [But t]he amount of money a company or individual can donate to a legislator’s PAC is limitless. . . . A Daytona Beach News-Journal investigation found PACs controlled by current Republican House and Senate members total $728 million. In contrast, Democratic legislators’ PACs total just $19 million.*

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Posted in campaign finance, lobbying

“Voting Rights Restoration Gives Felons a Voice in More States”

Posted on January 3, 2020 4:38 pm by **Justin Levitt**

A recap of recent action on the enfranchisement of people with convictions, from Stateline.

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Posted in political equality

“Lowering the Voting Age to 16: Learning from Real Experiences Worldwide”

Posted on January 3, 2020 4:38 pm by **Justin Levitt**

The new year brings another new book on electoral mechanics, edited by Jan Eichhorn and Johannes Bergh. The abstract:

> *This book explores the consequences of lowering the voting age to 16 from a global perspective, bringing together empirical research from countries where at least some 16-year-olds are able to vote. With the aim to show what really happens when younger people can take part in elections, the authors engage with the key debates on earlier enfranchisement and examine the lead-up to and impact of changes to the voting age in countries across the globe. The book provides the most comprehensive synthesis on this topic, including detailed case studies and broad comparative analyses. It summarizes what can be said about youth political participation and attitudes, and highlights where further research is needed. The findings will be of great interest to researchers working in youth political socialization and engagement, as well as to*

policymakers, youth workers and activists.

Should be an interesting read.

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Posted in political equality, voting

"SEC Proposed Proxy Rules Changes—A Risk to Companies, Corporate Political Disclosure and Accountability"

Posted on January 3, 2020 4:37 pm by **Justin Levitt**

Bruce Freed, Dan Carroll, and Karl Sandstrom, at the Harvard Law School Forum on Corporate Governance, connect proposed SEC rule changes, raising ownership thresholds and limiting repeat attempts for shareholder proxy fights, to the battle over disclosure of corporate political spending.

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Posted in campaign finance

Scheduling of special elections

Posted on January 3, 2020 4:36 pm by **Justin Levitt**

There's always a fair amount of controversy around the scheduling of special elections to fill vacancies, particularly when the date seems to create particularly advantageous or disadvantageous terrain.

The latest takes shape in New York, for the special election to replace Rep. Chris Collins, who resigned after pleading guilty to insider trading.

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Posted in The Voting Wars

California Democratic Party settles lawsuits alleging harassment and discrimination by former leader

Posted on January 3, 2020 4:35 pm by **Justin Levitt**

The LA Times has the latest on the continuing fallout from the scandal involving the former chair.

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Posted in political parties

The partisan campaign finance horse race

Posted on January 3, 2020 4:35 pm by **Justin Levitt**

The WaPo summarizes the reported candidate and party committee hauls for 2019 ($463 million for Trump and the RNC, for example).

It seems fair to compare RNC solo fundraising to DNC solo fundraising, and Trump's re-elect to Obama's 2012 re-elect. But if the point of the horserace tally is to get a rough sense of fundraising enthusiasm for the general election ahead, it's always struck me as profoundly weird to compare fundraising by one presidential incumbent to fundraising by any individual candidate for an opposing party nomination.

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Posted in campaign finance, campaigns

"Top DFLers, state party defend law that permits Trump-only GOP primary ballots"

Posted on January 3, 2020 4:34 pm by **Justin Levitt**

The real story isn't that state party officials are defending state party associational rights under the First Amendmetn (even if they also benefit opposing parties). The real story is the practical recognition that litigation now begins to creep up on getting the ballots out. The primary season is upon us.

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Posted in election law and constitutional law, political parties, The Voting Wars

"Chief Justice Roberts warns we're taking "democracy for granted." His rulings haven't helped."

Posted on January 3, 2020 4:34 pm by **Justin Levitt**

Ian Millhiser critiques what he sees as a disconnect between the Chief's year-end report on the judiciary and our democracy, and the Chief's actions on the judiciary and our democracy.

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Posted in campaign finance, Voting Rights Act

"Leaked Trump Camp Tape Reignites Concerns Over GOP 'Ballot Security' Plans"

Posted on January 3, 2020 4:33 pm by **Justin Levitt**

Tierney Sneed at TPM highlights the audio Rick blogged before the holidays, about the lapse of the consent decree between the DNC and RNC governing "ballot security" efforts.

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Posted in chicanery, political parties

"Man, 81, Pleads Guilty To Voting in N.H. and Mass."

Posted on January 3, 2020 4:33 pm by **Justin Levitt**

If this is the proof of the busloads of voters, those are very, very small buses.

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Posted in chicanery

New York made a few election law changes in 2019

Posted on January 3, 2020 4:32 pm by **Justin Levitt**

Greenberg Traurig, in The National Law Review, have you covered on some of the basics.

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Posted in campaign finance, election administration

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… in the Oscars race. It's an alternative voting system for nominations (and in a few categories, for the final result):

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Posted in alternative voting systems, primaries

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"News coverage gets geo-fragmented"

Posted on January 4, 2020 9:45 am by **Justin Levitt**

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Posted in campaigns, Election Meltdown

"Democracy itself is literally on the ballot"

Posted on January 4, 2020 9:44 am by **Justin Levitt**

Marc Elias in WaPo about his lawsuits on the ballot-order statutes giving unilateral pole position to candidates of one party.

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Posted in ballot access, election law and constitutional law, The Voting Wars

The presidential primary field narrows … but it's also broader than you may realize

Posted on January 4, 2020 9:43 am by **Justin Levitt**

There's been quite a bit of coverage on Julián Castro's recent exit from the presidential race.

On a comparatively slow (election) news day, your reminder that the FEC notes we've got plenty of options left: as of today, they list 1042 total declared candidates for President. I personally think "Chocolate Pancakes" makes for an intriguing dark horse.

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Posted in primaries

We're always in election season, example #927384

Posted on January 4, 2020 9:42 am by **Justin Levitt**

The City reports on what one attorney calls an "unusual electoral gauntlet":

> *Queens voters are being asked to head to the polls five times in less than two years to select a borough president to replace — and succeed — Melinda Katz.*
>
> *The race's six current candidates are gearing up for a March special election to temporarily fill the seat. Then the results of the June primary and November general election will combine to determine who serves the final year remaining in Katz' term, which ends Dec. 31, 2021.*
>
> *That will be followed by next year's primary and general election for a full four years in office, beginning Jan. 1, 2022. Katz recently stepped down after winning election as the borough's district attorney.*

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Posted in Uncategorized

"Election controversies, other concerns prompt potential Virginia voting changes in 2020"

Posted on January 4, 2020 9:41 am by **Justin Levitt**

This seems like a good roundup of many of the electoral proposals on the agenda in Virginia for the coming legislative session.

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Posted in election administration, redistricting

“Sponsor says Alaska elections initiative has enough signatures to be placed on ballot”

Posted on January 4, 2020 9:41 am by **Justin Levitt**

Alaska Public Media reports on the progress of a proposition calling for a top-four primary, ranked-choice voting, changes to appointments to local election boards, and campaign finance reform, among others.

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Posted in alternative voting systems, campaign finance, direct democracy, election administration, Uncategorized

Election-related options still to come at AALS

Posted on January 3, 2020 4:47 pm by **Justin Levitt**

Rick already mentioned a few of the exceptional election-related events at AALS so far.

There are still several to come, including my stint tomorrow at 8:30 as least valuable player on a 2020 census panel with Dale Ho, Christina Mora, and Franita Tolson, moderated by Rachel Moran.

Then stick around for a 10:30 panel on the 15th and 19th Amendments with Atiba Ellis, Catherine Powell, Camille Gear Rich, Jorge Roig, Ciara Torres-Spelliscy, and Sarah Catherine Walker, moderated by Marc-Tizoc Gonzalez. And a 1:30 program on partisan politics and our democratic order, with andré douglas pond cummings, Emma Jordan, Yvonne Lindgren, and Gerald Torres, moderated by Steven Ramirez. And another 1:30 program on litigating voting rights remedies in the Trump era, with Elise Boddie, Guy-Uriel Charles, John Harrison, and Pam Karlan, moderated by Alexandra Lahav. And a 3:30 program on discussing socioeconomic issues in the context of a polarized and polarizing election season, with Natalie Gomez-Velez, Susan Kuo, and Bertrall Ross, moderated by Deleso Alford and June Rose Carbone.

And the big presidential program tomorrow at 1:30, on representation, voting, and sustainable constitutional democracy, with Guy, Pam, Michael Morley, and Kim Lane Scheppele, moderated by Thomas Ginsburg.

Among (many) others. If you’re in the Wardman Park area, come join!

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Posted in census litigation, election law and constitutional law, The Voting Wars, theory, voting

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"Fresh Cambridge Analytica leak 'shows global manipulation is out of control'"

Posted on January 5, 2020 1:05 pm by **Justin Levitt**

From The Guardian:

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Posted in campaigns, Election Meltdown

"Deceased GOP Strategist's Daughter Makes Files Public That Republicans Wanted Sealed"

Posted on January 5, 2020 1:02 pm by **Justin Levitt**

As Hansi Lo Wang notes, Stephanie Hofeller just dropped the first full tranch of documents on The Hofeller Files.

Enjoy.

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Posted in election law biz, redistricting

"Paperwork problem blocks Andrew Yang from Ohio's

Democratic presidential primary ballot, campaign to launch write-in effort"

Posted on January 5, 2020 1:02 pm by **Justin Levitt**

Ballot access is not for the faint of heart.

Share / Save

Posted in ballot access, political parties, primaries

"What it means to participate in the Iowa caucuses"

Posted on January 5, 2020 1:01 pm by **Justin Levitt**

Lyz Lenz offers a wry view in The Gazette.

But past the humor, her overall point is spot-on: few Americans understand how the Iowa caucuses actually work — and it looks a lot more like a town meeting than a typical election, which has some fairly substantial consequences (and raises some fairly substantial legitimacy concerns). Rick, among a bunch of others, has been on this for a while – and I hope you can expect a lot more coverage of the actual process (and not just the polling horserace) as the process approaches.

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Posted in political parties, primaries

"To Produce Citizenship Data, Homeland Security To Share Records With Census"

Posted on January 5, 2020 1:00 pm by **Justin Levitt**

Hansi Lo Wang reports on the latest federal data-sharing agreement to capture citizenship data for the 2020 census: not on the questionnaire, but through administrative records.

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Posted in Uncategorized

"Georgia's new voting system set to roll out"

Posted on January 5, 2020 12:59 pm by **Justin Levitt**

The Savannah Morning News previews what it calls the "largest purchase of new machines in history."

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Posted in voting technology

“New law makes voters’ primary party choice public”

Posted on January 5, 2020 12:57 pm by **Justin Levitt**

The Pioneer Press reviews an interesting new facet of Minnesota’s law. As in many states, voters have to declare a party preference before voting in a primary, but apparently, the voters’ choice of party is “secret, just like your actual choices for candidates.” Except, now, if you’re voting in the presidential primary – the new law allows each of Minnesota’s parties to know who voted in which presidential preference primary.

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Posted in political parties, primaries

Redistricting Arizona

Posted on January 5, 2020 12:56 pm by **Justin Levitt**

The Arizona Daily Star goes quite deep on the past, present, and future of Arizona’s Independent Redistricting Commission.

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Posted in citizen commissions, redistricting

“Urban America likely to gain clout after Census”

Posted on January 5, 2020 12:55 pm by **Justin Levitt**

Reid Wilson, in The Hill, discusses the population shift to cities.

For those following census issues closely, one of the impacts of the implementation of differential privacy may blunt that apparent move a bit on the margins. As a really brief (and inadequate) primer: the Census Bureau plans to change the way in which it safeguards the confidentiality of responses by adding privacy protections that are far more resistant to reverse engineering than past practices. It involves adding noise to the actual counts (the way the algorithm works, small geographies end up noisier than large ones: state level total counts reflect the actual count exactly, but census-block information will be a bit different).

At the moment, the Bureau is leaning against releasing numbers that look fake (so, no negative counts). What that means is that big populations get both bigger and smaller — but tiny populations get larger than they get smaller (because a block with 2 people may be reported with 5 people, but won’t be reported with -1). And that potentially means a fairly small, but systemic, bias toward reported overall growth in rural populations that isn’t there.

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Posted in redistricting

“Voters in town once run by polygamous sect probably broke the law when they cast ballots, prosecutor says, but charges are unlikely”

Posted on January 5, 2020 12:54 pm by **Justin Levitt**

The Salt Lake Tribune runs a story about potential improper registration in Colorado City (which, despite the name, is half of a community that straddles the Utah-Arizona boder).

There are real problems of unlawful behavior in Colorado City. But some of the anecdotes in the story seem to suggest a conflation of domicile and physical presence. As one example:

> *Lori Barlow acknowledges she was one person whose address was out of date yet voted anyway. She still lives in Colorado City in what she says is temporary housing.*
>
> *Smith and Mohave County, Barlow said, have failed to appreciate the housing challenges in Colorado City, where many people loyal to imprisoned FLDS President Warren Jeffs have chosen to be evicted rather than deal with a local land trust that owns many of the homes.*
>
> *“I did not change my address,” Barlow said, “because I had nothing to change it to.”*

The story doesn’t state otherwise … but in most states, someone in Barlow’s apparent position is properly registered at her old address even if she no longer sleeps there at night, as long as she hasn’t yet established permanent residence elsewhere.

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Posted in chicanery, voter registration

“Give nonvoters a reason to participate in elections”

Posted on January 5, 2020 12:51 pm by **Justin Levitt**

Algernon D’Ammassa offers an intriguing critique of the “running a race” frame of American elections, tied to both news coverage and the “Campaigns, Inc.” influence of consultants.

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Posted in campaigns, election law biz

“Census will mean new ways for politicians to keep power despite earning fewer votes”

Posted on January 5, 2020 12:49 pm by **Justin Levitt**

Bill Leonard weighs in on new opportunities for partisan gerrymandering after the Census.

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Posted in political parties, redistricting

"Why Texas doesn't want to count all its Texans"

Posted on January 5, 2020 12:48 pm by **Justin Levitt**

Larry Wilson contrasts California's approach to Census outreach with the approach in Texas.

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Posted in redistricting

"News coverage gets geo-fragmented"

Posted on January 4, 2020 9:45 am by **Justin Levitt**

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Posted in campaigns, Election Meltdown

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"2020 Election Security-Perspectives From Voting System Vendors And Experts"

Posted on January 6, 2020 2:15 pm by **Justin Levitt**

This Thursday, Congress will hear from three scholars and analysts, and three of the primary manufacturers (ES&S, Hart InterCivic, and Dominion Voting Systems) of voting systems. This is apparently the first time the top executives of all three companies have testified together.

And Wednesday, Facebook is back on the Hill for a hearing on online manipulation and deception. (Here's a staff memo as background for the hearing.)

Here's hoping for some informed follow-up questions.

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Posted in Election Meltdown, voting technology

"Election experts urge Trump, congressional leaders to end stalemate at FEC"

Posted on January 6, 2020 2:15 pm by **Justin Levitt**

The Hill:

> *Lobbyists and lawyers who specialize in U.S. elections wrote to President Trump and congressional leaders on Monday, urging the confirmation of another federal election commissioner to end "an untenable situation."*
>
> *The Federal Election Commission (FEC), the government's campaign watchdog organization, only has three out of six commissioners, one shy of a quorum. Former FEC Vice President Matthew Peterson resigned in August and, since then, the organization has been unable to do its job, which is to enforce campaign laws.*

Among the things the FEC apparently can't do without a quorum: approve the distribution of public financing dollars for presidential campaigns opting into the system.

The letter is here (h/t to Alex Gangitano at The Hill), with an exceedingly impressive (and legitimately bipartisan) list of signatories.

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Posted in campaign finance, federal election commission

Implementing a waiver program for fines and fees in Florida

Posted on January 6, 2020 2:12 pm by **Justin Levitt**

WUSF reports on the implementation of programs in the courts to reduce the fines and fees of formerly incarcerated individuals, in the continuing fight over the aftermath of Amendment 4 and SB 7066.

The report indicates that the only four counties – so far – to systematically look at reducing fines and fees under a section of SB 7066 lean Democratic. The overall partisan leaning of the particular counties, of course, doesn't mean that the individuals getting their voting rights restored will have similar partisan inclinations.

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Posted in The Voting Wars

The Electoral College

Posted on January 6, 2020 2:12 pm by **Justin Levitt**

The latest issue of The Canvass leads off with a primer on some of the policy options for choosing electors (and the pending litigation on whether the choices of "faithless electors" can be punished or superseded).

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Posted in electoral college

"Where do inmates fall in Census count? NJ moves to end 'prison gerrymandering'"

Posted on January 6, 2020 2:11 pm by **Justin Levitt**

A bill has passed the state Senate, and is working its way through the state Assembly. If it gets signed into law, that would make New Jersey the seventh state to change where incarcerated individuals are counted for representational purposes.

And in related news, the Orlando Sentinel digs into the local impact of the status quo in Florida.

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Posted in political equality, redistricting

"Justices Urged to Nix Donor Disclosure Law"

Posted on January 6, 2020 2:11 pm by **Justin Levitt**

Bloomberg:

> *An unusually large number of amicus briefs filed by friends of a charity tied to the Koch brothers have flooded the U.S. Supreme Court, urging the justices to nix a California law requiring charities to disclose their largest donors to state lawmakers.*

These briefs (here) all came in September, but the Justices will be considering the Thomas More Law Center/Americans for Prosperity Foundation v. Becerra cert. petitions this Friday.

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Posted in campaign finance, election law and constitutional law, tax law and election law

"Under siege, McSally pleads for outside help on the airwaves"

Posted on January 6, 2020 2:10 pm by **Justin Levitt**

I missed this a few days ago. The money quote:

> *McSally suggested last month that outside groups should pitch in to help.*
>
> *"We need close air support to show up. There's outside groups. We can't talk to them. We can't invite them, but we pray for them every day. We need conservative outside groups, you know, to wake up, and get involved, and start muddying up the landscape a little bit, so I'm not just sitting here taking incoming and not having any A-10s show up, you know overhead, to help me out."*

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Posted in campaign finance

Techniques for Grassroots Campaign Volunteer Mobilization

Posted on January 6, 2020 2:07 pm by **Justin Levitt**

Joe Spaulding, lead field strategist for the Voters Not Politicians Michigan independent

redistricting campaign that got 440,000 signatures in 4 months without paying any signature gatherers, reveals some follicular (and data-supported) tactics for fighting diminishing returns out in canvass-land. Thread.

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Posted in petition signature gathering, redistricting

Informational Incentives for Campaign Mobilization

Posted on January 6, 2020 2:06 pm by **Justin Levitt**

Bertrall Ross and Doug Spencer have a new paper out in the Northwestern Law Review: "*Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*." The abstract:

> *A recent spate of election laws tightened registration rules, reduced convenient voting opportunities, and required voters to show specific types of identification in order to vote. Because these laws make voting more difficult, critics have analogized them to Jim Crow Era voter suppression laws.*
>
> *We challenge the analogy that current restrictive voting laws are a reincarnation of Jim Crow Era voter suppression. While there are some notable similarities, the analogy obscures a more apt comparison to a different form of voter suppression — one that operates to effectively disfranchise an entire class of people, just as the old form did for African Americans. This form of suppression excludes the poor.*
>
> *To account for the effective disfranchisement of the poor, we develop a more robust theory of voting than currently exists in the legal literature. Drawing on rational choice and sociological theories of voting, we show how information, affiliation with formal organizations, and integration into social networks of politically active individuals are far more important to the decision to vote than the tangible costs of voting associated with the new voter suppression.*
>
> *Using this expanded account of voting, we identify the role of political parties and their mobilization activities in the effective disfranchisement of the poor. Relying on the same proprietary data as the Obama campaign in 2008 and 2012 (and hundreds of campaigns since), along with other public sources of data, we show how campaigns employ a "calculus of contact" to decide whom to mobilize. That calculus leads campaigns to disproportionately neglect the poor when canvassing, calling, and sending political mailers to potential voters — mobilization activities that have a sizeable turnout effect. In our view, the most significant voter suppression tactics of the twenty-first century are therefore not what legislatures are doing, but what campaigns are not doing.*
>
> *We argue that a first step in combating this passive voter suppression should involve changing the information environment of campaigns: the amount and type of information about potential voters that the state makes available to campaigns. Such a change could force campaigns to adjust their calculus of contact and contact more low-income people during election season. Including the poor as targets of campaign*

mobilization would be an important first step toward a more egalitarian democracy.

I learn something every time I read work by either Bertrall or Doug – and so I'm really looking forward to checking out the product of the collaboration.

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Posted in campaigns, political equality, political parties

'Diminished' NRA at crossroads ahead of 2020 election

Posted on January 6, 2020 2:04 pm by **Justin Levitt**

Speaking of mobilization, the Washington Times has questions:

> *The National Rifle Association, after shedding its president and top lobbyist this year amid a string of internal disputes and legal battles, finds itself at a crossroads with Republican politicos wondering whether the group is still high powered or a campaign dud.*
>
> *The cloud of doubts about the NRA is stunning just four years after the gun rights group helped Donald Trump win the presidential election.*
>
> *The NRA says it plans to play a pivotal role, as always, in elections this year, especially because gun rights advocates are rallying against gun control platforms of the Democratic presidential contenders.*
>
> *It's an open question, however, whether Mr. Trump and like-minded political candidates can expect the same level of financial and organizational support as they did in 2016.*

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Posted in campaigns, lobbying

Campaign finance compliance hits the WWE with steel-chair-like force

Posted on January 6, 2020 2:03 pm by **Justin Levitt**

Former WWE star Rhino was a 2016 candidate for Congress … and seems to think that the rigors of campaign finance compliance may have impacted his last run in the WWE.

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Posted in campaign finance, campaigns

"Fresh Cambridge Analytica leak 'shows global

manipulation is out of control'"

Posted on January 5, 2020 1:05 pm by **Justin Levitt**

From The Guardian:

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Posted in election law biz, redistricting

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"The 2020 election will be the country's biggest cybersecurity test ever"

Posted on January 7, 2020 3:06 pm by **Justin Levitt**

Election issues lead the WaPo's "Cybersecurity 202" daily roundup today.

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Posted in voting technology

"Facebook Bans Deepfakes but Permits Some Altered Content"

Posted on January 7, 2020 3:06 pm by **Justin Levitt**

In the WSJ:

> *Facebook said it would remove or label misleading videos that had been edited or manipulated in ways that would not be apparent to the average person. That would include removing videos in which artificial intelligence tools are used to change statements made by the subject of the video or replacing or superimposing content.*
>
> * * *
>
> *It said its policy banning deepfakes "does not extend to content that is parody or satire, or video that has been edited solely to omit or change the order of words." That could put the company in the position of having to decide which videos are satirical, which aren't and where to draw the line on what doctored content will be taken down.*
>
> * * *
>
> *The Facebook ban wouldn't have applied to an altered video of House Speaker Nancy Pelosi. That video of a speech by Mrs. Pelosi—widely shared on social media last year—was slowed down and altered in tone, making her appear to slur her words.*

> *Facebook said the video didn't qualify as a deepfake because it used regular editing, though the company still limited its distribution because of the manipulation.*

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Posted in chicanery, Election Meltdown, social media and social protests

Facebook exec's internal memo on 2016 election

Posted on January 7, 2020 3:05 pm by **Justin Levitt**

The NYT has published an internal memo written by the Facebook exec overseeing advertising during 2016. The memo touches on Russian ad spending, misinformation, Cambridge Analytica, and more.

I have yet to see a headline on stories reporting the memo that doesn't breathlessly imply a Facebook attempt to help or defeat Trump, out of context. Read the memo for yourself.

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Posted in Election Meltdown, social media and social protests

"Did Britain meddle in a US presidential election?"

Posted on January 7, 2020 3:05 pm by **Justin Levitt**

The BBC reports on an intriguing episode from the 1992 race.

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Posted in Uncategorized

"Kim Reynolds promises to review backlog of felon voting rights applications by the Iowa caucuses"

Posted on January 7, 2020 3:04 pm by **Justin Levitt**

The latest on the restoration of voting rights in Iowa.

Share / Save

Posted in political equality, primaries

"National Democrats jump into new lawsuit over Texas voter registration requirements"

Posted on January 7, 2020 3:04 pm by **Justin Levitt**

The latest from the Marc Elias litigation machine is a challenge in Texas to the rejection of voter registration forms with digital pictures of signatures.

The complaint notes that, among other things, when voters register to vote along with getting a driver's license, they sign devices that store the signature in electronic form and transmit digital images of the signature to election officials.

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Posted in NVRA (motor voter), The Voting Wars, voter registration

"Groups settle suit with Arizona over voter address updates"

Posted on January 7, 2020 3:03 pm by **Justin Levitt**

In Arizona, litigants settled an NVRA compliance case over alleged failures in the process of updating voter registration addresses when people change their address during motor-vehicle transactions. The settlement itself is here.

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Posted in NVRA (motor voter), voter registration

"Voting rights, representation and the future of democracy in the nation's fruit basket"

Posted on January 7, 2020 3:03 pm by **Justin Levitt**

Nikkita Oliver on the aftermath of the VRA case in Yakima, Washington.

And a similar story, also today, from Pasco, 90 miles down the road.

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Posted in Voting Rights Act

"Nevada group to seek signatures for redistricting initiative"

Posted on January 7, 2020 3:02 pm by **Justin Levitt**

The initiative to institute a commission in Nevada was amended and refiled to address a trial judge's concerns about the ballot description.

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Posted in direct democracy, redistricting

“How Trump’s Trade War Is Making Lobbyists Rich and Slamming Small Businesses”

Posted on January 7, 2020 3:02 pm by **Justin Levitt**

ProPublica on the draining of the swamp.

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Posted in lobbying

“Durkan Supports Capping Super PAC Donations and Blocking Amazon from City Elections”

Posted on January 7, 2020 3:01 pm by **Justin Levitt**

In the wake of substantial spending by Amazon (and others) in 2019 city council elections, Seattle contemplates a Clean Campaigns Act purporting to limit contributions to Super PACs, and to limit spending from corporations with more than 1% ownership from a single foreign national or 5% ownership from multiple foreign nationals.

They know there are substantial legal questions (including in the Ninth Circuit) – there’s a good article from The Stranger on some of the legal backdrop.

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Posted in campaign finance, election law and constitutional law

What to do with campaign funds after retiring or passing away

Posted on January 7, 2020 3:01 pm by **Justin Levitt**

Two stories today about campaign funds active longer than their campaigners.

One focuses on FEC requests for explanation from retired officeholders still spending from campaign accounts. The other describes the plans that Rep. Cummings had for his unspent campaign money before he passed away.

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Posted in campaign finance, campaigns, federal election commission

“Democratic Candidates Together Doubled Trump’s 2020 Fundraising Numbers”

Posted on January 7, 2020 3:01 pm by **Justin Levitt**

A HuffPost piece on the other side of the odd horserace money count I mentioned last week:

> *Allies of President Donald Trump gloated last week at the news that his campaign outraised each of the Democratic presidential candidates. But when taken together, Democrats are outraising the president to an unprecedented degree.*
>
> *The top nine remaining candidates for the Democratic presidential nomination combined to raise nearly $400 million in 2019. Trump raised $144 million over the same period. (He raised an additional $67 million in the preceding two years.) There is no recent precedent for the leading presidential candidates of an out-of-power party doubling the fundraising total of the incumbent.*

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Posted in campaign finance

"The Real Power of Bloomberg's Money"

Posted on January 7, 2020 3:00 pm by **Justin Levitt**

A piece in the Atlantic on the governance options available to billionaires:

> *When people think about the political relevance of Michael Bloomberg's money, they tend to think about how his massive spending helps his campaigns: the record $261 million he spent on his three successful mayoral runs, the billions he could end up spending on his quest for the presidency. What people often miss is that Bloomberg actually spent more of his own money boosting his policy efforts in city hall than he did to get there.*
>
> *Part of Bloomberg's presidential sales pitch is that his personal wealth—he's worth an estimated $56 billion—makes him incorruptible. Not only is he unbribeable; being rich enough to never take political contributions, he can assume office unbeholden to donors. But Bloomberg is so rich that he shifts the direction of potential influence: Donors may not be able to buy influence, but he can use his wealth to push things in the directions he wants.*

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Posted in campaign finance, lobbying, political equality

"The Other Swing Voter"

Posted on January 7, 2020 2:59 pm by **Justin Levitt**

Ibram Kendi with a thoughtful piece on the terminology of "swing voters": some "swing" from candidate to candidate or party to party, and some swing between voting and not voting.

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Posted in campaigns

“Thirteen Democrats qualify for Washington presidential primary, Trump sole choice for Republicans”

Posted on January 7, 2020 2:58 pm by **Justin Levitt**

The Seattle Times reviews who’s on and who’s off the Washington State primary ballot. And while the story focuses on the candidates on the ballot who may not still be actively contending by the time March 10 rolls around, the list of candidates who claim to be actively contending but aren’t on the ballot is also revealing.

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Posted in ballot access

“Ensuring That People Can Easily Understand the Ballot Measures They’re Voting On”

Posted on January 7, 2020 2:58 pm by **Justin Levitt**

The lede in Route Fifty:

> *Legislation introduced by a Maryland lawmaker would set new standards for describing ballot measures in the state, with the aim of ensuring that people can clearly understand the proposals they’re casting votes on.*

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Posted in direct democracy

“Ranked-Choice Voting Could ‘Change the Rules’ of Electoral Politics in Mass.”

Posted on January 7, 2020 2:57 pm by **Justin Levitt**

WBUR with an explainer on the ranked choice initiative likely to make it to the ballot if the legislature doesn’t adopt something first.

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Posted in alternative voting systems, direct democracy

Census hearing on hard-to-count communities at same time as voting systems security hearing

Posted on January 7, 2020 2:57 pm by **Justin Levitt**

At the same time as the Thursday hearing on voting system security that I'd mentioned, House Oversight will be holding a hearing on "*Reaching Hard-to-Count Communities in the 2020 Census*." The witness list is still TBD, as far as I know.

While I'm at it, there's a magnificent map of hard-to-count communities here, laying out the Census Bureau's contact strategies in each location. The Census Bureau also has an interactive map for hard-to-count communities with a lot of demographic and socioeconomic information here; California's complete count committee has distilled the info in California to show the top-three reasons why any particular census block makes it harder to count.

Share / Save

Posted in political equality, redistricting

"Census Bureau Ramps Up Hiring Efforts for 2020 Census"

Posted on January 7, 2020 2:56 pm by **Justin Levitt**

The Census Bureau has reached most of its hiring goals in Puerto Rico. And almost everywhere else is still looking for help. They've even got a map to show you where (and how much they're paying).

Share / Save

Posted in Uncategorized

"Florida becomes one of last states to form Census committee"

Posted on January 7, 2020 2:56 pm by **Justin Levitt**

The AP reports on Florida's … exceedingly recent efforts to raise census awareness. In this context, I'm not sure whether "it's never too late" is quite accurate.

Share / Save

Posted in redistricting

"EAC 2020 Elections Summit"

Posted on January 7, 2020 2:55 pm by **Justin Levitt**

Next Tuesday, Jan. 14th, the EAC will host an summit with officials, experts, and advocates discussing the administration of the 2020 elections – and it'll be livestreamed for those who can't make it in person.

Share / Save

Posted in election administration, Election Assistance Commission

Good night, and good luck

Posted on January 7, 2020 3:11 pm by **Justin Levitt**

And now, I give you the inimitable Dan Tokaji, a national treasure. He's at the helm for the next week.

I can't leave without thanking Rick, again, for keeping this forum so vigorously alive. It's like drinking from a fire hose even over the holidays, when people really should have better things to do with their time. And every time I help for a short stretch, I'm reminded how staggering it is that he manages to do this day in and day out.

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Posted in Uncategorized

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To: Election Law Listserv
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"Second Judge Blocks Trump Administration's Census Citizenship Question Plans"

Posted on March 6, 2019 3:09 pm by **Justin Levitt**

Big (and voluminous) news from California: in a 126-page opinion, Judge Seeborg has enjoined the inclusion of a question regarding citizenship on the 2020 census.

The decision follows on Judge Furman's opinion out of New York, but is more expansive: the California decision includes not just a finding on the claim that Commerce's process violated the Administrative Procedure Act, but also that adding the question would substantively distort the conduct of the Census, and thereby violates the Enumeration Clause. That latter finding is not (yet, technically) the subject of Supreme Court review when it hears the appeal from New York on April 23.

I've not been shy about my own view of the process that got the citizenship question onto the decennial census, its likely impact, the pretextual excuse for the decision, or the more plausible reasons for the whole enterprise.

Share / Save

Posted in chicanery, redistricting, Supreme Court, The Voting Wars

2020 Presidential candidates

Posted on March 6, 2019 3:08 pm by **Justin Levitt**

You knew that Michael Bloomberg, Eric Holder, Jeff Merkley, and Hillary Clinton have all announced in the last two days that they're not running for President in 2020.

But did you know that, as of today, you still have 590 other official choices? Enjoy the full list over at the FEC. (h/t Richard Winger)

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Posted in campaigns

House Oversight Requests Documents re 2018 Georgia Elections

Posted on March 6, 2019 3:07 pm by **Justin Levitt**

The House Oversight Committee asked Georgia Governor Brian Kemp today for a set of documents related to voters' difficulties in Georgia in 2018. So far, it's just a request. And Kemp appears unimpressed.

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Posted in chicanery, provisional ballots, voter registration, voting, Voting Rights Act, voting technology

"Hillary Clinton's claims about voter suppression in Georgia and Wisconsin"

Posted on March 6, 2019 3:06 pm by **Justin Levitt**

WaPo's FactChecker reviews some of Hillary Clinton's claims about the 2016 election at the Selma Bloody Sunday commemorative service for this past weekend.

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Posted in chicanery, election administration, voting, Voting Rights Act

AOC PAC USDs to LLC, TBD by FEC

Posted on March 6, 2019 3:05 pm by **Justin Levitt**

A new FEC complaint alleges that several PACs directed by Rep. Alexandria Ocasio-Cortez and/or her chief of staff reported large lump-sum expenditures to a set of campaign vendor LLCs, apparently complaining that the specific expenditures should have been reported individually. More here and here (including some other allegations concerning potential improper affiliation of the PAC and the campaign, and several that just seem to be screaming "AOC" as loudly as possible).

Here's the PAC's own explanation (from May 2018) of why it was set up as it was. And a Twitter thread from Common Cause's Paul Ryan trying to parse what's what … and what might merit closer investigation.

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Posted in campaign finance

Stolen Votes North of the Border

Posted on March 6, 2019 3:04 pm by **Justin Levitt**

Steven Rosenfeld sees parallels between a 2017 Alberta provincial leadership campaign and the NC09 scandal, with lessons for 2020 primaries considering means to further participation online or by phone.

Share / Save

Posted in chicanery, internet voting, political parties, primaries

Nevada State Senate Majority Leader Resigns Based on Federal Campaign Finance Violations

Posted on March 6, 2019 3:03 pm by **Justin Levitt**

Nevada Senate Maj. Leader Kelvin Atkinson resigned yesterday, "announcing he would be pleading guilty to federal charges of misappropriation of campaign funds for personal use and taking 'full responsibility' for his actions." The resignation letter is here. There aren't a lot of other public details that I'm aware of about the basis for the federal charges.

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Posted in campaign finance, chicanery

Stay of NC State Ct Order Voiding Voter ID Amendment Because Enacted by Impermissibly Gerrymandered Legislature

Posted on March 6, 2019 3:03 pm by **Justin Levitt**

On February 22, Rick noted that a North Carolina state trial court had voided a constitutional amendment pertaining to voter ID, because the amendment had been put on the ballot by a legislature elected pursuant to an unconstitutional gerrymander.

Today, the North Carolina court of appeals temporarily put that decision on hold, while awaiting a ruling on the appeal. Stay tuned on this one.

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Posted in redistricting, voter id

Changes Coming to Wisconsin Voter ID Process?

Posted on March 6, 2019 3:02 pm by **Justin Levitt**

There's been ongoing litigation over the legality of Wisconsin's voter ID rule (and other changes to Wisconsin election law). And by "ongoing," I mean largely "in stasis": opinions from the trial court were issued in July 2016 (and partially stayed pending appeal), appellate briefing was complete in November 2016, the cases were argued to the Seventh Circuit on February 24, 2017 … and they've been sitting there since, for more than two years now. In the meantime, one of the plaintiffs has passed away.

One of the issues has been the implementation of the procedure for Wisconsin voters to get the ID they need, particularly in and around the Wisconsin DMV. Now newly elected Gov. Tony Evers has ordered the state Dept. of Transportation to come up with a plan to improve access to the voter ID cards.

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Posted in voter id

"States Are Trying to Stop Election Meddling. But the Real Risk is Public Confidence"

Posted on March 6, 2019 3:01 pm by **Justin Levitt**

TIME on the efforts of many election officials to protect the voting process against interference. And the Brennan Center on the work still to be done with respect to voting systems.

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Posted in election administration, voting technology

"The Movement To Skip The Electoral College Just Passed A Major Milestone"

Posted on March 6, 2019 3:01 pm by **Justin Levitt**

538 has the latest on the National Popular Vote compact, focused on the Colorado governor's likely signature on a new bill.

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Posted in electoral college

"Fighting Gerrymandering in 2021"

Posted on March 6, 2019 3:00 pm by **Justin Levitt**

Calling the hipsters at SXSW: I got an idea for your Friday afternoon.

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Posted in redistricting

More on SOS Office Use of the KY Voter Registration System

Posted on March 6, 2019 2:59 pm by **Justin Levitt**

The reporting continues with respect to employees in the Kentucky Secretary of State's office, looking up names in the voter registration rolls, potentially to assess political affiliation. The SOS's office claims that "all searches were performed at the request of the media or the public, or to perform background checks on job applicants."

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Posted in election administration, voter registration

White Papers Assessing California Top-Two Primary

Posted on March 6, 2019 2:58 pm by **Justin Levitt**

Three new white papers on California's top-two primary out of the USC Schwarzenegger Institute, by Charles Munger, Jr., a financial and political backer of the top-two system.

Share / Save

Posted in political parties, political polarization, primaries

Drinking from the Fire Hose

Posted on March 6, 2019 2:56 pm by **Justin Levitt**

As Dan mentioned, I'll be the one drinking from the fire hose through the 9th (with, as always, renewed appreciation for how Rick manages to do this every single day).

Please send tidbits (and complaints) to me.

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Posted in Uncategorized

Over to You Justin

Posted on March 6, 2019 4:58 am by **Dan Tokaji**

Thanks to Rick for inviting me to sit in for him during his absence. Justin Levitt will be guest-blogging through March 9.

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Posted in Uncategorized

"Transgender Political Candidates Are Increasingly Common. The Money Backing Them Is Not"

Posted on March 6, 2019 4:23 am by **Dan Tokaji**

CPI:

At least 51 transgender people unsuccessfully ran for state, local and federal office last year, according to data collected by Logan Casey, a political scientist who now works with the Movement Advancement Project. Nine ran for Congress, but none emerged victorious or even won a major-party nomination.…

A major obstacle for transgender candidates is money: Those nine transgender congressional candidates collectively raised less than $300,000 during the 2018 election cycle, a Center for Public Integrity review of federal records indicates.

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Posted in campaign finance

"Secretary of state advises Texas counties they may keep vetting list of suspected non-citizen voters"

Posted on March 6, 2019 4:20 am by **Dan Tokaji**

San Antonio Express News:

Texas Secretary of State David Whitley will tell Texas counties they may continue to look into the citizenship statuses of voters on his list of suspected noncitizens, according to an advisory approved by a federal judge Monday.

The advisory, which will be sent to all 254 counties in the state, notifies election offices that they must abide by the Feb. 27 court order that bars them from alerting people on the list that they're under examination or removing anyone from the rolls without approval from the court and "conclusive" evidence that they're ineligible.

It also clarifies that the counties may still vet voters on the list as long as they do not directly contact them.…

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Posted in voter registration

Ocasio-Cortez, Warren and Sanders Skirmish with NY Dems over Fusion Ban

Posted on March 5, 2019 11:53 am by **Dan Tokaji**

NYT reports on opposition to the N.Y. Democratic Party's resolution to eliminate fusion voting.

Share / Save

Posted in ballot access, political parties

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"The Geography of Partisan Prejudice"

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A fascinating mapping of estimates of affective polarization (how Americans feel about members of the opposing major party). The polling question isn't new, but I think that mapping the results onto counties by their demographic composition might be.

(Note: this doesn't mean that people in Florida or South Carolina or Massachusetts are actuallyirreconcilably prejudiced against opposing party members, or that folks in New York, North Carolina, or Nebraska aren't — just that counties in those states share demographic traits correlated to the demographics of folks who do or don't share high levels of partisan prejudice.)

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Posted in political parties, political polarization

"Congressional Tenure Steadily Increasing"

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On the occasion of Don Young's becoming the longest-serving Republican in the history of the House, U.S. Term Limits reviews the historical tenure patterns for members of Congress.

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Posted in term limits

"Republicans Say Democrats' Election Reform Bill Doesn't Address Ballot Harvesting"

Posted on March 7, 2019 11:49 am by **Justin Levitt**

McConnell picks on one thing missing from H.R. 1.

More on third parties collecting and returning absentee ballots, in California, here.

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Posted in absentee ballots, election administration

Chuck Schumer on his voting rights priorities

Posted on March 7, 2019 11:49 am by **Justin Levitt**

He picks his favorite parts of H.R. 1.

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Posted in election administration

"House Democrats Will Vote on Sweeping Anti-Corruption Legislation. Here's What's in It."

Posted on March 7, 2019 11:48 am by **Justin Levitt**

The New York Times runs down a brief summary of H.R. 1.

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Posted in election administration

"Voting Can Be Devastating for Iowa Felons, AP Review Finds"

Posted on March 7, 2019 11:48 am by **Justin Levitt**

An AP piece on the administrative hurdles of rights restoration, and the consequences for those who may not know that they're voting while ineligible. The cover photo of the lead subject of the story may challenge a lot of preconceptions.

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Posted in felon voting

Pushback to the 2018 Missouri redistricting citizens' initiative

Posted on March 7, 2019 11:47 am by **Justin Levitt**

The Springfield News-Leader reports:

Last fall, Missouri voters approved a one-of-a-kind plan to root out partisan gerrymandering with 62 percent of the vote.

Republicans unhappy with the changes are now trying to roll them back.

Five GOP lawmakers, including Senate President Pro Tem Dave Schatz, R-Sullivan, are proposing new modifications to the state constitution that would downplay or eliminate the new standards for "partisan fairness" and "competitiveness" when drawing legislative districts.

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Posted in political parties, redistricting

Federal Prosecutors Agree to Drop Charges Against Rep. Schock

Posted on March 7, 2019 11:46 am by **Justin Levitt**

A deferred prosecution agreement says that charges (including tax fraud, wire fraud, and theft of funds based on misappropriation of Congressional and campaign funds for personal use) will be dropped against Rep. Aaron Schock if he repays $68,000 and pays his taxes.

Repentance in 2019:

"I do feel like I've been wronged in this process by a prosecutor who saw me as his ticket to stardom and who was allowed to go unchecked for many years at great expense to me personally, my family and friends, and, yes, the taxpayers," Schock said. "I think it's unfortunate that he has not been held to account, and I think the question it begs is how did this go on for so long?"

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Posted in campaign finance, chicanery

ShouldTrumpRun.com

Posted on March 7, 2019 11:45 am by **Justin Levitt**

Ciara Torres-Spelliscy digs into what testing the waters in 2011 might have taught the President about corporate contributions and campaign finance law.

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Posted in campaign finance

"Michael Cohen sues Trump Organization for legal fees resulting from Mueller probe, porn star lawsuit"

Posted on March 7, 2019 11:45 am by **Justin Levitt**

This ought to be fascinating. Not least because if it goes anywhere, it may actually shed some light on what Cohen and the Trump Organization actually thought was legal representation and what was not. There's been an awful lot of haziness there.

(PS: don't pay attention to the URL link's content. Confusing generations of law students, New York's "Supreme Court" is its trial court, not its top court.)

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Posted in campaign finance, chicanery

"Political competition is moderating Texas Republicans"

Posted on March 7, 2019 11:45 am by **Justin Levitt**

Behind a paywall, the Economist reviews an apparent shift in Texas legislators' priorities.

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Posted in political parties, political polarization

DOJ Files Brief in SCOTUS Census Case

Posted on March 7, 2019 12:41 am by **Justin Levitt**

Here's the Government's brief in the SCOTUS case over the inclusion of a citizenship question in the decennial enumeration.

I expected the arguments about speculative standing, about the deferential APA review, and about the degree of discretion ostensibly committed to the Secretary of Commerce.

But the substantive argument (p. 32-34) encapsulated by the following (p.14) is willfully obtuse:

The [district] court's "most significant" reason for overruling the Secretary's policy choice was its [illogical] conclusion that citizenship data in federal administrative records is somehow more complete and accurate than that same data plus data from the census.

It's only illogical to conclude that A is more than A+B if you ignore the evidence that B is a net negative, undermining the value of A as well — like everything the career folks at the Census Bureau had been saying for years. It's not crazy to think that you'd make a house more sturdy by reinforcing the walls than by reinforcing the walls *and* tunnelling under the ground floor.

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Posted in Supreme Court

"Trump threatens to block networks from hosting debates

after Dems reject Fox" (in primaries)

Posted on March 6, 2019 8:08 pm by **Justin Levitt**

Sigh.

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Posted in campaigns, political parties

"Ahead of court ruling, Census Bureau seeks citizenship data"

Posted on March 6, 2019 6:14 pm by **Justin Levitt**

The AP has more on the latest at the Census Bureau.

I think this is an effort to gather the administrative data that Census employees said would be more effective at assessing statistical citizenship rates, with fewer downsides for public distrust, than actually asking the question on the decennial enumeration (which advice Sec. Ross promptly discarded).

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Posted in redistricting, Supreme Court

"Second Judge Blocks Trump Administration's Census Citizenship Question Plans"

Posted on March 6, 2019 3:09 pm by **Justin Levitt**

Big (and voluminous) news from California: in a 126-page opinion, Judge Seeborg has enjoined the inclusion of a question regarding citizenship on the 2020 census.

The decision follows on Judge Furman's opinion out of New York, but is more expansive: the California decision includes not just a finding on the claim that Commerce's process violated the Administrative Procedure Act, but also that adding the question would substantively distort the conduct of the Census, and thereby violates the Enumeration Clause. That latter finding is not (yet, technically) the subject of Supreme Court review when it hears the appeal from New York on April 23.

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Posted in chicanery, redistricting, Supreme Court, The Voting Wars

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H.R. 1 Coverage Roundup

Posted on March 8, 2019 11:16 am by **Justin Levitt**

AP
NPR
CBS
CNN
Fox
NBC
New York Times
Washington Post
USA Today
Wall St. Journal
HuffPost
Mother Jones
TPM
Vox
The Hill (and here, and here)
Roll Call
The Guardian
Tampa Bay Times (bonus: zombies!)

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Posted in campaign finance, conflict of interest laws, election administration, Elections Clause, Fixing Election Administration, legislation and legislatures, redistricting, voter registration

House for DC Statehood

Posted on March 8, 2019 11:16 am by **Justin Levitt**

Eleanor Holmes Norton points out that today is the first time the US House has endorsed DC statehood.

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Posted in voting

House Passes H.R. 1

Posted on March 8, 2019 11:15 am by **Justin Levitt**

Final vote: 234-193. The text of the whole thing is here.

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Posted in campaign finance, conflict of interest laws, election administration, Elections Clause, felon voting, Fixing Election Administration, legislation and legislatures, redistricting, voter registration, voting

"125 Democrats and 1 Republican Vote to Lower Voting Age to 16"

Posted on March 8, 2019 11:14 am by **Justin Levitt**

The Daily Caller on Wednesday's (unsuccessful) vote on an amendment to HR 1 that would have lowered the voting age to 16. This might also have been unconstitutional, for the same reasons Derek mentioned here.

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Posted in voting

"House votes in favor of illegal immigrant voting"

Posted on March 8, 2019 11:13 am by **Justin Levitt**

Well, that's the Washington Times headline. But no, no they didn't. They turned back an attempt to add a nonbinding (and likely unconstitutional) resolution (here's a version of the text in last year's Congress).

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Posted in The Voting Wars

"America the Disinterested"

Posted on March 8, 2019 11:13 am by **Justin Levitt**

US News & World Report notes the struggle to boost electoral participation beyond the fight over administrative barriers.

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Posted in Uncategorized

"Paul Manafort sentenced to about 4 years in prison in Virginia case"

Posted on March 7, 2019 4:19 pm by **Justin Levitt**

In line with sentencing guidelines, prosecutors had recommended 19-24 years; Judge Ellis sentenced Manafort to 47 months.

As a reminder, this case (in Virginia) concerned tax fraud and bank fraud. The sentencing in Manafort's DC case (after a plea to conspiracy based on money laundering, failure to register as an agent of a foreign principal, and witness tampering) is March 13.

Other docs here.

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Posted in chicanery

"A nanny state? Vermont town elects goat as honorary mayor"

Posted on March 7, 2019 2:03 pm by **Justin Levitt**

I look forward to the expose.

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Posted in fraudulent fraud squad

"Justice Dept. to Step Up Enforcement of Foreign Influence Laws"

Posted on March 7, 2019 2:00 pm by **Justin Levitt**

DOJ announces a step up in enforcement of statutes regulating foreign influence, including the Foreign Agents Registration Act … including a new team headed by a former Mueller prosecutor.

And a useful thread here explaining the import.

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Posted in lobbying

"The Geography of Partisan Prejudice"

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A fascinating mapping of estimates of affective polarization (how Americans feel about members of the opposing major party). The polling question isn't new, but I think that mapping the results onto counties by their demographic composition might be.

(Note: this doesn't mean that people in Florida or South Carolina or Massachusetts are actuallyirreconcilably prejudiced against opposing party members, or that folks in New York, North Carolina, or Nebraska aren't — just that counties in those states share demographic traits correlated to the demographics of folks who do or don't share high levels of partisan prejudice.)

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"How the Daughters and Granddaughters of Former Slaves Secured Voting Rights for All"

Posted on March 9, 2019 11:22 am by **Justin Levitt**

The Smithsonian lifts up African-American suffragettes.

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Posted in political equality, voting

"Dem long shots crash 2020 debate stage"

Posted on March 9, 2019 11:21 am by **Justin Levitt**

A Politico update on the impact of new rules for Democratic primary debates.

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Posted in political parties, primaries

"New Yorkers frustrated with Democratic dominance push bill to slice up state"

Posted on March 9, 2019 11:27 am by **Justin Levitt**

One state, three governors, three legislatures.

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Posted in Uncategorized

"Speaker Says Assembly No Longer Supports Public Campaign Financing, Downplays Other Reforms"

Posted on March 9, 2019 11:21 am by **Justin Levitt**

Democrats in New York state government back off of campaign finance reform now that they're in power.

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Posted in campaign finance

"Prison Gerrymandering Distorts Our Democracy in the Worst Ways"

Posted on March 9, 2019 11:20 am by **Justin Levitt**

The Nation on the piece of HR 1 that would require the Census to count people who are incarceratedat their last known address.

The Census Bureau requested comment on the issue several times in the last few years, but (despite my urging) has declined to change their practice.

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Posted in redistricting

"Only One Roadblock on the Road to Reform: Mitch McConnell"

Posted on March 9, 2019 11:20 am by **Justin Levitt**

The NY Times Editorial Board calls HR 1 the "Merrick Garland of reform legislation."

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Posted in campaign finance, election administration, Elections Clause, Fixing Election Administration, legislation and legislatures, redistricting, The Voting Wars, voter registration

More on the Census Bureau's collection of administrative citizenship data

Posted on March 9, 2019 11:19 am by **Justin Levitt**

The Washington Post goes deeper on this story, of the Census Bureau collecting administrative data (including citizenship information) to bolster household-by-household census results.

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Posted in redistricting

“Texas’ desperate search for fraudulent voters”

Posted on March 9, 2019 11:18 am by **Justin Levitt**

Robert Brischetto catalogs what Texas has found.

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Posted in chicanery

More on the prosecution of noncitizens voting in North Carolina

Posted on March 9, 2019 11:18 am by **Justin Levitt**

Sam Levine with followup on some of the North Carolina federal prosecutions of noncitizen voting.

And earlier, with a contrast of Crystal Mason’s sentence for casting a ballot while on supervised release and Paul Manafort’s sentence for tax and bank fraud.

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Posted in chicanery, felon voting

Amicus Briefs Supporting Plaintiffs in the MD/NC Partisan Gerrymandering Cases Are In

Posted on March 8, 2019 4:51 pm by **Justin Levitt**

At least 31 so far, here (MD) and here (NC).

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Posted in redistricting

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New York Times
Washington Post
USA Today
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HuffPost
Mother Jones
TPM
Vox
The Hill (and here, and here)
Roll Call
The Guardian
Tampa Bay Times (bonus: zombies!)

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Final vote: 234-193.

UPDATE: The text of the whole thing [will be] here. (As of 7:30pm ET on 3/8/19, the only text appears to be from an earlier version: the version actually considered is a combination of this, this, and these.)

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Forgive me – I didn't see Rick forward a blog update to the listserv yesterday, so this is going to be a doozy.

Citizenship and the Census: Behind the Bluster

Posted on July 13, 2019 12:12 pm by **Justin Levitt**

Hansi Lo Wang points to a July 3 census filing under the Paperwork Reduction Act (the weeds matter, people) in which the Department of Commerce, "having carefully considered the matter, has determined that there is not sufficient time to develop an alternative record to support inclusion of the citizenship question." That would have been really awkward to explain in another return to the courts.

The same paragraph also says that the Secretary has directed the Census Bureau to "produce citizen voting-age population (CVAP) information prior to April 1, 2021 that states may use in redistricting."

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Posted in census litigation, redistricting

Citizenship and the Census: pivot to the complete count

Posted on July 13, 2019 12:12 pm by **Justin Levitt**

With the legal fight over the content of the 2020 enumeration questionnaire finally settled, commentators and advocates are turning to the fight over getting the count right. Here's one example from Josh Geltzer and Mary McCord in the WaPo, and another in The Hill.

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Posted in census litigation, redistricting

Citizenship and the Census: pivot to redistricting

Posted on July 13, 2019 12:11 pm by **Justin Levitt**

And here's the other turn Rick's been forecasting: a HuffPost piece discussing the potential to use data culled for the President's Executive Order in the redistricting process. And a WaPo dive on the potential consequences.

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Posted in census litigation, redistricting, Voting Rights Act

Citizenship and the Census: it's all about Obama

Posted on July 13, 2019 12:10 pm by **Justin Levitt**

Fact check on the notion that Obama took a citizenship question off of the census.

Spoiler: nope.

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Posted in census litigation, chicanery

Citizenship and the Census: the test is freaking people out

Posted on July 13, 2019 12:10 pm by **Justin Levitt**

There's a Census Bureau test of the 2020 form in the field at the moment, with and without the citizenship question, and it's generating a bit of confusion.

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Posted in census litigation

Citizenship and the Census: representation is not the same as voting

Posted on July 13, 2019 12:09 pm by **Justin Levitt**

As Michael Li explains, on All Things Considered.

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Posted in census litigation, redistricting, The Voting Wars

Hofeller's files in North Carolina

Posted on July 13, 2019 12:09 pm by **Justin Levitt**

The files from Tom Hofeller that Rick keeps mentioning in the context of the census case were given to advocates in North Carolina primarily for use in a redistricting case in state court (i.e., not affected by the SCOTUS ruling two weeks ago). Looks like a court just approved the use of a few dozen of those files as evidence in the case.

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Posted in chicanery, political parties, redistricting

"New Election Systems Use Vulnerable Software"

Posted on July 13, 2019 12:08 pm by **Justin Levitt**

New this morning from the AP. A snippet:

An Associated Press analysis has found that like many counties in Pennsylvania, the vast majority of 10,000 election jurisdictions nationwide use Windows 7 or an older operating system to create ballots, program voting machines, tally votes and report counts.

That's significant because Windows 7 reaches its "end of life" on Jan. 14, meaning Microsoft stops providing technical support and producing "patches" to fix software vulnerabilities, which hackers can exploit. In a statement to the AP, Microsoft said Friday it would offer continued Windows 7 security updates for a fee through 2023.

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Posted in election administration, voting technology

Presidential Caucus Voting by Phone

Posted on July 13, 2019 12:07 pm by **Justin Levitt**

On Monday, Rick linked to an AP piece on 2020 Democratic caucus voting by phone in Iowa and Nevada.

Steve Rosenfeld has some deeper dives today (Iowa, Nevada) on what may be brake-pumping at the DNC.

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Posted in political parties, primaries, voting technology

"Who's Behind Voting-Machine Makers? Money of Unclear Origins"

Posted on July 13, 2019 12:06 pm by **Justin Levitt**

More from the AP. The subhead: "North Carolina election officials are learning that private equity firms which don't disclose whose money they're investing hold major stakes in voting-machine makers."

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Posted in election administration, voting technology

"Prosecutors unlikely to charge Trump Org executives, sources say"

Posted on July 13, 2019 12:05 pm by **Justin Levitt**

Reports from CNN and The Hill on potential campaign-finance charges against executives in the Trump Organization.

FWIW, I fully believe that the sources are being accurately quoted, but I'm always pretty skeptical about underlying representations of whether prosecutions are or are not coming down the pike, from people who may have an interest in driving a narrative about whether prosecutions are or are not coming down the pike.

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Posted in campaign finance, chicanery

Partisan Polarization: It's _Less_ Bad Than We Thought?

Posted on July 13, 2019 12:04 pm by **Justin Levitt**

An intriguing new study finds substantial split-ticket voting for downballot incumbents.

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Posted in political parties, political polarization

"Annexed Boise Neighborhood Left Out of Voting Rolls For Almost Five Years"

Posted on July 13, 2019 12:03 pm by **Justin Levitt**

Fixed now, but a helpful reminder that cities are organic, not static … and that it helps to let election offices know as they grow or shrink.

Share / Save

Posted in redistricting, voting

A fight over certifying referenda for signature-gathering

Posted on July 13, 2019 12:03 pm by **Justin Levitt**

When partisan officials control the process for certifying summaries and titles for initiatives

and referenda heading onto the ballot, there will be controversy along the way. This story is about alleged foot-dragging on beginning the petitioning process to validate a Missouri referendum on a new abortion law.

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Posted in ballot access, petition signature gathering, referendum

"Libertarian, Green parties sue Texas over ballot requirements"

Posted on July 13, 2019 12:02 pm by **Justin Levitt**

From the Houston Chronicle.

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Posted in ballot access, political parties

New Yorker on the Hofeller Files and More: "A Father, A Daughter, and the Attempt to Change the Census"

Posted on July 12, 2019 3:34 pm by **Rick Hasen**

Fascinating read.

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Posted in census litigation, chicanery, redistricting

"Pillar of Law Wins Important Free Speech Victory in Voter List Access Case"

Posted on July 12, 2019 1:24 pm by **Rick Hasen**

Release:

A panel of the United States Court of Appeals for the Fourth Circuit unanimously reversed dismissal of the case Fusaro v. Davitt today, restoring a challenge to a Maryland law that restricts access to the state's registered voter list to Maryland registered voters. Writing for the panel, Chief Judge Roger Gregory ruled that access to the list implicates First Amendment rights.

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Posted in Uncategorized

Trump's Executive Order on the Census

Posted on July 12, 2019 10:59 am by **Justin Levitt**

Hi. Please don't consider this a preview for the coming week: most of the posts will be a lot shorter. I promise.

Until yesterday, the official government reason for getting citizenship information in connection with the decennial census was the Voting Rights Act. The Supreme Court affirmed that that was ~~a lie~~pretext. Yesterday's Executive Order laid out a few more ostensible reasons for getting citizenship information in connection with the census. A few people have asked or wondered aloud why Commerce didn't just offer the reasons now laid out in the EO, when they were hunting for a pretext before the March 2018 decision.

If the Administration's real goal was to put a citizenship question on the decennial enumeration (I offer some thoughts here on why that might have been so), and only as a secondary matter to come up with a reason to justify that goal, there's a answer to the question that doesn't depend on incompetence. The EO rationales are only surface-level plausible. Either they don't actually explain the need for putting the question on the enumeration, or they don't fit the pre-existing OMB preference for uses reflecting strong federal enforcement needs. Or both.

I have no insight into Commerce's actual decision-making process, beyond what's been revealed in litigation. And so what follows represents the attempt to reverse-engineer a rational search for a purpose to put forward. YMMV for whether you think this resembles any plausible consideration in the decision making process that actually went on, in whole or in part.

1. Despite the assertions in yesterday's press conference, the Secretary's March 2018 decision was not a decision for the Census Bureau to start collecting information on citizenship rates from the public. The census's American Community Survey already collects citizenship information from the public on a rolling (and hence regularly updated) and fairly detailed basis (including data like country of birth and year of entry).

   Instead, the March 2018 decision was a decision to collect information on citizenship (alone) from the public on the decennial household-to-household 100% enumeration form.

   That sort of collection risks fomenting inaccuracy (inaccuracy quantified by Census Bureau experts in what they explicitly designated as an exceptionally conservative estimate, and undersold by SCOTUS as a predictive figure, without that same caveat). The size of the inaccuracy was disputed, but not the fact of the inaccuracy. So the decision to forge ahead despite that inaccuracy required at least some articulable benefit from asking for the information on the enumeration, over and above either administrative records or surveys. The ostensible benefit Commerce settled on was the illusion of block-by-block precision purportedly needed for Section 2.

   Beyond redistricting, none of the other uses in the Executive Order (overall national immigration policy, overall national benefits expenditures, various broad legislative purposes concerning the undocumented population) seem to offer a plausible meaningful incremental benefit (over surveys or administrative records) for household-by-household collection of the

one incremental citizenship question sufficient to justify the lapse in accuracy. That is, the other uses beyond redistricting in the EO are pitched at state or national estimates (where the ACS margins of error are really quite small) rather than block-level estimates, and often require information about year of entry, country of origin, or immigration status that the single citizenship question wasn't designed to get.

Or more simply still: except for redistricting, these other applications might explain why the Administration would want ACS data it's already got. But they don't really purport to explain why they'd need one extra household-by-household question on citizenship. The VRA pretext offers an excuse for block-level data on citizenship (without the extra questions on year of entry or status or the like).

2. I don't know offhand the process for reviewing content on the household-to-household enumeration, but there's a rather detailed OMB-fostered process for reviewing content on the ACS. It privileges information to be used by federal agencies, and particularly privileges with the following priority: 1) data explicitly required by statute to be gleaned from the census, 2) data required by statute or case law and naturally derived from the census, and only thereafter 3) data useful for programmatic planning. Data without mandatory or required uses by federal agencies, and only programmatic uses at geographic levels larger than counties, were lowest priority, and essentially flagged for likely deletion from the ACS. And would have been tricky to sell as prime candidates for elevation to the household-to-household enumeration.

   This means that in the existing OMB procedure, the gold standard (at least for ACS content) was information needed by a federal agency in small levels of geography in order to perform a function specifically required by statute or caselaw. (I'm assuming that the process for enumeration content – to the extent there was a process — was at least as restrictive.) "The statutes/courts make me do it" is the best reason to collect information.

   That explains why Commerce first went shopping to federal agencies – DOJ, DHS, DOJ again – for some requested justification, rather than just saying "hey, we're adding the question because this stuff might be useful for someone." The VRA pretext met that threshold of caselaw requirement for data in small levels of geography needed for federal agency enforcement.

   None of the other uses in the EO do the same thing. The first few have to do with changing laws and appropriations and broad national policies, but not enforcing existing statutes at the local level. These rationales in the EO seem pitched primarily at helping Congress pass better laws. But if Congress needs information to inform its policymaking, Congress can add whatever information it wishes to whichever Census instruments it wishes (which may well be why, in the absence of more specific legislation, the OMB process privileges data to assist executive functions). And the redistricting rationale in the EO isn't a federal agency rationale either – it's entirely dependent on the cited interest of "some State officials."

I'm not suggesting that there aren't other hypothetical pretexts that would both 1) fit the preference for data required for federal agencies to do their existing jobs and 2) make the case for a single question on citizenship collected at the block level, yielding information ostensibly

more suitable than the stuff already collected on the ACS. But in that respect, the VRA nonsense did deliver a two-fer. (To be clear, the VRA pretext doesn't really hold up on the merits either. But on these two axes, it might hold up a bit better than the EO alternatives.)

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Posted in census litigation, chicanery

"FEC Gets New Internal Watchdog Following Tumultuous Search"

Posted on July 12, 2019 10:49 am by **Rick Hasen**

CPI reports.

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Posted in federal election commission

"Here's (more) evidence Bill Nelson suffered from bad ballot design in 2018"

Posted on July 12, 2019 10:47 am by **Rick Hasen**

Tampa Bay Times:

It was immediately clear after the Nov. 6 election that far more voters than expected were leaving the Senate box blank. Many of those voters supported other Democrats, like the losing candidate for Governor, Andrew Gillum.
In a new academic paper presented Thursday at the Election Sciences, Reform, & Administration Conference, two researchers looked beyond vote totals, drilling down to the individual ballot level.
What they found was this: In Broward County, voters who skipped the Senate race likely did so by accident, rather than purposely avoiding the race…. 'The academic paper's authors, Marc Meredith at the University of Pennsylvania and Michael Morse at Harvard University, looked at individual "undervoters" — people who voted, but not for senator.
According to the research, "about 33 percent of Senate undervoters in other counties also voted for a third-party or undervoted in the gubernatorial race, consistent with a pattern of more intentional undervoting."
But that wasn't the case in Broward. There, "only about 7 percent of Broward voters who undervoted in the Senate race also voted for a third-party or undervoted again in the gubernatorial race." That indicates they skipped the race unintentionally.

But there's no definitive evidence that the quirk mattered enough to flip the race.

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Posted in Uncategorized

Reminder: Justin Levitt Guest Blogging July 13-20

Posted on July 12, 2019 8:32 am by **Rick Hasen**

I hope to be as off the grid as I can from this Saturday through the next (though maybe I won't be able to resist something on the census or Mueller).

I leave you in the excellent hands of Justin Levitt. Please direct all of your tips and suggestions to him.

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Posted in Uncategorized

If Trump's Executive Order Ends Up Creating Better Citizenship Data, Could It Be Used by States to Draw CONGRESSIONAL Districts with Equal Numbers of Voter Eligible Persons (and Not Total Population)? Would It Allow for Use in State and Local Districts?

Posted on July 12, 2019 8:29 am by **Rick Hasen**

In earlier posts, and in a Slate piece, I explained that both the original reason for trying to include the citizenship question on the census and Trump's executive order issued yesterday was to allow states to try to draw districts with equal numbers of voter-eligible persons, rather than equal numbers of all people. As the Hofeller memo explains, drawing districts in this way would increase white, non-Hispanic Republican voting power. Trump pointed to this as one of the reasons for his alternative approach of gathering better citizenship data:

Fourth, it may be open to States to design State and local legislative districts based on the population of voter-eligible citizens. In Evenwel v. Abbott, 136 S. Ct. 1120 (2016), the Supreme Court left open the question whether "States may draw districts to equalize voter-eligible population rather than total population." Some States, such as Texas, have argued that "jurisdictions may, consistent with the Equal Protection Clause, design districts using any population baseline — including total population and voter-eligible population — so long as the choice is rational and not invidiously discriminatory". Some courts, based on Supreme Court precedent, have agreed that State districting plans may exclude individuals who are ineligible to vote. Whether that approach is permissible will be resolved when a State actually proposes a districting plan based on the voter-eligible population. But because eligibility to vote depends in part on citizenship, States could more effectively exercise this option with a more accurate and complete count of the citizen population.

The approach raises two questions.

First, would the data on citizenship that government agencies will now collect be granular enough to allow for the drawing of voter-eligible equal districts? It seems to me this is an open question. Given*Evenwel* and what we know about the position of the Justices, there are at least three Justices (Alito, Gorsuch, and Thomas) who would have no problem accepting redistricting with less data (or perhaps no data at all—it is not clear whether Alito and Gorusch really agree with the one person, one vote standard, and Thomas is a no). For those Justices who would care about whether the data is good enough, I think this would need to be determined by the courts.

Second, Assuming drawing districts with voter eligible persons is allowed, and assuming the data are good enough, could the lines be drawn for use in creating new *congressional* districts? (Note that Trump's executive order speaks only about using them for state and local districts.) I have always taken this to be an open question following *Evenwel*, but others, including Marty Lederman, believe that the 1964 case *Wesberry v. Sanders* and language in *Evenwel* itself requires the use of total population for Congressional districts. (The part of *Evenwel* at issue reads: "Appellants ask us to find in the Fourteenth Amendment's Equal Protection Clause a rule inconsistent with this "theory of the Constitution." But, as the Court recognized in *Wesberry*, this theory underlies not just the method of allocating House seats to States; it applies as well to the method of apportioning legislative seats within States.").

I'm not sure I agree with this view, and would have to do more research on whether I think *Wesberry*and *Evenwel* settle this question. This could end up in the courts after the 2020 round of redistricting.

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Posted in redistricting

"F.E.C. Allows Security Company to Help 2020 Candidates Defend Campaigns"

Posted on July 12, 2019 8:04 am by **Rick Hasen**

NYT:

The Federal Election Commission said on Thursday that a Silicon Valley security company could immediately start helping 2020 presidential candidates defend their campaigns from the kinds of malicious email attacks that Russian hackers exploited in the 2016 election.

The F.E.C. made its advisory opinion one month after lawyers for the commission advised it to block a request by the company, Area 1 Security, which had sought to provide services to 2020 presidential candidates at a discount. The F.E.C. lawyers said that Area 1 would be violating campaign finance laws that prohibit corporations from offering free or discounted services to federal candidates. The same law also prevents political parties from offering candidates cybersecurity assistance because it is considered an "in-kind donation."

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Posted in campaign finance, campaigns, chicanery, federal election commission

Roundup of Stories on Trump's Census Cave at How Appealing

Posted on July 12, 2019 8:00 am by **Rick Hasen**

Thanks Howard!

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Posted in Uncategorized

"Roberts' Next Thicket?: The Coming One-Person, One-Vote Battle Over "How Much is Too Much"

Posted on July 12, 2019 7:43 am by **Rick Hasen**

Mike Parsons blogs.

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Posted in Uncategorized

Axios: Leonard Leo and Federalist Society Stalwarts "Shocked and Floored" By Trump's Census Cave

Posted on July 12, 2019 7:40 am by **Rick Hasen**

Axios's Jonathan Swan:

Top figures in the conservative legal community are stunned and depressed by President Trump's cave in his fight for a citizenship question on the 2020 Census.
The state of play: *Sources say Leonard Leo and other Federalist Society stalwarts were shocked and floored by how weak the decision was. "What was the dance … all about if this was going to be the end result?" a conservative leader asked.*
"A total waste of everyone's time. … It's certainly going to give people pause the next time one has to decide how far to stick one's neck out."
One GOP strategist called it a "punch in the gut."

Still not clear to me why the "conservative legal community" cared so much about this issue. Unless this was the reason.

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Posted in census litigation

The Trump (Second) Cave on the Citizenship Question is a Double Victory for the Rule of Law

Posted on July 11, 2019 3:08 pm by **Rick Hasen**

President Trump's Speech this afternoon in which he said that the Administration would give up on efforts to add a citizenship question to the census is a victory for the rule of law. Many people were predicting that Trump would use an Executive Order in an effort to force people in the Census Bureau to ignore multiple court orders which barred the inclusion of the question. I had been saying to wait and see, and fortunately, the Administration did not provoke a constitutional crisis by ignoring the judiciary and judicial review.

This is the second victory for the rule of law. The first was that the Supreme Court, likely thanks to the Hofeller files, refused to go along with the charade that the government wanted to add the census question to help Hispanic voters in Voting Rights Act lawsuits. In fact, it was quite the opposite: it was an attempt to maximize, in Hofeller's terms, white Republican voting power at the expense of Hispanics and Democrats. The pretext was too much for even Chief Justice Roberts to handle.

Sure it is not all good news. Four Justices were willing to go along with this charade. Roberts' majority opinion created an easy path for inclusion of the citizenship question in future decades, so long as the government learns to lie better. The government will still collect citizenship data to give Republican states a way to draw districts with equal numbers of voter eligible citizens, rather than all persons, thereby diminishing Hispanic (and Democratic) voting power. (The question of whether that is permissible will have to be decided by the Supreme Court, where the odds are good that drawing such discriminatory district would be allowed.) And attorney general William Barr further lied when he said that the Administration would have won its lawsuits, if only they had more time. (Not only would they have had a difficult time manufacturing a new pretext; the were amateurs in trying to fix things, and had no good explanation for why they could extend the deadline for printing after telling the Supreme Court it had to take the case on an expedited basis and skip the Court of Appeals given the time crunch.)

So it is not all good news. But it is good news for the census (where the real work of getting people to answer the survey is just beginning, given all of the dirt Trump has thrown up in the air, and all the intimidation of non-citizens to participate).

And it is good news for the rule of law. Even the Trump Administration listened to the courts. We shouldn't lose sight of that significant victory.

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Posted in census litigation, Supreme Court

"How a Congressman's Extramarital Affairs Could Undermine Campaign Spending Rules"

Posted on July 11, 2019 2:11 pm by **Rick Hasen**

Ciara Torres-Spelliscy blogs.

I'd like to see how this squares with treating Trump's hush money payments to Stormy Daniels as campaign related.

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Posted in Uncategorized

What Trump is Likely Up to with the Census Case Given the ABC News Report They are Abandoning an Effort to Include the Question: Still An Effort to Diminish Hispanic (and Democratic) Voting Strength

Posted on July 11, 2019 12:24 pm by **Rick Hasen**

See my earlier post: All's Well That Ends Well, or All's Well That Evenwel? How the Commerce Department May Still Help States to Draw Districts with Equal Numbers of Voter Eligible Persons to Minimize Hispanic (and Democratic) Voting Strength.

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Posted in census litigation

Scary Norm Ornstein Piece: "What Happens If the 2020 Election Is a Tie?"

Posted on July 11, 2019 9:28 am by **Rick Hasen**

Here at the Atlantic.

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Posted in Uncategorized

Breaking: Washington State Supreme Court Unanimously Rejects First Amendment Challenge to Seattle's Campaign Finance Voucher Program

Posted on July 11, 2019 9:25 am by **Rick Hasen**

This seems quite right, and I always thought this challenge was a sure loser.

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Posted in campaign finance

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"What the French Revolution teaches us about the dangers of gerrymandering"

Posted on July 14, 2019 11:07 am by **Justin Levitt**

Rebecca Spang with a Bastille Day connection to unabashed partisan redistricting.

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Posted in political parties, political polarization, redistricting

"How white supremacy shaped the original census — centuries before the citizenship debate"

Posted on July 14, 2019 11:07 am by **Justin Levitt**

The WaPo sees a through-line in debates about race and the census. Janai Nelson has a deeper look in the Columbia Law Review.

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Posted in census litigation, political equality

Citizenship data and the redistricting fight

Posted on July 14, 2019 11:06 am by **Justin Levitt**

The Nation picks up the redistricting thread.

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Posted in census litigation, redistricting

"How Trump can mitigate the damage of folding on the

census”

Posted on July 14, 2019 11:06 am by **Justin Levitt**

Hugh Hewitt’s op-ed suggests that the president should have refused to quit on the census case, and calls for a motion for reconsideration in the Supreme Court.

For perspective, it also claims that “the Supreme Court sat on the decision with the clock ticking,” and that the “White House counsel’s office has slowed to a crawl on judicial nominees.”

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Posted in census litigation, chicanery

“If the Supreme Court Won’t Prevent Gerrymandering, Who Will?”

Posted on July 14, 2019 11:05 am by **Justin Levitt**

Sam Wang in the NYT looks to the states.

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Posted in redistricting

“For Democratic presidential hopeful Steve Bullock, it’s all about the ‘dark money’”

Posted on July 14, 2019 11:05 am by **Justin Levitt**

Spotlight on Bullock’s spotlight on campaign finance and the Copper Kings.

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Posted in campaign finance

“Taking political financing private may be legal, but looks wrong for Gillum”

Posted on July 14, 2019 11:05 am by **Justin Levitt**

One Floridian commentator’s take on the flow of funds between PACs and c4s.

FWIW, I’m not sure the particular objection highlighted here makes much sense. It protests the funding of a c4 from donations collected for a PAC, on the basis that the funding isn’t transparent. That PAC money has all been disclosed – it’s likely the most transparent of the money the c4 is collecting.

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Posted in campaign finance

“California lawmakers consider new rules for political ads”

Posted on July 14, 2019 11:04 am by **Justin Levitt**

The AP reports on new proposals for disclaimers on Facebook ads about pending legislation.

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Posted in campaign finance

“W.Va. Secretary of State: Russians Meddled in Social Media, Not Voting Machines”

Posted on July 14, 2019 11:04 am by **Justin Levitt**

Mac Warner’s point is absolutely right: in 2016, the most meaningful system hacked was us. Humans were the most vulnerable link.

And as for securing the non-human component, election officials know that there’s been an enormous amount of work done.

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Posted in chicanery, voting technology

“Oklahoma City artist visiting 36 states for 19th amendment tribute flag”

Posted on July 14, 2019 11:03 am by **Justin Levitt**

Four states down, 32 to go.

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Posted in political equality

“What Really Happened With West Virginia’s Blockchain Voting Experiment?”

Posted on July 13, 2019 2:25 pm by **Justin Levitt**

Slate says ¯_(ツ)_/¯

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Posted in internet voting, voting technology

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"Roberts gave GOP cover on gerrymandering"

Posted on July 15, 2019 11:08 am by **Justin Levitt**

Gene Nichol, in the News & Observer, with a local's view on *Rucho* (feat. *Shelby County*).

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Posted in political parties, redistricting

"Florida's New Poll Tax"

Posted on July 15, 2019 11:03 am by **Justin Levitt**

Herman Schwartz blogs at Balkinization on the legislative cutbacks to Florida's Amendment 4 for people with convictions who still owe fines or fees.

And The Intercept has a piece on some prosecutors' attempts to reduce the fines and fees, in part driven by the controversy.

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Posted in direct democracy, felon voting

Prison gerrymandering and the impact on cities

Posted on July 15, 2019 11:03 am by **Justin Levitt**

The Philadelphia Inquirer's editorial board discusses the consequences when redistricting counts people temporarily incarcerated at a place far from home.

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Posted in redistricting

“North Carolina Gerrymandering Trial Could Serve As Blueprint For Other States”

Posted on July 15, 2019 11:02 am by **Justin Levitt**

Morning Edition on *Common Cause v. Lewis*, the North Carolina partisan gerrymandering case in **state** court, heading into trial today.

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Posted in political parties, redistricting

More on citizenship and redistricting

Posted on July 15, 2019 11:02 am by **Justin Levitt**

TPM dives in on the citizenship-data Paperwork Reduction Act filing spotted over the weekend.

And Reuters reviews the legal battles that might result.

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Posted in census litigation, redistricting

“Presidential popular vote compact would lead to chaos”

Posted on July 15, 2019 11:01 am by **Justin Levitt**

Sean Parnell, over at The Hill, notes some concerns about the National Popular Vote compact.

Some of these concerns have to do with the fact that different states have different rules for administering elections. I’ve got mixed emotions about NPV myself, but I’m not sure why the simple fact of different rules in each state necessarily implies more trouble in ascertaining the total. Or why a vote with consequences calibrated to the national total necessarily implies a perfectly uniform set of national rules.

Share / Save

Posted in electoral college

“A question to repeal national popular vote compact in Colorado is poised for 2020 ballot”

Posted on July 15, 2019 11:01 am by **Justin Levitt**

Advocates say they’ve got the signatures.

An extra note of significance:

If certified for the ballot, it would be the first time since The Great Depression that Colorado voters would decide whether to repeal or reaffirm a law approved by the General Assembly and signed by the governor. In 1932, voters repealed a law that increased the tax on oleomargarine.

Share / Save

Posted in electoral college, referendum

New volume of the Harvard Law & Policy Review is out

Posted on July 15, 2019 11:00 am by **Justin Levitt**

Chock full of election-law goodies. Among other pieces:

- Elizabeth Warren, Foreword (on corruption and faith in government)
- Jeffrey Clements, "But It Will Happen": A Constitutional Amendment to Secure Political Equality in Election Spending and Representation
- Viki Harrison, How One State Legislature Grappled with Creating an Ethics Commission
- Karl Racine & Elizabeth Wilkins, Enforcing the Anti-Corruption Provisions of the Constitution
- Ciara Torres-Spelliscy, Deregulating Corruption
- Nicholas Stephanopoulos, The Dance of Partisanship and Districting
- Daniel Tokaji, Denying Systemic Equality: The Last Words of the Kennedy Court

Share / Save

Posted in campaign finance, ethics investigations, political equality, political parties, redistricting, Supreme Court

Last week at the FEC

Posted on July 15, 2019 10:57 am by **Justin Levitt**

Here's last week's roundup of the latest at the FEC.

Includes, among other things, an advisory opinion allowing a vendor to offer cybersecurity services to campaigns at low- to no-cost, and an advisory opinion allowing a congressional campaign to distribute "valueless digital blockchain tokens as an incentive to engage in volunteer activities."

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Posted in campaign finance, federal election commission

Zombie campaigns

Posted on July 15, 2019 10:56 am by **Justin Levitt**

A nice summary here of some of the various reasons why campaign accounts may stay open long after the campaigners are out of office.

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Posted in campaign finance

"Thinking small: Why Bernie Sanders and other 2020 candidates seek low-dollar campaign contributions"

Posted on July 15, 2019 10:56 am by **Justin Levitt**

And a nice summary here of some of the various reasons for seeking grassroots contributions.

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Posted in campaign finance

Protecting the 2020 Election from Manipulation by the President

Posted on July 15, 2019 10:56 am by **Justin Levitt**

Protect Democracy has a new white paper with suggestions for what to do when the call is coming from inside the house.

Share / Save

Posted in chicanery

"Most Americans say no statehood for the District of Columbia, poll shows"

Posted on July 15, 2019 10:56 am by **Justin Levitt**

The latest polling numbers in the fight for representation for DC residents. That's consistent with past polls … which have also showed a majority favoring full voting rights for DC.

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Posted in political equality

"With straight-ticket voting gone, Texas House down-ballot races hang in the balance"

Posted on July 15, 2019 10:55 am by **Justin Levitt**

Commentary on the impact of the demise of straight-ticket voting options in Texas.

Share / Save

Posted in political parties, political polarization

Interesting suit against AZ initiative signature law

Posted on July 14, 2019 12:52 pm by **Justin Levitt**

Arizona law invalidates any signatures collected for a citizens' initiative, referedum, or recall by a particular circulator, if the circulator is paid or from out of state, and if that circulator is subpoenaed in a challenge and can't appear in court. A new lawsuit filed this past week challenges that law. Should be interesting.

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Posted in ballot access, direct democracy, recall elections, referendum

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"Some Fear Undercount As Texas Decides Not To Spend Money On 2020 Census"

Posted on July 16, 2019 10:50 am by **Justin Levitt**

Well, that's an interesting strategy:

You've got to spend money to make money. But that's not the way Texas, and a handful of other states, are looking at the 2020 census. Officials in Texas have decided not to spend any money or make statewide plans for the census, despite the fact that the state experienced massive population growth in the past decade.

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Posted in census litigation, chicanery

"2020 Dems Pledge To Reverse Trump's Move Towards Anti-Immigrant Redistricting"

Posted on July 16, 2019 10:50 am by **Justin Levitt**

The candidates weigh in on using citizenship data in the redistricting process.

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Posted in census litigation, redistricting

"Budget gridlock imperils 2020 census"

Posted on July 16, 2019 10:49 am by **Justin Levitt**

A reminder that we're not out of the woods yet.

I wonder if this will come up in the Senate hearing on the Census in an hour.

Share / Save

Posted in census litigation

Trial begins in party ballot position case

Posted on July 16, 2019 10:49 am by **Justin Levitt**

Trial has started up in Florida over the law automatically placing candidates of the governor's party in the first position of the ballot. I've been watching this case pretty closely; it's a really interesting test of the prevailing constitutional doctrine for evaluation of electoral regulations.

Share / Save

Posted in ballot access, election administration, election law and constitutional law, The Voting Wars

"Surge In Voters With Disabilities May Influence 2020 Election"

Posted on July 16, 2019 10:48 am by **Justin Levitt**

A reminder of a significant population often overlooked when summary stats are compiled.

In 2018, 14.3 million people with disabilities cast ballots, more than the 11.7 million Latino voters that year and nearly as many as the 15.2 million African-American voters.

What's more, the report found that an additional 10.2 million voters last year were people who live with someone who has a disability. When these voters are added to those with disabilities, that means that 20 percent of all voters in the 2018 midterms came from what the researchers called "disability households."

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Posted in political equality, voters with disabilities, voting

State v. county election systems management

Posted on July 16, 2019 10:48 am by **Justin Levitt**

An important story in Washington State about the integration of county registration systems into a newer statewide system. It's not important because it's particularly new or surprising (it's neither), but just as a reminder of the details to be ironed out in any new election-related I/T system. They don't just happen magically.

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Posted in election administration, voter registration, voting technology

"Top Democrat demands answers on election equipment

vulnerabilities."

Posted on July 16, 2019 10:47 am by **Justin Levitt**

The Hill reports on Sen. Ron Wyden's questions of the EAC. Senator Wyden took to the flooryesterday to speak about the issue as well.

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Posted in voting technology

Summary of Congressional Legislation on Security of Voting Systems

Posted on July 16, 2019 10:47 am by **Justin Levitt**

An interesting summary in Forbes of the bills on the table.

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Posted in voting technology

"Diversifying the Donor Pool: How Did Seattle's Democracy Vouchers Program Reshape Participation in Municipal Campaign Finance?"

Posted on July 16, 2019 10:46 am by **Justin Levitt**

A new paper about Seattle's campaign finance voucher program, from Brian McCabe and Jennifer Heerwig. I'm looking forward to reading this one.

The abstract:

In this paper, we evaluate whether an innovative new campaign finance program in Seattle, Washington shifted the composition of campaign donors in local elections. In 2015, voters in Seattle approved the creation of the Democracy Voucher program with the intent of broadening representation in the campaign finance system and expanding participation from marginalized communities. Every registered voter in Seattle was provided with four, twenty-five-dollar vouchers that they could, in turn, assign to the local candidate(s) of their choice. Through an analysis of the inaugural implementation of the program in 2017, we investigate whether this innovative public financing system increased participation, broadened involvement from underrepresented groups and led to a donor pool that was more representative of the electorate. Compared to cash donors in the municipal election, we report that voucher users are less likely to be high-income and more likely to come from poor neighborhoods. While older residents are over-represented among voucher users, there is little difference in the racial composition of cash donors and voucher users. Our analysis confirms that the Democracy Voucher program successfully moved the donor pool in a more egalitarian direction, although it remains demographically unrepresentative of the electorate. The lessons from Seattle's inaugural implementation offer key insights for other municipalities

considering public financing policies, and these lessons have the potential to reshape the national policy debate about the influence of political money.

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Posted in campaign finance

"GOP megadonors pour money into Trump campaign"

Posted on July 16, 2019 10:45 am by **Justin Levitt**

The Trump takeover of the GOP is reflected in the recent campaign finance disclosures. The subhead of the piece: "Some of the same donors who bankrolled anti-Trump efforts in 2016 are at the center of the president's reelection."

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Posted in campaign finance, political parties

"Kamala Harris Picks Perkins Coie as Firm Ramps Up Work for Democrats"

Posted on July 16, 2019 10:44 am by **Justin Levitt**

The National Law Journal reviews the law firms behind the presidential contenders.

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Posted in election law biz, primaries

Thad Hall to get ballots to the bottom of the Grand Canyon

Posted on July 16, 2019 10:44 am by **Justin Levitt**

Former election professor Thad Hall is practicing what he preaches, moving to become the Director of Elections in Coconino County, Arizona, from a similar gig in Richland County, South Carolina.

Among other attributes, Coconino is "the second largest geographic county in the contiguous United States, one that includes a chunk of the Grand Canyon — including a polling location at the bottom that can be reached only by helicopter or donkey."

(h/t Doug Chapin)

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Posted in election law biz

“Why More Companies Are Encouraging Their Employees to Vote — and How Yours Can, Too”

Posted on July 16, 2019 10:44 am by **Justin Levitt**

The power of brand leadership in encouraging participation.

Relatedly, Electionday.org has a running project encouraging companies to give their employees the day off on Election Day. I’m a fan.

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Posted in voting

“Why Was the Electoral College Created?”

Posted on July 16, 2019 10:42 am by **Justin Levitt**

The History Channel has an explainer.

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Posted in electoral college

“Why Congress’ Plan to Fix Gerrymandering Falls Short”

Posted on July 16, 2019 10:42 am by **Justin Levitt**

Harvard undergrads weigh in on HR 1.

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Posted in redistricting

Redistricting reform in New Jersey

Posted on July 16, 2019 10:42 am by **Justin Levitt**

As a Jersey native, this one caught my eye pretty quickly: an impressive group of scholars and advocates published a report recommending reforms to New Jersey’s redistricting system.

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Posted in redistricting

“Voters to decide on increased campaign finance disclosures, new limits on contributions”

Posted on July 16, 2019 10:41 am by **Justin Levitt**

San Francisco puts a measure on the November ballot aimed at disclosing the top funders of committees, rather than just the committee name itself.

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Posted in campaign finance

"NC trial looks at partisan bias after US justices won't"

Posted on July 16, 2019 10:41 am by **Justin Levitt**

A report from the opening days of the state court's partisan gerrymandering trial in North Carolina.

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Posted in chicanery, political parties, redistricting

"Defending the Census: The Next Frontier in the Fight for Our Democracy"

Posted on July 15, 2019 11:53 am by **Justin Levitt**

Video from a Netroots Nation panel with Adam Bonin, Eric Holder, Alex Padilla, Denise Merrill, and Vanita Gupta.

Man, last Thursday seems like a long time ago.

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Posted in census litigation

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"House votes to hold Barr and Ross in criminal contempt of Congress"

Posted on July 17, 2019 5:24 pm by **Justin Levitt**

AP, NYT, WaPo, WSJ, CBS, NBC, ABC, Fox, CNN. The vote, 230-198 (4 Democrats voting with Republicans uniformly against, and Rep. Amash voting with the rest of the Democrats) was for failure to comply with subpoenas about the origins of the attempt to place a citizenship question on the census.

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Posted in census litigation, chicanery, The Voting Wars

"Two SCOTUS Vets Denounce Roberts's Census Ruling as 'One-Off' and 'Bizarre'"

Posted on July 17, 2019 5:19 pm by **Justin Levitt**

Michael Carvin and Kannon Shanmugam, with a bonus appearance by Miguel Estrada.

I hope Mr. Carvin's right that the Census ruling won't really affect cases outside of this particular context. But I hope that's because agencies won't continue to lie to the public about why they're doing what they're doing.

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Posted in census litigation

"Alarm sounds over census cybersecurity concerns"

Posted on July 17, 2019 5:18 pm by **Justin Levitt**

The fallout from yesterday's hearing.

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Posted in census litigation

Microsoft and election security

Posted on July 17, 2019 5:18 pm by **Justin Levitt**

NBC reports on two Microsoft announcements, summarized in this blog post.

The headline is that Microsoft is giving away free, open source ElectionGuard software to election machine suppliers. According to the site, it apparently "enables" voting using a touchscreen for accessibility, with a printed voter-verifiable paper record of their votes, and an encrypted tracking code to enter into a website to confirm the vote was counted and not altered. The devil is always in the details of election software, and I'll be interested in learning more.

The subhead strikes me as at least as newsworthy: Microsoft has an AccountGuard system for detecting cyberattacks on political campaigns, parties, and democracy-focused NGOs, in 26 different countries. Since AccountGuard debuted last August, Microsoft reports 781 nation-state attacks – largely from Iran, North Korea, and Russia – against organizations participating in the system, with 95% of the attacks targeting U.S.-based organizations.

And don't forget, the most serious hack of the 2016 elections wasn't a hack of the technology – it was a hack of the humans.

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Posted in chicanery, The Voting Wars, voting technology

"Feds end investigation into Trump Org and hush money payments"

Posted on July 17, 2019 5:17 pm by **Justin Levitt**

CNN, The Hill, NYT, WSJ have reports. Looks like the leaks were accurate after all.

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Posted in campaign finance, chicanery

LULAC v. PILF settle two different lawsuits

Posted on July 17, 2019 5:17 pm by **Justin Levitt**

Well, one lawsuit, really, over publishing identifying information of individuals incorrectly accused of committing voter fraud.

But you'd never know it was the same suit from reading the press releases. Plaintiffs here, defendants here.

(*Disclosure: I helped one of the plaintiffs in the case find counsel, had occasional discussions with counsel in the case, and was treated to a deposition*.)

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Posted in chicanery, fraudulent fraud squad, voter registration

"Mississippi: Election lawsuit is not about voting rights"

Posted on July 17, 2019 5:16 pm by **Justin Levitt**

The AP has a story about a lawsuit challenging the requirement for winning statewide office that candidates win both a majority of the popular vote and a plurality of the vote in the majority of Mississippi state house districts.

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Posted in election law and constitutional law, Voting Rights Act

"Make the Guarantee Clause Great Again"

Posted on July 17, 2019 5:15 pm by **Justin Levitt**

A clever title for a clever piece about partisan gerrymandering, and the doctrine holding the Guarantee Clause nonjusticiable. I'm inclined to agree on the substance.

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Posted in political equality, political parties, redistricting

Common Cause wants you to know what presidential candidates think about democracy

Posted on July 17, 2019 5:15 pm by **Justin Levitt**

They've got a 17-question survey polling the candidates on particular campaign and electoral reforms. Sanders, Warren, Buttigieg, Booker, Williamson, and Bullock have turned in their take-home exams already.

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Posted in primaries

Voters file petition to get Pennsylvania to reconsider voting technology

Posted on July 17, 2019 5:15 pm by **Justin Levitt**

The fight in Pennsylvania continues.

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Posted in voting technology

Redistricting using a citizenship count

Posted on July 17, 2019 5:14 pm by **Justin Levitt**

Ari Berman adds his voice to discussion of the potential ahead.

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Posted in census litigation, redistricting, Voting Rights Act

Estimating the undocumented without the census

Posted on July 17, 2019 5:13 pm by **Justin Levitt**

Demographers weigh in on alternatives to a direct count.

(Note: this is an update of a piece published in 2016. Apparently, the issue is still of some interest.)

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Posted in census litigation

"It's time voting be constitutionally limited to U.S. citizens"

Posted on July 17, 2019 5:12 pm by **Justin Levitt**

A would-be movement to amend state constitutions to provide that only U.S. citizens may lawfully vote in state elections.

Of course, all state constitutions have currently been interpreted to provide that only U.S. citizens may lawfully vote in state elections.

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Posted in voting

"The Feds Have Helped Some Gerrymandering to Thrive"

Posted on July 17, 2019 5:11 pm by **Justin Levitt**

A letter in the WSJ claims that Eric Holder helped to lead the charge in *Bethune-Hill*, after approving Virginia districts in 2011.

Consider me skeptical. The letter appears to conflate preclearance approval (which focused on two particular legal standards; every preclearance letter expressly said that approval for those purposes should not be construed as validation more generally) with the *Shaw* causes of action that ultimately prevailed. Those are not the same.

And *Bethune-Hill*? Holder was the AG when the case was first brought by private plaintiffs in 2014; Lynch was the AG when the DOJ in 2016 submitted an amicus brief not lodged in support of either party (*disclosure: I worked on the brief*); and Whitaker was the AG when the DOJ submitted an amicus brief in 2019 on behalf of neither party. I don't see Holder's group in the case at all. I get that Holder's a generic fill-in-the-blank boogeyman, but …

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Posted in redistricting, Voting Rights Act

"It May Not Seem That Way, but Politicians Often Do What Voters Want"

Posted on July 17, 2019 5:10 pm by **Justin Levitt**

New data analysis in The Upshot.

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Posted in legislation and legislatures

"In Queens district attorney race, voters want affidavit ballots counted"

Posted on July 17, 2019 5:09 pm by **Justin Levitt**

Provisional or affidavit ballots are counted even when there's not a recount. But there's a whole lot more attention on them when the recount comes to town.

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Posted in provisional ballots, recounts

Looking to the high schools

Posted on July 17, 2019 5:09 pm by **Justin Levitt**

The Civics Center has been particularly active in encouraging eligible high school students to register and vote. A post today discusses the path forward after legislation failed in Maryland, following on a post a few weeks ago discussing a pending measure in California.

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Posted in voter registration

“Leahy casts his 16,000th vote, joining an exclusive Senate club”

Posted on July 17, 2019 5:08 pm by **Justin Levitt**

After a vote on a tax treaty with Japan, Vermont’s only Democratic Senator ever is now one of four Senators in history to reach the 16,000-vote plateau.

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Posted in legislation and legislatures

And a very happy birthday to …

Posted on July 17, 2019 5:07 pm by **Justin Levitt**

Elbridge Gerry.

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Posted in redistricting

“The Most Important Lesson the Supreme Court Liberals Can Take from John Paul Stevens”

Posted on July 17, 2019 3:18 pm by **Rick Hasen**

I have written this piece for Slate. It begins:

Supreme Court Justice John Paul Stevens, who passed away on Tuesday at the age of 99, was a reliable and important voice on issues of voting rights and election law. Most famously, Stevens wrote an impassioned dissent from the Supreme Court’s decision to stop the Florida recount in the 2000 case Bush v. Gore, saying that doing so would cast a cloud over the legitimacy of George W. Bush’s election. He also wrote a lengthy—if somewhat meandering—dissent in the court’s 2010 Citizens United decision allowing unlimited corporate spending supporting or opposing candidates for election. And he wrote a strong dissent in the 1997 case, Timmons v. Twin Cities Area New Party, a less well-known case about “fusion voting.” If Stevens had his way in that case, it would have empowered minor political parties and at the same time made them less likely to be spoilers between major party candidates.

But there is one case that serves as a partial blemish on Stevens’ commendable voting rights record, his 2008 opinion in Crawford v. Marion County Election Board, upholding Indiana’s strict voter identification law. The justice wrote an opinion for himself, Chief Justice John Roberts, and Justice Anthony Kennedy, holding that such a law was supported by the government’s interest in preventing voter fraud and instilling voter confidence, even though Indiana could come forward with not a single case of voter fraud in the state’s history that would have been stopped by the law, and there was no evidence such laws actually bolster

such confidence.

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Posted in Uncategorized

Census plaintiffs file blistering motion for sanctions

Posted on July 16, 2019 3:30 pm by **Justin Levitt**

The motion was filed in the SDNY case, mostly directed at Commerce officials. With 428 pp. of receipts.

UPDATE: HuffPost has coverage.

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Posted in census litigation, chicanery

Parties agree on proposed order in NY Census case

Posted on July 16, 2019 11:23 am by **Justin Levitt**

Hansi with the scoop:

https://twitter.com/hansilowang/status/1151169448457441282

UPDATE: Here's the final signed order itself.

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Posted in census litigation

10th Circuit upholds San Juan County race-and-redistricting decision

Posted on July 16, 2019 11:16 am by **Justin Levitt**

San Juan County, Utah, has had a long history of trouble, over several decades, with respect to providing equal opportunities for the Navajo community, including in voting. Today, the 10th Circuit affirmed a lower court opinion redrawing the district lines of the county commission and school board to provide opportunity for the Navajo community. Opinion here.

For those keeping track, it's 2019. The fight over these district lines began in 2011. Section 2 of the VRA is powerful … but also slooooooooow. That's part of why it's so important to restore an alternative to responsive litigation under the VRA for jurisdictions that seem to keep having repeated difficulties.

(*Disclosure: one of the claims in this case was that the county had to do what it did because of a 1984 consent decree with the DOJ. Both the trial court and court of appeals rejected that*

assertion. I was serving at the DOJ while part of this litigation was proceeding.)

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Posted in redistricting, Voting Rights Act

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"Senate passes bill making hacking voting systems a federal crime"

Posted on July 18, 2019 11:24 am by **Justin Levitt**

The legislation passed the Senate yesterday, and now heads over to the House.

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Posted in election administration, voting technology

"States don't have enough money to secure the 2020 election, new report warns"

Posted on July 18, 2019 11:23 am by **Justin Levitt**

A WaPo article on a new Brennan Center report diving into how six states (Alabama, Arizona, Illinois, Louisiana, Oklahoma, and Pennsylvania) used 2018 federal election security grants … and the need each has for much more.

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Posted in chicanery, election administration, voting technology

2020 Presidential fundraising hits a new record

Posted on July 18, 2019 11:23 am by **Justin Levitt**

The Campaign Finance Institute parses the 2Q returns.

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Posted in campaign finance

"A 'Train Wreck' Was Averted at the Supreme Court, but for

How Long?”

Posted on July 18, 2019 11:22 am by **Justin Levitt**

Linda Greenhouse on the rule of law’s near-miss in the census case, and its aftermath.

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Posted in census litigation, election law and constitutional law

“The Citizenship Question Is Dead But The Fight Isn’t Over”

Posted on July 18, 2019 11:22 am by **Justin Levitt**

David Gans weighs in on the base for representation in redistricting.

UPDATE: Keshia Morris does too.

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Posted in census litigation, redistricting

The Citizenship Question Is Dead But The Fight Isn’t Over, Part II

Posted on July 18, 2019 11:22 am by **Justin Levitt**

HuffPost on complete count advocacy in hard-to-count communities

And a piece from Minnesota on a complete count, but not an over-complete count, of snowbirds.

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Posted in census litigation

“Why Have Democrats Suddenly Become The Anti-Citizenship Party?”

Posted on July 18, 2019 11:21 am by **Justin Levitt**

Auguste Meyrat, in The Federalist, with a slightly different take on the census controversy.

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Posted in census litigation

“After census debacle, White House to knock out senior Commerce official”

Posted on July 18, 2019 11:21 am by **Justin Levitt**

Earl Comstock, top policy director over at Commerce, features heavily in the motion for sanctionsover conduct in the litigation over the citizenship question on the census.

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Posted in census litigation

A preview of the points of redistricting flux in 2020

Posted on July 18, 2019 11:21 am by **Justin Levitt**

With some fascinating data on the fastest shrinking, and fastest growing, place in every state.

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Posted in redistricting

"2020 Redistricting: An Early Look"

Posted on July 18, 2019 11:21 am by **Justin Levitt**

Kyle Kondik reviews partisan control of the process for Rasmussen.

I've got a summary of who's in charge of what, with the partisan control as of today, right here for Congress and here for state legislatures.

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Posted in political parties, redistricting

California's citizens redistricting commission

Posted on July 18, 2019 11:20 am by **Justin Levitt**

The application process is underway, until August 9, with stats (including the mix of gender, region, ethnicity, and political affiliation) updated regularly here. As of last week, 5000 people have applied for 14 slots.

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Posted in redistricting

"Wisconsin bill to end partisan gerrymandering picks up Republican support"

Posted on July 18, 2019 11:20 am by **Justin Levitt**

The bill to respond to partisan gerrymandering in the state gets some bipartisan support after *Rucho*.

And Miles Rapoport reviews some of the efforts underway elsewhere.

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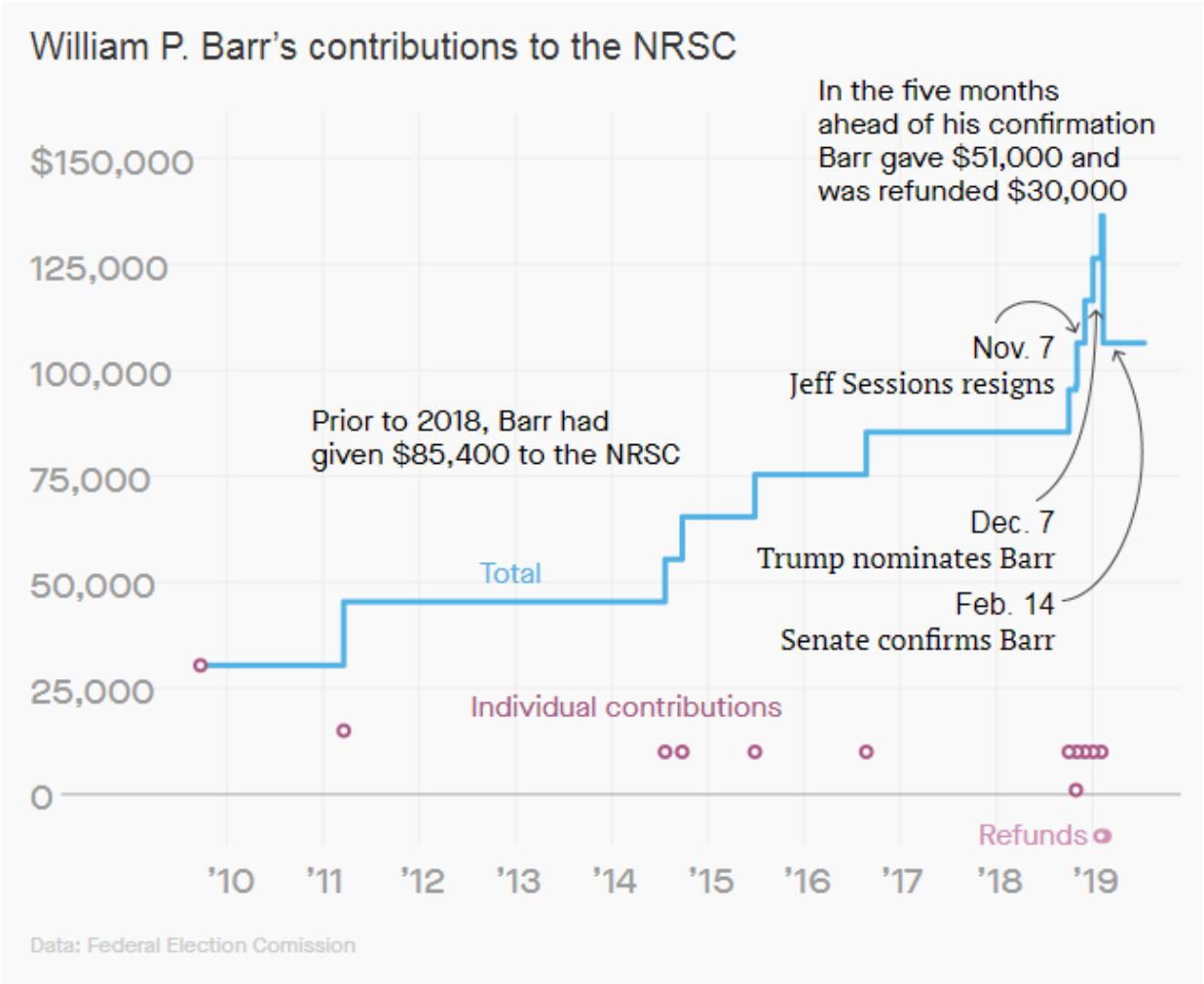
Posted in political parties, redistricting

"William Barr's donations to Senate Republicans spiked just before they confirmed him as attorney general"

Posted on July 18, 2019 11:19 am by **Justin Levitt**

Interesting.



And according to the story, unusual:

Neither Jeff Sessions, Loretta Lynch, nor Eric Holder—the three prior attorneys general—made payments to either party committees or senators ahead of confirmation hearings and votes. Holder gave $250 to the Democratic Senatorial Campaign Committee in 2007—two years ahead of his confirmation, and also made a contribution to then California senator Barbara Boxer in 2008. Lynch gave $13,800 to Barack Obama's election efforts in 2008. She wasn't nominated to become attorney general until 2014.

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Posted in campaign finance

"Court documents show close contact between Cohen and Trump during hush-money arrangements"

Posted on July 18, 2019 11:17 am by **Justin Levitt**

Unsealed copies of the Cohen search warrant materials were released today based on the close of the campaign finance investigation. Here's the cover letter. Zoe Tillman's got links to the docs.

Phone records in the documents show Cohen spoke with Hicks, Trump, and National Enquirer publishers in quick succession. As Taegard Goddard puts it:

Taegan Goddard

✓@politicalwire

Of course, no one is surprised Trump lied about the hush money paid to Stormy Daniels. But there are now documents that prove he lied. https://politicalwire.com/2019/07/18/fbi-believed-trump-closely-involved-in-hush-money-scheme/ … via @politicalwire

40

10:12 AM - Jul 18, 2019

Twitter Ads info and privacy

17 people are talking about this

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Posted in campaign finance, chicanery

Charles and Fuentes-Rohwer on Rucho

Posted on July 18, 2019 11:16 am by **Justin Levitt**

And they're (correctly) not happy.

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Posted in election law and constitutional law, political parties, redistricting

“Miami-Dade State Attorney Preparing Plan To Restore Voting Rights, Even If Money Is Owed”

Posted on July 18, 2019 11:16 am by **Justin Levitt**

A spotlight on Miami, following up on the more general effort I’d flagged by prosecutors to fight back against the Florida legislature’s fines-and-fees limitations on the Amendment 4 initiative restoring the vote to those with convictions.

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Posted in felon voting, voter initiatives

“Over-claiming knowledge predicts anti-establishment voting”

Posted on July 18, 2019 11:16 am by **Justin Levitt**

The study, in Social Psychological and Personality Science, examines voter behavior on an EU treaty.

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Posted in political polarization

“Voting by Phone Is Easy. But Is It Secure?”

Posted on July 18, 2019 11:15 am by **Justin Levitt**

Stateline focuses on a lot of questions about the plans for Iowa and Nevada caucuses.

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Posted in primaries, voting technology

“House votes to hold Barr and Ross in criminal contempt of Congress”

Posted on July 17, 2019 5:24 pm by **Justin Levitt**

AP, NYT, WaPo, WSJ, CBS, NBC, ABC, Fox, CNN. The vote, 230-198 (4 Democrats voting with Republicans uniformly against, and Rep. Amash voting with the rest of the Democrats) was for failure to comply with subpoenas about the origins of the attempt to place a citizenship question on the census.

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Posted in census litigation, chicanery, The Voting Wars

“Two SCOTUS Vets Denounce Roberts’s Census Ruling as

‘One-Off’ and ‘Bizarre’”

Posted on July 17, 2019 5:19 pm by **Justin Levitt**

Michael Carvin and Kannon Shanmugam, with a bonus appearance by Miguel Estrada.

I hope Mr. Carvin’s right that the Census ruling won’t really affect cases outside of this particular context. But I hope that’s because agencies won’t continue to lie to the public about why they’re doing what they’re doing.

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Posted in census litigation

“Alarm sounds over census cybersecurity concerns”

Posted on July 17, 2019 5:18 pm by **Justin Levitt**

The fallout from yesterday’s hearing.

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Posted in census litigation

Microsoft and election security

Posted on July 17, 2019 5:18 pm by **Justin Levitt**

NBC reports on two Microsoft announcements, summarized in this blog post.

The headline is that Microsoft is giving away free, open source ElectionGuard software to election machine suppliers. According to the site, it apparently “enables” voting using a touchscreen for accessibility, with a printed voter-verifiable paper record of their votes, and an encrypted tracking code to enter into a website to confirm the vote was counted and not altered. The devil is always in the details of election software, and I’ll be interested in learning more.

The subhead strikes me as at least as newsworthy: Microsoft has an AccountGuard system for detecting cyberattacks on political campaigns, parties, and democracy-focused NGOs, in 26 different countries. Since AccountGuard debuted last August, Microsoft reports 781 nation-state attacks – largely from Iran, North Korea, and Russia – against organizations participating in the system, with 95% of the attacks targeting U.S.-based organizations.

And don’t forget, the most serious hack of the 2016 elections wasn’t a hack of the technology – it was a hack of the humans.

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Posted in chicanery, The Voting Wars, voting technology

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Director of National Intelligence Creates "Election Threats Executive"

Posted on July 19, 2019 10:44 am by **Justin Levitt**

Shelby Pierson gets the nod for a new federal position to serve as the intelligence community's principal advisor on election security.

This bio fits the very general description in the DNI's press statement, but I'll confess I'm not sure if they're the same person. As someone often confused with another southern California researcher with the same name who also works on redistricting (hi, Justin!), I'm wary of making assumptions.

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Posted in campaigns, chicanery, voting technology

"Trump's Supreme Court Challenge Has a Historical Precedent"

Posted on July 19, 2019 10:43 am by **Justin Levitt**

Pacific Standard notes yet another connection to Andrew Jackson, in the overtime chaos of the Census case.

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Posted in census litigation

"How Trump could lose by 5 million votes and still win in 2020"

Posted on July 19, 2019 10:43 am by **Justin Levitt**

David Wasserman does some Electoral College math.

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Posted in electoral college

"After Publishing Strong Evidence of Trump's Campaign Finance Crimes, DOJ Closes Case Without Explanation"

Posted on July 19, 2019 10:42 am by **Justin Levitt**

Paul Ryan in Just Security on the announced end of the Stormy Daniels campaign finance case.

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Posted in campaign finance

"Prosecutors weighed DOJ policy blocking indictment of a sitting president in closing Trump hush-money probe"

Posted on July 19, 2019 10:42 am by **Justin Levitt**

And maybe there's an explanation after all.

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Posted in campaign finance

"John Paul Stevens Was Right: Citizens United Opened the Door to Foreign Money in U.S. Elections"

Posted on July 19, 2019 10:42 am by **Justin Levitt**

The Intercept traces funding from foreign nationals through American corporations to super PACs.

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Posted in campaign finance, election law and constitutional law

The latest Citizens United constitutional amendment proposal

Posted on July 19, 2019 10:40 am by **Justin Levitt**

Relatedly, the latest proposed amendment to overturn Citizens United was filed yesterday. It would ban private funding of support for or opposition to candidates if the funding isn't a

donation to a candidate's campaign. I'm not a fan.

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Posted in campaign finance

"GAO again warns of risks in 2020 census"

Posted on July 19, 2019 10:40 am by **Justin Levitt**

Specifically, "untested innovations," IT implementation, and cybersecurity. The report is here.

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Posted in census litigation

"Census citizenship question is dropped, but challenges linger"

Posted on July 19, 2019 10:40 am by **Justin Levitt**

Science magazine digs in on the likelihood that non-response follow up, administrative records, and (legally permissible) imputation will be able to compensate for a large-scale chilled response.

And local outreach efforts by Census officials continue to try to narrow that gap.

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Posted in census litigation

"The Way the Census Counts Prison Populations Seriously Distorts Redistricting"

Posted on July 19, 2019 10:39 am by **Justin Levitt**

Mekela Panditharatne talks prison gerrymandering in Slate.

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Posted in redistricting

"America's Historic Fight Over Who Deserves Representation"

Posted on July 19, 2019 10:39 am by **Justin Levitt**

Michael Li, in Slate, on the census, citizenship, and representation.

Related: the Council on Foreign Relations gets in on the discussion too.

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Posted in census litigation, election law and constitutional law, redistricting

The long arm of Gill

Posted on July 19, 2019 10:38 am by **Justin Levitt**

Mississippi cites *Gill v. Whitford* in contesting challengers' standing to contest the requirement that statewide candidates win both a majority of the state and a majority of state house districts.

And the Court's refusal to recognize that redistricting problems are group problems continues to foster incoherence.

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Posted in election law and constitutional law, political equality, redistricting

"Drawing new congressional lines won't be easy for Democrats"

Posted on July 19, 2019 10:38 am by **Justin Levitt**

Nathan Gonzales in Roll Call counting an awful lot of chickens:

Democrats' potential challenge in the next round of redistricting will be drawing new lines at the apex of electoral performance.

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Posted in political parties, redistricting

"Can a racially gerrymandered legislature amend the N.C. constitution?"

Posted on July 19, 2019 10:37 am by **Justin Levitt**

Facing South on the lawsuits challenging the validity of amendments to the state constitution because they were passed by a legislature elected via unlawful district lines.

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Posted in political equality, redistricting

"Would ending fusion voting hurt GOP and help suburban

Dems?”

Posted on July 19, 2019 10:37 am by **Justin Levitt**

An interesting commentary on the debate over fusion voting in New York.

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Posted in ballot access, political parties, third parties

“Rensselaer County Board of Elections to give ICE voter registration information”

Posted on July 19, 2019 10:36 am by **Justin Levitt**

Specifically, Rensselaer apparently indicates that they’re going to share the list of people registering through the DMV, ostensibly to combat illegal immigration (the only relevant list ICE would have, I believe, pertains to individuals overstaying visas).

I’m not sure how this comports with the provision of the NVRA notifying applicants that the office at which an individual applies for registration is confidential, and used only for voter registration purposes.

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Posted in NVRA (motor voter), voter registration

“Fulton reduces early voting as cities complain about election costs”

Posted on July 19, 2019 10:36 am by **Justin Levitt**

We get the election mechanics we pay for.

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Posted in election administration, election law biz

“Japan to test online voting for overseas citizens”

Posted on July 19, 2019 10:36 am by **Justin Levitt**

I’d be most interested in knowing whether this system contemplates a secret ballot or not.

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Posted in internet voting

“Judiciary chair demands Hope Hicks clarify closed-door

testimony”

Posted on July 18, 2019 6:32 pm by **Justin Levitt**

On whether she had direct knowledge of payments to Stormy Daniels, or whether she was “present” when Trump discussed Daniels.

The documents unsealed in the Cohen warrant today seem to suggest there may be more to the story.

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Posted in campaign finance, campaigns, chicanery

“Does the Fourteenth Amendment Require Collecting Citizenship Data?”

Posted on July 18, 2019 6:26 pm by **Justin Levitt**

Thomas Berry makes the case that it does, in Yale’s Notice & Comment administrative law blog.

He’s promised more on enforcing that reading tomorrow, with a hint of a note of caution.

One note: whether the basic argument is right or wrong, I noted last week that we currently collect citizenship data, in the ACS, which has a rather small margin of error at a statewide level (and is constantly updated, rather than arriving every decade). I don’t think Berry is making the point that the 14th Amendment requires collecting citizenship data on the enumeration rather than on the ACS, and so this comment isn’t particularly responsive to his piece. But I haven’t yet heard an argument that it’d be necessary to collect block-level citizenship data in order to enforce section 2 of the 14th Amendment.

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Posted in census litigation, election law and constitutional law

Justice Kagan speaks at Georgetown Law event

Posted on July 18, 2019 4:57 pm by **Justin Levitt**

Some enlightening answers on interesting questions. She’s spot-on on partisan gerrymandering. And on Spider-Man.

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Posted in redistricting

“Voter Fraud Activist Will Apologize To Citizens He Accused Of Being Illegal Voters”

Posted on July 18, 2019 11:42 am by **Justin Levitt**

HuffPost follows up on yesterday's announced settlement.

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Posted in chicanery, fraudulent fraud squad, voter registration

"Senate passes bill making hacking voting systems a federal crime"

Posted on July 18, 2019 11:24 am by **Justin Levitt**

The legislation passed the Senate yesterday, and now heads over to the House.

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Posted in election administration, voting technology

"States don't have enough money to secure the 2020 election, new report warns"

Posted on July 18, 2019 11:23 am by **Justin Levitt**

A WaPo article on a new Brennan Center report diving into how six states (Alabama, Arizona, Illinois, Louisiana, Oklahoma, and Pennsylvania) used 2018 federal election security grants … and the need each has for much more.

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Posted in chicanery, election administration, voting technology

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"Intelligence Chief Names New Election Security Oversight Official"

Posted on July 20, 2019 11:26 am by **Justin Levitt**

More on the appointment of Shelby Pierson, from the NYT, NPR, Reuters.

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Posted in chicanery, voting technology

"'It's really a new low': In first news conference, deputy attorney general lashes out at Congress"

Posted on July 20, 2019 11:26 am by **Justin Levitt**

The subject of the DAG's ire was the criminal contempt vote against the AG, for failure to comply with subpoenas regarding the citizenship question on the decennial enumeration.

More from Fox.

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Posted in census litigation

"2020 election: Dems man up for recount; GOP looks to boost voter ranks"

Posted on July 20, 2019 11:25 am by **Justin Levitt**

Florida gonna Florida.

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Posted in campaigns, recounts, The Voting Wars, voter registration

Hofeller files come into court in North Carolina state gerrymandering case

Posted on July 20, 2019 11:24 am by **Justin Levitt**

Courthouse News Service reviews the end of week one of trial.

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Posted in political parties, redistricting

"Marine Corps Orders Duncan Hunter to Stop Using Emblem on Political Mailers"

Posted on July 20, 2019 11:24 am by **Justin Levitt**

A snippet of the NYT piece:

The Marine Corps said it was not uncommon to encounter politicians using the Eagle, Globe and Anchor, commonly referred to as the E.G.A., and officials routinely send letters telling them to stop.

"We encourage such individuals to be proud of their service," the Marine Corps said in a statement. "But the use of the E.G.A. or other indicia, where it could appear that the Marine Corps endorses or sponsors a particular candidate, is inappropriate."

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Posted in campaigns

"De Blasio used state account he controls as campaign slush fund"

Posted on July 20, 2019 11:23 am by **Justin Levitt**

The NY Post discusses some questionable state-PAC spending on a federal race.

A related Politico story notes that de Blasio is claiming that his presidential campaign launch video was not a presidential campaign expense.

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Posted in campaign finance

"Prosecutors Are Asked Why Trump Wasn't Indicted for Campaign Violations"

Posted on July 20, 2019 11:22 am by **Justin Levitt**

The WSJ covers the House Oversight letter.

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Posted in campaign finance

"Iowa will keep voter registration system for 2020 elections"

Posted on July 20, 2019 11:22 am by **Justin Levitt**

The AP on the nuts and bolts of trying to figure out the right amount of space to upgrade election technology in an unending election environment.

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Posted in voter registration, voting technology

Parking as pretext?

Posted on July 20, 2019 11:22 am by **Justin Levitt**

ThinkProgress on the challenged Florida law requiring sufficient parking for early voting sites, and its impact on college voters.

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Posted in election administration, The Voting Wars

"Judges won't block voter ID law for 2020, but lawsuit will continue"

Posted on July 20, 2019 11:21 am by **Justin Levitt**

The denial of a preliminary injunction in North Carolina. The opinion is here … with not much by way of explanation.

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Posted in voter id

"New Normal: Bloodlust on the Left in Census and Election Fights"

Posted on July 20, 2019 11:20 am by **Justin Levitt**

Wherein J. Christian Adams rails against “personal destruction” and “demonization,” and compares Kris Kobach (or, possibly, himself) to Aleksandr Solzhenitsyn.

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Posted in census litigation, chicanery, The Voting Wars

Census recruiting and hiring is ahead of schedule

Posted on July 20, 2019 11:20 am by **Justin Levitt**

But there are still some “headwinds” ahead (including low unemployment rates) to hiring for the push to come.

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Posted in census litigation

“Texas leaves Census outreach to cities, counties”

Posted on July 20, 2019 11:19 am by **Justin Levitt**

A follow-up in the Houston Chronicle to this NPR report a few days ago.

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Posted in census litigation

“How Polarized Are State Politicians?”

Posted on July 20, 2019 11:19 am by **Justin Levitt**

A deeper dive on Wisconsin and the Midwest, using data from the Shor-McCarty American Legislatures Project.

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Posted in legislation and legislatures, political polarization

“Federal Election Agency, Hungry for Funds, Now Pays for Officials to Get to Office”

Posted on July 19, 2019 4:07 pm by **Justin Levitt**

ProPublica on some apparent extended commutes to the EAC.

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Posted in Election Assistance Commission

Ninth Circuit upholds California's 1% signature requirement for independent candidates

Posted on July 19, 2019 3:43 pm by **Justin Levitt**

The decision is here.

(h/t, as in everything ballot access, to Richard Winger.)

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Posted in ballot access, third parties

Ballot initiative skullduggery?

Posted on July 19, 2019 2:41 pm by **Justin Levitt**

The plot thicks. Maybe.

Earlier this week, I'd mentioned a movement to amend state constitutions to prohibit voting by noncitizens in state elections, even though every state currently prohibits voting by noncitizens in state elections.

Now a report featuring speculation (and it is only that) about another motive for the campaign in Florida, where the nonprofit is based: the possible attempt to corner the market on petition circulators, to box out another campaign.

And in the middle of it all, the election administrators trying to keep up with the volume.

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Posted in direct democracy, petition signature gathering

And now House Oversight wants to know how OLC's stance on indicting the President factored in to the NY campaign finance case

Posted on July 19, 2019 2:26 pm by **Justin Levitt**

Following on this story, the letter is here.

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Posted in campaign finance

Director of National Intelligence Creates "Election Threats Executive"

Posted on July 19, 2019 10:44 am by **Justin Levitt**

Shelby Pierson gets the nod for a new federal position to serve as the intelligence community's principal advisor on election security.

This bio fits the very general description in the DNI's press statement, but I'll confess I'm not sure if they're the same person. As someone often confused with another southern California researcher with the same name who also works on redistricting (hi, Justin!), I'm wary of making assumptions.

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"Trump's Supreme Court Challenge Has a Historical Precedent"

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Pacific Standard notes yet another connection to Andrew Jackson, in the overtime chaos of the Census case.

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10 and 2 on the wheel

Posted on December 30, 2019 12:52 pm by **Justin Levitt**

Hi. Justin here. As Rick mentioned, I'll be at the helm of the Election Law Blog from now through January 7, then turning things over to Dan Tokaji for the next stretch.

Please send the tips to me and the hate mail to Dan for the next few days, and then please switch it up the week after. Thanks!

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Posted in Uncategorized

"Federal Judge Won't Undo Georgia Voter Purge"

Posted on December 30, 2019 1:04 pm by **Justin Levitt**

On Friday, the federal court rejected a preliminary injunction seeking to reinstate about 98,000 registration entries who had not responded to notices or contacted election officials since January 1, 2012 – declining (under *Pennhurst*) to issue a federal order enforcing state law, and otherwise finding insufficient proof of severe constitutional burden. More here and here.

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Posted in NVRA (motor voter), voter registration

While in Wisconsin, a purge sits temporarily on hold…

Posted on December 30, 2019 1:04 pm by **Justin Levitt**

The lede from the Milwaukee Journal-Sentinel:

> *"The Wisconsin Elections Commission deadlocked Monday over whether to remove*

the voter registrations of more than 200,000 people in response to a judge's order. The commission's inability to reach a consensus means the voters will stay on the rolls for at least the time being."

There are dueling cases here – a state case with an order from a trial judge to remove voters from the rolls, currently on appeal, and a federal case seeking an order to keep the voters on the rolls. It appears that approximately 88,000 or so of the entries correspond to people who have moved within the same municipality. Wisconsin, with same-day registration, is exempt from federal NVRA provisions limiting purges of the rolls.

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Posted in NVRA (motor voter), voter registration

"Suit on ex-offender voting filed in close-divided N Carolina"

Posted on December 30, 2019 1:03 pm by **Justin Levitt**

The AP covers a lawsuit, filed in November under the state constitution, challenging disenfranchisement after incarceration, for terms of probation or parole or until payment of fines and fees. The case documents are here (the early-December amended complaint is here).

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Posted in political equality

"Native Americans, the census' most undercounted racial group, fight for an accurate 2020 tally"

Posted on December 30, 2019 1:02 pm by **Justin Levitt**

A compelling report on the abundant challenges facing Native Americans seeking an accurate count, and the extraordinary stakes for some of the smaller and more isolated communities.

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Posted in redistricting

"Massachusetts voters may consider ranked-choice voting on 2020 ballot"

Posted on December 30, 2019 1:02 pm by **Justin Levitt**

The threshold signatures are in, and under Massachusetts' system, now the legislature gets to decide whether to adopt the measures before putting them before the voters.

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Posted in alternative voting systems

“Ranked Choice, Fair Choice: Recapping the RCVictories of the Last Decade”

Posted on December 30, 2019 1:01 pm by **Justin Levitt**

And Maura Reilly has a ranked-choice decade recap on the locations Massachusetts may be joining.

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Posted in alternative voting systems

“Decade in review: Citizens United and campaign spending”

Posted on December 30, 2019 1:01 pm by **Justin Levitt**

SCOTUSblog has a running decade-in-review series, and *Citizens United* occupies 14% of the space so far.

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Posted in campaign finance, campaigns

Partisan gerrymandering and the 2010s

Posted on December 30, 2019 1:00 pm by **Justin Levitt**

And for David Daley, one of the biggest stories of the decade-in-review is partisan gerrymandering.

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Posted in political parties, redistricting

I’m shocked – shocked – to find that gambling is going on in here.

Posted on December 30, 2019 1:00 pm by **Justin Levitt**

A few stories about incumbent government officials weighing the merits of redistricting reform, finding reason to put up the strongest resistance coincidentally right when they unilaterally control the partisan levers of power. In Virginia, it’s Democrats; in Idaho, Republicans.

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Posted in political parties, redistricting

"Gerrymandering is alive and well. The coming battle will be bigger than ever."

Posted on December 30, 2019 12:59 pm by **Justin Levitt**

And Jane Timm at NBC News previews the 2020 redistricting cycle these partisan fights are about.

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Posted in political parties, redistricting

"Inside the Biggest 2020 Advertising War Against Trump"

Posted on December 30, 2019 12:58 pm by **Justin Levitt**

The NYT reviews Bloomberg's ad blitz:

> *The effort, which is targeting seven battleground states where polls show Mr. Trump is likely to be competitive in November, is just one piece of an advertising campaign that is unrivaled in scope and scale. On Facebook and Google alone, where Mr. Bloomberg is most focused on attacking the president, he has spent $18 million on ads over the last month, according to Acronym, a digital messaging firm that works with Democrats.*
>
> *That is on top of the $128 million the Bloomberg campaign has spent on television ads, according to Advertising Analytics, an independent firm, which projects that Mr. Bloomberg is likely to spend a combined $300 million to $400 million on advertising across all media before the Super Tuesday primaries in early March.*
>
> *Those amounts dwarf the ad budgets of his rivals, and he is spending at a faster clip than past presidential campaigns as well. Mr. Bloomberg is also already spending more than the Trump campaign each week to reach voters online. And if the $400 million estimate holds, that would be about the same as what President Barack Obama's campaign spent on advertising over the course of the entire general election in 2012.*

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Posted in campaign finance

"By the Numbers: A 2019 Money-in-Politics Index"

Posted on December 30, 2019 12:57 pm by **Justin Levitt**

The Center for Public Integrity with year-end facts and figures.

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Posted in campaign finance

"2020 Democrats are naming their fund-raising 'bundlers' amid a fight over big money in politics"

Posted on December 30, 2019 12:57 pm by **Justin Levitt**

The Philadelphia Inquirer digs into presidential primary bundler disclosure.

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Posted in campaign finance

"The Supreme Court Is Killing Contribution Limits Softly; A Few Years from Now They Likely Will Be Dead."

Posted on December 30, 2019 12:56 pm by **Justin Levitt**

Ciara Torres-Spelliscy offers a cheery take on the *Thompson v. Hebdon* contribution limits case out of Alaska, in the Harvard Law Review blog.

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Posted in campaign finance

Racial disparities in waits at the polls

Posted on December 30, 2019 12:56 pm by **Justin Levitt**

Kareem Haggag and Devin Pope, following up on their study using smartphone data, offer some suggestions in the WaPo for reducing wait times at the polls.

I offered my own suggestions a few years ago.

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Posted in election administration

9 Iowans suspected of voting twice in 2018

Posted on December 30, 2019 12:55 pm by **Justin Levitt**

The cases have been referred for further investigation. The initial flag apparently comes from ERIC (the Electronic Registration Information Center), which is more careful than other

systems at screening for false positives.

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Posted in absentee ballots, chicanery

"Dixville Notch, N.H., may have to give up tradition of midnight voting"

Posted on December 30, 2019 12:54 pm by **Justin Levitt**

One piece of sad news for presidential primary human-interest stories: Dixville Notch, NH, allows voting at the stroke of midnight, and had the first voters in the country's first primary for years. But they're essentially out of people – if I'm reading the article correctly, there are four residents in town, and that leaves too few people to serve as local officials to run the election.

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Posted in primaries

Happy Holidays, Light Blogging, Then Guest Bloggers Through Mid-January

Posted on December 30, 2019 10:45 am by **Rick Hasen**

(*Bumping to the top*)

Happy holidays to all our #ELB readers! Your tips, feedback, and support make all this worthwhile.

Blogging will be light through the end of the year. From the end of December to January 15, I will be off the grid before the crazy 2020 election season starts in earnest and before the release of my new book, Election Meltdown: Dirty Tricks, Distrust, and the Threat to American Democracy and the accompanying book tour.

Justin Levitt and Dan Tokaji will be guest blogging Dec. 30 to January 15. Please send any tips and feedback to them during that period.

To all the ELB readers, wishing you a safe, happy, healthy, peaceful, and prosperous 2020!

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Posted in Uncategorized

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"John Lewis and the need to preserve history"

Posted on December 31, 2019 2:10 pm by **Justin Levitt**

Brandon Tensley offers thoughts on the occasion of Rep. John Lewis's announcement of his fight against pancreatic cancer – the most recent courageous fight of an iconic career.

(We know that animal Twitter is heartwarming, sure. But if you're looking for proof that political Twitter doesn't always have to be a train wreck, check out the replies to Rep. Lewis's message.)

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Posted in Voting Rights Act

New apportionment estimates

Posted on December 31, 2019 2:10 pm by **Justin Levitt**

Election Data Services and Polidata have their new apportionment calculations up, based on the latest year-end Census estimates – they estimate the congressional seats apportioned to each state if the Census count follows past trends … and if the count is accurate. This time next year, we'll have the real numbers in hand.

CNN has a recap, and Politico has a piece on the redistricting battles those seat changes portend.

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Posted in redistricting

"'Your Body Being Used': Where Prisoners Who Can't Vote Fill Voting Districts"

Posted on December 31, 2019 2:09 pm by **Justin Levitt**

Hansi Lo Wang with an NPR report on prison gerrymandering.

I've tried to convince the Census Bureau to change the way it counts people who are incarcerated, but no national change is coming this decade. States and localities are waking up, though — the Prison Gerrymandering Projct has the latest tally of all the jurisdictions.

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Posted in redistricting

"Census Bureau Finds Latinos, Asians Sensitive to Now-Blocked Citizenship Question"

Posted on December 31, 2019 2:09 pm by **Justin Levitt**

Hansi also covers the Census Bureau's final report on its 2019 test of placing a citizenship question on the decennial enumeration. (That test, of course, was conducted after Secretary Ross had already decided to include the question.)

The final report finds little impact overall, but a significant impact on some sizable populations. I also wonder whether the white-hot publicity over the citizenship question in 2019 artificially depressed the "control" group of individuals asked to respond to the test questionnaire without the additional question … and the degree of any continuing reluctance to respond to the Census even with the citizenship question now legally barred.

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Posted in census litigation

"37 quotes that defined American politics in 2019"

Posted on December 31, 2019 2:08 pm by **Justin Levitt**

I have to assume that quote #30 – from the SCOTUS decision on the census's citizenship question – is just a shameless attempt to get a retweet from @LeahLitman. (Hi, Leah!)

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Posted in census litigation

"Feds: No Evidence Hackers Disrupted North Carolina Voting"

Posted on December 31, 2019 2:07 pm by **Justin Levitt**

With lots of election security concerns in the air, a problem in 2016 with electronic pollbooks

in Durham County generated a fair amount of attention. At the time, it didn't look like a malicious incursion, but that didn't stop speculation, particularly in the aftermath of the Mueller Report. And it was a good idea to do a real investigation, just to check.

Yesterday, DHS released a heavily redacted report on the results of the investigation, confirming no evidence of anything malicious. More of a summary here.

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Posted in chicanery, Election Meltdown, voting technology

Purges and the 2020 election

Posted on December 31, 2019 2:06 pm by **Justin Levitt**

Sam Levine, from his new post at the Guardian, with a report.

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Posted in NVRA (motor voter), voter registration

"What Campaign Finance Enforcement Could Look Like in 2020"

Posted on December 31, 2019 2:06 pm by **Justin Levitt**

Campaigns & Elections magazine looks to the year ahead.

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Posted in campaign finance

"Independent Citizens Redistricting Commission applications mailed out"

Posted on December 31, 2019 2:05 pm by **Justin Levitt**

Michigan's new independent commission law requires the Secretary of State to send hundreds of thousands of applications to randomly selected citizens … and the applications are now in the mail.

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Posted in citizen commissions, redistricting

“Final Pennsylvania county OKs new paper-trail voting system”

Posted on December 31, 2019 2:05 pm by **Justin Levitt**

Dauphin County is the last over the line to purchase a new voting system with a paper trail, right at the deadline.

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Posted in election administration, voting technology

“Beauty on the Ballot: Candidates’ Attractiveness Plays Role in Voters’ Decisions, Especially in U.S.”

Posted on December 31, 2019 2:04 pm by **Justin Levitt**

A study by Sebastian Jäckle et al. finds an advantage up to 11% for congressional candidates based on appearance alone. The study itself – titled “A Catwalk to Congress” – is here.

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Posted in campaigns

“Federal Judge Won’t Undo Georgia Voter Purge”

Posted on December 30, 2019 1:04 pm by **Justin Levitt**

On Friday, the federal court rejected a preliminary injunction seeking to reinstate about 98,000 registration entries who had not responded to notices or contacted election officials since January 1, 2012 – declining (under *Pennhurst*) to issue a federal order enforcing state law, and otherwise finding insufficient proof of severe constitutional burden. More here and here.

Share / Save

Posted in NVRA (motor voter), voter registration

While in Wisconsin, a purge sits temporarily on hold…

Posted on December 30, 2019 1:04 pm by **Justin Levitt**

The lede from the Milwaukee Journal-Sentinel:

“The Wisconsin Elections Commission deadlocked Monday over whether to remove the voter registrations of more than 200,000 people in response to a judge’s order. The commission’s

inability to reach a consensus means the voters will stay on the rolls for at least the time being."

There are dueling cases here – a state case with an order from a trial judge to remove voters from the rolls, currently on appeal, and a federal case seeking an order to keep the voters on the rolls. It appears that approximately 88,000 or so of the entries correspond to people who have moved within the same municipality. Wisconsin, with same-day registration, is exempt from federal NVRA provisions limiting purges of the rolls.

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Posted in NVRA (motor voter), voter registration

A Happy New Year to All

Posted on December 31, 2019 2:11 pm by **Justin Levitt**

May your '20s be even better than you allow yourself to imagine.

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Posted in Uncategorized

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From: Law-election on behalf of Levitt, Justin
To: Rick Hasen; Election Law Listserv
Subject: [External] [EL] Finding a "winner" out of the Iowa caucuses
Date: Friday, February 7, 2020 5:55:13 PM
Attachments: ATT00001.txt

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The formula for awarding delegates in the Iowa caucus is unquestionably complex (and I'm no fan, for that and other reasons), but it's my understanding that that process turns on proportional levels of support precinct by precinct, and later county by county, but not statewide. If I'm mistaken about that, I'd welcome the correction. But if it's true that delegates are awarded based on local results, is there any point to branding a statewide "winner" of the Iowa caucuses beyond the need to fill in the blanks on an artificial narrative?

Put differently: assume that Buttigieg won either 12 or 13 delegates to the national convention, and Sanders won either 12 or 13 delegates to the national convention, and that we eventually know for sure whether the answer for each candidate is 12 or 13. Real question: why does it matter whether the AP is able to tell us who "won," beyond widespread public misunderstanding of the significance of what it means to "win" in this context? Imagine it was a precise tie, and each candidate got the same number of delegates, so that neither "won." I understand full well why that matters in the perceptions horserace … but the lack of a "winner" would have zero significance in terms of progress toward picking a nominee. Is the inability to "call" a winner the problem, or is it our need to have a clearly branded "winner"?

Justin

AP Unable to Call Winner in Iowa Democratic Caucus Due to Closeness and "Irregularities"

Posted on February 6, 2020 3:51 pm by **Rick Hasen**

Wow, it's this bad:

"The Associated Press calls a race when there is a clear indication of a winner. Because of a tight margin between former Mayor Pete Buttigieg and Sen. Bernie Sanders and the irregularities in this year's caucus process, it is not possible to determine a winner at this point," said Sally Buzbee, AP's senior vice president and executive editor.

Posted in Uncategorized

From:	Law-election on behalf of Rob Richie
To:	Levitt, Justin
Cc:	Election Law Listserv
Subject:	[External] [EL] More info on Oscar nomination & role of ranked choice voting (was Re: ELB News and Commentary 1/2/20)
Date:	Sunday, January 5, 2020 1:13:17 PM
Attachments:	image001.png ATT00001.txt

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Justin is a great, spirited substitute for Rick's amazing work keeping us updated with daily updates of election law news. Thanks to both of you and t others like Dan Tokaji for your service!

I wanted to clarify one item Justin has below. A good rundown of what it takes to be nominated came out this week by Steve Pond in the Wrap, who covers his better than anyone. We have some older resources on it to, as the main way Oscars are nominated is the foundation for the Fair Representation Act in Congress.

For those who know your voting methods, nearly all Oscar nominations -- including every major category expect Best Picture -- are by a classic form of ranked choice voting: the "single transferable vote" form of proportional representation. There are a fixed number of nominees in nearly all categories (five), and it takes just over one-sixth of each branch of the Academy to nominate a candidate. The rules are like other "STV" elections for the Irish parliament, Australian senate, Cambridge (MA) city council (and some local elections in Minneapolis MN and Eastpointe MI) and council/board elections affecting all voters in Scotland and New Zealand.

There is one minor category using a form of range voting. But such "rating" system have fallen out of favor at the Academy after some history of gaming the vote -- like how the documentary Hoop Dreams was denied a nomination by a group artificially lowering their ratings of it. A virtue of "STV" is that, as in the instant runoff form, tactical voting is impractical in the real world.

For Best Picture, the Academy still uses a ranked ballot but a few years ago it modified STV for a fixed slate of 10 nominees to instead emphasize the first choice and not have a fixed number of nominees. At the same time, Best Picture is the only category to rely on ranked choice voting to pick the Oscar in part because it's the only category to have more than 5 nominees -- and a "plurality vote" was seen as too risky for betting a really polarizing winner in a fractured field.

In general, one sees a lot of interesting alternative voting system use in such kinds of voting. Among many examples, the Heisman Trophy and most major sports awards and college team rankings used ranked choice systems tied to point totals - variations of the "Borda count" that are easy to game, but with gaming kept i check because individual votes are made public and open to scrutiny. Hall of Fame selection is a form of "approval voting" with a cap on votes and minimum level of support needed to get into the Hall -- a system that allows a determined minority to block a controversial figure like Barry Bonds despite his unparalleled stats.

On the ranked choice voting front, well over 60 American colleges and universities today use RCV to pick student leaders --with a wide variation of schools (recent additions include Auburn and U-Texas), and a good number use the single transferable vote, proportional form and nearly all use the "instant runoff" form for student government presidents.

The British Labor Party and Liberal Party will both use RCV to choose their new leaders in the coming weeks, and the Conservative Party of Canada will likely do so later this year -- it used RCV in its 2017 leadership election, as do all the other national political parties in Canada.

- Rob Richie, FairVote

On Thursday, January 2, 2020, Levitt, Justin <justin.levitt@lls.edu> wrote:

> ## Primary voting begins today …
>
> Posted on January 2, 2020 1:38 pm by **Justin Levitt**
>
> … in the Oscars race. It's an alternative voting system for nominations (and in a few categories, for the final result):
>
> In the nominations voting, the marking and tabulation of all ballots shall be according to the preferential, weighted average, or reweighted range voting system. Votes for achievements in motion pictures not on the Reminder List will not be counted in the nominations balloting. Tabulation of final ballots shall be according to the plurality or preferential system. No "write-in" votes shall be counted on the final ballot.
>
> There's a good explanation here using last year's Best Actress contenders, and FairVote (among others) will periodically put out explanations of its own.
>
> Share / Save
>
> Posted in alternative voting systems, primaries
>
> ## "Voting Rights Restoration Backlog Leaves Iowans with Felony Convictions Waiting"
>
> Posted on January 2, 2020 1:37 pm by **Justin Levitt**
>
> Iowa Public Radio previews an issue with increased urgency given the February 3 primaries.
>
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>
> Posted in primaries

Unaffiliated voters and the California primaries

Posted on January 2, 2020 1:37 pm by **Justin Levitt**

Jessica Levinson forecasts coming confusion in California, a heavily absentee-voting state where voters have now been trained on a "top two" state primary (in which voters can vote on all candidates, no matter their party registration). But the top two system doesn't apply to the presidential primary.

This year, the California vote is likely to be quite meaningful in the presidential nominating contest … and voters not already registered in the Democratic party (among others) will have to request a partisan absentee ballot in order to vote in the primary. That's an extra step that local election officials are doing their best to highlight, but still likely to cause some confusion come election day itself.

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Posted in political parties, primaries

"Conservatives seek immediate purge of voters in Wisconsin"

Posted on January 2, 2020 1:36 pm by **Justin Levitt**

The latest on this saga is a motion seeking to hold the members of the Wisconsin Elections Commission in contempt for failing to remove 200,000 voter registrations pending an appeal of a state trial court's order. More here.

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Posted in The Voting Wars, voter registration

"'Alabama Counts': How one Republican state bucks national trends and boosts Census awareness"

Posted on January 2, 2020 1:35 pm by **Justin Levitt**

Alabama is *right* on the brink of losing a congressional seat – under most projections, it's the state that would get the 436th seat if that were a thing. (And that's if the Census count is actually accurate.)

And so perhaps it's not surprising that Alabama is one of the few conservative states apparently spending substantially on Census outreach.

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Posted in redistricting

"Census 2020 Tests Social-Media Giants' Ability to Combat Disinformation"

Posted on January 2, 2020 1:34 pm by **Justin Levitt**

The Wall St. Journal highlights the social media fight against disinformation ahead of the 2020 census.

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Posted in chicanery, Election Meltdown, social media and social protests

"Americans wary of 2020 census; more than $1 trillion hangs in balance"

Posted on January 2, 2020 1:34 pm by **Justin Levitt**

The Washington Times on census response.

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Posted in Uncategorized

"Cyber attacks and electronic voting errors threaten 2020 outcome, experts warn"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

The Guardian reports.

Cybersecurity is exceedingly important. And now your reminder that at least in the past, we have been more prone to hacking than the voting systems.

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Posted in chicanery, voting technology

"Election Security at the Chip Level"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

Semiconductor Engineering reports on some of the challenges confronting manufacturers of secure accessible voting systems, and some of the industry efforts to meet those challenges.

That's right, *Semiconductor Engineering*. You're welcome.

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Posted in voting technology

"Under Trump, voter turnout surges in Virginia's off-year elections"

Posted on January 2, 2020 1:33 pm by **Justin Levitt**

The WaPo headline is absolutely accurate.

And the "surge" they're describing reached 48 percent turnout in 2017, and 43 percent in 2019 – far more than most off-year elections, and still less than a majority of the eligible electorate.

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Posted in voting

The Year in Recall Elections

Posted on January 2, 2020 1:32 pm by **Justin Levitt**

Apropos for the holiday season, the Recall Elections Blog summarizes some of the "returns and exchanges" of 2019.

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Posted in recall elections

"Commission on Appellate Court Appointments in Spotlight as Redistricting Fight Nears"

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

In Arizona, the commission on appellate court appointments is also the screening body for applicants to the state's independent redistricting commission. And with tomorrow's

deadline on applications to the commission, KJZZ has a story on some of the upstream impact on the bodies designated to choose those drawing the lines.

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Posted in redistricting

"Virginia was home to the first gerrymander. It should also be the home of its solution."

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

Sam Wang urges the new unilateral Democratic majority in Virginia to follow through on redistricting reform.

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Posted in legislation and legislatures, political parties, redistricting

"Paralysis Grips U.S. Election Overseer While Complaints Pile Up"

Posted on January 2, 2020 1:31 pm by **Justin Levitt**

Bloomberg (the press entity, not the candidate) reviews the FEC docket.

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Posted in campaign finance

"A Century of Votes for Women"

Posted on January 2, 2020 1:30 pm by **Justin Levitt**

Christina Wolbrecht and J. Kevin Corder with a new book on the 100th anniversary of the 19th Amendment. The abstract:

> *How have American women voted in the first 100 years since the ratification of the Nineteenth Amendment? How have popular understandings of women as voters both persisted and changed over time? In A Century of Votes for Women, Christina Wolbrecht and J. Kevin Corder offer an unprecedented account of women voters in American politics over the last ten decades. Bringing together new and existing data, the book provides unique insight into women's (and men's) voting behavior, and*

> *traces how women's turnout and vote choice evolved across a century of enormous transformation overall and for women in particular. Wolbrecht and Corder show that there is no such thing as 'the woman voter'; instead they reveal considerable variation in how different groups of women voted in response to changing political, social, and economic realities. The book also demonstrates how assumptions about women as voters influenced politicians, the press, and scholars.*

Should be an interesting read.

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Posted in 19th Amendment, political equality

Quantitative election administration studies: early voting and polling place location

Posted on January 2, 2020 1:30 pm by **Justin Levitt**

Two studies newly published in the latest issue of the *American Economic Journal: Applied Economics* series:

Ethan Kaplan and Haishan Yuan, Early Voting Laws, Voter Turnout, and Partisan Vote Composition: Evidence from Ohio

> *We estimate effects of early voting on voter turnout using a 2010 homogenization law from Ohio that forced some counties to expand and others to contract early voting. Using voter registration data, we compare individuals who live within the same 2×2 mile squareblock but in different counties. We find substantial positive impacts of early voting on turnout equal to 0.22 percentage points of additional turnout per additional early voting day. We also find greater impacts on women, Democrats, independents, and those of child-bearing and working age. We simulate impacts of national early day laws on recent election outcomes.*

Enrico Cantoni, A Precinct Too Far: Turnout and Voting Costs

> *I study the effects of voting costs—specifically, distance to polling location—using geographic discontinuities. Opposite sides of boundaries between voting precincts are observationally identical, except for their assigned polling locations. This discontinuous assignment produces sharp changes in voters' travel distance to cast their ballots. In nine municipalities in Massachusetts and Minnesota, a 1 standard deviation (0.245 mile) increase in distance reduces ballots cast by 2 to 5 percent across four elections. During non-presidential elections, effects are three times larger in high-minority areas than in low-minority areas. Finally, I simulate the impact of various counterfactual assignments of voters to polling places.*

I look forward to reading these.

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Posted in election administration, legislation and legislatures, political equality, The Voting Wars

"On Va. Democrats' 2020 to-do list, voting rights seem to top campaign finance reform"

Posted on January 2, 2020 1:28 pm by **Justin Levitt**

The Virginia Mercury looks at the legislative session ahead.

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Posted in campaign finance, election administration, The Voting Wars

"In ancient Athens, ostracism did the job of impeachment"

Posted on January 2, 2020 1:27 pm by **Justin Levitt**

The Economist seriously shifting the Overton window for impeachment, with a review of ancient Athenian exile.

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Posted in Uncategorized

Federal court issues preliminary injunction against 2018 NC voter ID law

Posted on January 1, 2020 3:21 pm by **Justin Levitt**

The law, enacted over the Governor's veto, usually requires a qualifying photo ID to vote. As compared to the previous ID law passed in the wake of *Shelby County* and invalidated in 2016, it expands the list of acceptable IDs (to a list of 10 different types, though with limits on student and government employee IDs) and the means of getting a free ID, applies to absentee as well as in-person ballots, and allows for a voter with a reasonable impediment to getting a photo ID to say so at the polls in order to vote a ballot that should count … if the administrative process works smoothly.

The court enjoined the law as the product of discriminatory intent, but found that the proven impact was (at least at the preliminary stage) insufficient to make out a "results" violation of section 2 of the Voting Rights Act. Stay tuned for the inevitable appeal.

Coverage of the federal court's decision is here, here, and here. The order itself is here.

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Posted in The Voting Wars, voter id

Chief Justice Roberts's year-end report on the judiciary

Posted on January 1, 2020 3:20 pm by **Justin Levitt**

It starts with a tie between the Federalist Papers and the danger of fake news (which started a riot which earned John Jay a rock to the head), and includes a brief paean to the independence of the judiciary from the gentleman about to preside over an impeachment trial. 7 pages, but there's a fair amount of there in there.

From:	Law-election on behalf of Paul Weich
To:	Levitt, Justin; Election Law Listserv
Subject:	[External] [EL] Polygamous sect supporters" improper voting RE: ELB News and Commentary 1/5/20
Date:	Sunday, January 5, 2020 8:08:54 PM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png image007.png ATT00001.txt

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I'm following up on the thorough article in the Salt Lake Trib re: FLDS supporters improperly voting, and Professor Levitt's valid point questioning whether the people were properly registered.

In Arizona - where this portion of the FLDS story takes place) - the supporters were NOT properly registered once they were evicted. The statute requires them to re-register and use (1) a homeless shelter to which he/she "regularly returns"; (2) place where they *are* residing; (3) the county courthouse; or (4) a general delivery address (USPS). (A.R.S. §16-121)

QUESTION for the listserv: if they HAD voted multiple times, would the correct term be "polysuffrageous", "polytribous" or something else. (I would have loved to throw those into the headline!)

--Paul

_____
Paul Weich, co-founder
www.ArizonasPolitics.com
New: www.ArizonasLaw.org
602-908-9132

> -------- Original Message --------
> Subject: [EL] ELB News and Commentary 1/5/20
> From: "Levitt, Justin" <justin.levitt@lls.edu>
> Date: Sun, January 05, 2020 2:11 pm
> To: Election Law Listserv <law-election@uci.edu>
>
> **“Voters in town once run by polygamous sect probably broke the law when they cast ballots, prosecutor says, but charges are unlikely”**

Posted on January 5, 2020 12:54 pm by **Justin Levitt**

The Salt Lake Tribune runs a story about potential improper registration in Colorado City (which, despite the name, is half of a community that straddles the Utah-Arizona boder).

There are real problems of unlawful behavior in Colorado City. But some of the anecdotes in the story seem to suggest a conflation of domicile and physical presence. As one example:

> *Lori Barlow acknowledges she was one person whose address was out of date yet voted anyway. She still lives in Colorado City in what she says is temporary housing.*
>
> *Smith and Mohave County, Barlow said, have failed to appreciate the housing challenges in Colorado City, where many people loyal to imprisoned FLDS President Warren Jeffs have chosen to be evicted rather than deal with a local land trust that owns many of the homes.*
>
> *"I did not change my address," Barlow said, "because I had nothing to change it to."*

The story doesn't state otherwise … but in most states, someone in Barlow's apparent position is properly registered at her old address even if she no longer sleeps there at night, as long as she hasn't yet established permanent residence elsewhere.

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Posted in chicanery, voter registration

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From: Law-election on behalf of Pildes, Rick
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] [EL] symmetry got no shrift at all in Justice Kagan"s dissent in Rucho
Date: Friday, June 28, 2019 4:14:02 PM
Attachments: image001.png
ATT00001.txt

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In light of the exchanges here about how much attention symmetry tests did or didn't receive in the Roberts opinion, it seems odd not to mention that these tests received *no* attention at all in Justice Kagan's dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court's additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in *Whitford* last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in *Vieth*).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a "symmetry standard" to "measure partisan bias" by comparing how the two major political parties "would fare hypothetically if they each . . . received a given percentage of the vote." 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of "adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs." Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on "how much partisan dominance is too much." Ibid. JUSTICE KENNEDY therefore concluded that "asymmetry alone is not a reliable measure of unconstitutional partisanship." Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466–467, 471–473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not "rule out the utility of a criterion of symmetry," and that "further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review." Id., at 483–484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin's statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs' case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from "partisan symmetry," which they describe as the "social scientific tenet that [districting] maps should treat parties symmetrically." Brief for Appellees 37.

We need not doubt the plaintiffs' math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> A vote for willful misrepresentation. Claiming "the Constitution doesn't require proportionality" is a handy strawman.
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rick Hasen
> **Sent:** Thursday, June 27, 2019 9:46 PM
> **To:** Election Law Listserv <law-election@uci.edu>
> **Subject:** [EL] symmetry really got short shrift in Rucho
>
> It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn't have made it clearer.
>
> --
> Rick Hasen

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--

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From:	Law-election on behalf of Levitt, Justin
To:	Marty Lederman; Rick Hasen
Cc:	Election Law Listserv
Subject:	[External] [EL] Why not just pick a pretext from the EO?
Date:	Friday, July 12, 2019 3:39:39 AM
Attachments:	image001.png image004.png ATT00001.txt

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To Marty's question about why Commerce didn't just originally pick a pretext from the array in the EO: I think the TL;DR answer is that the EO answers are only surface-level plausible for what they wanted to do. Either they don't actually explain the need for putting the question on the enumeration, or they don't fit the pre-existing OMB preference for uses reflecting strong federal enforcement needs.

And now the overly long version:

Obviously, I have no insight into Commerce's actual decision-making process beyond what's been revealed in litigation. And so what follows represents the attempt to reverse-engineer a rational search for a purpose to put forward. YMMV for whether you think this resembles any plausible consideration in the decision making process that actually went on, in whole or in part.

1. Despite the assertions in today's press conference, the Secretary's March 2018 decision was not a decision for the Census Bureau to start collecting citizenship information from the public. The census's American Community Survey already collects citizenship information from the public on a rolling (and hence regularly updated) and fairly detailed basis (country of birth, year of entry). Instead, the March 2018 decision was a decision to collect information on citizenship (alone) from the public on the decennial household-to-household 100% enumeration form.

   That sort of collection risks fomenting inaccuracy (inaccuracy quantified by Census Bureau experts in what they explicitly designated as an exceptionally conservative estimate, and undersold by SCOTUS as a predictive figure, without that same caveat). The size of the inaccuracy was disputed, but not the fact of the inaccuracy. So the decision to forge ahead despite that inaccuracy required at least some articulable benefit from asking for the information on the enumeration, over and above either administrative records or surveys. The ostensible benefit they settled on was the illusion of block-by-block precision purportedly needed for Section 2.

   Beyond redistricting, none of the other uses in pp. 5-8 of the Executive Order (overall national immigration policy, overall national benefits expenditures, various broad legislative purposes concerning the undocumented population) seem to offer a plausible meaningful incremental benefit (over surveys or administrative records) for household-by-household collection of the one incremental citizenship question sufficient to justify the lapse in accuracy. That is, the other uses beyond redistricting in the EO are pitched at state or

national estimates (where the ACS margins of error are really quite small) rather than block-level estimates, and often require information about year of entry, country of origin, or immigration status that the single citizenship question wasn't designed to get.

Or more simply: except for redistricting, these other applications might explain why the Administration would want ACS data it's already got. But they don't really purport to explain why they'd need one extra household-by-household question on citizenship. The VRA pretext offers an excuse for block-level data on citizenship (without the extra questions on year of entry or status or the like).

2. I don't know offhand the process for reviewing content on the household-to-household enumeration, but there's a rather detailed OMB-fostered process for reviewing content on the ACS. It privileges information to be used by federal agencies, and particularly privileges with the following priority: 1) data explicitly required by statute to be gleaned from the census, 2) data required by statute or case law and naturally derived from the census, and only thereafter 3) data useful for programmatic planning. Data without mandatory or required uses by federal agencies, and only programmatic uses at geographic levels larger than counties, were lowest priority, and essentially flagged for likely deletion from the ACS. And would have been tricky to sell as prime candidates for elevation to the household-to-household enumeration.

   This means that in the existing OMB procedure, the gold standard (at least for ACS content) was information needed by a federal agency in small levels of geography in order to perform a function specifically required by statute or caselaw. (I'm assuming that the process for enumeration content – to the extent there was a process -- was at least as restrictive.)

   That explains why Commerce first went shopping to federal agencies – DOJ, DHS, DOJ again – for some requested justification, rather than just saying "hey, we're adding the question because this stuff might be useful for someone." The VRA pretext met that threshold of caselaw requirement for data in small levels of geography needed for federal agency enforcement.

   None of the other uses in pp. 5-8 of the EO do the same thing. The first few have to do with changing laws and appropriations and broad national policies, but not enforcing existing statutes at the local level. The rationales in the EO seem pitched primarily at helping Congress pass better laws. But if Congress needs information to inform its policymaking, Congress can add whatever information it wishes (which may well be why the OMB process privileges data to assist executive functions). And the redistricting rationale in the EO isn't a federal agency rationale either – it's entirely dependent on the cited interest of "some State officials."

I'm not suggesting that there aren't other hypothetical pretexts that would both 1) fit the preference for data required for federal agencies to do their existing jobs and 2) make the case for a single question on citizenship collected at the block level, yielding information ostensibly more suitable than the stuff already collected on the ACS. But in that respect, the VRA nonsense did deliver a two-

fer. (To be clear, it doesn't hold up either. But on these two axes, it might hold up a bit better than the EO alternatives.)

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Marty Lederman
Sent: Thursday, July 11, 2019 7:25 PM
To: Rick Hasen <rhasen@law.uci.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] The Trump (Second) Cave on the Citizenship Question is a Double Victory for the Rule of Law

Here's the great mystery (unless I'm overlooking something): Why didn't Commerce in the first instance, back in early 2018, cite the purposes articulated at pp. 5-8 of the Executive Order (or at least all of them other than the redistricting rationale), instead of the patently bullshit "to help CRT enforce Section 2 of the Voting Rights Act" fiction, as justifications for adding the question to the census--something the Court probably would have upheld?

On Thu, Jul 11, 2019 at 6:15 PM Rick Hasen <rhasen@law.uci.edu> wrote:

> # The Trump (Second) Cave on the Citizenship Question is a Double Victory for the Rule of Law
>
> Posted on July 11, 2019 3:08 pm by **Rick Hasen**
>
> President Trump's Speech this afternoon in which he said that the Administration would give up on efforts to add a citizenship question to the census is a victory for the rule of law. Many people were predicting that Trump would use an Executive Order in an effort to force people in the Census Bureau to ignore multiple court orders which barred the inclusion of the question. I had been saying to wait and see, and fortunately, the Administration did not provoke a constitutional crisis by ignoring the judiciary and judicial review.
>
> This is the second victory for the rule of law. The first was that the Supreme Court, likely thanks to the Hofeller files, refused to go along with the charade that the government wanted to add the census question to help Hispanic voters in Voting Rights Act lawsuits. In fact, it was quite the opposite: it was an attempt to maximize, in Hofeller's terms, white Republican voting power at the expense of Hispanics and Democrats. The pretext was too much for even Chief Justice Roberts to handle.
> Sure it is not all good news. Four Justices were willing to go along with this charade. Roberts' majority opinion created an easy path for inclusion of the citizenship question in future decades, so long as the government learns to lie better. The government will still collect citizenship data to give Republican states a way to draw districts with equal numbers of voter eligible citizens, rather than all

persons, thereby diminishing Hispanic (and Democratic) voting power. (The question of whether that is permissible will have to be decided by the Supreme Court, where the odds are good that drawing such discriminatory district would be allowed.) And attorney general William Barr further lied when he said that the Administration would have won its lawsuits, if only they had more time. (Not only would they have had a difficult time manufacturing a new pretext; the were amateurs in trying to fix things, and had no good explanation for why they could extend the deadline for printing after telling the Supreme Court it had to take the case on an expedited basis and skip the Court of Appeals given the time crunch.)

So it is not all good news. But it is good news for the census (where the real work of getting people to answer the survey is just beginning, given all of the dirt Trump has thrown up in the air, and all the intimidation of non-citizens to participate).

And it is good news for the rule of law. Even the Trump Administration listened to the courts. We shouldn't lose sight of that significant victory.

Share / Save
Posted in census litigation, Supreme Court

--
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--
Marty Lederman
Georgetown University Law Center
600 New Jersey Avenue, NW
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202-662-9937

From:	Law-election on behalf of Rick Hasen
To:	Allen Dickerson; Levitt, Justin; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] * RE: * RE: * Re: * Re: Uber/Lyft to the polls
Date:	Friday, November 2, 2018 2:34:45 PM
Attachments:	ATT00001.txt

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Here's the FEC guidance for corporations and unions:

https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/conducting-voter-registration-and-get-out-the-vote-drives-corporation-labor-organization/

Transportation
The corporation or labor organization may provide transportation to the place of registration or to the polls in connection with the voter registration or GOTV drive.

From: Allen Dickerson <adickerson@ifs.org>
Date: Friday, November 2, 2018 at 11:30 AM
To: Rick Hasen <rhasen@law.uci.edu>, "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

True, but that's a strawman. The substance of the argument was that requiring *proof* of having voted would raise legal issues. Rick has previously agreed in another context: Ben and Jerry's providing free ice cream to those who voted. http://electionlawblog.org/archives/011866.html ("The only out I see is that one need not prove one voted; it is enough to say 'I voted.'").

There's probably agreement that transportation could be treated differently from ice cream, and good policy reasons for doing so. But absent a statutory exception (after *CREW v. FEC,* a regulation might not be good enough), why would a responsible company risk an FEC complaint?

That's a business judgment, of course, but it blinks reality to ignore its legal dimension.

Allen Dickerson
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adickerson@ifs.org

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Rick

Hasen
Sent: Friday, November 02, 2018 1:57 PM
To: Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even

> if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.

Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**
Clark.com:
Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.
But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for

registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:
In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.
[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:

The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."

His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.

North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>
Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.
<image001.png>
Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* *Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote.*
Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* *A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote*, *will be published in 2019.*
Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*
<image001.png>
Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court justices a fight"

Posted on November 2, 2018 8:05 am by **Rick Hasen**
Detroit News:
The campaign was roiled in early August when the state's high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed "special interests" attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members' votes on absentee ballots, while Wilder's name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading

into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

<image001.png>
Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion

Dollars to Super PACs”

Posted on November 2, 2018 7:58 am by **Rick Hasen**

Public Citizen:

Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.

The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700 million to influence elections.

<image001.png>

Posted in campaign finance, campaigns, Plutocrats United

“Hoboken developer ‘Pupie’ Raia indicted in alleged cash-for-votes scheme”

Posted on November 2, 2018 7:57 am by **Rick Hasen**

NJ.com:

Frank “Pupie” Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city’s 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken’s 2013 race. Braxton, 43, was also indicted today.

<image001.png>

Posted in absentee ballots, chicanery

“Citizenship Question May Be ‘Major Barrier’ To 2020 Census Participation”

Posted on November 2, 2018 7:54 am by **Rick Hasen**

Hansi Lo Wang for NPR:

The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a “major barrier” to the country’s full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….

In focus groups conducted in March and April to inform the government’s outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences," she added.
<image001.png>
Posted in Uncategorized

"Too Poor to Vote; If you've committed a crime and are rich, you can pay court fees and cast a ballot. If you don't have money, you might be left out of democracy."

Posted on November 2, 2018 7:47 am by **Rick Hasen**
Danielle Lang and Thea Sebastian NYT oped.
<image001.png>
Posted in voting

"An End to Spoiler Candidates"

Posted on November 2, 2018 7:30 am by **Rick Hasen**
Dave Daley for Democracy Journal, with the subhead: "If more states adopted ranked-choice voting, far fewer elections would include unsatisfactory, binary choices and minority-backed winners."
<image001.png>
Posted in alternative voting systems

North Dakota Ad Apparently Run By Democrats on Facebook Says Hunters Could Lose Out-of State Licenses by Voting in North Dakota; Controversy Shows Value of Disclosure

Posted on November 1, 2018 3:20 pm by **Rick Hasen**
This is interesting.
Also interesting: the use that is being made of Facebook's disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don't voters want to know who is behind these messages.

<image001.png>
Posted in campaigns

"Here's Why Democrats Have Made Secretary Of

State Elections One Priority”

Posted on November 1, 2018 2:39 pm by **Rick Hasen**

Iowa Public Radio reports.

<image001.png>

Posted in Uncategorized

Dodge City, KS Moved Polling Place Because of “Construction,” But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**

<image002.jpg>

<image003.jpg>

Maddow Blog

✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?

6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

Twitter Ads info and privacy

Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.

<image001.png>

Posted in election administration, fraudulent fraud squad

“Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost’s Negative Coverage Of A Democratic PAC”

Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:

HuffPost’s April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party’s official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC’s pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.

Until this spring, HuffPost's story was the second to come up in a generic Google search for "End Citizens United." But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.
End Citizens United did not respond to HuffPost's request for comment before publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**
The order is here and is not a surprise given the timing:
The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>
Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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http://www.law.uci.edu/faculty/full-time/hasen/
http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From:	Law-election on behalf of Rick Hasen
To:	Allen Dickerson; Levitt, Justin; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] * RE: * RE: * RE: * Re: * Re: Uber/Lyft to the polls
Date:	Friday, November 2, 2018 2:43:37 PM
Attachments:	ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

The statute banning vote buying has been construed by courts for decades to not cover the costs of transportation to the polls.
I do not believe any court would take seriously the argument that there is legal liability for providing round-trip transportation.

From: Allen Dickerson <adickerson@ifs.org>
Date: Friday, November 2, 2018 at 11:38 AM
To: Rick Hasen <rhasen@law.uci.edu>, "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

That isn't a statute, does not prevent a complaint, and does not forestall a future reviewing court from believing the FEC's position fails *Chevron* Step 1. As happened in the *CREW* litigation.

Unfortunately, good policy arguments do not wish away complaint-driven legal risk.

Allen Dickerson
Legal Director | Institute for Free Speech
124 S. West Street | Suite 201 | Alexandria, VA 22314
O: 703.894.6800 | F: 703.894.6811
adickerson@ifs.org

From: Rick Hasen [mailto:rhasen@law.uci.edu]
Sent: Friday, November 02, 2018 2:33 PM
To: Allen Dickerson <adickerson@ifs.org>; Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: * RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

Here's the FEC guidance for corporations and unions:

https://www.fec.gov/help-candidates-and-committees/making-disbursements-ssf-or-connected-organization/conducting-voter-registration-and-get-out-the-vote-drives-corporation-labor-organization/

Transportation

The corporation or labor organization may provide transportation to the place of registration or to the polls in connection with the voter registration or GOTV drive.

From: Allen Dickerson <adickerson@ifs.org>
Date: Friday, November 2, 2018 at 11:30 AM
To: Rick Hasen <rhasen@law.uci.edu>, "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

True, but that's a strawman. The substance of the argument was that requiring *proof* of having voted would raise legal issues. Rick has previously agreed in another context: Ben and Jerry's providing free ice cream to those who voted. http://electionlawblog.org/archives/011866.html ("The only out I see is that one need not prove one voted; it is enough to say 'I voted.'").

There's probably agreement that transportation could be treated differently from ice cream, and good policy reasons for doing so. But absent a statutory exception (after *CREW v. FEC,* a regulation might not be good enough), why would a responsible company risk an FEC complaint?

That's a business judgment, of course, but it blinks reality to ignore its legal dimension.

Allen Dickerson
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adickerson@ifs.org

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Rick Hasen
Sent: Friday, November 02, 2018 1:57 PM
To: Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in

a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM

To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center

http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**

Clark.com:

Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.

But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:

In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in

part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:
The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."
His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.
North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified

multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>
Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.
<image001.png>
Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote*.*
Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote*, will be published in 2019.*
Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate*

information about the United States Constitution on a nonpartisan basis."
<image001.png>
Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court justices a fight"

Posted on November 2, 2018 8:05 am by **Rick Hasen**
Detroit News:
The campaign was roiled in early August when the state's high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed "special interests" attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members' votes on absentee ballots, while Wilder's name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

<image001.png>
Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion Dollars to Super PACs"

Posted on November 2, 2018 7:58 am by **Rick Hasen**
Public Citizen:
Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.
The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700

million to influence elections.

<image001.png>
Posted in campaign finance, campaigns, Plutocrats United

"Hoboken developer 'Pupie' Raia indicted in alleged cash-for-votes scheme"

Posted on November 2, 2018 7:57 am by **Rick Hasen**
NJ.com:
Frank "Pupie" Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city's 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken's 2013 race. Braxton, 43, was also indicted today.

<image001.png>
Posted in absentee ballots, chicanery

"Citizenship Question May Be 'Major Barrier' To 2020 Census Participation"

Posted on November 2, 2018 7:54 am by **Rick Hasen**
Hansi Lo Wang for NPR:
The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a "major barrier" to the country's full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….
In focus groups conducted in March and April to inform the government's outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences," she added.
<image001.png>
Posted in Uncategorized

"Too Poor to Vote; If you've committed a crime and are rich, you can pay court fees and cast a ballot. If you don't have money, you might be left

out of democracy."

Posted on November 2, 2018 7:47 am by **Rick Hasen**
Danielle Lang and Thea Sebastian NYT oped.
<image001.png>
Posted in voting

"An End to Spoiler Candidates"

Posted on November 2, 2018 7:30 am by **Rick Hasen**
Dave Daley for Democracy Journal, with the subhead: "If more states adopted ranked-choice voting, far fewer elections would include unsatisfactory, binary choices and minority-backed winners."
<image001.png>
Posted in alternative voting systems

North Dakota Ad Apparently Run By Democrats on Facebook Says Hunters Could Lose Out-of State Licenses by Voting in North Dakota; Controversy Shows Value of Disclosure

Posted on November 1, 2018 3:20 pm by **Rick Hasen**
This is interesting.
Also interesting: the use that is being made of Facebook's disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don't voters want to know who is behind these messages.

<image001.png>
Posted in campaigns

"Here's Why Democrats Have Made Secretary Of State Elections One Priority"

Posted on November 1, 2018 2:39 pm by **Rick Hasen**
Iowa Public Radio reports.
<image001.png>
Posted in Uncategorized

Dodge City, KS Moved Polling Place Because of "Construction," But…. (Bonus Spurious Claim of Risk of Double Voting)

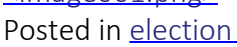
Posted on November 1, 2018 1:09 pm by **Rick Hasen**
<image002.jpg>

Maddow Blog
✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?
6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

Twitter Ads info and privacy

Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.

Posted in election administration, fraudulent fraud squad

"Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost's Negative Coverage Of A Democratic PAC"

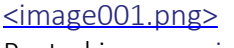
Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:

HuffPost's April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party's official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC's pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.

Until this spring, HuffPost's story was the second to come up in a generic Google search for "End Citizens United." But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.

End Citizens United did not respond to HuffPost's request for comment before publication.


Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**

The order is here and is not a surprise given the timing:

The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>

Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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Rick Hasen
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rhasen@law.uci.edu
http://www.law.uci.edu/faculty/full-time/hasen/
http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of Douglas Johnson
To: "Rick Hasen"; "Levitt, Justin"; "Allison Hayward"; "Paul Gronke"; "edu law-election@uci. edu law-election@uci."
Subject: [External] Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls
Date: Friday, November 2, 2018 2:33:36 PM
Attachments: ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

I think that would not be the first time courts have made rulings based on points that many thought were "nonsensical sophistry."

Think of a challenge along these lines: as a frequent Uber user in all parts of California, I can confirm that Uber and Lyft drivers area much more common in densely populated urban areas. So the company's free rides are much more likely to be used by voters in those areas. Given voter registration patterns in densely populated urban areas compared to suburban and rural areas, the free rides are more likely to be used by Democratic voters. I think everyone on this list is aware of parties that, given an opening, might challenge Uber's and Lyft's donations of free rides because the parties want to avoid the disparate partisan benefits of the free rides.

I don't think such a challenge is merited, and I definitely think the logic of allowing rides one way but not the other is absurd, but there are many seemingly absurd rules in the campaign finance field.

I think legal counsel for Lyft and Uber are probably justified in their fear that this 'good citizen' donation could blow up in their face, and both of those companies have enough legal issues going on to want to play it safe on this issue. I believe the problem is with the definitions and the law, not with the companies' legal counsels' concern that it might blow up on them.

- Doug

Douglas Johnson, Ph.D.
Fellow, Rose Institute of State and Local Government
at Claremont McKenna College
douglas.johnson@cmc.edu
direct: 310-200-2058

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rick Hasen
Sent: Friday, November 2, 2018 10:57 AM
To: Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or

because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**

Clark.com:

Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.

But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:

In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing

the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:
The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."
His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification

now required.

North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>

Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**

WaPo.

<image001.png>

Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**

Constitution Daily Podcast:

As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*

Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote*.*

Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law.*

Her forthcoming book, A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote, will be published in 2019.

***Jeffrey Rosen** is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*

<image001.png>

Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court justices a fight"

Posted on November 2, 2018 8:05 am by **Rick Hasen**

Detroit News:

The campaign was roiled in early August when the state's high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed "special interests" attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members' votes on absentee ballots, while Wilder's name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

<image001.png>
Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion Dollars to Super PACs"

Posted on November 2, 2018 7:58 am by **Rick Hasen**
Public Citizen:
Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.
The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor

Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700 million to influence elections.

<image001.png>
Posted in campaign finance, campaigns, Plutocrats United

"Hoboken developer 'Pupie' Raia indicted in alleged cash-for-votes scheme"

Posted on November 2, 2018 7:57 am by **Rick Hasen**
NJ.com:
Frank "Pupie" Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city's 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken's 2013 race. Braxton, 43, was also indicted today.

<image001.png>
Posted in absentee ballots, chicanery

"Citizenship Question May Be 'Major Barrier' To 2020 Census Participation"

Posted on November 2, 2018 7:54 am by **Rick Hasen**
Hansi Lo Wang for NPR:
The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a "major barrier" to the country's full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….
In focus groups conducted in March and April to inform the government's outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences," she added.
<image001.png>
Posted in Uncategorized

“Too Poor to Vote; If you’ve committed a crime and are rich, you can pay court fees and cast a ballot. If you don’t have money, you might be left out of democracy.”

Posted on November 2, 2018 7:47 am by **Rick Hasen**

Danielle Lang and Thea Sebastian NYT oped.

<image001.png>

Posted in voting

“An End to Spoiler Candidates”

Posted on November 2, 2018 7:30 am by **Rick Hasen**

Dave Daley for Democracy Journal, with the subhead: “If more states adopted ranked-choice voting, far fewer elections would include unsatisfactory, binary choices and minority-backed winners.”

<image001.png>

Posted in alternative voting systems

North Dakota Ad Apparently Run By Democrats on Facebook Says Hunters Could Lose Out-of State Licenses by Voting in North Dakota; Controversy Shows Value of Disclosure

Posted on November 1, 2018 3:20 pm by **Rick Hasen**

This is interesting.

Also interesting: the use that is being made of Facebook’s disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don’t voters want to know who is behind these messages.

<image001.png>

Posted in campaigns

“Here’s Why Democrats Have Made Secretary Of State Elections One Priority”

Posted on November 1, 2018 2:39 pm by **Rick Hasen**

Iowa Public Radio reports.

<image001.png>

Posted in Uncategorized

Dodge City, KS Moved Polling Place Because of

“Construction,” But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**

<image002.jpg>
<image003.jpg>
Maddow Blog
✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?
6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

Twitter Ads info and privacy

Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.
<image001.png>
Posted in election administration, fraudulent fraud squad

“Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost’s Negative Coverage Of A Democratic PAC”

Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:
HuffPost’s April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party’s official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC’s pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.
Until this spring, HuffPost’s story was the second to come up in a generic Google search for “End Citizens United.” But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost’s story dropped from the second place on the first page of the Google search to the second page of search results.
End Citizens United did not respond to HuffPost’s request for comment before

publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**
The order is here and is not a surprise given the timing:
The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>
Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**
I had been expecting an emergency stay request from Ohio, but it's not going to happen:
Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>
Posted in election administration

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Rick Hasen
Chancellor's Professor of Law and Political Science
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rhasen@law.uci.edu
http://www.law.uci.edu/faculty/full-time/hasen/
http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From:	Law-election on behalf of Allison Hayward
To:	Levitt, Justin; Rick Hasen; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls
Date:	Friday, November 2, 2018 2:13:59 PM
Attachments:	ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

But see, that's just it. A ride sharing company doesn't function like the charity/good government bus to the polls, or the volunteer driving team that scours the precinct for their voters. So I think for the ride sharing companies there is potential exposure different from the conventional voter transportation scenarios we've all dealt with as counsel or as activists.

I am most assuredly NOT arguing that there's a rule prohibiting the ride home always and everywhere. I don't think anybody is. That's just silly.

A.

From: Levitt, Justin <justin.levitt@lls.edu>
Sent: Friday, November 2, 2018 11:02 AM
To: Rick Hasen; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

If the only thing the voter has done at the destination is vote, I think it's perfectly legal to give rides in either direction, just as it would be perfectly legal to give a ride to, wait, and give a ride back.

(And I think it's likely also fine for the companies to presume that the only thing the voter has done at the destination is vote – or to set up the app so that any ride back within XX time of a free dropoff at the polls is presumed to be just for voting.)

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 02, 2018 10:57 AM
To: Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul

Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or

because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>

Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**

Clark.com:

Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.

But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:

In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have

means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

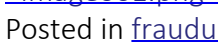
<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:
The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."
His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.
North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

Posted in The Voting Wars, voter id

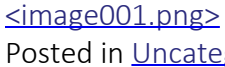
"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.

Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* *Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote.*
Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* *A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote,* *will be published in 2019.*
Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*

Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court

justices a fight”

Posted on November 2, 2018 8:05 am by **Rick Hasen**

Detroit News:

The campaign was roiled in early August when the state’s high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed “special interests” attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members’ votes on absentee ballots, while Wilder’s name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped “dark money” into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**

Arkansas Online:

A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.

I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion Dollars to Super PACs"

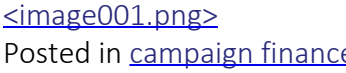
Posted on November 2, 2018 7:58 am by **Rick Hasen**

Public Citizen:

Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.

The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700 million to influence elections.


Posted in campaign finance, campaigns, Plutocrats United

“Hoboken developer ‘Pupie’ Raia indicted in alleged cash-for-votes scheme”

Posted on November 2, 2018 7:57 am by **Rick Hasen**

NJ.com:

Frank “Pupie” Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city’s 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken’s 2013 race. Braxton, 43, was also indicted today.

<image001.png>

Posted in absentee ballots, chicanery

“Citizenship Question May Be ‘Major Barrier’ To 2020 Census Participation”

Posted on November 2, 2018 7:54 am by **Rick Hasen**

Hansi Lo Wang for NPR:

The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a “major barrier” to the country’s full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….

In focus groups conducted in March and April to inform the government’s outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

“They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group,” explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. “This was an idea we heard across audiences,” she added.

<image001.png>

Posted in Uncategorized

“Too Poor to Vote; If you’ve committed a crime and are rich, you can pay court fees and cast a ballot. If you don’t have money, you might be left out of democracy.”

Posted on November 2, 2018 7:47 am by **Rick Hasen**

Danielle Lang and Thea Sebastian NYT oped.

<image001.png>

Posted in voting

“An End to Spoiler Candidates”

Posted on November 2, 2018 7:30 am by **Rick Hasen**

Dave Daley for Democracy Journal, with the subhead: “If more states adopted ranked-choice voting, far fewer elections would include unsatisfactory, binary choices and minority-backed winners.”

<image001.png>

Posted in alternative voting systems

North Dakota Ad Apparently Run By Democrats on Facebook Says Hunters Could Lose Out-of State Licenses by Voting in North Dakota; Controversy Shows Value of Disclosure

Posted on November 1, 2018 3:20 pm by **Rick Hasen**

This is interesting.

Also interesting: the use that is being made of Facebook’s disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don’t voters want to know who is behind these messages.

<image001.png>

Posted in campaigns

“Here’s Why Democrats Have Made Secretary Of State Elections One Priority”

Posted on November 1, 2018 2:39 pm by **Rick Hasen**

Iowa Public Radio reports.

<image001.png>

Posted in Uncategorized

Dodge City, KS Moved Polling Place Because of “Construction,” But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**

<image002.jpg>

<image003.jpg>

Maddow Blog

✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location

because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?
6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

Twitter Ads info and privacy

Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.
<image001.png>
Posted in election administration, fraudulent fraud squad

"Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost's Negative Coverage Of A Democratic PAC"

Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:

HuffPost's April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party's official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC's pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.

Until this spring, HuffPost's story was the second to come up in a generic Google search for "End Citizens United." But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.

End Citizens United did not respond to HuffPost's request for comment before publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**

The order is here and is not a surprise given the timing:

The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>

Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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Rick Hasen

Chancellor's Professor of Law and Political Science

UC Irvine School of Law

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http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From:	Law-election on behalf of Rick Hasen
To:	Levitt, Justin; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls
Date:	Friday, November 2, 2018 1:59:25 PM
Attachments:	ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

> If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM

To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**
Clark.com:
Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.
But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it

a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:
In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.
[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:

The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."

His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.

North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>
Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.
<image001.png>
Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* *Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote.*
Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* *A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote*, *will be published in 2019.*
Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*
<image001.png>
Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court justices a fight"

Posted on November 2, 2018 8:05 am by **Rick Hasen**
Detroit News:
The campaign was roiled in early August when the state's high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed "special interests" attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members' votes on absentee ballots, while Wilder's name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading

into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
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Posted on November 2, 2018 7:57 am by **Rick Hasen**

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<image001.png>

Posted in absentee ballots, chicanery

“Citizenship Question May Be ‘Major Barrier’ To 2020 Census Participation”

Posted on November 2, 2018 7:54 am by **Rick Hasen**

Hansi Lo Wang for NPR:

The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a “major barrier” to the country’s full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….

In focus groups conducted in March and April to inform the government’s outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences," she added.
<image001.png>
Posted in Uncategorized

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Also interesting: the use that is being made of Facebook's disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don't voters want to know who is behind these messages.

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Dodge City, KS Moved Polling Place Because of “Construction,” But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**

<image002.jpg>

<image003.jpg>

Maddow Blog

✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?

6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

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Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.

<image001.png>

Posted in election administration, fraudulent fraud squad

“Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost’s Negative Coverage Of A Democratic PAC”

Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:

HuffPost’s April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party’s official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC’s pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.

Until this spring, HuffPost's story was the second to come up in a generic Google search for "End Citizens United." But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.
End Citizens United did not respond to HuffPost's request for comment before publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**
The order is here and is not a surprise given the timing:
The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>
Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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Rick Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law
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949.824.3072 - office
rhasen@law.uci.edu
http://www.law.uci.edu/faculty/full-time/hasen/
http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of Rick Hasen
To: Levitt, Justin; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [External] Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls
Date: Friday, November 2, 2018 1:56:01 PM
Attachments: ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or because they were just in the neighborhood, or because they voted a few hours before and did

errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural

areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM

To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**
Clark.com:
Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.
But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:
In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe

"efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.
[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:
The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are

fast approaching."
His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.
North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>
Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.
<image001.png>
Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS
Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law,*

specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including *Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote.*

Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* *A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote*, *will be published in 2019.*

Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*

<image001.png>

Posted in Uncategorized

"Well-financed foes give Michigan Supreme Court justices a fight"

Posted on November 2, 2018 8:05 am by **Rick Hasen**

Detroit News:

The campaign was roiled in early August when the state's high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed "special interests" attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members' votes on absentee ballots, while Wilder's name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge

Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

<image001.png>
Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion Dollars to Super PACs"

Posted on November 2, 2018 7:58 am by **Rick Hasen**
Public Citizen:
Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a

record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.
The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700 million to influence elections.

<image001.png>
Posted in campaign finance, campaigns, Plutocrats United

"Hoboken developer 'Pupie' Raia indicted in alleged cash-for-votes scheme"

Posted on November 2, 2018 7:57 am by **Rick Hasen**
NJ.com:
Frank "Pupie" Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city's 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken's 2013 race. Braxton, 43, was also indicted today.

<image001.png>
Posted in absentee ballots, chicanery

"Citizenship Question May Be 'Major Barrier' To 2020 Census Participation"

Posted on November 2, 2018 7:54 am by **Rick Hasen**
Hansi Lo Wang for NPR:
The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a "major barrier" to the country's full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….
In focus groups conducted in March and April to inform the government's outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences,"

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Dodge City, KS Moved Polling Place Because of "Construction," But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**

<image002.jpg>
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Maddow Blog
✓@MaddowBlog

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"Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost's Negative Coverage Of A Democratic PAC"

Posted on November 1, 2018 12:57 pm by **Rick Hasen**

HuffPost:

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when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.
End Citizens United did not respond to HuffPost's request for comment before publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**
The order is here and is not a surprise given the timing:
The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>
Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of Pildes, Rick
To: Levitt, Justin; Nicholas Stephanopoulos
Cc: law-election@UCI.EDU
Subject: [External] Re: [EL] Can federal partisan gerrymandering claims still be brought in state court?
Date: Sunday, June 30, 2019 6:06:28 PM
Attachments: ATT00001.txt

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I agree with Justin that any ongoing development of doctrine, for purposes of influencing some imagined future Supreme Court decision, could be done under state equal protection doctrine or state First Amendment law (as well as other provisions). I would just add the additional point that if state courts strike down plans under federal law, we can imagine three main possibilities, in my initial reflections on this: (1) they do so on the basis of different analysis than in the federal court decisions to date; (2) they do so on the same basis but their reasoning is much weaker; (3) they do on the same basis as the federal court decisions to date [I exclude the fourth possibility that they write stronger, more persuasive opinions than the federal courts to date since I think the opinions to date have been quite well done already].

In other words, even favorable outcomes on the federal question wouldn't necessarily strengthen the case for reconsideration. If the state courts do either (1) or (2), it might very well weaken the case. Right now, we have a number of three-judge federal court decisions that all converge on the same approach and provide extremely long, careful analysis of the issues. The only scenario in which even favorable state decisions on federal grounds might in theory bolster the case would be if they basically track the analysis in the federal court opinions – and the theory have to be that by adding a bunch of state supreme court decisions to these federal court decisions, you bolster the case for reconsideration. I find that a pretty thin speculative benefit; if the Court wants to point to convergent lower-court decisions that show how this issue can be manageable, there already exists a substantial body of those opinions. And given the risks of opening the federal-law can of worms and inviting the Supreme Court back in, it's hard to see these minor benefits, if they exist at all, as worth it.

I see any further doctrinal developments as coming from state courts applying state law exclusively.

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Levitt, Justin
Sent: Sunday, June 30, 2019 4:51 PM
To: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: law-election@UCI.EDU
Subject: Re: [EL] Can federal partisan gerrymandering claims still be brought in state court?

As Justice Thomas keeps reminding us, Supreme Court doctrine is not fixed. The Court has said that it can find no manageable standards in a federal constitutional cause of action. I think that decision was both unwise and incorrect, but I acknowledge that it's firm.

If state courts decided to address not only state law, but also federal law, in forthcoming decisions, I'm not at all sure that the Court would sit that fight out, no matter how much current doctrine on adequate and independent state grounds suggests otherwise. Smith begat RFRA, which begat Boerne. Citizens United seemed to leave the theoretical opening for as-applied cases, and the Montana litigation shut that down. The Court doesn't appear to like other actors attempting to "correct" its constitutional decisions, or to evade what the Court _thinks_ is a broad and definitive rule settling the field.

I hear the hypothetical value of the notion of state courts building federal constitutional doctrine in waiting for a future Supreme Court. It is, sincerely, an interesting theory. I happen to think that state constitutional approaches to partisan gerrymandering would supply the same reservoir of available approaches for a future Supreme Court, without provoking the bear into defending what it perceives as its holding (even at the expense of current doctrinal limits on jurisdiction). And so I wonder whether, in practice, that particular juice would be worth the squeeze.

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Justin Levitt
justin.levitt@lls.edu

On Jun 30, 2019, at 1:32 PM, Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com> wrote:

> I'm more or less persuaded by Michael, Rick, and Sam that if a state court struck down a map *solely* on federal partisan gerrymandering grounds, the Supreme Court would find a way to reverse that judgment, even if this result isn't compelled by *ASARCO*. The question then becomes whether there's value in state courts striking down maps *jointly* on federal and state partisan gerrymandering grounds. I think there's significant value. The state courts' decisions are then unreviewable by the Supreme Court. But they still constitute precedents -- on-the-books, non-reversed precedents -- about the contours of the federal partisan gerrymandering cause of action. Those precedents

could be quite helpful to a future Supreme Court inclined to reverse *Rucho*. That future Court could cite the precedents as evidence that, actually, partisan gerrymandering claims *can* be decided consistently and non-arbitrarily. The precedents themselves could amount to changed circumstances compelling the Court to revisit *Rucho*.

On Sun, Jun 30, 2019 at 3:10 PM Samuel Bagenstos <sbagen@gmail.com> wrote:

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> > I do not see why any lawyer would now bring a state-court partisan gerrymandering case and invoke the federal constitution. There is no benefit to bringing the federal claim. Every state constitution has provisions that bear just as directly, or even more directly, on partisan gerrymandering claims as does the federal constitution. Moreover, any state court prepared to invoke the federal constitution to strike down a partisan GM would surely be willing to do so under the state constitution.
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> > And on the cost side of the ledger, if a state court did rely on the federal constitution as the basis for its holding, I have little doubt the Supreme Court would review the matter. There is no way that a state court will have final say over the substantive meaning of the federal constitution. That is the larger point that *ASARCO* represents. Yes, it is technically only a standing case and the Court has never had to directly address the analogous issue under the political question doctrine. But standing is the hardest hurdle to get over in federal courts, since it is an Art. III hurdle. Doctrines like mootness and ripeness are prudential principles, not Art. III ones, and so the question is even easier there: any state court decision relying on the federal constitution will be reviewable in the Supreme Court, even if it could not have been brought in the first instance in the federal courts.
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court construes the U.S. Constitution as providing stronger protections against political gerrymandering, or providing more extensive relief, than the state constitution. If a state court of last resort allows a political gerrymandering ruling for plaintiffs to stand in either of those types of cases, I think it's likely the ruling is reviewable by the U.S. Supreme Court, and -- unless the U.S. Supreme Court decides to overturn *Rucho* -- it should reverse the state-court's ruling.

Under *ASARCO* (to oversimplify a bit), the Supreme Court considered a case that was initially non-justiciable, filed by a plaintiff who lacked standing. That plaintiff ultimately prevailed in the state courts. The Supreme Court held that it had jurisdiction to hear the defendant's appeal, even though a federal court couldn't have heard the case as an initial matter. The state court's ruling ordering relief against the defendant constituted injury-in-fact to the defendant, giving it standing to seek federal review and creating a justiciable dispute. Thus, *ASACRO* recognizes that cases which couldn't initially have been filed in federal court due to justiciability restrictions may nevertheless be amenable to Supreme Court review.

The political gerrymandering hypothetical isn't exactly the same, of course, since the justiciability barrier is the political question doctrine, rather than lack of standing. Like the defendant in *ASARCO*, however, when a defendant in a political gerrymandering case seeks Supreme Court review, the nature of its claim is different than that of a plaintiff initially attempting to invoke federal jurisdiction. The defendant isn't really bringing a "political gerrymandering" claim. Rather, it's arguing the state court has impermissibly limited its sovereign power to draw district lines based on an erroneous construction of some federal constitutional provision, like the First or Fourteenth Amendment. Such an argument may be especially strong in the context of congressional redistricting, where the defendant can argue that the state court impermissibly burdened or limited its exercise of power under the U.S. Constitution's Elections Clause to determine the "manner" in which congressional elections are held.

Rucho held there are no judicially manageable standards under any U.S. constitutional provisions for prohibiting political gerrymandering. A state court ruling interpreting the First Amendment, Equal Protection Clause, or some other U.S. Constitutional provision as imposing a test or standard for prohibiting political gerrymandering claims is contrary to that holding. Even if one construes the political question doctrine exclusively as a jurisdictional doctrine (but see Tara Grove and John Harrison), its applicability in this context depends on the Supreme Court's conclusions about various provisions of the U.S. Constitution that state courts aren't free to disregard. The Supreme Court could grant certiorari to enforce its construction of those constitutional provisions -- even if that construction is that they don't give rise to any judicially applicable prohibitions on political gerrymandering -- and I don't think there are any justiciability barriers to it doing so.

If this argument is correct, a defendant still would not be able to remove a political gerrymandering claim under the U.S. Constitution from state court to federal court. It would have to litigate the matter through the state courts until it can seek Supreme Court review of the state judiciary's rulings.

P.S. - I discussed and argued against the possibility of litigating claims that are nonjusticiable under *Spokeo* in state court in: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2946482

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Sent: Sunday, June 30, 2019 1:28 PM
To: law-election@UCI.EDU
Subject: [EL] Can federal partisan gerrymandering claims still be brought in state court?

Will Baude has an intriguing post suggesting that, even after *Rucho*, federal partisan gerrymandering claims can still be brought in state court. The rationale is that federal jurisdictional doctrines like standing, mootness, and justiciability don't apply in state court. So a state court could reason: (1) The Supreme Court unanimously believes that extreme partisan gerrymandering is unconstitutional. (2) The Supreme Court also believes that partisan gerrymandering claims are nonjusticiable. (3) However, *we* believe that such claims *are* justiciable. (4) So we're going to adjudicate them.

I'm curious whether this move would be attractive to the litigants currently pursuing (or considering pursuing) state constitutional partisan gerrymandering claims. On the one hand, these claims are only being brought in forums thought to be receptive. If state courts are already expected to be sympathetic to state claims, it might be pointless to add a federal claim to the mix.

On the other hand, after *Rucho*, any judgment a state court reaches on a federal partisan gerrymandering claim would seem to be nonreviewable by the Supreme Court. The Court couldn't tell the state court to apply a federal jurisdictional doctrine that the state court rejects. And the Court couldn't reach the merits of a federal partisan gerrymandering claim. As long as *Rucho* remains good law, then, it appears possible for state courts to generate a body of shadow precedent about partisan gerrymandering under the federal Constitution. These rulings could never be recognized by federal courts. But they would nevertheless have legal force. And they would serve as powerful evidence that *Rucho* is wrong: that courts are indeed capable of deciding federal partisan gerrymandering claims consistently and non-arbitrarily.

Two final points: First, a defendant against whom a federal partisan gerrymandering claim was brought couldn't remove the case to federal court. That's because, per *Rucho*, no federal court would have jurisdiction over the claim. And second, if a state court reached its decision on federal *and* state grounds, the decision's nonreviewability by the Supreme Court would be even clearer. In that case, there would be an adequate and independent state law basis for the decision.

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To: Nicholas Stephanopoulos
Cc: law-election@UCI.EDU
Subject: [External] Re: [EL] Can federal partisan gerrymandering claims still be brought in state court?
Date: Sunday, June 30, 2019 4:52:04 PM
Attachments: ATT00001.txt

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True (and that was my experience as well). I don't know the existing state of affairs is a reflection of local rules and practice, or binding legal constraint. And I readily admit I'm not an expert on the contours of this particular issue – others may know more about the history or caselaw.

I do distinctly remember at least one instance in which the courts weighed in on the issue: *In re United States*, 791 F.3d 945, 955-958 (9th Cir. 2015). A federal trial judge apparently had a policy of denying appearance to out-of-state government attorneys. The 9th Circuit corrected that policy, but on the basis of arbitrary abuse of discretion, and not the blanket inability of courts to govern appearances by federal attorneys. Specifically, the court noted 28 USC 517, and expressly said: "The Attorney General has clear statutory authority to choose which attorneys will represent the United States in litigation. See 28 U.S.C. §§ 515(a), 517; Hall, 145 F.2d at 783–84. That authority does not mandate that district courts automatically grant government attorneys' applications for pro hac vice admission." The discussion is fairly nuanced, and makes me think that at least in the Ninth Circuit, the courts do not believe that federal statutes provide blanket and unreviewable authority for the Attorney General to dictate the conditions under which specific personnel may appear. And they emphatically thought that the trial court was way out of line in this instance.

I don't know if there's similar precedent in the Second Circuit (or in others). And I certainly see opportunities for abuse if the local court rules aren't generally applicable and actually applied in neutral fashion across the board.

Justin

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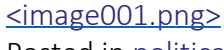
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"Call Time is a Time Suck for Congress"—Post and New Ciara Torres-Spelliscy Blog

Posted on July 9, 2019 9:02 am by **Rick Hasen**
Looking forward to more blog posts at her new site.
<image001.png>
Posted in campaign finance

Watch the Archived Video: UCI Law 9th Annual SCOTUS Review, with Adler, Chemerinsky, Geidner, Goodwin, and Harrington

Posted on July 9, 2019 7:41 am by **Rick Hasen**
You can watch here. It was a dynamite discussion.
<image001.png>
Posted in Uncategorized

"Be Careful What You Wish For: Private Political Parties, Public Primaries, and State Constitutional Restrictions

Posted on July 9, 2019 7:39 am by **Rick Hasen**

Hugh Spitzer has written this article for the *Washington Law Review*. Here is the abstract:

Political parties always disliked the Progressive Era changes that pulled the entire electorate into nominating candidates. Why, after all, should non-party members participate in the affairs and choices of private organizations? Over the course of a century, Democrats, Republicans, and minor parties repeatedly mounted lawsuits to attack new primary laws, and they eventually prevailed on a key constitutional issue: the First Amendment right of association. But when political actors access the courts for strategic purposes, they can get caught in the vagaries of history and public attitudes, with outcomes they might not like. This Essay focuses on the history of Washington State's "direct primary" and "blanket primary" systems, the repeated lawsuits challenging them, and the freedom of association doctrine that propelled the blanket primary's 2004 demise. It then recounts the blowback from Washington voters, who enacted a "top two" primary system that sidelined the political parties by sending the two highest vote-getters to the general election regardless of political affiliation. It asserts that remaining aspects of Washington's election system might violate the State's own constitution, and that things could get worse than ever for the parties, perhaps disrupting precinct officer elections and even the state's presidential primary. How did the political parties wind up at odds with their own voters, with an outcome opposite to what they intended? This Essay suggests that the answer lies in a web of conflicts: between litigation and political strategies; between the federal and state constitutions; and between the First Amendment's protections of freedom of association, the late nineteenth century populist constitutional ban on public assistance to private entities, and the early twentieth century progressive goal of forcing private political parties to open their processes to the voting public. It concludes that long-term litigation strategies to address political issues can fail to achieve their objectives when those lawsuits overlook historical policy choices and ignore popular sentiments entrenched in the national and state constitutions.

<image001.png>
Posted in political parties

Second Circuit Unanimously Affirms Decision Granting Declaratory Judgment Holding President Trump Violates the 1st Amendment by Blocking Followers on Twitter

Posted on July 9, 2019 7:37 am by **Rick Hasen**
Here's the opinion.
<image009.jpg>
Rick Hasen
✓@rickhasen

· Jul 9, 2019

#ELB: Second Circuit Unanimously Affirms Decision Granting Declaratory Judgment Holding President Trump Violates the 1st Amendment by Blocking Followers on Twitter https://electionlawblog.org/?p=106143

<image009.jpg>

Rick Hasen

✓@rickhasen

Here's a bit on the Trump Twitter case, and the trial court's use of a declaratory judgment rather than an injunction, from the Laycock & Hasen remedies casebook (5th ed.)

12

7:44 AM - Jul 9, 2019

Twitter Ads info and privacy

<image010.jpg>

See Rick Hasen's other Tweets

<image001.png>

Posted in Remedies

"California May Mandate Tax Returns for Presidential Candidates"

Posted on July 9, 2019 7:10 am by **Rick Hasen**

Bloomberg Tax reports.

<image001.png>

Posted in Uncategorized

--
Rick Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law
401 E. Peltason Dr., Suite 1000
Irvine, CA 92697-8000
949.824.3072 - office
rhasen@law.uci.edu
http://www.law.uci.edu/faculty/full-time/hasen/
http://electionlawblog.org
<image011.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of John Tanner
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Denial of withdrawal of DoJ counsel
Date: Wednesday, July 10, 2019 3:05:40 PM

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to report.spam@nc.gov<mailto:report.spam@nc.gov>

That ruling is unsurprising, as courts like to maintain final authority, and especially to lay down markers when not exercising that authority. Still, the census case court should have addressed the issue.

Sent from my iPhone

> On Jul 10, 2019, at 2:52 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
> discretion

_____
Law-election mailing list
Law-election@department-lists.uci.edu
https://gcc01.safelinks.protection.outlook.com/?url=https%3A%2F%2Fdepartment-lists.uci.edu%2Fmailman%2Flistinfo%2Flaw-election&data=02%7C01%7Clindsey.wakely%40ncsbe.gov%7Ce7b1326a8feb463fbe6f08d705699857%7C7a7681dcb9d0449a85c3ecc26cd7ed19%7C0%7C0%7C636983823399141914&sdata=dc4bT9KRVnm0KoF2vbvZldKBqJQK%2BLbmyhXRilK2uXg%3D&reserved=0

From: Law-election on behalf of Paul Gronke
To: Levitt, Justin; edu law-election@uci. edu law-election@uci.
Subject: [External] Re: [EL] ELB News and Commentary 1/2/20
Date: Thursday, January 2, 2020 5:02:32 PM
Attachments: signature.asc
ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to report.spam@nc.gov

Not of the same magnitude as in California, but a similar issue may come up in Oregon. I wonder about the automatically registered citizens (over 300,000), of whom 85% are registered as NAV.

I expect to see the parties attempt to get many of these registrants to affiliate, but it's not clear how well this will work, and if many will be surprised and disappointed not to be able to vote in what may be a still competitive primary contest in May.

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

> On Jan 2, 2020, at 1:52 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
> # Unaffiliated voters and the California primaries
>
> Posted on January 2, 2020 1:37 pm by **Justin Levitt**
>
> Jessica Levinson forecasts coming confusion in California, a heavily absentee-voting state where voters have now been trained on a "top two" state primary (in which voters can vote on all candidates, no matter their party registration). But the top two system doesn't apply to the presidential primary.
>
> This year, the California vote is likely to be quite meaningful in the presidential nominating contest … and voters not already registered in the Democratic party (among others) will have to request a partisan absentee ballot in order to vote in the primary. That's an extra step that local election officials are doing their best to highlight, but still likely to cause some confusion come election day itself.
>
> <image001.png>
>
> Posted in political parties, primaries

From:	Law-election on behalf of larrylevine@earthlink.net
To:	"Paul Gronke"; "Levitt, Justin"; "edu law-election@uci. edu law-election@uci."
Subject:	[External] Re: [EL] ELB News and Commentary 1/2/20
Date:	Thursday, January 2, 2020 5:33:56 PM
Attachments:	ATT00001.txt

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Among the lowest turnout groups in CA elections have been those who register at the Department of Motor Vehicles. Others, of course, are those who register as some kind of youth voter movement on campuses. I suspect the same will happen with the Oregon automatically registered voters.
Larry

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Paul Gronke
Sent: Thursday, 2 January 2020 2:01 PM
To: Levitt, Justin <justin.levitt@lls.edu>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] ELB News and Commentary 1/2/20

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>
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Posted in political parties, primaries

From: Law-election on behalf of Paul Gronke
To: Levitt, Justin; edu law-election@uci. edu law-election@uci.
Subject: [External] Re: [EL] ELB News and Commentary 1/5/20
Date: Sunday, January 5, 2020 5:26:54 PM
Attachments: signature.asc
ATT00001.txt

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Readers may be interested to know that a lot of political scientists are converging on the University of Iowa, courtesy of their wonderful political science department, to engage in some candidate chasing, share our research insights, and experience the caucus. Hat tip in particular to Dr. Caroline Tolbert who does a lot of the coordination.

I'm not saying we'll have anything brilliant or insightful to say, but you might want to watch various twitter feeds (and maybe we'll figure out a hashtag) to give real time, on the ground reactions from a set of scholars.

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Professor, Reed College
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General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

> On Jan 5, 2020, at 1:11 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
> ## "What it means to participate in the Iowa caucuses"
>
> Posted on January 5, 2020 1:01 pm by **Justin Levitt**
>
> Lyz Lenz offers a wry view in The Gazette.
>
> But past the humor, her overall point is spot-on: few Americans understand how the Iowa caucuses actually work — and it looks a lot more like a town meeting than a typical election, which has some fairly substantial consequences (and raises some fairly substantial legitimacy concerns). Rick, among a bunch of others, has been on this for a while – and I hope you can expect a lot more coverage of the actual process (and not just the polling horserace) as the process approaches.
>
> <image001.png>
>
> Posted in political parties, primaries

From: Law-election on behalf of Gaddie, Ronald K.
To: Paul Gronke; Levitt, Justin; edu law-election@uci. edu law-election@uci.
Subject: [External] Re: [EL] ELB News and Commentary 1/5/20
Date: Sunday, January 5, 2020 6:06:27 PM
Attachments: ATT00001.txt

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Related: I will have 14 undergraduate journalists form University of Oklahoma's Gaylord College of Journalism and Mass Communication in the field in Iowa for two weeks before and during the caucuses. If you come across one of my kids, be a good interview for them. I'd be much obliged.

Keith Gaddie, Ph.D.
Executive Faculty Fellow of the University of Oklahoma
Senior Fellow of Headington College
President's Associates Presidential Professor of
Political Science, Journalism, & Architecture
General Editor, *Social Science Quarterly*

"I would like to build a University of which the football team could be proud." ~George Lynn Cross

---

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Sent: Sunday, January 5, 2020 4:26 PM
To: Levitt, Justin <justin.levitt@lls.edu>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] ELB News and Commentary 1/5/20

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Posted on January 5, 2020 1:01 pm by **Justin Levitt**

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But past the humor, her overall point is spot-on: few Americans understand how the Iowa caucuses actually work — and it looks a lot more like a town meeting than a typical election, which has some fairly substantial consequences (and raises some fairly substantial legitimacy concerns). Rick, among a bunch of others, has been on this for a while – and I hope you can expect a lot more coverage of the actual process (and not just the polling horserace) as the process approaches.

<image001.png>

Posted in political parties, primaries

From: Law-election on behalf of Sean Parnell
To: "Levitt, Justin"; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] ELB News and Commentary 7/15/19
Date: Tuesday, July 16, 2019 10:00:18 AM
Attachments: image001.png
ATT00001.txt

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Justin asks why different rules/procedures in different states would be an issue under the National Popular Vote Interstate Compact. Briefly, and it appears this didn't come through well enough in the piece.

The reason is that these differences will spark widespread litigation – Florida 2000 on a much bigger scale. As I noted, "it becomes the rationale for serious legal challenges when votes from different states are all tallied together."

It's no big deal for Oregon to determine Oregon's electors based on Oregon's laws (which, for example, require that a mailed-in ballot be *received* by the elections office by election day in order to count) and Oregon voters, but now that Oregon's electors are also going to be decided by Washington's voters as well (which only requires the ballot be *postmarked* by election day), you've got no shortage of legal claims about disenfranchisement and the like. Now do this for every state…

This is hardly the listserve that needs to be reminded that elections often spur litigation, much of it on election day and int the days following. My point is that NPV would dramatically expand this litigation and offer new avenues for litigation based on the fact that voters in different states are treated very differently. I had one election attorney describe NPV as the "Election Lawyers Full Employment Act" for this reason.

Also, the fact that the fourth most populous state in the union seems to be unable to put the right vote tally on the piece of paper that NPV says will be the official source of vote totals seems problematic.

Best,

Sean Parnell

"Presidential popular vote compact would lead to chaos"

Posted on July 15, 2019 11:01 am by **Justin Levitt**

Sean Parnell, over at The Hill, notes some concerns about the National Popular Vote compact.

Some of these concerns have to do with the fact that different states have different rules for

administering elections. I've got mixed emotions about NPV myself, but I'm not sure why the simple fact of different rules in each state necessarily implies more trouble in ascertaining the total. Or why a vote with consequences calibrated to the national total necessarily implies a perfectly uniform set of national rules.

Share / Save

Posted in electoral college

From: Law-election on behalf of larrylevine@earthlink.net
To: "Chambers, Hank"; "Levitt, Justin"; "Lonna Atkeson"
Cc: "Election Law Listserv"
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Sunday, February 9, 2020 12:37:06 PM
Attachments: ATT00001.txt

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The quest for a "winner" is driven by recollections of the days of winner-take-all primaries and the medias need to be done with today's election and move on to next week. If the TV news shuts down on election night without being able to proclaim a winner, it becomes tempting to rail against the slow count and find other excuses. Often they will look at the total vote as of off-the-air time and proclaim the person with the most votes the winner, ignoring completely that the total vote may not be reflective of the delegates won. I'll use California as an example. Delegates are awarded to candidates who score 15% or higher of the vote in individual congressional districts. If one district has multiple candidates in the 15% to 25% range and another district has won candidate with 60% of the vote, that latter candidate will certainly have more votes that the former but, as there are limited number of delegates available in each district, he or she may not earn as many delegates. The next night's TV story will be "why things went off the rails" and "why it took so long to count the ballots" in yesterday's state. Then they will move on to coverage of the next state primary and the potential for the same kind of "delays" next week. Winner-take-all was easy to cover. Proportional awarding of delegates is more complex and TV news does not do complex very well.
Larry

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Chambers, Hank
Sent: Sunday, 9 February 2020 7:27 AM
To: 'Levitt, Justin' <justin.levitt@lls.edu>; Lonna Atkeson <atkeson@unm.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

I agree, but will add three quick points.

1. I use the following analogy in my Voting Rights Seminar. Venus beats Serena in a tennis match: 6-4, 0-6, 6-4. Venus won two sets to one, and won the match. Serena won more games (14 to 12) and may have played a better match than Venus, but she lost. We may listen to Serena complain about line calls and we may listen to her suggestion that total games won should determine the winner of future matches. We will ignore Serena's suggestion that total games won should have determined the winner of the match she and Venus just played.
2. The Iowa caucus results may not be about fairness or democracy. The barriers to participate in the caucus, e.g., time, are not insubstantial. The caucus results may reflect what occurred that night at the caucuses given who could participate in the caucuses, but who "won" the

caucus may not reflect the preferences of the Iowa Democratic electorate. Nonetheless, the results determine how delegates to the convention are selected.

3. In my seminar, the tenor of the discussion of the Iowa caucus changed somewhat when we focused on the fact that the Iowa caucus is technically solely about how to allocate a certain number of delegates to the party convention. The students still thought Iowa had made a hash of the caucus, but they were far less concerned that Iowa's mistakes mattered in the grand scheme of the Democratic primary process. Note: We covered the white primary cases that day, so they were primed to think about how important primaries and the rules that govern them are.

-Hank

Henry L. Chambers, Jr.
Austin E. Owen Research Scholar and Professor of Law
University of Richmond School of Law
203 Richmond Way
Richmond, Va. 23173
(804) 289-8199
hchamber@richmond.edu

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Levitt, Justin
Sent: Saturday, February 8, 2020 3:43 PM
To: Lonna Atkeson <atkeson@unm.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

I can see the point when it comes to naming a single occupant of a particular office. If one person gets the most overall votes and somebody else is given the office, that's fruit for a discussion about whether the system is operating as we want.

(Though there's another big caveat: strategies change based on the rules of the contest, and I wouldn't expect the person who wins the most votes when that's not the metric for awarding the office to necessarily be the person who wins the most votes when it is. In Super Bowl 52, the Patriots had 613 total yards while the Eagles had 538. The Eagles ended up with more points, and won. If it were clear from the outset that the team with the most yards would have won, I don't know that either team would have played the same game, and I don't know that the Patriots would have ended up with more yards. In Iowa, if the popular vote mattered more than the delegate apportionment, I don't know that the candidates would have run the same campaigns or used the same organizing strategies.)

But my point is a little different. It appears that the popular vote and delegate count were both quite close for Buttigieg and Sanders. And we can have plentiful discussions about whether the system for awarding the delegates makes sense. But we're not choosing the nominee based on the Iowa caucuses, and the difference between the delegates awarded to Buttigieg or Sanders in Iowa

(or any lingering uncertainty over the exact number awarded to each) is exceedingly unlikely to affect the outcome of the Democratic nomination by the time we get to July. It seems there are a lot of people exercised about who "won" Iowa – and in particular, I was reacting to the story about the AP's inability to "call" the race. And I guess I'm asking whether this problem is an actual problem or a problem of our own making because we need rigid winner/loser narratives and misunderstand what the Iowa caucuses are designed to do.

To return to the football metaphor, I think the rough equivalent may be trying to assess who "won" the first six minutes of the Super Bowl. I can fully understand the effort put into deciding the accuracy of ruling on every incremental opportunity to accrue points, and even in debating the individual rules deciding when points can be accrued and under what conditions. But asking who "won" the first six minutes seems like a question that's entirely beside the point of the Super Bowl itself, and only relevant to a prop bet that might itself be destructive if allowed to become more important in the popular mindset than the actual rules for the contest.

Justin

From: Lonna Atkeson <atkeson@unm.edu>
Sent: Saturday, February 08, 2020 12:17 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Rick Hasen <rhasen@law.uci.edu>; Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

This is about small d democracy—if who wins in that scenario is different from who wins the delegates then the system is unfair/rigged.

This isn't about the rules of the process per se, it's about the fairness of those rules. This is, in part, why Sanders folks insisted on this info after 2016.

What is the distortion is an interesting and relevant question. Who got the most votes and whether it is fair seems particularly relevant to Democrats who are advocating the elimination of the electoral college and pushing for more democracy.

Lonna

> On Feb 7, 2020, at 4:55 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
> **UNM-IT Warning:** This message was sent from outside of the LoboMail system. Do not click on links or open attachments unless you are sure the content is safe. (2.3)
>
> The formula for awarding delegates in the Iowa caucus is unquestionably complex (and I'm no fan, for that and other reasons), but it's my understanding that that process turns on proportional levels of support precinct by precinct, and later county by county, but not statewide. If I'm mistaken about that, I'd welcome the correction. But if it's true that delegates are awarded based on local results, is

there any point to branding a statewide "winner" of the Iowa caucuses beyond the need to fill in the blanks on an artificial narrative?

Put differently: assume that Buttigieg won either 12 or 13 delegates to the national convention, and Sanders won either 12 or 13 delegates to the national convention, and that we eventually know for sure whether the answer for each candidate is 12 or 13. Real question: why does it matter whether the AP is able to tell us who "won," beyond widespread public misunderstanding of the significance of what it means to "win" in this context? Imagine it was a precise tie, and each candidate got the same number of delegates, so that neither "won." I understand full well why that matters in the perceptions horserace … but the lack of a "winner" would have zero significance in terms of progress toward picking a nominee. Is the inability to "call" a winner the problem, or is it our need to have a clearly branded "winner"?

Justin

AP Unable to Call Winner in Iowa Democratic Caucus Due to Closeness and "Irregularities"

Posted on February 6, 2020 3:51 pm by **Rick Hasen**

Wow, it's this bad:

"The Associated Press calls a race when there is a clear indication of a winner. Because of a tight margin between former Mayor Pete Buttigieg and Sen. Bernie Sanders and the irregularities in this year's caucus process, it is not possible to determine a winner at this point," said Sally Buzbee, AP's senior vice president and executive editor.

Posted in Uncategorized

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of Rob Richie
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Sunday, February 9, 2020 11:37:13 AM
Attachments: ATT00001.txt

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(My apologies, but my keyboard sometimes gets away ahead of me in hitting "send" to email . I'll finish this email below where that happened earlier.... There were a couple annoying missing elements to it! - Rob)

On Sun, Feb 9, 2020 at 10:28 AM Rob Richie <rr@fairvote.org> wrote:

> Adding to this point, "winning" with well under 30% can more a product of dumb luck of votes happen to be split than realtive performance. Even with Iowa having a horse-and-buggy form of ranked choice voting that makes more votes count for delegates, it doesn't enable a true "instant runoff" where we would have seen who would have won head-to-head in a contest between Buttigieg and Sanders.
>
> The media does tend to treat these as winner take all contests, but of course they're not. This year is going to be fascinating, as the Bloomberg campaign has called the 'bluff" of the early states being determinative and instead saying, "Look, nearly all the actual delegates are allocated in the contests after the first four in February, so that's where we're going to focus." His campaign will have far more money than any other campaign (with the possible exception of Steyer) and is spending heavily on field as well as TV, so we will see what it means, especially if more than two of the current frontrunners keep running after South Carolina.
>
> There's a lot of timely reform conversation going on that I suspect will come with real changes before the 2024 nomination process. Last weekend, I presented on building ranked choice voting into the presidential nomination process at the excellent Shambaugh conference organized by Caroline Tolbert of the University of Iowa. Nearly all the national parties now use RCV to pick their leaders in Canada and the United Kingdom, and the idea is getting more support here. A few associated links:
>
> * Dan Pfeiffer of Pod Save America calls for using ranked choice voting in winner-take-all primaries
> * This Chicago Tribune oped of mine as widely picked up on a comprehensive reform of the nomination process
> * I was on Matter of Fact with Soledad O'Brien this weekend on The Young Turks on Thursday.
>
> Rob

On Sat, Feb 8, 2020 at 3:43 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

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person gets the most overall votes and somebody else is given the office, that's fruit for a discussion about whether the system is operating as we want.

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From: Lonna Atkeson <atkeson@unm.edu>
Sent: Saturday, February 08, 2020 12:17 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Rick Hasen <rhasen@law.uci.edu>; Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

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> ## AP Unable to Call Winner in Iowa Democratic

Caucus Due to Closeness and “Irregularities”

Posted on February 6, 2020 3:51 pm by **Rick Hasen**

Wow, it’s this bad:

“The Associated Press calls a race when there is a clear indication of a winner. Because of a tight margin between former Mayor Pete Buttigieg and Sen. Bernie Sanders and the irregularities in this year’s caucus process, it is not possible to determine a winner at this point,” said Sally Buzbee, AP’s senior vice president and executive editor.

Posted in Uncategorized

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Rob Richie
President and CEO, FairVote
6930 Carroll Avenue, Suite 240
Takoma Park, MD 20912
rr@fairvote.org (301) 270-4616 http://www.fairvote.org
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From: Law-election on behalf of Rob Richie
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Sunday, February 9, 2020 10:29:39 AM
Attachments: ATT00001.txt

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Adding to this point, "winning" with well under 30% can more a product of dumb luck of votes happen to be split than realtive performance. Even with Iowa having a horse-and-buggy form of ranked choice voting that makes more votes count for delegates, it doesn't enable a true "instant runoff" where we would have seen who would have won head-to-head in a contest between Buttigieg and Sanders.

The media does tend to treat these as winner take all contests, but of course they're not. This year is going to be fascinating, as the Bloomberg campaign has called the 'bluff" of the early states being determinative and instead saying, "Look, nearly all the actual delegates are allocated in the contests after the first four in February, so that's where we're going to focus." His campaign will have far more money than any other campaign (with the possible exception of Steyer) and is spending heavily on field as well as TV, so we will see what it means, especially if more than two of the current frontrunners keep running after South Carolina.

There's a lot of timely reform conversation going on that I suspect will come with real changes before Last weekend, I presented on building ranked choice voting into the presidential nomination process at the excellent Shambaugh conference organized by Caroline Tolbert of the University of Iowa. Nearly all the national parties now use RCV to pick their leaders in Canada and the United Kingdom, and the idea is getting more support here. A few associated links:

* Dan Pfeiffer of Pod Save America calls for using ranked choice voting in winner-take-all primaries
* This Chicago Tribune oped of mine as widely picked up on a comprehensive reform of the nomination process
* I was on Matter of Fact with Soledad O'Brien this weekend on The Young Turks on Thursday.

Rob

On Sat, Feb 8, 2020 at 3:43 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

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To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Rick Hasen <rhasen@law.uci.edu>; Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

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> Posted on February 6, 2020 3:51 pm by **Rick Hasen**
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From: Law-election on behalf of Chambers, Hank
To: "Levitt, Justin"; Lonna Atkeson
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Sunday, February 9, 2020 10:27:23 AM
Attachments: ATT00001.txt

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I agree, but will add three quick points.

1) I use the following analogy in my Voting Rights Seminar. Venus beats Serena in a tennis match: 6-4, 0-6, 6-4. Venus won two sets to one, and won the match. Serena won more games (14 to 12) and may have played a better match than Venus, but she lost. We may listen to Serena complain about line calls and we may listen to her suggestion that total games won should determine the winner of future matches. We will ignore Serena's suggestion that total games won should have determined the winner of the match she and Venus just played.
2) The Iowa caucus results may not be about fairness or democracy. The barriers to participate in the caucus, e.g., time, are not insubstantial. The caucus results may reflect what occurred that night at the caucuses given who could participate in the caucuses, but who "won" the caucus may not reflect the preferences of the Iowa Democratic electorate. Nonetheless, the results determine how delegates to the convention are selected.
3) In my seminar, the tenor of the discussion of the Iowa caucus changed somewhat when we focused on the fact that the Iowa caucus is technically solely about how to allocate a certain number of delegates to the party convention. The students still thought Iowa had made a hash of the caucus, but they were far less concerned that Iowa's mistakes mattered in the grand scheme of the Democratic primary process. Note: We covered the white primary cases that day, so they were primed to think about how important primaries and the rules that govern them are.

-Hank

Henry L. Chambers, Jr.
Austin E. Owen Research Scholar and Professor of Law
University of Richmond School of Law
203 Richmond Way
Richmond, Va. 23173
(804) 289-8199
hchamber@richmond.edu

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Levitt, Justin
Sent: Saturday, February 8, 2020 3:43 PM
To: Lonna Atkeson <atkeson@unm.edu>
Cc: Election Law Listserv <law-election@uci.edu>

Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

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Sent: Saturday, February 08, 2020 12:17 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Rick Hasen <rhasen@law.uci.edu>; Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

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Posted in Uncategorized

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Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of John Tanner
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Saturday, February 8, 2020 7:15:44 PM
Attachments: ATT00001.txt

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I recall reading about large discrepancies between candidate totals and delegate totals in the 2008 and, I think, 2016. Alabama was a case in point in at least 2008, when Obama won handily and Clinton had a sizesble majority of delegates. I don't think it mattered at the end of the day. It is, or at least was the case that the DNC has rules — the 15% threshold, for example, but leaves it to the states to apply them. As long as they are applied at a sub/state level, such as congressional districts, discrepancies are bound to occur.

Sent from my iPhone

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>
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Posted on February 6, 2020 3:51 pm by **Rick Hasen**

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From: Law-election on behalf of Levitt, Justin
To: Lonna Atkeson
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Saturday, February 8, 2020 3:44:01 PM
Attachments: ATT00001.txt

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> On Feb 7, 2020, at 4:55 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
> **UNM-IT Warning:** This message was sent from outside of the LoboMail system. Do not click on links or open attachments unless you are sure the content is safe. (2.3)
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> Justin

AP Unable to Call Winner in Iowa Democratic Caucus Due to Closeness and “Irregularities”

Posted on February 6, 2020 3:51 pm by **Rick Hasen**

Wow, it’s this bad:

“The Associated Press calls a race when there is a clear indication of a winner. Because of a tight margin between former Mayor Pete Buttigieg and Sen. Bernie Sanders and the irregularities in this year’s caucus process, it is not possible to determine a winner at this point,” said Sally Buzbee, AP’s senior vice president and executive editor.

Posted in Uncategorized

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of Lonna Atkeson
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Saturday, February 8, 2020 3:17:29 PM
Attachments: ATT00001.txt

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This is about small d democracy—if who wins in that scenario is different from who wins the delegates then the system is unfair/rigged.

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Posted in Uncategorized

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of John Tanner
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Friday, February 7, 2020 7:02:30 PM
Attachments: ATT00001.txt

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As I understand, the current results, such as they are, give Sanders the most ... electoral votes, to borrow a turn. Want that sort of thing an issue a while back?

Sent from my iPhone

> On Feb 7, 2020, at 5:55 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:
>
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> Posted on February 6, 2020 3:51 pm by **Rick Hasen**

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Posted in Uncategorized

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of larrylevine@earthlink.net
To: "Rob Richie"; "Levitt, Justin"
Cc: "Election Law Listserv"
Subject: [External] Re: [EL] Finding a "winner" out of the Iowa caucuses
Date: Sunday, February 9, 2020 12:54:31 PM
Attachments: ATT00001.txt

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Iowa, oh, Iowa. Let's keep some things in mind:
The turnout (caucus participation) was about 10%. That means the turnout was predominately the activist base of the party. The predicted rush of new voters, fostered by the Sanders campaign and echoed by the media, did not develop. There was a slight increase in younger voters, particularly when the caucus was held on a college campus.
A "winner" with 30% of the votes will have just 3% of the total registration.
The activist base of the Democratic Party here as elsewhere leans heavily in the direction of candidates who are, in this order, the most "progressive", of color, LGBT, women. Some combination of these is even better. At the bottom of the list, and totally unacceptable, are white men.
The big loser may have been Sanders. His percentage was half what it was in 2016. Yes, there were more candidates sharing the voting pool. But half of Sanders' voters left him for other Democrats. We'll still hear some of his supporters threatening to sit out November if he isn't the nominee. But Iowa may have proved they are inconsequential in numbers.
Larry

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rob Richie
Sent: Sunday, 9 February 2020 8:36 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

(My apologies, but my keyboard sometimes gets away ahead of me in hitting "send" to email . I'll finish this email below where that happened earlier.... There were a couple annoying missing elements to it! - Rob)

On Sun, Feb 9, 2020 at 10:28 AM Rob Richie <rr@fairvote.org> wrote:

> Adding to this point, "winning" with well under 30% can more a product of dumb luck of votes happen to be split than realtive performance. Even with Iowa having a horse-and-buggy form of ranked choice voting that makes more votes count for delegates, it doesn't enable a true "instant runoff" where we would have seen who would have won head-to-head in a contest between Buttigieg and Sanders.
>
> The media does tend to treat these as winner take all contests, but of course they're not. This year is going to be fascinating, as the Bloomberg campaign has called the 'bluff" of the early states

being determinative and instead saying, "Look, nearly all the actual delegates are allocated in the contests after the first four in February, so that's where we're going to focus." His campaign will have far more money than any other campaign (with the possible exception of Steyer) and is spending heavily on field as well as TV, so we will see what it means, especially if more than two of the current frontrunners keep running after South Carolina.

There's a lot of timely reform conversation going on that I suspect will come with real changes before the 2024 nomination process. Last weekend, I presented on building ranked choice voting into the presidential nomination process at the excellent Shambaugh conference organized by Caroline Tolbert of the University of Iowa. Nearly all the national parties now use RCV to pick their leaders in Canada and the United Kingdom, and the idea is getting more support here. A few associated links:

* Dan Pfeiffer of Pod Save America calls for using ranked choice voting in winner-take-all primaries
* This Chicago Tribune oped of mine as widely picked up on a comprehensive reform of the nomination process
* I was on Matter of Fact with Soledad O'Brien this weekend on The Young Turks on Thursday.

Rob

On Sat, Feb 8, 2020 at 3:43 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> I can see the point when it comes to naming a single occupant of a particular office. If one person gets the most overall votes and somebody else is given the office, that's fruit for a discussion about whether the system is operating as we want.
>
> (Though there's another big caveat: strategies change based on the rules of the contest, and I wouldn't expect the person who wins the most votes when that's not the metric for awarding the office to necessarily be the person who wins the most votes when it is. In Super Bowl 52, the Patriots had 613 total yards while the Eagles had 538. The Eagles ended up with more points, and won. If it were clear from the outset that the team with the most yards would have won, I don't know that either team would have played the same game, and I don't know that the Patriots would have ended up with more yards. In Iowa, if the popular vote mattered more than the delegate apportionment, I don't know that the candidates would have run the same campaigns or used the same organizing strategies.)
>
> But my point is a little different. It appears that the popular vote and delegate count were both quite close for Buttigieg and Sanders. And we can have plentiful discussions about whether the system for awarding the delegates makes sense. But we're not choosing the nominee based on the Iowa caucuses, and the difference between the delegates awarded to Buttigieg or Sanders in Iowa (or any lingering uncertainty over the exact number awarded to each) is exceedingly unlikely to affect the outcome of the Democratic nomination by the time we get to

July. It seems there are a lot of people exercised about who "won" Iowa – and in particular, I was reacting to the story about the AP's inability to "call" the race. And I guess I'm asking whether this problem is an actual problem or a problem of our own making because we need rigid winner/loser narratives and misunderstand what the Iowa caucuses are designed to do.

To return to the football metaphor, I think the rough equivalent may be trying to assess who "won" the first six minutes of the Super Bowl. I can fully understand the effort put into deciding the accuracy of ruling on every incremental opportunity to accrue points, and even in debating the individual rules deciding when points can be accrued and under what conditions. But asking who "won" the first six minutes seems like a question that's entirely beside the point of the Super Bowl itself, and only relevant to a prop bet that might itself be destructive if allowed to become more important in the popular mindset than the actual rules for the contest.

Justin

From: Lonna Atkeson <atkeson@unm.edu>
Sent: Saturday, February 08, 2020 12:17 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Rick Hasen <rhasen@law.uci.edu>; Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Finding a "winner" out of the Iowa caucuses

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Posted on February 6, 2020 3:51 pm by **Rick Hasen**

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Posted in Uncategorized

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Rob Richie
President and CEO, FairVote
6930 Carroll Avenue, Suite 240
Takoma Park, MD 20912
rr@fairvote.org (301) 270-4616 http://www.fairvote.org
FairVote Facebook FairVote Twitter My Twitter
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> *Thank you for considering a donation. Enjoy our video on ranked choice voting!*

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~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~~

From:	Law-election on behalf of Douglas Johnson
To:	Levitt, Justin
Cc:	Election Law Listserv
Subject:	[External] Re: [EL] Impact on the census
Date:	Monday, June 24, 2019 1:38:59 AM
Attachments:	image001.png ATT00001.txt

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Just so there's clarity (since so many general news media articles have completely missed this difference):

what this article studies is the change in self-response rates, which if they decline (to quote the article) "would predict an overall 2.2 percentage point drop in self-response in the 2020 census, increasing costs and reducing the quality of the population count."

This article does NOT measure expected undercount, and the 2.2 percentage point drop estimate is self-response rates,NOT a predicted undercount.

As the article clearly states, there are follow-up efforts that make significant strides toward filling in the data for non-responsive households, with or without the citizenship question. According to this Census study those follow up efforts are likely to be more expensive if there's is a citizenship question, and this and other articles assert that if the follow up efforts have to rely on neighbor- or administrative records the data may be less precise.

(This goes back to the often-missed fact that final census records for each household are never partial responses - if a partial form is received, it will get completed one way or another.)

I am not weighing in either way on the study's topic (plenty of other sources are already doing that).

My only goal in this message is to clarify for those not deeply immersed in Census methodology that the study does not quantify the expected undercount, just the drop in the expected self-response rate, which is related but very different.

- Doug

Douglas Johnson
Rose Institute of State and Local Government
Claremont McKenna College

On Sun, Jun 23, 2019 at 9:56 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> The paper Rick flags below makes three assumptions – two acknowledged and one unacknowledged. First, it assumes that the citizenship question affects only households with at least one noncitizen, despite fears in the broader community. Second, it assumes that response in 2020 will be no worse than response in 2010, despite the change in climate. Third (this is the unacknowledged one), it assumes that the impact of a question on the 10-question enumeration delivered to every household in the country is no more salient than the impact of a question on a 70-question survey delivered to a tiny fraction of the country each month.

If any of those assumptions doesn't hold, the impact will be worse. If several of those assumptions don't hold, that impact will be compounded.

Oh, and the paper tallies its final results in terms of household response. If the households of those who don't answer the census are larger than those who do, the error rate of the total count will be larger still.

None of that is a critique of the paper. It's just that there's plenty of reason to think that these are still low-ball estimates of damage. Don't be surprised when the oil spill is a lot bigger than the initial estimates.

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rick Hasen
Sent: Sunday, June 23, 2019 9:21 PM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] ELB News and Commentary 6/23/19

New Estimate from Census Department Researchers Forthcoming in Peer Reviewed Journal Finds Citizenship Question Could Depress Response Rate by 8 Percent in Households That May Have Noncitizens

Posted on June 23, 2019 9:15 pm by **Rick Hasen**

This paper is forthcoming in Demography (h/t Hansi Lo Wang). Here is the abstract:

he addition of a citizenship question to the 2020 census could affect the self-response rate, a key driver of the cost and quality of a census. We find that citizenship question response patterns in the American Community Survey (ACS) suggest that it is a sensitive question when asked about administrative record noncitizens but not when asked about administrative record citizens. ACS respondents who were administrative record noncitizens in 2017 frequently choose to skip the question or answer that the person is a citizen. We predict the effect on self-response to the entire survey by comparing mail response rates in the 2010 ACS, which included a citizenship question, with those of the 2010 census, which did not have a citizenship question, among households in both surveys. We compare the actual ACS-census difference in response rates for households that may contain noncitizens

(more sensitive to the question) with the difference for households containing only U.S. citizens. We estimate that the addition of a citizenship question will have an 8.0 percentage point larger effect on self-response rates in households that may have noncitizens relative to those with only U.S. citizens. Assuming that the citizenship question does not affect unit self-response in all-citizen households and applying the 8.0 percentage point drop to the 28.1 % of housing units potentially having at least one noncitizen would predict an overall 2.2 percentage point drop in self-response in the 2020 census, increasing costs and reducing the quality of the population count.

Recall that at oral argument in the census case, Justice Gorsuch sought to minimize census department studies which predicted (a smaller) response rate drop.

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Posted in census litigation

_____
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--
- Doug

Douglas Johnson
National Demographics Corporation
djohnson@NDCresearch.com
phone 310-200-2058
fax 818-254-1221

From: Law-election on behalf of Levitt, Justin
To: Rick Hasen; Election Law Listserv
Subject: [External] Re: [EL] Impact on the census
Date: Monday, June 24, 2019 12:56:24 AM
Attachments: image001.png
ATT00001.txt

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Justin

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Sent: Sunday, June 23, 2019 9:21 PM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] ELB News and Commentary 6/23/19

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Posted in census litigation

From:	Law-election on behalf of Levitt, Justin
To:	Douglas Johnson
Cc:	Election Law Listserv
Subject:	[External] Re: [EL] Impact on the census
Date:	Monday, June 24, 2019 3:07:38 AM
Attachments:	image001.png ATT00001.txt

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Doug's right, of course. The article (and most of the other studies) only estimates anticipated changes in self-response. For those who do not initially respond to the survey, the Census will attempt to follow up, including with door-to-door enumerators.

It's just that there's reason to think that the same population that declines to respond to the census by Internet or mail because of the citizenship question may be even less likely to respond to personal door-to-door follow-up from the federal government. And in communities feeling fearful, follow-up with neighbors may be no more successful or accurate. The precise efficacy of the non-response follow-up operations in this climate is really, really difficult to assess through historical study (like the study in the paper). Which is why a real test under real-world conditions might have been informative. Perhaps even before the decision itself was finally made.

Justin

From: Douglas Johnson <djohnson@ndcresearch.com>
Sent: Sunday, June 23, 2019 10:41 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>; Rick Hasen <rhasen@law.uci.edu>
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>
> Posted on June 23, 2019 9:15 pm by **Rick Hasen**
> This paper is forthcoming in Demography (h/t Hansi Lo Wang). Here is the abstract:

> *he addition of a citizenship question to the 2020 census could affect the self-response rate, a key driver of the cost and quality of a census. We find that citizenship question response patterns in the American Community Survey (ACS) suggest that it is a sensitive question when asked about administrative record noncitizens but not when asked about administrative record citizens. ACS respondents who were administrative record noncitizens in 2017 frequently choose to skip the question or answer that the person is a citizen. We predict the effect on self-response to the entire survey by comparing mail response rates in the 2010 ACS, which included a citizenship question, with those of the 2010 census, which did not have a citizenship question, among households in both surveys. We compare the actual ACS-census difference in response rates for households that may contain noncitizens (more sensitive to the question) with the difference for households containing only U.S. citizens. We estimate that the addition of a citizenship question will have an 8.0 percentage point larger effect on self-response rates in households that may have noncitizens relative to those with only U.S. citizens. Assuming that the citizenship question does not affect unit self-response in all-citizen households and applying the 8.0 percentage point drop to the 28.1 % of housing units potentially having at least one noncitizen would predict an overall 2.2 percentage point drop in self-response in the 2020 census, increasing costs and reducing the quality of the population count.*
>
> Recall that at oral argument in the census case, Justice Gorsuch sought to minimize census department studies which predicted (a smaller) response rate drop.
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--
- Doug

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National Demographics Corporation
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phone 310-200-2058
fax 818-254-1221

From:	Law-election on behalf of Schultz, David
To:	Levitt, Justin
Cc:	Election Law Listserv
Subject:	[External] Re: [EL] North Carolina
Date:	Friday, June 28, 2019 2:05:03 PM
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Hi all:
So Rucho suggests it is back to the states and state constitutions for litigating partisan gerrymanders, much in the same way that litigation on LGBTQ, school equity funding, and voter ID issues moved after initial bad US Supreme Court issues. It is no surprise that this is the direction that needs to considered. Justice Brennan anticipated this decades ago in his call for the New Judicial Federalism and return to state constitutions.

Much the constitutional change coming at the S.Ct. level in recent years has been started at the state level, suggesting a bottom-up theory of constitutional change. For those of us who teach state constitutional law (in additional to election law), we have advocated this approach for some time. Several years ago I did pieces on state constitutions, redistricting commissions, and partisan gerrymandering, and also on voter ID and state litigation. I hope more people will begin to look into state remedies and arguments for election law and gerrymandering issues much in the same way other reformers were forced into a state route in the past.

It is of course sexier to do grand US constitutional law theories than it is to do it at the local level. However, for those interested, I have a forthcoming piece " State Courts and Democratic Theory: Toward of Theory of State Constitutional Judicial Review" that will examine some of these issues.

On Fri, Jun 28, 2019 at 12:35 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> One additional point: the NC state constitution prohibits redistricting state legislative lines more than once in a decade, and there was just litigation on that point, with a decision reaffirming the ban in November of 2018. There's no similar prohibition in the NC state constitution – at least no similar express prohibition – on redrawing congressional lines more than once in a decade. Michael McDonald and I had a 2007 wrapup of the relevant state rules here, and I don't think too many have changed.
>
> Justin
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rick Hasen
> **Sent:** Friday, June 28, 2019 10:26 AM
> **To:** Marty Lederman <Martin.Lederman@law.georgetown.edu>; John Shockley <shockley1894@gmail.com>

Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] North Carolina

[I changed the topic heading.]

Don’t forget about pending cases in the state supreme court, with a majority of Democrats, that is hearing a partisan gerrymandering case under the state constitution.

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Date: Friday, June 28, 2019 at 10:08 AM
To: John Shockley <shockley1894@gmail.com>
Cc: Rick Hasen <rhasen@law.uci.edu>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] ELB News and Commentary 6/28/19

They "can" do so in the sense that no one will stop them--but they will be acting unconstitutionally when they do.

On Fri, Jun 28, 2019 at 1:00 PM John Shockley <shockley1894@gmail.com> wrote:

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Does this seem like an accurate conclusion?

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Political Science, Retired

Augsburg College

Minneapolis, MN

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Posted on June 27, 2019 9:42 pm by **Rick Hasen**

This should be good.

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"House Passes Election Security Package, With an Eye on Mitch McConnell"

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Timed to coincide with the July 4 holiday, the House bill, which passed 225 to 184, largely along party lines, is the first and most expansive in a blitz of new measures that House Democrats say they will pass to address vulnerabilities highlighted by the special counsel, Robert S. Mueller III. His report concluded that Russia had conducted "sweeping and systematic" interference in the 2016 presidential election, and members of both parties fear that not enough is being done to prevent that from happening again next year.
Other legislation could include a requirement that political campaigns report to the F.B.I. any offer of assistance from a foreign power, new sanctions to punish Russia and other foreign powers that interfere with the American democratic processes, and bipartisan mandates for social media platforms like Facebook to disclose the purchasers of political advertisements.
But with the Senate in Republican hands, Democrats have another, more immediate target in mind: trying to shame Mr. McConnell, the majority leader, into dropping his opposition to proposals — even bipartisan ones — and allowing his chamber to consider measures to better protect the vote

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WaPo reports.

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Roundup of News and Commentary on Census Citizenship Decision

Posted on June 27, 2019 9:30 pm by **Rick Hasen**

Here at Howard.

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Posted in census litigation, Supreme Court

Crum: "Rucho and Section 2 of the Voting Rights Act"

Posted on June 27, 2019 4:18 pm by **Rick Hasen**

The following is a guest post from Travis Crum:

In Rucho v. Common Cause, the conservatives on the Supreme Court finally prevailed on their decades-long effort to declare partisan gerrymandering a non-justiciable political question. Rather than add to the legion of voices condemning Rucho on its own terms, I want to focus on its worrisome implications for racial vote-dilution claims and Section 2 of the Voting Rights Act.

The Rucho Court condemned partisan gerrymandering claims for "invariably sound[ing] in a desire for proportional representation." In so doing, the Court cited a racial vote-dilution case—the plurality opinion in City of Mobile v. Bolden—for the proposition that proportional representation is not mandated by the Equal Protection Clause. Building off this point, the Court turned to the question of fashioning a judicially manageable standard for apportioning political power in the context of partisan gerrymandering. The Court observed that "it is not even clear what fairness looks like" and proceeded to identify numerous visions of "fair" representation, from competitive districts to an "'appropriate' share of 'safe' seats" to maps based on traditional redistricting criteria.

Now, if this argument sounds familiar, that's because it mirrors the long-running

debate between scholars like Sam Issacharoff and Rick Pildes who advocate the creation of competitive districts and academics like Heather Gerken, Michael Kang, and Pam Karlan who are far more comfortable with race-conscious redistricting. What's troubling about Rucho's logic is that it outlines an analogous debate and then throws its hands up and says there's no judicially manageable standard. In this way, Rucho channels concerns similar to those articulated in Justice Thomas's concurring opinion in Holder v. Hall, where he criticized Section 2 for lacking a legitimate and manageable benchmark.

And therein lies Rucho's relevance to the VRA. To be sure, Section 2 expressly disclaims a right to proportional representation, but ever since Johnson v. De Grandy, the Court has made "rough proportionality" a central part of Section 2's totality-of-the-circumstances inquiry. Given this, Rucho's criticism of proportionality standards should be a warning sign for Section 2's constitutionality, especially when combined with the Roberts Court's colorblind instincts and its outright hostility to race-conscious redistricting.

If you think I've stared at the tea leaves for too long, consider the ways the Rucho Court deployed and distinguished other election-law precedents. The Court greenlit Reynolds's one-person, one-vote principle as "relatively easy to administer as a matter of math." As for the Shaw line of cases, the Court observed that racial gerrymandering claims seek the "elimination of a racial classification" and "do[] not ask for a share of political power and influence, with all the justiciability conundrums that entails." Put simply, the Court went out of its way to preserve those precedents—indeed, with a rationale for Shaw that is at cross-purposes with Section 2—but only invoked a racial vote-dilution case as a sword to undercut a claim for proportional representation.

To be clear, I'm not predicting that the Court is going to determine that racial vote-dilution claims are non-justiciable political questions—such a holding wouldn't make much sense for a variety of reasons. Rather, my point is that the Court's intuitions tend to sublimate across numerous doctrinal contexts.

Thus, in defending Section 2's constitutionality, civil rights advocates and the academy should emphasize that proportionality is just one factor in a Section 2 case and that the touchstone is rough proportionality, not perfect proportionality. The Gingles factors, moreover, have functioned as an effective gatekeeping mechanism and a de facto sunset provision for Section 2, thus limiting the situations where proportionality concerns even enter the equation. And, of course, the Court has long viewed Congress's Reconstruction Amendment enforcement authority to be at its zenith when seeking to remedy and deter racial discrimination in voting. Race was not directly at issue in Rucho, and for the plaintiffs to have prevailed, the Court would have had fashion its own standard for adjudicating partisan gerrymandering claims without congressional guidance.

The Court's decision in Rucho will have profound and disastrous implications for the 2020 redistricting cycle and beyond. But it may also foreshadow the endgame for Section 2.

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Posted in redistricting, Supreme Court, Voting Rights Act

"Judge Wants To Know By Monday If Gov't Will Fold On Census Citizenship Fight"

Posted on June 27, 2019 4:11 pm by **Rick Hasen**

TPM:

If the Trump administration does not want another round of discovery into whether its census citizenship question was discriminatory, it has until Monday to tell the judge who is currently considering the claim that it is backing down from trying to add the question.

That is according to Denise Hulett, a lawyer for the Mexican American Legal Defense and Educational Fund, who was on teleconference hearing that U.S. District Judge George Hazel held Thursday afternoon with the parties in the census citizenship case in Maryland. A second source with knowledge of the call also gave TPM that read out.

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Quote of the Day

Posted on June 27, 2019 4:02 pm by **Rick Hasen**

"We are in Mad Max territory now, there are no rules."

–Justin Levitt to NPR, "Supreme Court Rules Partisan Gerrymandering Is Beyond The Reach Of Federal Courts."

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“Judge Dismisses Effort To Accelerate Special Election For Arizona’s U.S. Senate Seat”

Posted on June 27, 2019 3:59 pm by **Rick Hasen**

Arizona’s Law reports.

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“The Supreme Court’s Green Light to Partisan Gerrymandering Will Drag It Down Further Into the Mud”

Posted on June 27, 2019 3:30 pm by **Rick Hasen**

I have written this oped for the *New York Times*. It begins:

The Supreme Court decision on Thursday in Rucho v. Common Cause purports to take federal courts out of the business of policingpartisan gerrymanders and leave the issue for states to handle. But the decision will instead push federal courts further into the political thicket, and, in states with substantial minority voter populations, force courts to make logically impossible determinations about whether racial reasons or partisan motives predominate when a party gerrymanders for political advantage. It didn’t have to be this way.

…

Second, we are in an era of hyperpartisanship, when a politician pays no political consequences (and indeed gets rewarded) for publicly declaring a partisan purpose. Indeed, Rucho involved a Republican gerrymander of North Carolina’s 13 congressional districts, and David Lewis, one of the Republican legislative leaders, said in 2016 that even though the state was about evenly divided between the parties, he was proposing a map drawn with the aim of electing 10 Republicans and three Democrats — and that was only because he didn’t “believe it was possible to draw a map with 11 Republicans and two Democrats.”

Mr. Lewis’s conduct will now become de rigueur, not only because naked partisanship has been approved by the court, but because his outrageous comment gave him legal cover for the gerrymander. North Carolina was forced to redistrict in 2016 because the Supreme Court found its earlier congressional map to be a racial gerrymander. Since 1993, the Supreme Court has held that making race the predominant factor in drawing

district lines without a compelling reason for doing so violates the equal protection clause of the 14th Amendment. By so openly declaring he was engaged in partisan politics, Mr. Lewis was trying to prove that race did not drive the North Carolina General Assembly's decisions.'
The entire exercise is nonsensical in a place like North Carolina, where about 90 percent of African-American voters support Democratic candidates and about two-thirds of white voters support Republicans. One cannot discriminate against Democrats without discriminating against African-Americans in North Carolina, and vice versa.

So we know what we can expect in North Carolina in 2021, if Republicans still control the legislative branch and thus redistricting (in that state, the governor, who now is a Democrat, plays no role in approving the plans). Republicans will use sophisticated technology to draw a very effective partisan gerrymander. They might even keep redrawing lines every few years to keep their advantage. They will proclaim loudly and often that their purpose is to help the Republican Party. They will all be instructed not to talk about race.

Democrats and minority voting advocates will sue in federal court and claim that this is a racial gerrymander in disguise. And federal courts will have to figure out whether it was race or party that motivated the decision of the state's Legislature.

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Posted in redistricting, Supreme Court

"What do redistricting advocates do now?"

Posted on June 27, 2019 2:42 pm by **Richard Pildes**

From this Washington Post piece by Amber Phillips:

That's what redistricting advocates in North Carolina plan to do next. "North Carolina can't force redistricting reform on its legislature, but it can take it to the state courts, and we will go to the state courts," said Allison Riggs, senior voting rights attorney for the Southern Coalition for Social Justice, which argued the North Carolina redistricting case at the Supreme Court.

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“The Supreme Court just body-slammed democracy. More is coming.”

Posted on June 27, 2019 1:16 pm by **Rick Hasen**

Paul Waldman and Greg Sargent for WaPo.

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Posted in Supreme Court

“Chief Justice Roberts’s ‘proportional representation’ error”

Posted on June 27, 2019 1:14 pm by **Rick Hasen**

Sam Wang blogs.

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Posted in redistricting, Supreme Court

“When You Use Campaign Funds To Pay For Your Pet Rabbit’s Trip, You’re Doing It Wrong”

Posted on June 27, 2019 1:11 pm by **Rick Hasen**

Ciara Torres Spelliscy for TPM.

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Posted in campaign finance

“How’s This for a Radical Campaign-Finance Proposal? Follow the Existing Rules.”

Posted on June 27, 2019 1:06 pm by **Rick Hasen**

Eliza Newlin Carney writes.

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Posted in campaign finance

President Trump Tweets Indicate that Battle Over Citizenship Question on the Census is NOT Over

Posted on June 27, 2019 10:56 am by **Rick Hasen**

I indicated in my Slate piece that this is not over, and here's more proof:

Donald J. Trump

✓@realDonaldTrump

Seems totally ridiculous that our government, and indeed Country, cannot ask a basic question of Citizenship in a very expensive, detailed and important Census, in this case for 2020. I have asked the lawyers if they can delay the Census, no matter how long, until the.....

96.8K

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.....United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter. Can anyone really believe that as a great Country, we are not able the ask whether or not someone is a Citizen. Only in America!

89.3K

10:37 AM - Jun 27, 2019

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35K people are talking about this

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Posted in census litigation, Supreme Court

"How John Roberts Might Allow Trump to Resurrect the Census Question"

Posted on June 27, 2019 9:37 am by **Rick Hasen**

I have posted this piece at Slate. It begins:

Despite a favorable ruling for opponents of the census citizenship question on Thursday, the Supreme Court did not definitively decide to exclude citizenship question from the 2020 census. Indeed, I expect that the Trump administration's Commerce Department and Department of Justice could well be back before the Supreme Court's next term begins in October arguing for the question's inclusion, and they could well win and include the question.

It concludes:

The majority opinion and the separate conservative opinions, however, have given the agency plenty of non-pretextual things to say about why it would want to include the citizenship question. Administrative law professor Jennifer Nou even ponders that they could argue they were doing it for partisan reasons, following the decision in Thursday's partisan gerrymandering case giving such conduct the green light.
But whatever the reason, the agency will likely act quickly to rehabilitate its pretexual ruling. The agency has said that printing had to begin in July, but plaintiffs challenging inclusion of the question have long claimed the real deadline is October. The government will surely concede now that October is doable. The agency could come back with new reasons, and the part of Roberts' opinion joined by the conservatives which recognizes the broad agency discretion to include the question for non-pretextual reasons will be front and center.

If the agency moves to include the question again, the case will be back before the Supreme Court. It would likely be joined by the other case coming out of the Fourth Circuit arguing that the inclusion of the question violated the Equal Protection Clause because it was based on a racially discriminatory purpose. The court did not address the equal protection holding Thursday, despite the outrageous urging of the Solicitor General for the Court do to so without briefing. Assuming the Commerce Department moves forward with trying to include the question on the 2020 census, the Fourth Circuit could well keep this case alive to create a record of the racial motivations for inclusion of the original question.

On this question, I expect that any new agency decision to include the citizenship question would be found by the court's conservatives to have cleansed the decision of any racial animus. (The court made just such a finding last year in a Voting Rights Act redistricting case from Texas, Abbott v. Perez.)

So we may see a rare September argument where these issues will be back before the Supreme Court, and John Roberts, who gave the Republicans a green light to gerrymander to their hearts content in today's Rucho case, may give them yet another tool to solidify their grasp on power despite demographic forces moving against them.

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The Dark Future of Gerrymandering

Posted on June 27, 2019 9:15 am by **Nicholas Stephanopoulos**

After today's disastrous decision, here are some things that line-drawers could do in the future:

- Instruct a computer algorithm to generate huge numbers of maps that comply with all nonpartisan criteria *and* produce as large and durable an advantage as possible for the line-drawing party. Then pick an actual plan from this array of potential gerrymanders. This plan will be close to impregnable if it's challenged on nonpartisan grounds. But it will still massively benefit the line-drawing party, probably more than any human-drawn map could.

- Revise districts after each election to optimize their performance in the next election. Any districts slipping away from the line-drawing party could have some copartisans added to them. Any districts becoming overly safe could have some copartisans subtracted. Decennial redistricting, in other words, could become a thing of the past. Redistricting every two years is so much more effective.

- Design noncontiguous districts in order to avoid the constraints of political geography. A state with many Democrats concentrated in cities (like my Illinois) could join clusters of urban Democrats with slightly smaller clusters of rural Republicans hundreds of miles away. These clusters wouldn't have to be connected since no federal law, and no other law in many states, mandates contiguity. A state could even adopt entirely nongeographic districts, e.g., by assigning a representative (and sufficiently numerous) sample of the state's population to each district.

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http://schultzstake.blogspot.com/
Twitter: @ProfDSchultz
My latest book: Presidential Swing States: Why Only Ten Matter
https://rowman.com/ISBN/9780739195246/Presidential-Swing-States-Why-Only-Ten-Matter
FacultyRow SuperProfessor, 2012, 2013, 2014

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The Rucho Court condemned partisan gerrymandering claims for "invariably sound[ing] in a desire for proportional representation." In so doing, the Court cited a racial vote-dilution case—the plurality opinion in City of Mobile v. Bolden—for the proposition that proportional representation is not mandated by the Equal Protection Clause. Building off this point, the Court turned to the question of fashioning a judicially manageable standard for apportioning political power in the context of partisan gerrymandering. The Court observed that "it is not even clear what fairness looks like" and proceeded to identify numerous visions of "fair" representation, from competitive districts to an "'appropriate' share of 'safe' seats" to maps based on traditional redistricting criteria.

Now, if this argument sounds familiar, that's because it mirrors the long-running debate between scholars like Sam Issacharoff and Rick Pildes who advocate the creation of competitive districts and academics like Heather Gerken, Michael Kang, and Pam Karlan who are far more comfortable with race-conscious redistricting. What's troubling about Rucho's logic is that it outlines an analogous debate and then throws its hands up and says there's no judicially manageable standard. In this way, Rucho channels concerns similar to those articulated in Justice Thomas's concurring opinion in Holder v. Hall, where he criticized Section 2 for lacking a legitimate and manageable benchmark.

And therein lies Rucho's relevance to the VRA. To be sure, Section 2 expressly disclaims a right to proportional representation, but ever since Johnson v. De Grandy, the Court has made "rough proportionality" a central part of Section 2's totality-of-the-circumstances inquiry. Given this, Rucho's criticism of proportionality standards should be a warning sign for Section 2's constitutionality, especially when combined with the Roberts Court's colorblind instincts and its outright hostility to race-conscious redistricting.

If you think I've stared at the tea leaves for too long, consider the ways the Rucho Court deployed and distinguished other election-law precedents. The Court greenlit Reynolds's one-person, one-vote principle as "relatively easy to administer as a matter of math." As for the Shaw line of cases, the Court observed that racial gerrymandering claims seek the "elimination of a racial classification" and "do[] not ask for a share of political power and influence, with all the justiciability conundrums that entails." Put simply, the Court went out of its way to preserve those precedents—indeed, with a rationale for Shaw that is at cross-purposes with Section 2—but only invoked a racial vote-dilution case as a sword to undercut a claim for proportional representation.

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Thus, in defending Section 2's constitutionality, civil rights advocates and the academy should emphasize that proportionality is just one factor in a Section 2 case and that the touchstone is rough proportionality, not perfect proportionality. The Gingles factors, moreover, have functioned as an effective gatekeeping mechanism and a de facto sunset provision for Section 2, thus limiting the situations where proportionality concerns even enter the equation. And, of course, the Court has long viewed Congress's Reconstruction Amendment enforcement authority to be at its zenith when seeking to remedy and deter racial discrimination in voting. Race was not directly at issue in Rucho, and for the plaintiffs to have prevailed, the Court would have had fashion its own standard for adjudicating partisan gerrymandering claims without congressional guidance.

The Court's decision in Rucho will have profound and disastrous implications for the 2020 redistricting cycle and beyond. But it may also foreshadow the endgame for Section 2.

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Posted in redistricting, Supreme Court, Voting Rights Act

"Judge Wants To Know By Monday If Gov't Will Fold On Census Citizenship Fight"

Posted on June 27, 2019 4:11 pm by **Rick Hasen**

TPM:

If the Trump administration does not want another round of discovery into whether its census citizenship question was discriminatory, it has until Monday to tell the judge who is currently considering the claim that it is backing down from trying to add the question.

That is according to Denise Hulett, a lawyer for the Mexican American Legal Defense and Educational Fund, who was on teleconference hearing that U.S. District Judge George Hazel held Thursday afternoon with the parties in the census citizenship case in Maryland. A second source with knowledge of the call also gave TPM that read out.

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Arizona’s Law reports.

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The Supreme Court decision on Thursday in Rucho v. Common Cause purports to take federal courts out of the business of policingpartisan gerrymanders and leave the issue for states to handle. But the decision will instead push federal courts further into the political thicket, and, in states with substantial minority voter populations, force courts to make logically impossible determinations about whether racial reasons or partisan motives predominate when a party gerrymanders for political advantage. It didn’t have to be this way.

…

Second, we are in an era of hyperpartisanship, when a politician pays no political consequences (and indeed gets rewarded) for publicly declaring a partisan purpose. Indeed, Rucho involved a Republican gerrymander of North Carolina’s 13 congressional districts, and David Lewis, one of the Republican legislative leaders, said in 2016 that even though the state was about evenly divided between the parties, he was proposing a map drawn with the aim of electing 10 Republicans and three Democrats — and that was only because he didn’t “believe it was possible to draw a map with 11 Republicans and two Democrats.”

Mr. Lewis’s conduct will now become de rigueur, not only because naked partisanship has been approved by the court, but because his outrageous comment gave him legal cover for the gerrymander. North Carolina was forced to redistrict in 2016 because the Supreme Court found its earlier congressional map to be a racial gerrymander. Since 1993, the Supreme Court has held that making race the predominant factor in drawing district lines without a compelling reason for doing so violates the equal protection clause of the 14th Amendment. By so openly declaring he was engaged in partisan politics, Mr. Lewis was trying to prove that race did not drive the North Carolina General Assembly’s decisions.’

The entire exercise is nonsensical in a place like North Carolina, where about 90 percent of African-American voters support Democratic candidates and about two-thirds of white voters support Republicans. One cannot discriminate against Democrats without discriminating against African-Americans in North Carolina, and vice versa.

So we know what we can expect in North Carolina in 2021, if Republicans still control the legislative branch and thus redistricting (in that state, the governor, who now is a Democrat, plays no role in approving the plans). Republicans will use sophisticated technology to draw a very effective partisan gerrymander. They might even keep redrawing lines every few years to keep their advantage. They will proclaim loudly and often that their purpose is to help the Republican Party. They will all be instructed not to talk about race.

Democrats and minority voting advocates will sue in federal court and claim that this is a racial gerrymander in disguise. And federal courts will have to figure out whether it was race or party that motivated the decision of the state's Legislature.

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Posted in redistricting, Supreme Court

"What do redistricting advocates do now?"

Posted on June 27, 2019 2:42 pm by **Richard Pildes**
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That's what redistricting advocates in North Carolina plan to do next. "North Carolina can't force redistricting reform on its legislature, but it can take it to the state courts, and we will go to the state courts," said Allison Riggs, senior voting rights attorney for the Southern Coalition for Social Justice, which argued the North Carolina redistricting case at the Supreme Court.

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Eliza Newlin Carney writes.
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Posted in campaign finance

President Trump Tweets Indicate that Battle Over Citizenship Question on the Census is NOT Over

Posted on June 27, 2019 10:56 am by **Rick Hasen**
I indicated in my Slate piece that this is not over, and here's more proof:

Donald J. Trump
✓@realDonaldTrump

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96.8K
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.....United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter. Can anyone really believe that as a great Country, we are not able the ask whether or not someone is a Citizen. Only in America!

89.3K
10:37 AM - Jun 27, 2019
Twitter Ads info and privacy
35K people are talking about this

Share / Save
Posted in census litigation, Supreme Court

"How John Roberts Might Allow Trump to Resurrect the Census Question"

Posted on June 27, 2019 9:37 am by **Rick Hasen**

I have posted this piece at Slate. It begins:

Despite a favorable ruling for opponents of the census citizenship question on Thursday, the Supreme Court did not definitively decide to exclude citizenship question from the 2020 census. Indeed, I expect that the Trump administration's Commerce Department and Department of Justice could well be back before the Supreme Court's next term begins in October arguing for the question's inclusion, and they could well win and include the question.

It concludes:

The majority opinion and the separate conservative opinions, however, have given the agency plenty of non-pretextual things to say about why it would want to include the citizenship question. Administrative law professor Jennifer Nou even ponders that they could argue they were doing it for partisan reasons, following the decision in Thursday's partisan gerrymandering case giving such conduct the green light.
But whatever the reason, the agency will likely act quickly to rehabilitate its pretexual ruling. The agency has said that printing had to begin in July, but plaintiffs challenging inclusion of the question have long claimed the real deadline is October. The government

will surely concede now that October is doable. The agency could come back with new reasons, and the part of Roberts' opinion joined by the conservatives which recognizes the broad agency discretion to include the question for non-pretextual reasons will be front and center.

If the agency moves to include the question again, the case will be back before the Supreme Court. It would likely be joined by the other case coming out of the Fourth Circuit arguing that the inclusion of the question violated the Equal Protection Clause because it was based on a racially discriminatory purpose. The court did not address the equal protection holding Thursday, despite the outrageous urging of the Solicitor General for the Court do to so without briefing. Assuming the Commerce Department moves forward with trying to include the question on the 2020 census, the Fourth Circuit could well keep this case alive to create a record of the racial motivations for inclusion of the original question.

On this question, I expect that any new agency decision to include the citizenship question would be found by the court's conservatives to have cleansed the decision of any racial animus. (The court made just such a finding last year in a Voting Rights Act redistricting case from Texas, Abbott v. Perez.)

So we may see a rare September argument where these issues will be back before the Supreme Court, and John Roberts, who gave the Republicans a green light to gerrymander to their hearts content in today's Rucho case, may give them yet another tool to solidify their grasp on power despite demographic forces moving against them.

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The Dark Future of Gerrymandering

Posted on June 27, 2019 9:15 am by **Nicholas Stephanopoulos**

After today's disastrous decision, here are some things that line-drawers could do in the future:

- Instruct a computer algorithm to generate huge numbers of maps that comply with all nonpartisan criteria *and* produce as large and durable an advantage as possible for the line-drawing party. Then pick an actual plan from this array of potential gerrymanders. This plan will be close to impregnable if it's challenged on nonpartisan grounds. But it will still massively benefit the line-drawing party, probably more than any human-drawn map could.
- Revise districts after each election to optimize their performance in the next election. Any districts slipping away from the line-drawing party could have some copartisans added to them. Any districts becoming overly safe could have some copartisans subtracted. Decennial redistricting, in other words, could become a thing of the past. Redistricting every two years is so much more effective.
- Design noncontiguous districts in order to avoid the constraints of political geography. A state with many Democrats concentrated in cities (like my Illinois) could join clusters of urban Democrats with slightly smaller clusters of rural Republicans hundreds of miles away.

> These clusters wouldn't have to be connected since no federal law, and no other law in many states, mandates contiguity. A state could even adopt entirely nongeographic districts, e.g., by assigning a representative (and sufficiently numerous) sample of the state's population to each district.

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Marty Lederman
Georgetown University Law Center
600 New Jersey Avenue, NW
Washington, DC 20001
202-662-9937

From: Law-election on behalf of Douglas Johnson
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] North Carolina
Date: Friday, June 28, 2019 2:05:59 PM
Attachments: image001.png
ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to report.spam@nc.gov

Very true. And what this ruling did is essentially leave in place the rules as they were in place in 2011, so there's little reason to redraw the 2011 maps. There's a small change coming out of this ruling, as the *Vieth* and *Bandemer* mentions that partisan gerrymandering *could* be unconstitutional are now gone, but neither of those cases actually imposed any real Federal limits or restrictions on the 2011 map-drawing.

- Doug

Douglas Johnson
Rose Institute of State and Local Government at Claremont McKenna College
douglas.johnson@cmc.edu

On Fri, Jun 28, 2019 at 10:36 AM Levitt, Justin <justin.levitt@lls.edu> wrote:

> One additional point: the NC state constitution prohibits redistricting state legislative lines more than once in a decade, and there was just litigation on that point, with a decision reaffirming the ban in November of 2018. There's no similar prohibition in the NC state constitution – at least no similar express prohibition – on redrawing congressional lines more than once in a decade. Michael McDonald and I had a 2007 wrapup of the relevant state rules here, and I don't think too many have changed.
>
> Justin
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Rick Hasen
> **Sent:** Friday, June 28, 2019 10:26 AM
> **To:** Marty Lederman <Martin.Lederman@law.georgetown.edu>; John Shockley <shockley1894@gmail.com>
> **Cc:** Election Law Listserv <law-election@uci.edu>
> **Subject:** [EL] North Carolina
>
> [I changed the topic heading.]

Don’t forget about pending cases in the state supreme court, with a majority of Democrats, that is hearing a partisan gerrymandering case under the state constitution.

From: Marty Lederman <Martin.Lederman@law.georgetown.edu>
Date: Friday, June 28, 2019 at 10:08 AM
To: John Shockley <shockley1894@gmail.com>
Cc: Rick Hasen <rhasen@law.uci.edu>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] ELB News and Commentary 6/28/19

They "can" do so in the sense that no one will stop them--but they will be acting unconstitutionally when they do.

On Fri, Jun 28, 2019 at 1:00 PM John Shockley <shockley1894@gmail.com> wrote:

> Dear Listserve:
>
> I haven't read the gerrymandering decision, but am I correct that now North Carolina Republicans can draw legislative districts to ensure Republican control in perpetuity? The Democratic Governor plays no role in redistricting there. The Republican-gerrymandered legislature can do whatever it wants. By packing Democrats into as few districts as possible, can't they make sure that no matter how big a wave ever comes, they can be sure of maintaining their control? And they can keep doing it every ten years (or possibly more often) as needed. The same can happen in Texas and wherever Republicans have their "trifecta." (For sure in states that allow no initiative process). Wisconsin would not be in that category, because the Democratic Governor also plays a role in the process, and the Republicans don't have a super-majority, although they have strong dominance.
>
> Am I basically correct that now North Carolina legislative elections are basically pointless, except in the sense that they will be in and out supermajorities depending upon how extreme they can distort the process? There is no way Democrats could ever re-take the legislature. I suppose the only way out would be for the state Supreme Court to declare the gerrymandering unconstitutional under the state constitution, as happened in Pennsylvania. I'm guessing that the Supreme Court Republicans won't intervene in state court interpretations of state constitutions on gerrymandering, but I could be wrong here.
>
> Does this seem like an accurate conclusion?

John Shockley

Political Science, Retired

Augsburg College

Minneapolis, MN

On Thu, Jun 27, 2019 at 11:45 PM Rick Hasen <rhasen@law.uci.edu> wrote:

Coming Next Week: #ELB Symposium on Partisan Gerrymandering After Rucho

Posted on June 27, 2019 9:42 pm by **Rick Hasen**

This should be good.

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"House Passes Election Security Package, With an Eye on Mitch McConnell"

Posted on June 27, 2019 9:39 pm by **Rick Hasen**

NYT:
The House on Thursday approved expansive election security legislation that would mandate the use of backup paper ballots and postelection vote audits to guard against potential foreign meddling, seeking to pressure Senator Mitch McConnell to lift his blockade of election legislation in the upper chamber.
Timed to coincide with the July 4 holiday, the House bill, which passed 225 to 184, largely along party lines, is the first and most expansive in a blitz of new measures that House Democrats say they will pass to address vulnerabilities highlighted by the

special counsel, Robert S. Mueller III. His report concluded that Russia had conducted "sweeping and systematic" interference in the 2016 presidential election, and members of both parties fear that not enough is being done to prevent that from happening again next year.
Other legislation could include a requirement that political campaigns report to the F.B.I. any offer of assistance from a foreign power, new sanctions to punish Russia and other foreign powers that interfere with the American democratic processes, and bipartisan mandates for social media platforms like Facebook to disclose the purchasers of political advertisements.
But with the Senate in Republican hands, Democrats have another, more immediate target in mind: trying to shame Mr. McConnell, the majority leader, into dropping his opposition to proposals — even bipartisan ones — and allowing his chamber to consider measures to better protect the vote

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"Decision on gerrymandering brings new urgency to Democratic fight to win state seats"

Posted on June 27, 2019 9:36 pm by **Rick Hasen**

WaPo reports.

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"Supreme Court's approval of partisan gerrymandering raises 2020 election stakes"

Posted on June 27, 2019 9:32 pm by **Rick Hasen**

LAT reports.

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Roundup of News and Commentary on Census Citizenship Decision

Posted on June 27, 2019 9:30 pm by **Rick Hasen**

Here at Howard.

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Posted in census litigation, Supreme Court

Crum: "Rucho and Section 2 of the Voting Rights Act"

Posted on June 27, 2019 4:18 pm by **Rick Hasen**

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Seems totally ridiculous that our government, and indeed Country, cannot ask a basic question of Citizenship in a very expensive, detailed and important Census, in this case for 2020. I have asked the lawyers if they can delay the Census, no matter how long, until

the.....

Donald J. Trump

✓@realDonaldTrump

.....United States Supreme Court is given additional information from which it can make a final and decisive decision on this very critical matter. Can anyone really believe that as a great Country, we are not able the ask whether or not someone is a Citizen. Only in America!

89.3K

10:37 AM - Jun 27, 2019

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Posted in census litigation, Supreme Court

"How John Roberts Might Allow Trump to Resurrect the Census Question"

Posted on June 27, 2019 9:37 am by **Rick Hasen**

I have posted this piece at Slate. It begins:

Despite a favorable ruling for opponents of the census citizenship question on Thursday, the Supreme Court did not definitively decide to exclude citizenship question from the 2020 census. Indeed, I expect that the Trump administration's Commerce Department and Department of Justice could well be back before the Supreme Court's next term begins in October arguing for the question's inclusion, and they could well win and include the question.

It concludes:

The majority opinion and the separate conservative opinions, however, have given the agency plenty of non-pretextual things to say about why it would want to include the citizenship question. Administrative law professor Jennifer Nou even ponders that they could argue they were doing it for partisan reasons, following the decision in Thursday's partisan gerrymandering case giving such conduct the green light.
But whatever the reason, the agency will likely act quickly to rehabilitate its pretexual ruling. The agency has said that printing had to begin in July, but plaintiffs challenging inclusion of the question have long claimed the real deadline is October. The government will surely concede now that October is doable. The agency could come back with new reasons, and the part of Roberts' opinion joined by the conservatives which recognizes the broad agency discretion to include the question for non-pretextual reasons will be front and center.

If the agency moves to include the question again, the case will be back before the Supreme Court. It would likely be joined by the other case coming out of the Fourth Circuit arguing that the inclusion of the question violated the Equal Protection Clause because it was based on a racially discriminatory purpose. The court did not address the equal protection holding Thursday, despite the outrageous urging of the Solicitor General for the Court do to so without briefing. Assuming the Commerce Department moves forward with trying to include the question on the 2020 census, the Fourth Circuit could well keep this case alive to create a record of the racial motivations for inclusion of the original question.

On this question, I expect that any new agency decision to include the citizenship question would be found by the court's conservatives to have cleansed the decision of any racial animus. (The court made just such a finding last year in a Voting Rights Act redistricting case from Texas, Abbott v. Perez.)

So we may see a rare September argument where these issues will be back before the Supreme Court, and John Roberts, who gave the Republicans a green light to gerrymander to their hearts content in today's Rucho case, may give them yet another tool to solidify their grasp on power despite demographic forces moving against them.

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Posted in Uncategorized

The Dark Future of Gerrymandering

Posted on June 27, 2019 9:15 am by **Nicholas Stephanopoulos**

After today's disastrous decision, here are some things that line-drawers could do in the future:

- Instruct a computer algorithm to generate huge numbers of maps that comply

with all nonpartisan criteria *and* produce as large and durable an advantage as possible for the line-drawing party. Then pick an actual plan from this array of potential gerrymanders. This plan will be close to impregnable if it's challenged on nonpartisan grounds. But it will still massively benefit the line-drawing party, probably more than any human-drawn map could.

- Revise districts after each election to optimize their performance in the next election. Any districts slipping away from the line-drawing party could have some copartisans added to them. Any districts becoming overly safe could have some copartisans subtracted. Decennial redistricting, in other words, could become a thing of the past. Redistricting every two years is so much more effective.

- Design noncontiguous districts in order to avoid the constraints of political geography. A state with many Democrats concentrated in cities (like my Illinois) could join clusters of urban Democrats with slightly smaller clusters of rural Republicans hundreds of miles away. These clusters wouldn't have to be connected since no federal law, and no other law in many states, mandates contiguity. A state could even adopt entirely nongeographic districts, e.g., by assigning a representative (and sufficiently numerous) sample of the state's population to each district.

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Posted in Uncategorized

--

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http://electionlawblog.org

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--
- Doug

Douglas Johnson
National Demographics Corporation
djohnson@NDCresearch.com
phone 310-200-2058
fax 818-254-1221

From:	Law-election on behalf of Levitt, Justin
To:	Mark Scarberry
Cc:	Election Law Listserv
Subject:	[External] Re: [EL] partisan gerrymandering
Date:	Thursday, June 27, 2019 3:19:12 PM
Attachments:	image001.png image002.png image001.png ATT00001.txt

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FWIW, I view the part that Mark points out here as one of the most damaging portions of today's decision, with majority support behind what had been either dicta or the isolated statements of individual Justices.

As far as I'm aware, there are now two instances in which a government may constitutionally exercise state power in order to injure US citizens based on those citizens' partisan beliefs - at least sometimes. The first is in senior political governmental employment, which affects a few people in a few jobs. The second is in redistricting, which affects all of us.

If that part of the decision is "conservative," I don't understand the label.

Even in the retaliatory arrest cases this Term, I don't believe that the court said that a retaliatory arrest was constitutional. It just said there's no recourse if there's also probable cause. Today's decision goes farther.

One other thought: I'm not sure exactly how this affects Latinos v. Cox, but I don't understand the logic in which there's still a viable Larios claim.

--
Justin Levitt
justin.levitt@lls.edu

On Jun 27, 2019, at 10:47 AM, Mark Scarberry <mark.scarberry@pepperdine.edu> wrote:

> It seems to me that the Court recognized the constitutionality of at least some degree of political gerrymandering. This may not be a holding, but the Court does say that "a jurisdiction may engage in constitutional political gerrymandering."
>
> From page 12 of the slip opinion:
>
> "Partisan gerrymandering claims have proved far more difficult to adjudicate. The basic reason is that, while it is illegal for a jurisdiction to depart from the one-person, one-vote rule, or to engage in racial discrimination in districting, 'a jurisdiction may engage in constitutional political gerrymandering.' Hunt v. Cromartie, 526 U. S. 541, 551 (1999) (citing Bush v. Vera, 517 U. S. 952, 968 (1996); Shaw v. Hunt, 517 U. S. 899, 905 (1996) (Shaw II); Miller v. Johnson, 515 U. S. 900, 916 (1995); Shaw I, 509

U. S., at 646). See also Gaffney v. Cummings, 412 U. S. 735, 753 (1973) (recognizing that '[p]olitics and political considerations are inseparable from districting and apportionment')."

Legislators must refuse to engage in actions that they, in their own judgment, believe would violate the Constitution, whether or not a court would or could make that determination. Their oath of office requires no less. So this recognition by the Court that at least some degree of political gerrymandering is constitutional is not determinative of whether a legislator should refuse on constitutional grounds to engage in it. The Court's statement does provide a basis for a legislator to conclude in good faith that he or she does not violate the oath of office by engaging in political gerrymandering.

Mark

Prof. Mark S. Scarberry
Pepperdine Univ. School of Law

On Thu, Jun 27, 2019 at 9:56 AM Marty Lederman <Martin.Lederman@law.georgetown.edu> wrote:

> Did the Court hold in Rucho that it's *constitutional* for officials to draw districts for partisan gain (as opposed to simply that it's nonjusticiable)? I don't think so. And I doubt even the Trump Administration would publicly assert hat partisan advantage is a factor the statute allows (or could constitutionally allow) Ross to consider--or that DOJ would argue that it is. Naive?
>
> On Thu, Jun 27, 2019 at 12:44 PM Josh Blackman <joshblackman@gmail.com> wrote:
>
> > Rick,
> >
> > Roberts's most important statement is the fact that Ross made up his mind at the outset is not dispositive. In other words, that fact does not "forever taint" the action. It could be cured by additional justifications. Perhaps, as you note, that additional justification could be for political gain. It would be a brazen argument, but could work.
> >
> > I summarize the thought here:
> >
> > https://twitter.com/JoshMBlackman/status/1144283664991301632
> > ---
> > Josh Blackman
> > http://JoshBlackman.com
> > **Unprecedented: The Constitutional Challenge to Obamacare**
> > **Unraveled: Obamacare, Religious Liberty, & Executive Power**
> >
> > On Thu, Jun 27, 2019 at 11:39 AM Rick Hasen <rhasen@law.uci.edu> wrote:
> >
> > > **“How John Roberts Might Allow Trump to**

Resurrect the Census Question”

Posted on June 27, 2019 9:37 am by **Rick Hasen**

I have posted this piece at Slate. It begins:

Despite a favorable ruling for opponents of the census citizenship question on Thursday, the Supreme Court did not definitively decide to exclude citizenship question from the 2020 census. Indeed, I expect that the Trump administration's Commerce Department and Department of Justice could well be back before the Supreme Court's next term begins in October arguing for the question's inclusion, and they could well win and include the question.

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Assuming the Commerce Department moves forward with trying to include the question on the 2020 census, the Fourth Circuit could well keep this case alive to create a record of the racial motivations for inclusion of the original question.

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> *just such a finding last year in a Voting Rights Act redistricting case from Texas, Abbott v. Perez.)*
>
> *So we may see a rare September argument where these issues will be back before the Supreme Court, and John Roberts, who gave the Republicans a green light to gerrymander to their hearts content in today's Rucho case, may give them yet another tool to solidify their grasp on power despite demographic forces moving against them.*
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From:	Law-election on behalf of Levitt, Justin
To:	Paul Weich
Cc:	Election Law Listserv
Subject:	[External] Re: [EL] Polygamous sect supporters" improper voting RE: ELB News and Commentary 1/5/20
Date:	Monday, January 6, 2020 12:49:41 AM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png image007.png ATT00001.txt

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Thanks for the clarification, Paul.

--
Justin Levitt
justin.levitt@lls.edu

On Jan 5, 2020, at 5:08 PM, Paul Weich <paul@arizonaspolitics.com> wrote:

I'm following up on the thorough article in the Salt Lake Trib re: FLDS supporters improperly voting, and Professor Levitt's valid point questioning whether the people were properly registered.

In Arizona - where this portion of the FLDS story takes place) - the supporters were NOT properly registered once they were evicted. The statute requires them to re-register and use (1) a homeless shelter to which he/she "regularly returns"; (2) place where they *are* residing; (3) the county courthouse; or (4) a general delivery address (USPS). (A.R.S. §16-121)

QUESTION for the listserv: if they HAD voted multiple times, would the correct term be "polysuffrageous", "polytribous" or something else. (I would have loved to throw those into the headline!)

--Paul

_____
Paul Weich, co-founder
www.ArizonasPolitics.com
New: www.ArizonasLaw.org
602-908-9132

> -------- Original Message --------
> Subject: [EL] ELB News and Commentary 1/5/20
> From: "Levitt, Justin" <justin.levitt@lls.edu>
> Date: Sun, January 05, 2020 2:11 pm
> To: Election Law Listserv <law-election@uci.edu>

“Voters in town once run by polygamous sect probably broke the law when they cast ballots, prosecutor says, but charges are unlikely”

Posted on January 5, 2020 12:54 pm by **Justin Levitt**

The Salt Lake Tribune runs a story about potential improper registration in Colorado City (which, despite the name, is half of a community that straddles the Utah-Arizona boder).

There are real problems of unlawful behavior in Colorado City. But some of the anecdotes in the story seem to suggest a conflation of domicile and physical presence. As one example:

> *Lori Barlow acknowledges she was one person whose address was out of date yet voted anyway. She still lives in Colorado City in what she says is temporary housing.*
>
> *Smith and Mohave County, Barlow said, have failed to appreciate the housing challenges in Colorado City, where many people loyal to imprisoned FLDS President Warren Jeffs have chosen to be evicted rather than deal with a local land trust that owns many of the homes.*
>
> *“I did not change my address,” Barlow said, “because I had nothing to change it to.”*

The story doesn’t state otherwise … but in most states, someone in Barlow’s apparent position is properly registered at her old address even if she no longer sleeps there at night, as long as she hasn’t yet established permanent residence elsewhere.

<image001.png>

Posted in chicanery, voter registration

Justin Levitt (he/him/his)
Associate Dean for Research
Professor of Law / Gerald T. McLaughlin Fellow

<image002.png>

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From: Law-election on behalf of Levitt, Justin
To: Steven John Mulroy (smulroy); Charles H Stewart
Cc: law-election@department-lists.uci.edu
Subject: [External] Re: [EL] Preliminary Census survey form
Date: Saturday, July 20, 2019 2:10:10 PM
Attachments: ATT00001.txt

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13 USC 221. Tests connected to the Census are likely just as "authorized" under 13 USC 141 as the Census itself.

As for enforcement, from the Census Bureau itself, in 2010 (https://web.archive.org/web/20100704172418/http://www.census.gov/acs/www/Downloads/CT_%20answers.pdf), the very last question on the FAQ in the context of the ACS:

> Both Title 13 and Title 18, United States Code, provide for monetary penalties for failure to respond. Title 18, U.S.C., Section 3551, et seq., the Sentencing Reform Act of 1984, establishes uniform penalties for all federal crimes. Title 13 U.S.C., Section 221, makes it a misdemeanor to refuse or willfully neglect to complete the questionnaire or answer questions posed by census takers and imposes a fine of not more than $100. This fine is changed by the Sentencing Reform Act of 1984 from $100 to not more than $5,000.
>
> The Census Bureau is not a prosecuting agency. Failure to provide information is not likely to result in a fine. The Census Bureau staff work to achieve cooperation and high response rates by helping the public understand that responding to the ACS is a matter of civic responsibility, and prefers to encourage participation in this manner rather than prosecution.

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Steven John Mulroy (smulroy)
Sent: Saturday, July 20, 2019 10:48 AM
To: Charles H Stewart <cstewart@mit.edu>
Cc: law-election@department-lists.uci.edu
Subject: Re: [EL] Preliminary Census survey form

Is the boilerplate about the legal obligation to respond just bluffing? The statutes they cite do not seem to support an obligation to respond, and I was always under the impression that responses were voluntary. I suppose there could be some generic statute under title 18 that could be read to apply here, but I don't understand why the form wouldn't cite such a statute if it existed.

I understand that even if there were such a technical requirement, enforcement would be so rare as to be unheard of and as a practical matter render it the same as there being no legal obligation. I'm just wondering what legal basis if any there is for the forms assertion that recipients are obligated by law to respond.

Sent from my iPhone. Please excuse typos.

On Jul 20, 2019, at 10:11 AM, Charles H Stewart <cstewart@mit.edu> wrote:

> Here is the link to the Census Bureau press release about the test. The test has been covered in several news reports. https://www.census.gov/newsroom/press-releases/2019/2019-test-begins.html
>
> Charles Stewart III
> MIT
> Sent from my iPad
>
> Law-election mailing list

Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From:	Law-election on behalf of Levitt, Justin
To:	Gardner, James
Cc:	edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] response to Marty Lederman post on the Supreme Court"s decision about Wisconsin"s elections today
Date:	Tuesday, April 7, 2020 2:30:23 PM
Attachments:	image001.png image002.png image003.png image004.png image005.png image006.png ATT00001.txt

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Two quick points. And I've not had time to read everything written in a flurry on the Wisconsin election, so please forgive me if this point's been made already by others.

First, to Jim's post: during the presidential primaries, networks have consistently "called" states for particular candidates at the time given for "closing the polls," as if the fact of winning were more relevant than the margin of victory in a series of quasi-proportional delegate contests. But those media reports have also consistently come while voters are still in line to vote, which may well be changing voter behavior in a way that affects the final results – not only for that state, but for the delegate race as a whole. I recognize that the results of exit polls are different from officially released partial counts. But votes are currently being cast even as information emerges about how the election results seem to be stacking up. That is, voting does not currently take place in a sealed information environment, with all voters casting ballots under the veil of ignorance about the status thus far.

Second: one irony – if that's the right word -- in all of this discussion is that Wisconsin might end up getting a "delayed" election in any event. Steve Huefner has chronicled in detail [papers.ssrn.com] the various remedies available for election problems, and though (as he says, for good reason) rerun elections are quite rare, so are global pandemics radically limiting the availability of in-person polling places (and subjecting voters who brave the lines to a not-insubstantial risk of grave personal injury), and tens of thousands of absentee ballots that voters requested on time but did not arrive on time. If the ostensible margin of victory in some of the elections today is slim compared to the number of absentee ballots not timely delivered and/or radically depressed in-person turnout compared to past years, I would not be surprised to see a call for a rerun election, as a matter of constitutional due process (indeed, that may explain the "provocative footnote" Rick Hasen called out [electionlawblog.org] in the federal trial court's Wisconsin opinion on deadlines).

(As a side note: distinct from the federal constitutional issue, I'd welcome the input of those experienced in Wisconsin state law, which seems to have its own ambiguity. In 1981, the Wisconsin Supreme Court set aside an election after about 40% of the electorate were excluded from voting, "so undermin[ing] the appearance of fairness in the election that the election must be set aside." In 1983, the legislature amended the recount statute – which doesn't really deal with ballots not cast -- to purport to render Wis. Stat. 9.01 "the exclusive judicial remedy for testing the right to hold an elective office." But I don't know the extent to which the Wisconsin State Constitution would limit that 1983 legislative amendment, in cases of, as the Wisconsin Supreme Court put it, "deprivations of the right to vote [ ] so significant

in number or so egregious in character as to seriously undermine the appearance of fairness.")

Justin Levitt (he/him/his)
Associate Dean for Research
Professor of Law / Gerald T. McLaughlin Fellow

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On Apr 7, 2020, at 9:29 AM, Gardner, James <jgard@buffalo.edu> wrote:

Further to Jeff's last point, I wonder if the advent of universal voting by mail and early voting hasn't simply undermined the concept of an election "day." Seems we now have an election "period," the boundaries of which may seem quite fluid and uncertain in the public mind. Obviously, there needs to be close even to a prolonged election period, but I'm not so sure that it is obvious that the relevant date needs to correspond to the moment when in-person polling ceases. A lot might depend on the state's practice of reporting results. If we want people to vote without knowing how others have voted, and the state were to start reporting partial results immediate after the in-person polls close, then casting as vote after the polls close must be prohibited. But if the state doesn't report partial results, maybe it doesn't matter? Just thinking out loud here.

Jim

_____

James A. Gardner
Bridget and Thomas Black SUNY Distinguished Professor of Law
Research Professor of Political Science
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The State University of New York
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www.law.buffalo.edu [law.buffalo.edu]
Papers at http://ssrn.com/author=40126 [ssrn.com]

From: Law-election on behalf of Levitt, Justin
To: Dan Meek
Cc: law-election@department-lists.uci.edu
Subject: [External] Re: [EL] Rick Pildes Guest Post
Date: Thursday, July 4, 2019 10:12:27 PM
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I believe, but am not certain, that most mixed-member systems allow but do not require a party vote. So if independents do not wish to select a party in addition to selecting a local candidate, they need not do so. Seats are allotted in the legislature based on those who choose a party, and abstentions are tallied but do not affect the final calculation.

I also believe that recent political science has repeatedly shown that the vast majority of voters who are "independent" — that is, not registered as a member of a party — vote reliably for candidates of one of the two major parties. That is, most "independents" do not wish to join a party, but vote most of the time as if they were a party member. In a mixed-member system, a vote for a party is a declaration of temporary preference, but not necessarily membership.

And so my assumption — and I'd welcome empirical analysis of the assumption — is that many of Oregon's non-affiliated voters would nevertheless vote for a party even if they did not wish to belong to one.

--
Justin Levitt
justin.levitt@lls.edu

On Jul 4, 2019, at 3:56 PM, Dan Meek <dan@meek.net> wrote:

> Rick Pildes suggests " the hybrid German system, in which voter elect individual representatives from districts but there is also a party-based vote, and the overall representation reflects the correct PR outcome."
>
> In Oregon very soon the largest group of voters will be the non-affiliateds, who already comprise 33% of all registered voters. How does the German system work when lots of voters join and support no party?
>
> Dan Meek 503-293-9021 dan@meek.net 855-280-0488 fax
>
> On 7/4/2019 2:17 PM, Rob Richie wrote:
>
> > I'm pleased that this exchange is happening on Independence Day, with its special connection to our nation's founding principles -- the meaning of being created equal, how best to ensure government is grounded in the consent of the governed, and what it might mean today for the people to act "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."
> >
> > i think Rick Pildes is right to be cautious about proposals like the Fair Representation Act for Congress, and he asks good question about how the single transferable vote (ranked choice voting in multi-winner districts) might work in elections to the US House.
> >
> > At the same time, we have a lot of data to help assess his questions and similar ones, and I'm looking forward to upcoming work being organized to evaluate such questions. In 2015, FairVote oversaw an important comparative analysis involving a lot of scholars active on this list or frequently cited that suggested a system like the Fair Representation Act would be the most positively consequential change we might do - and certainly more feasible than a mixed member system in a nation where half of states have five or fewer House seats.
> >
> > What I've seen suggests strongly it won't cost more to run and win seats within such a system, that racial minority voting rights would be expanded and better protected, that fair political outcomes the norm.and that every voter in every election would participate in a meaningfully contest where their vote mattered. Living in a Maryland community where I am directly represented by five county commissioners, four state legislators and two U.S Senators (as with all state residents without great complaint), I am comfortable with not being limited to one representative per legislative body. Having more than one representative is quite common in the United States, with 41 states having at least some multi-member state legislative districts as recently as the 1950s.
> >
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> > > But none of these changes are going to happen, certainly not for the 2020 round. So for that, I still will focus on IRCs.

Best,
Rick

Richard H. Pildes
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40 Washington Sq. So.
NYC, NY 10012
212 998-6377

-----Original Message-----
From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Steven John Mulroy (smulroy)
Sent: Thursday, July 4, 2019 3:50 PM
To: law-election@department-lists.uci.edu
Subject: Re: [EL] Rick Pildes Guest Post

Rick Pildes does a good job explaining the practical tensions between partisan fairness and competitiveness, and between both and traditional districting criteria like compactness, contiguity, respect for political subdivision boundaries, and "communities of interest" (whatever that means). In my recent book Rethinking US Election Law, I argue that these tensions are inherent and irreconcilable, and reveal a fundamental flaw in our single member district, winner take all system. Thus, we should not assume that the ultimate I hope I iremedy is in independent Redistricting commissions (or IRCs, as Pildes calls them)

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I hope reformers disappointed by Rucho don't rush to judgment towards IRCs as a perceived best practice.

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From: Law-election on behalf of Pildes, Rick
To: Levitt, Justin; Dan Meek
Cc: law-election@department-lists.uci.edu
Subject: [External] Re: [EL] Rick Pildes Guest Post
Date: Friday, July 5, 2019 8:06:08 AM
Attachments: ATT00001.txt

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On this issue, also: if we did go to a hybrid system like Germany's, there would be many more parties running candidates than in our system. I think there are roughly 30 parties on the ballot in German elections (to win a seat, a party must get over the electoral threshold, which is 5% there). If you still can't bring yourself to vote for any of those 30 parties, because you think politics should never require you to make any compromises with your ideals, then you can preserve your purity by abstaining, as Justin says.

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Levitt, Justin
Sent: Thursday, July 4, 2019 10:12 PM
To: Dan Meek <dan@meek.net>
Cc: law-election@department-lists.uci.edu
Subject: Re: [EL] Rick Pildes Guest Post

I believe, but am not certain, that most mixed-member systems allow but do not require a party vote. So if independents do not wish to select a party in addition to selecting a local candidate, they need not do so. Seats are allotted in the legislature based on those who choose a party, and abstentions are tallied but do not affect the final calculation.

I also believe that recent political science has repeatedly shown that the vast majority of voters who are "independent" — that is, not registered as a member of a party — vote reliably for candidates of one of the two major parties. That is, most "independents" do not wish to join a party, but vote most of the time as if they were a party member. In a mixed-member system, a vote for a party is a declaration of temporary preference, but not necessarily membership.

And so my assumption — and I'd welcome empirical analysis of the assumption — is that many of Oregon's non-affiliated voters would nevertheless vote for a party even if they did not wish to belong to one.

--
Justin Levitt
justin.levitt@lls.edu

On Jul 4, 2019, at 3:56 PM, Dan Meek <dan@meek.net> wrote:

> Rick Pildes suggests " the hybrid German system, in which voter elect individual representatives from districts but there is also a party-based vote, and the overall representation reflects the correct PR outcome."
>
> In Oregon very soon the largest group of voters will be the non-affiliateds, who already comprise 33% of all registered voters. How does the German system work when lots of voters join and support no party?
>
> Dan Meek 503-293-9021 dan@meek.net 855-280-0488 fax
>
> On 7/4/2019 2:17 PM, Rob Richie wrote:
>
> > I'm pleased that this exchange is happening on Independence Day, with its special connection to our nation's founding principles -- the meaning of being created equal, how best to ensure government is grounded in the consent of the governed, and what it might mean today for the people to act "to institute new government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."
> >
> > i think Rick Pildes is right to be cautious about proposals like the Fair Representation Act for Congress, and he asks good question about how the single transferable vote (ranked choice voting in multi-winner districts) might work in elections to the US House.
> >
> > At the same time, we have a lot of data to help assess his questions and similar ones, and I'm looking forward to upcoming work being organized to evaluate such questions. In 2015, FairVote oversaw an important comparative analysis involving a lot of scholars active on this list or frequently cited that suggested a system like the Fair Representation Act would be the most positively consequential change we might do - and certainly more feasible than a mixed member system in a nation where half of states have five or fewer House seats.
> >
> > What I've seen suggests strongly it won't cost more to run and win seats within such a system, that racial minority voting rights would be expanded and better protected, that fair political outcomes the norm.and that every voter in every election would participate in a meaningfully contest where their vote mattered. Living in a Maryland community where I am directly represented by five county commissioners, four state legislators and two U.S Senators (as with all state residents without great complaint), I am comfortable with not being limited to one representative per legislative body. Having more than one representative is quite common in the United States, with 41 states having at least some multi-member state legislative districts as recently as the 1950s.
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Sent: Thursday, July 4, 2019 3:50 PM
To: law-election@department-lists.uci.edu
Subject: Re: [EL] Rick Pildes Guest Post

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From: Law-election on behalf of Levitt, Justin
To: Edelman, Paul; law-election@uci.edu
Subject: [External] Re: [EL] Shrinking legislatures
Date: Thursday, May 16, 2019 2:57:09 PM
Attachments: ATT00001.txt

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The 1980 "Cutback Amendment" in Illinois reduced the size of the Illinois house from 177 to 118. It also ended statewide cumulative voting in Illinois, instituting single-member districts instead (and there are a number of critiques about the fact that the latter came with the former). See, e.g., Ann Lousin, Where Are We At? The Illinois Constitution After Forty-Five Years, 48 John Marshall L. Rev. 1 (2014).

Justin

--
Justin Levitt (he/him/his)
Associate Dean for Research
Professor of Law and Gerald T. McLaughlin Fellow
Loyola Law School, Los Angeles
919 Albany St., LA, CA 90015
213-736-7417
@_justinlevitt_

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Edelman, Paul
Sent: Thursday, May 16, 2019 11:41 AM
To: law-election@uci.edu
Subject: [EL] Shrinking legislatures

I am in search of examples of legislative bodies that have shrunk, either of their own volition or by order of some superior entity. They seem to be as uncommon as shrinking university administrations. Does anyone have any examples? Thanks in advance.

Paul

Paul H. Edelman
Professor of Mathematics and Law
Vanderbilt University
paul.edelman@vanderbilt.edu
615-322-0990

From: Law-election on behalf of Jeff Wice
To: Levitt, Justin
Cc: law-election@uci.edu
Subject: [External] Re: [EL] Shrinking legislatures
Date: Thursday, May 16, 2019 3:34:00 PM
Attachments: ATT00001.txt

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I recall that the Massachusetts House downsized from 240 to 160 after a 1974 referendum.

Jeff Wice

via Newton Mail

On Thu, May 16, 2019 at 2:56 PM, Levitt, Justin <justin.levitt@lls.edu> wrote:

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> @_justinlevitt_
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Paul H. Edelman
Professor of Mathematics and Law
Vanderbilt University
paul.edelman@vanderbilt.edu
615-322-0990

From: law-election on behalf of Eric McGhee
To: Nicholas Stephanopoulos; Lewis, Justin
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Date: Tuesday, July 2, 2019 4:59:51 PM
Attachments: ATT00001.txt

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It's possible I misread the Kagan dissent, but it seemed like she talked about specific maps largely as examples and then turned to sampling when she got into actual legal standards. If Nick is correct and she feels both sampling and some other notion of fairness are required, then I have no issue with that approach. (Also, consistent with Ruth's point, I'm deliberately staying agnostic about what that notion of fairness is—I'm only asserting that there needs to be something beyond just the sampling or you can end up with some funky outcomes.)

With regard to Rick's points, a few thoughts. First, I don't think we (or at least I) ever intended for the efficiency gap approach to be either/or—we always said the state should be allowed to offer some justification, and we allowed for a pretty wide range of EG values around 0 before there was even a trigger. That made it consistent with the "policing outliers" approach discussed in this thread.

Second, the normatively desirable criteria that Kagan discusses do not in my reading include any explicit notion of symmetry. And that potentially sets up a scenario where a party can sue to force a plan closer to the median of the sampling distribution even if it violates notions of fairness (such as majority rule) that are pretty broadly shared. To me, that's problematic. The MA example differs from the one I offered because the majority party has produced a plan that **"is"** at the median of the sampling distribution. By contrast, the example that concerns me is where a party draws a plan that is far from the median but is actually much fairer according to some concept of symmetry. That makes Ruth's example of IL more apposite.

FWIW, I've always viewed sampling as a measure of intent: did the redistricting authority intend to produce the seats-votes outcome it did or could that have occurred by accident as a result of unrelated neutral criteria? Intent can absolutely be part of a larger notion of fairness, and also any legal standard. But because it makes no reference to the symmetry of the outcome itself, in my view it cannot stand alone as a complete notion of fairness because it doesn't address a major part of what most people consider unfair.

Again, if I misread Kagan's argument and she is actually open to including some concept of symmetry along with sampling, then all of this is moot. I hope that's true, since I suspect the dissent will serve as the basis for any future lawsuits that might come if the membership of the court changes to be more amenable to these sorts of legal actions.

Eric

From: Nicholas Stephanopoulos [mailto:nicholas.stephanopoulos@gmail.com]
Sent: Tuesday, July 02, 2019 12:32 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Pildes, Rick <rick.pildes@nyu.edu>; Eric McGhee <mcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

A few quick points:

1. Kagan sometimes talks about the median of computer-generated maps -- and sometimes doesn't. She criticizes the MD, OH, and PA maps based only on seat-vote data. I think a fair inference is that she thinks that *both* deviation from the median of the computer-generated distribution *and* asymmetry are problematic.

2. That view also seems reasonable to me. The case for invalidity seems strongest when a map both deviates from the median of the simulated distribution and is asymmetric. If a map only fails one of these two conditions, I don't think there would be consensus that it's normatively problematic. Take Illinois, for example, which has a nearly perfectly symmetric congressional map that's also more pro-Democratic than the median of the simulated distribution. I think many folks would balk at condemning this map, precisely because of its symmetry.

3. Both of these baselines seem like "fair outcomes" approaches to me. They just differ in what that fair outcome is: the median of the simulated distribution or symmetry. A true "fair process" approach, I would think, wouldn't look at results at all. It would solely ask whether districts complied with nonpartisan criteria, and it would condemn districts solely because of their noncompliance -- not because of what seat tallies the noncompliance yielded.

On Tue, Jul 2, 2019 at 2:08 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> And as a slight addition to Rick's point, I still think it's useful to distinguish between legal vehicles for the two normative choices. The Constitution usually privileges process rules over outcome rules. And while there are plenty of statutes that privilege process as well, to the extent that there are outcome choices in the law, I believe those are more often driven by statute.
>
> Justin
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Pildes, Rick
> **Sent:** Tuesday, July 02, 2019 11:58 AM
> **To:** Eric McGhee <mcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> Kagan's point is that the median of a sampling distribution in which each plan is *itself based on normatively desirable criteria* (indeed, the same criteria) has normative force.
>
> And Kagan does not "end up" talking about seat-vote discrepancies. She starts with them, as any sensible discussion would: when you see significant disparities, that gives reason to probe more deeply to see if those disparities are justified or not. As her discussion of MA points out (based on the simulations Moon Duchin's amicus brief reported on), MA Republicans get 35% of the votes statewide but 0 of 9 congressional seats. That might initially look unfair, but when you draw alternative maps based on the appropriate criteria, you learn that the outcome in virtually all cases remains 0 Republican seats. So you start by being worried about the seats/vote ratio but you end up not being concerned because fair plans do not generate a different partisan distribution, given how evenly R voters are spread across MA.
>
> But even though I disagree with Eric's specific substantive points, and think they are not apt descriptions or criticisms of the Kagan dissent, I do agree with the larger point I take him to be ultimately raising here. We can decide that a "fair process" is one based on various normative criteria for how districts should be designed, regardless of the outcomes those process produce in terms of seat/vote measures. Or we can decide that a "fair system" should produce outcomes that honor partisan symmetry, even if that means overriding lots of other potentially valuable normative criteria for how districts should be designed.
>
> Ultimately, there is a normative choice that must be made between these two options (or the appropriate balance between the two). Kagan is most naturally read to be endorsing the former, "fair process" position. It is not an internal criticism of Kagan's approach to say sometimes this will not produce "fair outcomes." As her discussion of MA indicates, she does not think it is unfair that Rs in MA get 0 seats with 35% of the vote. The kind of criticism Eric is making -- and that his efficiency gap metric makes -- is an external criticism -- it's an argument that Kagan (or we) should adopt a "fair outcome" measure instead.
>
> Best,
> Rick
>
> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
> NYU School of Law
> 40 Washington Sq. So.
> NYC, NY 10012
> 212 998-6377
>
> ---
>
> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Eric McGhee
> **Sent:** Tuesday, July 2, 2019 2:26 PM
> **To:** Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not an attorney so I can't offer an opinion on the legal issues here. But in my mind the absence of symmetry in Kagan's dissent is problematic from a logical standpoint. The pure sampling approach she advocates is great for the cases that have been in front of us: PA, NC, WI, etc. These are cases where the median outcome in the sampling is pretty fair, and the adopted plan is an unfair one way out in the tails of the distribution. But imagine if the median is pretty **"unfair"**—say, a plan that gives the majority party 40 percent of the seats for 55 percent of the vote. Could a minority party sue to force the median plan, or does this majority party have the right to draw a plan out in the tails—like one that gives them 55 percent of the seats instead? In my opinion, it's absurd to say the median of a sampling distribution has any per se normative force, which is why Kagan ends up talking about seats-votes discrepancies. She has a symmetry-ish notion of fairness in her head whether she knows it or not. (I suspect she does know it, and also knows it's not worth fighting to promote her particular version at this point.)
>
> Would the solution offered in the Kagan dissent be a disaster? No. It would definitely be an improvement on the status quo. Would the court eventually have to address symmetry-type issues anyway? Probably.Eric
>
> ---
>
> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Chambers, Hank
> **Sent:** Sunday, June 30, 2019 6:34 AM
> **To:** Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> It is fair to say every justice believes that extreme partisan gerrymandering is thoroughly inconsistent with important constitutional principles. To some, inconsistency with constitutional principles is the definition of unconstitutionality; to others, it is not. I suspect some of the justices who agree extreme partisan gerrymandering is inconsistent with important constitutional principles do not believe that extreme partisan gerrymandering violates the Constitution.
>
> Many actions may be inconsistent with important constitutional principles, but not unconstitutional.
>
> -Hank
>
> Henry L. Chambers, Jr.
> Austin E. Owen Research Scholar and Professor of Law
> University of Richmond School of Law
> 203 Richmond Way
> Richmond, Va. 23173
> (804) 289-8199
> hchamber@richmond.edu
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> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Smith, Brad <BSmith@law.capital.edu>
> **Sent:** Saturday, June 29, 2019 10:18 PM
> **To:** Nicholas Stephanopoulos
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not sure that every justice has made that decision at all, but for argument's sake, it doesn't much affect my point--the Constitution protects against some forms of political equality in some cases. It's a big jump from there to "therefore gerrymandering--as defined by symmetry, efficiency gaps, or any other particular criteria-- is unconstitutional."
>
> *Bradley A. Smith*
> *Josiah H. Blackmore II/Shirley M. Nault*
> *Professor of Law*
> *Capital University Law School*
> *303 E. Broad St.*
> *Columbus, OH 43215*
> *614.236.6317*
> http://law.capital.edu/faculty/bios/bsmith.aspx
>
> ---
>
> **From:** Nicholas Stephanopoulos [nicholas.stephanopoulos@gmail.com]
> **Sent:** Saturday, June 29, 2019 10:02 PM
> **To:** Smith, Brad
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> - - - - - - - - - - - - - -
> ** [This email originated outside of Capital University] **
> - - - - - - - - - - - - - -
>
> But that's a jump the Court has already made. Every Justice agrees that sufficiently extreme gerrymandering is unconstitutional. The only debate is whether it's possible to distinguish constitutional from unconstitutional gerrymandering.
>
> On Sat, Jun 29, 2019 at 8:38 PM Smith, Brad <BSmith@law.capital.edu> wrote:
>
> > The Constitution protects against some forms of political inequality in some cases. There is a very, very, very big jump in going from "the Constitution protects political equality" to "therefore gerrymandering is unconstitutional."
> >
> > *Bradley A. Smith*
> > *Josiah H. Blackmore II/Shirley M. Nault*
> > *Professor of Law*
> > *Capital University Law School*
> > *303 E. Broad St.*
> > *Columbus, OH 43215*
> > *614.236.6317*
> > http://law.capital.edu/faculty/bios/bsmith.aspx
> >
> > ---
> >
> > **From:** Law-election [law-election-bounces@department-lists.uci.edu] **on behalf of** Michael Latner [mlatner@calpoly.edu]
> > **Sent:** Saturday, June 29, 2019 4:08 PM
> > **To:** law-election@department-lists.uci.edu
> > **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
> >
> > - - - - - - - - - - - - - -
> > ** [This email originated outside of Capital University] **
> > - - - - - - - - - - - - - -
> >
> > Nick, Guy, Marc and others raise important points that I believe highlight a tension between the legal and scientific theory employed in gerrymandering cases. On the one hand the legal consensus is that the Constitution protects political equality but does not require PR as a remedy, so we (social scientists) employ metrics that are alternatives to proportionality.
> >
> > On the other hand, social choice theory shows that equally weighted votes do indeed imply proportional outcomes. And the racial gerrymandering case remedies imply this as well if viewed from the level of the state. Perhaps this is the underlying reason so many legal academics are focusing on the quantitative work, because it has yet to be fully engaged within legal theory.
> >
> > One reason I was particularly impressed by the Gaddie/Grofman brief that essentially reformulated the Gingles Test for partisan gerrymandering, going under the hood of asymmetry to define what it looks like sub-state (as Kagan did in her dissent), was that it pointed out that dilution is dilution, and single-seat systems provide a uniform method of reducing bias (though one that will still fall short of proportionality).
> >
> > Michael Latner, Ph.D.
> > Associate Professor of Political Science
> > California Polytechnic State University, San Luis Obispo
> > www.michaellatner.com
> >
> > Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty
> >
> > ---
> >
> > **From:** Law-election <law-election-bounces@department-lists.uci.edu> on behalf of law-election-request@department-lists.uci.edu <law-election-request@department-lists.uci.edu>
> > **Sent:** Saturday, June 29, 2019 12:00 PM
> > **To:** law-election@department-lists.uci.edu
> > **Subject:** Law-election Digest, Vol 98, Issue 32
> >
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When replying, please edit your Subject line so it is more specific
than "Re: Contents of Law-election digest..."

Today's Topics:

1. Partisan gerrymandering and state courts: discover your inner Federalist! (Wang, Samuel S.)
2. symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
3. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Nicholas Stephanopoulos)
4. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
5. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
6. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
7. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Michael Parsons)
8. more news 6/28/19 (Rick Hasen)
9. Re: Equalizing CVAP without citizenship question (Jeff Wice)
10. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Greg Warrington)
11. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
12. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
13. Scalia's Last Laugh (Michael Latner)
14. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Chambers, Hank)
15. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Mark)

Message: 1
Date: Fri, 28 Jun 2019 19:43:14 +0000
From: "Wang, Samuel S." <sswang@Princeton.EDU>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Partisan gerrymandering and state courts: discover your inner Federalist!
Message-ID:
<BN8PR04MB6020AF1D8F6F2325A1A1EC8C8FC0@BN8PR04MB6020.namprd04.prod.outlook.com>

Content-Type: text/plain; charset="iso-8859-1"

Dear Law-election Digest colleagues:

The Supreme Court decisions in Rucho v. Common Cause and Benisek v. Lamone are a severe disappointment, of course. But they left a second avenue wide open, and even invited it: state courts.

In a forthcoming article in the University of Pennsylvania Journal of Constitutional Law, my colleagues Rick Ober, Ben Williams, and I review the provisions for bringing such a lawsuit in all fifty states: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622

In this article, we catalogue provisions that resemble the First-Amendment-like freedoms of association, Fourteenth-Amendment-like equal protections, and other protections such as "free and fair elections" clauses. Overall, we see many promising avenues. In addition, we review close to a hundred cases in which state laws or constitutions were used to force the redrawing of district lines. So there is ample precedent for taking a federalist path.

Warm regards,

Sam

>>>

Samuel S.-H. Wang, Ph.D.

Professor, Neuroscience Institute

Director, Gerrymandering Project

Princeton University

Princeton, NJ 08544

Neuroscience: synapse.princeton.edu

Elections: election.princeton.edu

Redistricting: gerrymander.princeton.edu

------------ next part ------------
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Message: 2
Date: Fri, 28 Jun 2019 20:08:22 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Levitt, Justin" <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Message-ID:
<0C6C9D5F39B7B4DAB90B9928F227EAEAGEXC06@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
Sudler Family Professor of Constitutional Law
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NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could lead to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4833484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

--
Rick Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law
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http://www.law.uci.edu/faculty/full-time/hasen<https://urldefense.proofpoint.com/v2/url?u=https-3A__linkprotect.cudasvc.com_url-3Fa-3Dhttp-253a-252f-252fwww.law.uci.edu-252ffaculty-252ffull-2Dtime-252fhasen-252f-26c-3DE-2C1-2CatVSaqz0R2vqtBS37fCZOFPX58ZRU-2D16hFdnt128sfSVFFWLXvDTIReOnCOd8i6SOi11mYoJU7mTIRu0s6Ax-2Fq3qwcxMycvRurVI9hNZOACeKM-5Fs1eYAt-26tvm-3D1Rd-2DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=v3uo9hpMizqP1TBKwLvSYT-_tyoyaOkdhkRAclqHRk&m=YBlwV86RY-mwyXs6ufq6g2w2XbnyY2mbCqnnM56JoOOs&s=sMVSVmLZKuE-YVQpnXONRyuPMM5dcbTWcdfqLPs9ds0&e=>
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[signature_1987881029]

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Message: 3
Date: Fri, 28 Jun 2019 15:29:40 -0500
From: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Message-ID:
<CAKZh_81VmqH44bvVO-_DH+mT0Gaoho4U78hu1S95e-dV+z4CPM8w@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Though note that Kagan extensively discusses the seat and vote figures from which asymmetry metrics are calculated -- and not just in order to compare these figures to the performance of the computer-generated maps.

In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote.

In 2016, Republican congressional candidates won 10 of North Carolina?s 13 seats, with 53% of the statewide vote. Two years later,Republican candidates won 9 of 12 seats though they received only 50% of the vote.

In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats.

Take Pennsylvania. In the three congressional elections occurring under the State?s original disctricting plan (before the State Supreme Court struck it down), Democrats receivedbetween 45% and 51% of the statewide vote, but won only5 of 18 House seats.

Or go next door to Ohio. There, in four congressional elections, Democrats

tallied between 39% and 47% of the statewide vote, but never won more than
4 of 16 House seats.

On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

> In light of the exchanges here about how much attention symmetry tests did
> or didn?t receive in the Roberts opinion, it seems odd not to mention that
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>
> Best,
>
> Rick
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>
> Richard H. Pildes
>
> Sudler Family Professor of Constitutional Law
>
> NYU School of Law
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> 40 Washington Sq. So.
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> NYC, NY 10012
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> 212 998-6377
>
>
>
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> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
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> --
>
> Rick Hasen
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> <https://urldefense.proofpoint.com/v2/url?u=https-3A__linkprotect.cudasvc.com_url-3Fa-3Dhttp-253a-252f-252fwww.law.uci.edu-252ffaculty-252ffull-2Dtime-252Fhasen-252F-26c-3DE-2C1-2CqdV5aqz0B2vq0S376CZOFPSX0ZRU-2D16bFdzn12bdSVFFWLXvDTIBaOmCOd8S5O11mYo0U7mTBu0e6Ax7F3qtscxMyvvRuVTBbNZQACu6KM-5FxJqYAz-26sysu-3D1&d-3DwMFaQ&c-3DclrB7dIE8n7gRJheO0g-2QKwvx3uz9kpMirqP1TBKwLv3YT-2DyyraOkdnhkRAclqHIB&m-3DRwV86RY-2Dmvy5xfqifg2w2X8mvY2mbCzppnM56JpOOnKs-2DVzFWZ-2DzC6-2Dwh3MuDaNzNIHBkJT2mzXfCEujx9uKA&e-3D>

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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/5fedfcea/attachment-0001.html>
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Message: 4
Date: Fri, 28 Jun 2019 20:36:50 +0000
From: "Gary-Uriel E. Charles" <lhachar@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <21B0B9F9-D5DE-42BF-BBCB-F9372E65DF48@law.duke.edu>
Content-Type: text/plain; charset="us-ascii"

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law.election@uci.edu<mailto:law.election@uci.edu>>
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Message: 5
Date: Fri, 28 Jun 2019 21:23:56 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law.election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<9F5C3D5F39B78ADAB9080920BF227EAE6E2313@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="us-ascii"

Guy,
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From: Goy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu>
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Message: 6
Date: Fri, 28 Jun 2019 21:26:25 +0000
From: "Goy-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law.election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID: <C9A3A04A-AD5E-4AD3-BC84-C77EA13516C1@law.duke.edu>
Content-Type: text/plain; charset="us-ascii"

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Cc: Election Law Listserv <law.election@uci.edu<mailto:law.election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own prizes. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 7
Date: Fri, 28 Jun 2019 18:31:49 -0400
From: Michael Parsons <pmichael@pwrstems.net>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAEBUvCHWO27=ufhJXYPQPEqNHXs60ehrk9qfLxzCBn6KWaw5c7g@mail.gmail.com>
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To be honest, I think Nick's earlier point -- i.e., that Roberts' opinion
is fundamentally disingenuous in its arguments and reasoning -- maybe
addresses this point too. Roberts feigned ignorance about the meaning of
the outlier method and he feigned ignorance about symmetry, but he also
took "partisan advantage is a legitimate/permissible interest" as a
starting point for his analysis even though the legal/theoretical arguments
contesting this assumption were before him as well (both in the briefs and
in the underlying legal scholarship). Kagan points out in her dissent that
this assumption is unjustified and that all of the "neutral" examples of
"competing visions of electoral fairness" differ in type, not degree.
Roberts attempts to ground this starting-point assumption in precedent
(e.g., *Gaffney*) so that he doesn't have to try and justify it on its own
terms, but (1) the precedent doesn't truly support this position (as
Levitt, Kang, and I have argued), and (2) given the contested state of the
law, the majority could have decided otherwise in *Rucho* anyway since the
arguments were before it.

At the end of the day, I think Roberts wanted this outcome, and so he said
whatever he felt he needed to say, and he declined to engage with any
arguments that might complicate that outcome. I think both the lawyers
involved and the underlying scholarship (legal and otherwise) split in
different directions based on reasonable disagreements over theoretical
first principles *and* lawyering strategies, but the majority opinion
ignores the inconvenient parts from all camps while focusing on the
weaknesses of all camps in a way that's internally inconsistent and
dishonest in its portrayal of what those in each camp were arguing.

Apologies for the cruciun -- reading this opinion really got to me.

On Fri, Jun 28, 2019 at 5:27 PM Goy-Uriel E. Charles <charles@law.duke.edu>
wrote:

> My point is not about lawyering. It?s about scholarship and specifically
> about legal scholarship.
>
> On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> Goy,
> As part of the Common Cause legal team in the North Carolina case, I can
> tell you that the work of Michael Kang and Justin Levitt significantly and
> directly influenched the structure of arguments Common Cause made.
>
>
> *From:* Goy-Uriel E. Charles [mailto:charles@law.duke.edu
> <charles@law.duke.edu>]
> *Sent:* Friday, June 28, 2019 4:37 PM
> *To:* Pildes, Rick <rick.pildes@nyu.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry got no shrift at all in Justice Kagan's
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> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
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> 212 998-6377
>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu
> <law-election-bounces@department-lists.uci.edu>] *On Behalf Of *Nicholas
> Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <lawelection@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
>
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> *Sent:* Thursday, June 27, 2019 9:46 PM
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>
> --
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Message: 8
Date: Fri, 28 Jun 2019 22:31:30 +0000
From: Rick Hasen <chasen@law.uci.edu>
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] more news 6/28/19
Message-ID: <BT3D0C23-A5E8-4E42-BD37-855576EB7C86@law.uci.edu>
Content-Type: text/plain; charset="utf-8"

Florida Governor Signs SB 7066, Making It Harder for Felons Who Have Completed Time Served to Get Their Voting Rights Restored, And Thinks Amendment 4, Restoring Such Rights, Was Too Generous<https://electionlawblog.org/?p=105866>
Posted on June 28, 2019 3:30 pm<https://electionlawblog.org/?p=105866> by Rick Hasen<https://electionlawblog.org/?author=3>

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I am sure the lawsuits will be filed almost immediately.
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<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105866&title=Florida%20Governor%20Signs%20SB%207066%2C%20Making%20It%20Harder%20for%20Felons%20Who%20Have%20Completed%20Time%20Served%20to%20Get%20Their%20Voting%20Rights%20Restored%2C%20And%20Thinks%20Amendment%204%2C%20Restoring%20Such%20Rights%2C%20Was%20Too%20Generous>
Posted in felon voting<https://electionlawblog.org/?cat=66>

Justice Thomas?s Ugly Accusation (Joined by Justices Gorsuch and Kavanaugh) in the Census Case<https://electionlawblog.org/?p=105862>
Posted on June 28, 2019 12:38 pm<https://electionlawblog.org/?p=105862> by Rick Hasen<https://electionlawblog.org/?author=3>

Others have made<https://twitter.com/mjs_DC/status/1144359892158951424> this point, but I wanted to flag this gratuitous and unsupported impugning of district court judge Furman in the census case<https://www.supremecourt.gov/opinions/18pdf/18-966_3ep7c.pdf>. Thomas painted Furman as a conspiracy theorist in his partial dissent (joined by Gorsuch and Kavanaugh):

The District Court?s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 5677572, 6607664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard andPwith a jar of pins and a spool of string?create an eye-catching conspiracy web. Cf. id., at 662 (inferring ?from the various ways in which [the Secretary] and his aides acted like people with something to hide that they did have something to hide?). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary?s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.
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Posted in census litigation<https://electionlawblog.org/?cat=125>, Supreme Court<https://electionlawblog.org/?cat=29>

?Why the Supreme Court?s Rulings Have Profound Implications for American Politics?<https://electionlawblog.org/?p=105860>
Posted on June 28, 2019 11:47 am<https://electionlawblog.org/?p=105860> by Rick Hasen<https://electionlawblog.org/?author=3>

Michael Wines for the NYT <https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html>:
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105860&title=%E2%80%9CWhy%20the%20Supreme%20Court%E2%80%99s%20Rulings%20Have%20Profound%20Implications%20for%20American%20Politics%E2%80%9D>
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?With No Supreme Court End to Gerrymandering, Will States Make It More Extreme??<https://electionlawblog.org/?p=105858>
Posted on June 28, 2019 11:18 am<https://electionlawblog.org/?p=105858> by Rick Hasen<https://electionlawblog.org/?author=3>

NYT<https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html>:

Thursday?s 5-4 ruling means that North Carolina?s current Republican-drawn map delineating its 13 Congressional districts ? a map that critics have said is among the country?s most egregious examples of hyper-partisanship ? will stand. The decision could also embolden lawmakers around the country to continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105858&title=%E2%80%9CWith%20No%20Supreme%20Court%20End%20to%20Gerrymandering%2C%20Will%20States%20Make%20It%20More%20Extreme%3F%E2%80%9D>
Posted in Uncategorized<https://electionlawblog.org/?cat=1>

The Erasure of Racial Vote Dilution Doctrine<https://electionlawblog.org/?p=105855>
Posted on June 28, 2019 10:18 am<https://electionlawblog.org/?p=105855> by Nicholas Stephanopoulos<https://electionlawblog.org/?author=12>

I?ll have more to say about the Court?s appalling opinion in Rucho in Rick?s symposium next week. But I want to flag one point now: the Court?s erasure of racial vote dilution doctrine. This is the doctrine that allows groups of minority voters to challenge electoral arrangements (including district lines) on the ground that the policies dilute the plaintiffs? votes. When such claims are brought under the Constitution, they require both discriminatory intent and discriminatory effect in the form of cracking and packing that reduce the plaintiffs? electoral influence. And crucially, the claims can be brought under the Constitution, not just the Voting Rights Act. Landmark precedents like White v. Regester and Rogers v. Lodge involve exclusively constitutional?and successful?racial vote dilution suits.

But you wouldn?t know any of this from Rucho. The Court discussed the two other kinds of redistricting claims that can be raised under the Constitution: one person, one vote, and racial gerrymandering. According to the Court, neither of these theories supports the justiciability of partisan gerrymandering claims. That?s because one person, one vote is an individualistic theory from which claims about group power can?t be derived, while racial gerrymandering suits don?t ?ask for a fair share of political power and influence,? with all the justiciability conundrums that entails.? In contrast, the Court didn?t say a word about racial vote dilution. It didn?t cite White or Rogers or any other racial vote dilution decision. It didn?t mention the standard for liability in those cases. It didn?t even acknowledge that the doctrine exists.

This omission couldn?t have been accidental. In their briefs, the plaintiffs focused relentlessly on racial vote dilution precedents, arguing that they provided an analytical structure that could be used for partisan gerrymandering claims too. As the League of Women Voters plaintiffs put it, ?but [partisan gerrymandering claims] are not political questions . . . follows from the undisputed justiciability of racial vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not.? It was thus bitterly ironic when the Court asserted that ?Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.? After all, that was never Appellees? contention. Their actual argument, which the Court studiously refused to acknowledge, was that if the Court can adjudicate racial vote
 dilution claims, it can also assess analytically identical partisan gerrymandering claims.

Why did the Court refuse to recognize the plaintiffs? actual position? Probably because of its force. The parallels between partisan vote dilution and racial vote dilution go on and on, and make it impossible to distinguish between the doctrines? justiciability. First, both doctrines require proof of discriminatory intent. Second, the vote dilution condemned by both doctrines operates through the cracking and packing of groups of disfavored voters. Third, this dilution can only occur when members of both the favored and disfavored groups are politically cohesive. Fourth, the dilution can only be discerned by looking beyond the boundaries of a single district to the entire region where the disfavored group?s influence is abridged. And fifth, and most fundamentally, both claims ?ask for a fair share of political power and influence? for the targeted group. Both claims, that is, ask for the very thing that, in the Court?s view, poses unsolvable ?justiciability conundrums.?

Rucho?s silence about racial vote dilution, then, is extremely ominous. Does the Court no longer believe the doctrine exists? If so, decades of precedent would have to be discarded and the constitutional foundation of Section 2 of the Voting Rights Act would crumble into nothing. Or, only slightly less radically, does the Court think the doctrine exists but is nonjusticiable because it too involves ?reallocating power and influence between political [groups]?? Then constitutional racial vote dilution claims would be unavailable but Section 2 suits might still be allowed to proceed. Or, probably most plausibly, did the Court fail to mention the doctrine because its existence complicated the Court?s effort to shut the door on partisan gerrymandering claims? Then these dire consequences wouldn?t necessarily follow?but Court?s bad faith would be crystal clear. It?s the epitome of motivated, lawless reasoning to ignore a whole body of precedent just because it points in an awkward direct
 on.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105855&title=The%20Erasure%20of%20Racial%20Vote%20Dilution%20Doctrine>
Posted in Uncategorized<https://electionlawblog.org/?cat=1>

?The Census Decision: Institutional Realism, Institutional Formalism, and Judicial Review?<https://electionlawblog.org/?p=105848>
Posted on June 28, 2019 9:57 am<https://electionlawblog.org/?p=105848> by Richard Pildes<https://electionlawblog.org/?author=7>

Yesterday at the Balkinization blog, I put up this<https://balkin.blogspot.com/2019/06/the-census-decision-institutional.html> perspective on the Court?s Census decision. Here is a bit of that analysis:

Today?s decision in the Census case is a powerful example of what I call an ?institutionally realist? approach to judicial review of executive branch action. The Court not only probed deeply beneath the surface of the formal administrative record, which it rarely does, to conclude that the administration?s justification for the citizenship question was ?contrived? and pretextual.

In various other ways, the Court concluded that the ?unusual circumstances? of the case warranted the approach the Court was taking. For example, the Court also concluded that, even though the district judge was wrong to permit discovery outside the record at the stage he did so, it turned out after the fact that there were good reasons for doing, and the Court was therefore willing to rely on the information generated in this way. That the stakes are far higher regarding the Census than ordinary administrative law issues undoubtedly played a major role in why the Court was willing to approach the case as it did. The ?unusual circumstances? that justified a more aggressive application of administrative-law doctrines were thus a realistic recognition of the (1) magnitude of the issues and (2) the signs that there was nothing regular about the processes that led to the Commerce Department?s decision.

I want to put this way of looking at the Census decision in a larger context concerning how courts review the actions of governmental institutions more generally. Back before the Trump administration was a gleam in the eye of American politics, I wrote an article called Institutional Formalism and Realism in Constitutional and Public Law<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411141>. I mention when the piece was written to indicate that it was not written [or gerrymandered] for the Trump administration. But I think it frames the central, underlying issue the courts confront in reviewing many of the actions of the Trump administration, including in today?s Census case.

The central idea of Institutional Formalism and Realism is that, when courts are called up to judge the actions of other governmental institutions or actors, they implicitly confront a choice about whether to adopt a more formalist or more realist stance towards the institution or actor involved. When courts are institutionally formalist, they treat the government institution involved largely as a black box, to which the Constitution (or other sources of law) allocate specific powers or functions. In this mode, courts do not open up that black box to attempt to make more realist assessments of what underlies the way those institutions exercise their powers at any particular moment in time, or how those institutions might function differently in different eras.

This is reflected in doctrines like ?the presumption of regularity,? which courts ordinarily apply in reviewing agency action ? and which Justice Thomas relies heavily on in his critical dissent today. Institutional realism entails the opposite stance: in assessing the legality of government decision-making, courts do take into account their judgments about how specific institutions are actually functioning (or failing to function) at particular moments in time. ?

Today?s Census decision, and the conflict between Chief Justice Roberts and Justice Thomas? dissent, nicely illustrates how strongly this tension between institutional formalism and realism underlies major Court decisions. But the tension is pervasive and inescapable.
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Posted in Uncategorized<https://electionlawblog.org/?cat=1>

?Trump jokes to Putin: ?Don?t meddle in the election??<https://electionlawblog.org/?p=105847>
Posted on June 28, 2019 9:44 am<https://electionlawblog.org/?p=105847> by Rick Hasen<https://electionlawblog.org/?author=3>

Politico<https://www.politico.com/story/2019/06/28/trump-putin-meeting-1386123>:

Trump spoke to reporters briefly before he and Putin were scheduled to talk for an hour to discuss a series of national security issues, including Iran?s recent aggression<https://www.politico.com/story/2019/06/27/trump-iran-nuclear-deal-1385148>, the civil war in Syria, where the United States and Russia are backing opposing sides, and a new arms control treaty with China.

When Trump did not bring up to reporters whether he would mention election interference, a reporter asked him if he would talk to Putin about it.

?Yes, of course I will,? Trump told reporters. Then he turned to Putin, smiling and wagging his finger in the Russian president?s direction at one point, and said: ?Don?t meddle in the election, president. Don?t meddle in the election.?

But it?s unclear whether Trump actually pressed Putin on Mueller?s findings. A readout from the White House did not include the subject
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Posted in fraudulent fraud squad<https://electionlawblog.org/?cat=6>

?Editorial: N.C. can and must act for fair districts even if high court won?t stop gerrymandering?<https://electionlawblog.org/?p=105845>
Posted on June 28, 2019 9:38 am<https://electionlawblog.org/?p=105845> by Rick Hasen<https://electionlawblog.org/?author=3>

WRAL editorial: <https://www.wral.com/editorial-n-c-can-and-must-act-for-fair-districts-even-if-high-court-won-s-stop-gerrymandering/18478285/>
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105845&title=%E2%80%9CEditorial%3A%20N.C.%20can%20and%20must%20act%20for%20fair%20districts%20even%20if%20high%20court%20won%E2%80%99t%20stop%20gerrymandering%E2%80%9D>
Posted in Uncategorized<https://electionlawblog.org/?cat=1>

Thank You to Peter Overby<https://electionlawblog.org/?p=105843>
Posted on June 28, 2019 9:28 am<https://electionlawblog.org/?p=105843> by Rick Hasen<https://electionlawblog.org/?author=3>

Peter is retiring as the Money and Politics reporter at NPR after a great run. I?ve always benefitted from Peter?s tenacity and his excellent reporting skills.

Happy Retirement and we will miss you on the beat!
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Message: 9
Date: Fri, 28 Jun 2019 18:35:04 -0400
From: Jeff Wice <jjwice@gmail.com>
To: Douglas Johnson <djohnson@ndcresearch.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Equalizing CVAP without citizenship question
Message-ID: <3f69fbc9-8f5f-4c7e-a8e8-3b2543f3d449@gmail.com>
Content-Type: text/plain; charset="utf-8"

The Census Bureau informed participants at a recent National Conference of State Legislatures (NCSL) redistricting seminar that it has been asked by the Commerce Department to look into providing citizenship data derived from the ACS in the PL 94-171 datafile provided to the states. No decision has yet been made.
I recently came upon an expert statement submitted to a New York federal district court by the late Tom Hofeller where he said: "When the Census Bureau initiated the ACS process, it was made clear that the ACS data were not intended for use in redistricting and were certainly not included in the details? small area tabulations to be released in conjunction with the Public Law 94-171 data generated for the Census Bureau?s Redistricting Data Program.?
Tom elaborated on this in detail in his report submitted to the New York eastern district federal court in the case Boone et al v. Nassau County Legislature et al (see document no. 44-4 in case 2:11-cv-02712). Readers who are interested in reading the entire explanation can email mail me directly for a copy.
Jeff Wice
via Newton Mail [https://cloudmagic.com/k/d/mailapp?ct=dk&cv=10.0.188&pv=10.14.5&source=email_footer_2]
On Thu, Jun 27, 2019 at 10:50 PM, Douglas Johnson <djohnson@ndcresearch.com> wrote:
All of those options include both measurable and unmeasurable margins of error, the former of which could be calculated and used to determine the odds that all the districts are within the allowed spread. For Congress, that?s near-impossible. It might work for some legislative plans.
- Doug
On Thu, Jun 27, 2019 at 6:53 PM Kogan, Vladimir < kogan.1@osu.edu [kogan.1@osu.edu] > wrote:
Relatedly, is there anything that would prevent the Trump administration from directing the Census Bureau to put out block level CVAP estimates by appending Census counts to other administrative data (which critics of the citizenship questions have argued all along provide more accurate citizenship info) for easy redistricting use?

From: Kogan, Vladimir
Sent: Thursday, June 27, 2019 9:15 PM
To: Election Law Listserv < law-election@uci.edu [law-election@uci.edu] >
Subject: Equalizing CVAP without citizenship question

Question: Suppose that (1) the citizenship question stays off the 2020 census and (2) at least one state decides to redistrict by equalizing CVAP anyway using the American Community Survey citizenship estimates (combined with the 2020 population counts).

Have any courts ruled on the question of how to navigate population equality requirements with data subject to considerable statistical uncertainty due to sampling? I know CVAP is used all the time in the context of VRA compliance; are there any cases from that area that speak to this question? (I realize Evenwel left open the question of whether equalizing CVAP was permissible, but it seems like there are five votes on that question.)

Thanks!

Vlad

Vladimir Kogan , Associate Professor
Department of Political Science

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- Doug

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Message: 10
Date: Fri, 28 Jun 2019 21:07:32 -0400
From: Greg Warrington <gregory.warrington@uconn.edu>
To: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <20190629010731.GC28077@gowarrin-XPS-13-9350>
Content-Type: text/plain; charset=utf-8

Unfortunately, the bare recitation of seats-votes outcomes plays into
the narrative of the majority that a gerrymander exists through the
resulting deviation from proportionality.

On Fri, Jun 28, 2019 at 03:29-409M -0500, Nicholas Stephanopoulos wrote:
> Though note that Kagan extensively discusses the seat and vote figures from
> which asymmetry metrics are calculated -- and not just in order to compare
> these figures to the performance of the computer-generated maps.
>
> ----------
>
> In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
> House of Representatives, although they received only 49% of the statewide
> vote. In 2014, Republican candidates increased their total to 10 of the 13
> seats, this time based on 55% of the vote.
>
> In 2016, Republican congressional candidates won 10 of North Carolina?s 13
> seats, with 53% of the statewide vote. Two years later,Republican
> candidates won 9 of 12 seats though they received only 50% of the vote.
>
> In the four elections that followed (from 2012 through 2018), Democrats
> have never received more than 65% of the statewide congressional vote. Yet
> in each of those elections, Democrats have won (you guessed it) 7 of
> 8 House seats.
>
> Take Pennsylvania. In the three congressional elections occurring under the
> State?s original districting plan (before the State Supreme Court struck it
> down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
> only5 of 18 House seats.
>
> Or go next door to Ohio. There, in four congressional elections, Democrats
> tallied between 39% and 47% of the statewide vote, but never won more than
> 4 of 16 House seats.
>
> On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:
> >
> > In light of the exchanges here about how much attention symmetry tests did
> > or didn?t receive in the Roberts opinion, it seems odd not to mention that
> > these tests received *no *attention at all in Justice Kagan?s dissent.
> > When she lays out her approach for how the courts should determine when
> > unconstitutional partisan gerrymandering has occurred, she relies entirely
> > on the use of alternative, non-partisan maps to determine whether an
> > enacted plan is enough of an outlier to be unconstitutional (of course,
> > direct evidence of intent is also relevant).
> > >
> > >
> > >
> > > The only time she even mentions symmetry tests is in note 4, to which she
> > > relegates a brief description of the District Court?s additional reliance
> > > on such tests. Even then, she does not actually say anything about whether
> > > she endorses this approach. The note just provides a brief description of
> > > what the District Court did.
> > >
> > >
> > >
> > > Best,
> > >
> > > Rick
> > >
> > >
> > >
> > > Richard H. Pildes
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> > >
> > > *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> > > *On Behalf Of *Nicholas Stephanopoulos
> > > *Sent:* Friday, June 28, 2019 11:44 AM
> > > *To:* Levitt, Justin <justin.levitt@lls.edu>
> > > *Cc:* Election Law Listserv <law-election@uci.edu>
> > > *Subject:* Re: [EL] symmetry really got short shrift in Rucho
> > >
> > >
> > >
> > >
> > > He clearly understood; see all his passages in *Whitford* last year
> > > discussing symmetry. But that was a concept in which Kennedy was
> > > interested, not Roberts. So with Kennedy off the Court, Roberts could just
> > > return to calling everything proportionality if it involved seats and votes
> > > (much like Scalia did in *Vieth*).
> > >
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> > > ---------------------
> > >
> > >
> > >
> > >
> > > Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> > > proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> > > the two major political parties ?would fare hypothetically if they each . .
> > > . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> > > KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> > > ?adopting a constitutional standard that invalidates a map based on unfair
> > > results that would occur in a hypothetical state of affairs.? Id., at 420.
> > > Aside from that problem, he wrote,the partisan bias standard shed no light
> > > on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> > > therefore concluded that ?asymmetry alone is not a reliable measure of
> > > unconstitutional partisanship.? Ibid.
> > >
> > >
> > >
> > > Justice Stevens would have found that the Texas map was a partisan
> > > gerrymander based in part on the asymmetric advantage it conferred on
> > > Republicans in converting votes to seats. Id., at 4667467, 471473 (opinion
> > > concurring in part and dissenting in part). Justice Souter, writing for
> > > himself and JUSTICE GINSBURG, noted that he would not ?role out the utility
> > > of a criterion of symmetry,? and that ?further attention could be devoted
> > > to the administrability of such a criterion at all levels of redistricting
> > > and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> > > in part).
> > >
> > >
> > >
> > >
> > > Third, the plaintiffs offered evidence concerning the impact that Act 43
> > > had in skewing Wisconsin?s statewide political map in favor of Republicans.
> > > This evidence, which made up the heart of the plaintiffs? case, was derived
> > > from partisan-asymmetry studies similar to those discussed in LULAC. The
> > > plaintiffs contend that these studies measure deviations from ?partisan

> > symmetry,? which they describe as the ?social scientific tenet that
> > [districting] maps should treat parties symmetrically.? Brief for Appellees
> > 37.
> >
> >
> >
> > We need not doubt the plaintiffs? math. The difficulty for standing
> > purposes is that these calculations are an average measure. They do not
> > address the effect that a gerrymander has on the votes of particular
> > citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> > something else en- tirely: the effect that a gerrymander has on the
> > fortunes of political parties.
> >
> >
> >
> >
> >
> > On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> > wrote:
> >
> > A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> > require proportionality? is a handy strawman.
> >
> >
> >
> > *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> > Behalf Of *Rick Hasen
> > *Sent:* Thursday, June 27, 2019 9:46 PM
> > *To:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* [EL] symmetry really got short shrift in Rucho
> >
> >
> >
> > It is like a reprise of the Gill oral argument and sociological
> > gobbledygook: does the Chief Justice not understand the difference between
> > proportional representation arguments and symmetry arguments, or did he
> > just willfully misrepresent the position of many of the plaintiffs? They
> > couldn?t have made it clearer.
> >
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> >
> > --
> >
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> > Nicholas O. Stephanopoulos
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> > <https://urldefense.proofpoint.com/v2/url?u=http-3A__www.law.uchicago.edu_faculty_stephanopoulos&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&v=v3uz9bpMizqP1TBKwLv3YT-_tqvuaOkzhhkRAcIqHHk&m=YBlwV86RY-mwyXsfqf6g2w2X8mvY2mhCqppM56JuOOs&s=TBODm1WRXAE2S_zgZr2UlOg5HPgGnUkqnhJxxCIBOBw&e=>
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> Greg Warrington
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> gswarrin@uvm.edu
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> (802) 656-2195

Message: 11
Date: Sat, 29 Jun 2019 02:45:04 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <DD2C2BC4-D316-4E6C-A5E1-6B27D123BBD4@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
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Cc: Election Law Listserv <law-election@uci.edu>
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Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
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Best,
Rick

Richard H. Pildes
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NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

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Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 12
Date: Sat, 29 Jun 2019 02:48:51 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <CH2TB113-F960-4889-ABC3-55D86522E2C2@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

And to clarify/I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Goy suggests.

--
Marc E. Elias
Perkins Coie LLP
700 13th St, NW
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202-434-1609
melias@perkinscoie.com<mailto:melias@perkinscoie.com>
@marceelias<https://twitter.com/marceelias>

For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Goy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Goy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
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To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
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Richard H. Pildes
Sudler Family Professor of Constitutional Law
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Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
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To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190629/f8c79f431/attachment-0001.html>

Message: 13
Date: Sat, 29 Jun 2019 15:00:50 +0000
From: Michael Latner <mlatner@calpoly.edu>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Scalia?s Last Laugh
Message-ID:
<BYAPR08MB4726AC7D80D09E39D45F6B8A9FF0@BYAPR08MB4726.namprd08.prod.outlook.com>

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Our response to Rucho
https://blogs.lse.ac.uk/usappblog/2019/06/28/the-supreme-courts-partisan-gerrymandering-decision-is-justice-scalias-last-laugh-democratic-restoration-now-depends-on-the-people-alone/
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Message: 14

Date: Sat, 29 Jun 2019 15:28:35 +0000
From: "Chambers, Hank" <hchamber@richmond.edu>
To: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>, "Guy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Message-ID: <SN6PR13MB2399BB007F292D8329F6E86AAFE60@SN6PR13MB2399.namprd13.prod.outlook.com>

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I tend to agree with Marc and Goy about the mismatch. I always prefer that courts give a nod to or engage with legal (and other relevant) scholarship, but I am not sure what shrift the symmetry literature should get in the majority opinion (or even the minority opinion) in Rucho.

Assume Chief Justice Roberts fully agrees that the scholarship on symmetry provides evidence/proof of partisan gerrymandering and its severity, but that partisan gerrymandering - even severe partisan gerrymandering - is not unconstitutional under the 1st Amendment/equal protection clause. Assume that CJ Roberts further believes that even if some severe gerrymandering is unconstitutional, symmetry analysis can tell us how severe the gerrymander is, but does not help a court draw the line between a severe and unconstitutional gerrymander and a severe and constitutional gerrymander.

If CJ Roberts believes what is in the paragraph above - the opinion seems to provide justification to think he may - I am not sure he needs to engage the literature on symmetry in his opinion. At least, he is no more derelict in declining to engage the symmetry literature than the Court is in many other opinions where it declines to engage relevant legal scholarship.

-Hank

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Elias, Marc (Perkins Coie) <MElias@perkinscoie.com>
Sent: Friday, June 28, 2019 10:48 PM
To: Guy-Uriel E. Charles; Pildes, Rick
Cc: Election Law Listserv
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,

As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,

Rick

Richard H. Pildes

Sudler Family Professor of Constitutional Law

NYU School of Law

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212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?ocial scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:

A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 15
Date: Sat, 29 Jun 2019 13:31:30 -0400
From: Mark <markrush7983@gmail.com>
To: 'Pildes, Rick' <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CACvkSVuphBf_24_9pSf3w_ayStHc29JeQKwhxv+BNvgDoOPPrtA@mail.gmail.com>
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Is it not even remotely possible that those symmetry tests (and other
similar statewide tests) that SCOTUS rejected in Gill and rejected again in
Rucho need some work? They are based on the assumption that partisan votes
in one district are equatable to partisan votes in another. I know it
takes on the entire profession to say this, but poli sci research has
shown that this is not true.

Getting rid of the single member district and moving to nonpartisan
commissions would go a long way towards resolving our collective concerns
about gerrymandering.

On Fri, Jun 28, 2019 at 4:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

> In light of the exchanges here about how much attention symmetry tests did
> or didn't receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan's dissent.
> When she lays out her approach for how the courts should determine when
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>
> Best,
>
> Rick
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>
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> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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> Aside from that problem, he wrote,the partisan bias standard shed no light
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>
>
> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> in part).
>
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>
> Third, the plaintiffs offered evidence concerning the impact that Act 43
> had in skewing Wisconsin?s statewide political map in favor of Republicans.
> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
> plaintiffs contend that these studies measure deviations from ?partisan
> symmetry,? which they describe as the ?social scientific tenet that
> [districting] maps should treat parties symmetrically.? Brief for Appellees
> 37.
>
>
>
>
> We need not doubt the plaintiffs? math. The difficulty for standing
> purposes is that these calculations are an average measure. They do not
> address the effect that a gerrymander has on the votes of particular
> citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> something else en- tirely: the effect that a gerrymander has on the
> fortunes of political parties.
>
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>
> On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> wrote:
>
> A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> require proportionality? is a handy strawman.
>
>
>
> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
>
>
>
> It is like a reprise of the Gill oral argument and sociological
> gobbledygook: does the Chief Justice not understand the difference between
> proportional representation arguments and symmetry arguments, or did he
> just willfully misrepresent the position of many of the plaintiffs? They
> couldn?t have made it clearer.
>
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> Rick Hasen
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> Nicholas O. Stephanopoulos
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From: law-election on behalf of Levitt, Justin
To: Nicholas Stephanopoulos
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Date: Tuesday, July 2, 2019 3:38:51 PM
Attachments: ATT00001.txt

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If you're looking at whether the districts ended up complying with nonpartisan criteria, that's an outcome measure. If you're looking at whether the lawmakers went about their business complying with nonpartisan criteria, that's a process measure.

It's usually the case, obviously, that the two are aligned. A process designed to yield wild partisan advantage is likely to yield wild partisan advantage. But the two different lenses have different normative valence, and different jurisprudential grounding as a matter of constitutional law or statute. It's not that outcomes don't matter. It's about why they matter.

Justin

From: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Sent: Tuesday, July 02, 2019 12:32 PM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Pildes, Rick <rick.pildes@nyu.edu>; Eric McGhee <mcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

A few quick points:

1. Kagan sometimes talks about the median of computer-generated maps -- and sometimes doesn't. She criticizes the MD, OH, and PA maps based only on seat-vote data. I think a fair inference is that she thinks that *both* deviation from the median of the computer-generated distribution *and* asymmetry are problematic.

2. That view also seems reasonable to me. The case for invalidity seems strongest when a map both deviates from the median of the simulated distribution and is asymmetric. If a map only fails one of these two conditions, I don't think there would be consensus that it's normatively problematic. Take Illinois, for example, which has a nearly perfectly symmetric congressional map that's also more pro-Democratic than the median of the simulated distribution. I think many folks would balk at condemning this map, precisely because of its symmetry.

3. Both of these baselines seem like "fair outcomes" approaches to me. They just differ in what that fair outcome is: the median of the simulated distribution or symmetry. A true "fair process" approach, I would think, wouldn't look at results at all. It would solely ask whether districts complied with nonpartisan criteria, and it would condemn districts solely because of their noncompliance -- not because of what seat tallies the noncompliance yielded.

On Tue, Jul 2, 2019 at 2:08 PM Levitt, Justin <justin.levitt@lls.edu> wrote:

> And as a slight addition to Rick's point, I still think it's useful to distinguish between legal vehicles for the two normative choices. The Constitution usually privileges process rules over outcome rules. And while there are plenty of statutes that privilege process as well, to the extent that there are outcome choices in the law, I believe those are more often driven by statute.
>
> Justin
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Pildes, Rick
> **Sent:** Tuesday, July 02, 2019 11:58 AM
> **To:** Eric McGhee <mcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> Kagan's point is that the median of a sampling distribution in which each plan is *itself based on normatively desirable criteria* (indeed, the same criteria) has normative force.
>
> And Kagan does not "end up" talking about seat-vote discrepancies. She starts with them, as any sensible discussion would: when you see significant disparities, that gives reason to probe more deeply to see if those disparities are justified or not. As her discussion of MA points out (based on the simulations Moon Duchin's amicus brief reported on), MA Republicans get 35% of the votes statewide but 0 of 9 congressional seats. That might initially look unfair, but when you draw alternative maps based on the appropriate criteria, you learn that the outcome in virtually all cases remains 0 Republican seats. So you start by being worried about the seats/vote ratio but you end up not being concerned because fair plans do not generate a different partisan distribution, given how evenly R voters are spread across MA.
>
> But even though I disagree with Eric's specific substantive points, and think they are not apt descriptions or criticisms of the Kagan dissent, I do agree with the larger point I take him to be ultimately raising here. We can decide that a "fair process" is one based on various normative criteria for how districts should be designed, regardless of the outcomes those process produce in terms of seat/vote measures. Or we can decide that a "fair system" should produce outcomes that honor partisan symmetry, even if that means overriding lots of other potentially valuable normative criteria for how districts should be designed.
>
> Ultimately, there is a normative choice that must be made between these two options (or the appropriate balance between the two). Kagan is most naturally read to be endorsing the former, "fair process" position. It is not an internal criticism of Kagan's approach to say sometimes this will not produce "fair outcomes." As her discussion of MA indicates, she does not think it is unfair that Rs in MA get 0 seats with 35% of the vote. The kind of criticism Eric is making – and that his efficiency gap metric makes – is an external criticism – it's an argument that Kagan (or we) should adopt a "fair outcome" measure instead.
>
> Best,
> Rick
>
> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
> NYU School of Law
> 40 Washington Sq. So.
> NYC, NY 10012
> 212 998-6377
>
> ---
>
> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Eric McGhee
> **Sent:** Tuesday, July 2, 2019 2:26 PM
> **To:** Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not an attorney so I can't offer an opinion on the legal issues here. But in my mind the absence of symmetry in Kagan's dissent is problematic from a logical standpoint. The pure sampling approach she advocates is great for the cases that have been in front of us: PA, NC, WI, etc. These are cases where the median outcome in the sampling is pretty fair, and the adopted plan is an unfair one way out in the tails of the distribution. But imagine if the median is pretty ***unfair*** -- say, a plan that gives the majority party 40 percent of the seats for 55 percent of the vote. Could a minority party sue to force the median plan, or does this majority party have the right to draw a plan out in the tails—like one that gives them 55 percent of the seats instead? In my opinion, it's absurd to say the median of a sampling distribution has any per se normative force, which is why Kagan ends up talking about seats-votes discrepancies. She has a symmetry-ish notion of fairness in her head whether she knows it or not. (I suspect she does know it, and also knows it's not worth fighting to promote her particular version at this point.)
>
> Would the solution offered in the Kagan dissent be a disaster? No. It would definitely be an improvement on the status quo. Would the court eventually have to address symmetry-type issues anyway? Probably.Eric
>
> ---
>
> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Chambers, Hank
> **Sent:** Sunday, June 30, 2019 6:34 AM
> **To:** Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> It is fair to say every justice believes that extreme partisan gerrymandering is thoroughly inconsistent with important constitutional principles. To some, inconsistency with constitutional principles is the definition of unconstitutionality; to others, it is not. I suspect some of the justices who agree extreme partisan gerrymandering is inconsistent with important constitutional principles do not believe that extreme partisan gerrymandering violates the Constitution.
>
> Many actions may be inconsistent with important constitutional principles, but not unconstitutional.
>
> -Hank
>
> Henry L. Chambers, Jr.
> Austin E. Owen Research Scholar and Professor of Law
> University of Richmond School of Law
> 203 Richmond Way
> Richmond, Va. 23173
> (804) 289-8199
> hchamber@richmond.edu
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>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Smith, Brad <BSmith@law.capital.edu>
> **Sent:** Saturday, June 29, 2019 10:18 PM
> **To:** Nicholas Stephanopoulos
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not sure that every justice has made that decision at all, but for argument's sake, it doesn't much affect my point--the Constitution protects against some forms of political equality in some cases. It's a big jump from there to "therefore gerrymandering--as defined by symmetry, efficiency gaps, or any other particular criteria-- is unconstitutional."
>
> *Bradley A. Smith*
> *Josiah H. Blackmore II/Shirley M. Nault*
> *Professor of Law*
> *Capital University Law School*
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> *Columbus, OH 43215*
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> http://law.capital.edu/faculty/bios/bsmith.aspx
>
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>
> **From:** Nicholas Stephanopoulos [nicholas.stephanopoulos@gmail.com]
> **Sent:** Saturday, June 29, 2019 10:02 PM
> **To:** Smith, Brad
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
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>
> But that's a jump the Court has already made. Every Justice agrees that sufficiently extreme gerrymandering is unconstitutional. The only debate is whether it's possible to distinguish constitutional from unconstitutional gerrymandering.
>
> On Sat, Jun 29, 2019 at 8:38 PM Smith, Brad <BSmith@law.capital.edu> wrote:
>
> > The Constitution protects against some forms of political inequality in some cases. There is a very, very, very big jump in going from "the Constitution protects political equality" to "therefore gerrymandering is unconstitutional."
> >
> > *Bradley A. Smith*
> > *Josiah H. Blackmore II/Shirley M. Nault*
> > *Professor of Law*
> > *Capital University Law School*
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> > *Columbus, OH 43215*
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> > http://law.capital.edu/faculty/bios/bsmith.aspx
> >
> > ---
> >
> > **From:** Law-election [law-election-bounces@department-lists.uci.edu] on behalf of Michael Latner [mlatner@calpoly.edu]
> > **Sent:** Saturday, June 29, 2019 4:08 PM
> > **To:** law-election@department-lists.uci.edu
> > **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
> >
> > - - - - - - - - - - - - -
> > ** [This email originated outside of Capital University] **
> > - - - - - - - - - - - - -
> >
> > Nick, Guy, Marc and others raise important points that I believe highlight a tension between the legal and scientific theory employed in gerrymandering cases. On the one hand the legal consensus is that the Constitution protects political equality but does not require PR as a remedy, so we (social scientists) employ metrics that are alternatives to proportionality.
> >
> > On the other hand, social choice theory shows that equally weighted votes do indeed imply proportional outcomes. And the racial gerrymandering case remedies imply this as well if viewed from the level of the state. Perhaps this is the underlying reason so many legal academics are focusing on the quantitative work, because it has yet to be fully engaged within legal theory.
> >
> > One reason I was particularly impressed by the Gaddie/Grofman brief that essentially reformulated the Gingles Test for partisan gerrymandering, going under the hood of asymmetry to define what it looks like sub-state (as Kagan did in her dissent), was that it pointed out that dilution is dilution, and single-seat systems provide a uniform method of reducing bias (though one that will still fall short of proportionality).
> >
> > Michael Latner, Ph.D.
> > Associate Professor of Political Science
> > California Polytechnic State University, San Luis Obispo
> > www.michaellatner.com
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> > Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty
> >
> > ---
> >
> > **From:** Law-election <law-election-bounces@department-lists.uci.edu> on behalf of law-election-request@department-lists.uci.edu <law-election-request@department-lists.uci.edu>
> > **Sent:** Saturday, June 29, 2019 12:00 PM
> > **To:** law-election@department-lists.uci.edu
> > **Subject:** Law-election Digest, Vol 98, Issue 32
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Today's Topics:

1. Partisan gerrymandering and state courts: discover your inner Federalist! (Wang, Samuel S.)
2. symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
3. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Nicholas Stephanopoulos)
4. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
5. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
6. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
7. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Michael Parsons)
8. more news 6/28/19 (Rick Hasen)
9. Re: Equalizing CVAP without citizenship question (Jeff Wice)
10. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Greg Warrington)
11. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
12. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
13. Scalia?s Last Laugh (Michael Latner)
14. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Chambers, Hank)
15. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Mark)

Message: 1
Date: Fri, 28 Jun 2019 19:43:14 +0000
From: "Wang, Samuel S." <swang@Princeton.EDU>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Partisan gerrymandering and state courts: discover your
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Dear Law-election Digest colleagues:

The Supreme Court decisions in Rucho v. Common Cause and Benisek v. Lamone are a severe disappointment, of course. But they left a second avenue wide open, and even invited it: state courts.

In a forthcoming article in the University of Pennsylvania Journal of Constitutional Law, my colleagues Rick Ober, Ben Williams, and I review the provisions for bringing such a lawsuit in all fifty states: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622

In this article, we catalogue provisions that resemble the First-Amendment-like freedoms of association, Fourteenth-Amendment-like equal protections, and other protections such as "free and fair elections" clauses. Overall, we see many promising avenues. In addition, we review close to a hundred cases in which state laws or constitutions were used to force the redrawing of district lines. So there is ample precedent for taking a federalist path.

Warm regards,

Sam

>>>

Samuel S.-H. Wang, Ph.D.

Professor, Neuroscience Institute

Director, Gerrymandering Project

Princeton University

Princeton, NJ 08544

Neuroscience: swanglab.princeton.edu

Elections: election.princeton.edu

Redistricting: gerrymander.princeton.edu

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Message: 2
Date: Fri, 28 Jun 2019 20:08:22 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Levitt, Justin" <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] symmetry got no shrift at all in Justice Kagan's dissent
in Rucho
Message-ID:
<0SC3C9SF39378ADAB900B9238F727EAEAGF1C06@XCHMB01.ad.law.nyu.edu>
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In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

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212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

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[signature_1987881029]

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https://department-lists.uci.edu/mailman/listinfo/law-election<https://urldefense.proofpoint.com/v2/url?u=https-3A__department-2Dlists.uci.edu_mailman_listinfo_law-2Delection&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=v3ozI9upMizqP1T8KwLv3YT-_ioyxaOkdthkRAclqHR&m=YR0wV8GRY-emcyXs6q6g2w2XBmyY2mbCqppM56JuOOs&s=H8NRu5t4rFvf_ahzEWvZRKUaf9i2t9dsmkAOsBJwPuU&e=>

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Type: image/png
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Desc: image001.png
URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/218f3fbf/attachment-0001.png>

Message: 3
Date: Fri, 28 Jun 2019 15:29:40 -0500
From: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAKZh_81Vxq914fvVO-_DH+uT06uohxL7JBhn1S95a-fY+v4CPMBw@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Though note that Kagan extensively discusses the seat and vote figures from which asymmetry metrics are calculated -- and not just in order to compare these figures to the performance of the computer-generated maps.

In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote.

In 2016, Republican congressional candidates won 10 of North Carolina?s 13 seats, with 53% of the statewide vote. Two years later,Republican candidates won 9 of 12 seats though they received only 50% of the vote.

In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats.

Take Pennsylvania. In the three congressional elections occurring under the State?s original districting plan (before the State Supreme Court struck it down), Democrats receivedbetween 45% and 51% of the statewide vote, but won only5 of 18 House seats.

Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats.

On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

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> or didn?t receive in the Roberts opinion, it seems odd not to mention that
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> Best,
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> Rick
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> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> 212 998-6377
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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
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> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
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Message: 4
Date: Fri, 28 Jun 2019 20:36:50 +0000
From: "Gary-Lirael E. Charles" <lcharles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID: <A1B0B9A9-D65E-439E-8BCB-F9372E65DF4B@law.duke.edu>
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Rick raises an interesting point. I've been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/a2bab49e/attachment-0001.html>

Message: 5
Date: Fri, 28 Jun 2019 21:23:56 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<0563CC8D5F39B7B4DAB9B0B09228F227EAEAGF2313@SXCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

Gay,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Goy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Rick Hasen
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Message: 6
Date: Fri, 28 Jun 2019 21:26:25 +0000
From: "Gary-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <C9A3A04A-ADDF-4A2D-BF84-677FA13516C1@law.duke.edu>
Content-Type: text/plain; charset="utf-8"

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40 Washington Sq. So.
NYC, NY 10012
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Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
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Rick Hasen
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Message: 7
Date: Fri, 28 Jun 2019 18:31:49 -0400
From: Michael Parsons <michael@parsons.net>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID:
<CAEB1vCHWO27=q0sJXYPQPEqNHCv60dob9qBLxxQBe6KWuv5+Tg@mail.gmail.com>
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To be honest, I think Nick's earlier point -- i.e., that Roberts' opinion
is fundamentally disingenuous in its arguments and reasoning -- maybe
addresses this point too. Roberts feigned ignorance about the meaning of
the outlier method and he feigned ignorance about symmetry, but he also
took "partisan advantage is a legitimate/permissible interest" as a
starting point for his analysis even though the legal/theoretical arguments
contesting this assumption were before him as well (both in the briefs and
in the underlying legal scholarship). Kagan points out in her dissent that
this assumption is unjustified and that all of the "neutral" examples of
"competing visions of electoral fairness" differ in type, not degree.
Roberts attempts to ground this starting-point assumption in precedent
(e.g., *Gaffney*) so that he doesn't have to try and justify it on its own
terms, but (1) the precedent doesn't truly support this position (as
Levitt, Kang, and I have argued), and (2) given the contested state of the
law, the majority could have decided otherwise in *Rucho* anyway since the
arguments were before it.

At the end of the day, I think Roberts wanted this outcome, and so he said
whatever he felt he needed to say, and he declined to engage with any
arguments that might complicate that outcome. I think both the lawyers
involved and the underlying scholarship (legal and otherwise) split in
different directions based on reasonable disagreements over theoretical
first principles *and* lawyering strategies, but the majority opinion
ignores the inconvenient parts from all camps while focusing on the
weaknesses of all camps in a way that's internally inconsistent and
dishonest in its portrayal of what those in each camp were arguing.

Apologies for the cynicism -- reading this opinion really got to me.

On Fri, Jun 28, 2019 at 5:27 PM Goy-Uriel E. Charles <charles@law.duke.edu>
wrote:

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> about legal scholarship.
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> *From:* Goy-Uriel E. Charles [mailto:charles@law.duke.edu
> <charles@law.duke.edu>]
> *Sent:* Friday, June 28, 2019 4:37 PM
> *To:* Pildes, Rick <rick.pildes@nyu.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry got no shrift at all in Justice Kagan's
> dissent in Rucho
>
> Rick raises an interesting point. I?ve been struck by the mismatch
> between the substantive focus of the opinions in Rucho and the legal
> academic literature. I wonder if legal academics were insufficiently
> attentive to the legal/theoretical questions raised by the cases and too
> focused on the empirical/political science issues. To be a bit more
> precise, I wonder if the focus on EG and symmetry standards overshadowed
> what should have been a healthy debate about the legal/theoretical
> questions that a number of legal academics, (C. Elmendorf, M. Kang, J.
> Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all
> tend to see Rucho through our own priors. And I will admit to that bias in
> this case. But, I was surprised by what seemed to me to an asymmetry
> (sorry) between the focus of the opinions in Rucho and the legal academic
> literature.
>
>
> On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> In light of the exchanges here about how much attention symmetry tests did
> or didn?t receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan?s dissent.
> When she lays out her approach for how the courts should determine when
> unconstitutional partisan gerrymandering has occurred, she relies entirely
> on the use of alternative, non-partisan maps to determine whether an
> enacted plan is enough of an outlier to be unconstitutional (of course,
> direct evidence of intent is also relevant).
>
> The only time she even mentions symmetry tests is in note 4, to which she
> relegates a brief description of the District Court?s additional reliance
> on such tests. Even then, she does not actually say anything about whether
> she endorses this approach. The note just provides a brief description of
> what the District Court did.
>
> Best,
> Rick
>
> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
> NYU School of Law
> 40 Washington Sq. So.
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> 212 998-6377
>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu
> <law-election-bounces@department-lists.uci.edu>] *On Behalf Of *Nicholas
> Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
>
> He clearly understood; see all his passages in *Whitford* last year
> discussing symmetry. But that was a concept in which Kennedy was
> interested, not Roberts. So with Kennedy off the Court, Roberts could just
> return to calling everything proportionality if it involved seats and votes
> (much like Scalia did in *Vieth*).
>
> ---------- ----------
>
> Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> the two major political parties ?would fare hypothetically if they each . .
> . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> ?adopting a constitutional standard that invalidates a map based on unfair
> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
> on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> therefore concluded that ?asymmetry alone is not a reliable measure of
> unconstitutional partisanship.? Ibid.
>
> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> in part).
>
> Third, the plaintiffs offered evidence concerning the impact that Act 43
> had in skewing Wisconsin?s statewide political map in favor of Republicans.
> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
> plaintiffs contend that these studies measure deviations from ?partisan
> symmetry,? which they describe as the ?social scientific tenet that
> [districting] maps should treat parties symmetrically.? Brief for Appellees
> 37.
>
> We need not doubt the plaintiffs? math. The difficulty for standing
> purposes is that these calculations are an average measure. They do not
> address the effect that a gerrymander has on the votes of particular
> citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> something else en- tirely: the effect that a gerrymander has on the
> fortunes of political parties.
>
>
> On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> wrote:
>
> A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> require proportionality? is a handy strawman.
>
> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
>
> It is like a reprise of the Gill oral argument and sociological

> gobbledygook: does the Chief Justice not understand the difference between
> proportional representation arguments and symmetry arguments, or did he
> just willfully misrepresent the position of many of the plaintiffs? They
> couldn't have made it clearer.
>
>
> --
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Message: 8
Date: Fri, 28 Jun 2019 22:31:30 +0000
From: Rick Hasen <rhasen@law.uci.edu>
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] more news 6/28/19
Message-ID: <B7D20FC23-A5E8-4E42-BD37-855576EB7C86@law.uci.edu>
Content-Type: text/plain; charset="utf-8"

Florida Governor Signs SB 7066, Making It Harder for Felons Who Have Completed Time Served to Get Their Voting Rights Restored, And Thinks Amendment 4, Restoring Such Rights, Was Too Generous<https://electionlawblog.org/?p=105866>
Posted on June 28, 2019 3:30 pm<https://electionlawblog.org/?p=105866> by Rick Hasen<https://electionlawblog.org/?author=3>

From the Governor?s signing statement<https://www.flgov.com/wp-content/uploads/2019/06/6.JR2.pdf> (via Steve Bosquet<https://twitter.com/stevebousquet/status/1144731377432236039>) i issued late on a Friday afternoon:
[https://electionlawblog.org/wp-content/uploads/Screen-Shot-2019-06-28-at-3.29.02-PM-1024x216.png]

I am sure the lawsuits will be filed almost immediately.
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<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105866&title=Florida%20Governor%20Signs%20SB%207066%2C%20Making%20It%20Harder%20for%20Felons%20Who%20Have%20Completed%20Time%20Served%20to%20Get%20Their%20Voting%20Rights%20Restored%2C%20And%20Thinks%20Amendment%204%2C%20Restoring%20Such%20Rights%2C%20Was%20Too%20Generous>
Posted in felon voting<https://electionlawblog.org/?cat=66>

Justice Thomas?s Ugly Accusation (Joined by Justices Gorsuch and Kavanaugh) in the Census Case<https://electionlawblog.org/?p=105862>
Posted on June 28, 2019 12:38 pm<https://electionlawblog.org/?p=105862> by Rick Hasen<https://electionlawblog.org/?author=3>

Others have made<https://twitter.com/mjs_DC/status/1144335889215895142> this point, but I wanted to flag this gratuitous and unsupported impugning of district court judge Furman in the census case<https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf>. Thomas painted Furman as a conspiracy theorist in his partial dissent (joined by Gorsuch and Kavanaugh):

The District Court?s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 5677572, 6607664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and?with a jar of pins and a spool of string?create an eye-catching conspiracy web. Cf. id., at 662 (referring ?from the various ways in which [the Secretary] and his aides acted like people with something to hide that they did have something to hide?). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary?s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census. [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105862&title=Justice%20Thomas%E2%80%99s%20Ugly%20Accusation%20Joined%20by%20Justices%20Gorsuch%20and%20Kavanaugh%20in%20the%20Census%20Case>
Posted in census litigation<https://electionlawblog.org/?cat=125>, Supreme Court<https://electionlawblog.org/?cat=29>

?Why the Supreme Court?s Rulings Have Profound Implications for American Politics?<https://electionlawblog.org/?p=105860>
Posted on June 28, 2019 11:47 am<https://electionlawblog.org/?p=105860> by Rick Hasen<https://electionlawblog.org/?author=3>

Michael Wines for the NYT.?<https://www.nytimes.com/2019/06/25/us/supreme-court-gerrymandering-census.html>
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105860&title=%E2%80%9CWhy%20the%20Supreme%20Court%E2%80%99s%20Rulings%20Have%20Profound%20Implications%20for%20American%20Politics%E2%80%9D>
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?With No Supreme Court End to Gerrymandering, Will States Make It More Extreme??<https://electionlawblog.org/?p=105858>
Posted on June 28, 2019 11:18 am<https://electionlawblog.org/?p=105858> by Rick Hasen<https://electionlawblog.org/?author=3>

NYT:<https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html>:

Thursday?s 5-4 ruling means that North Carolina?s current Republican-drawn map delineating its 13 Congressional districts ? a map that critics have said is among the country?s most egregious examples of hyper-partisanship ? will stand. The decision could also embolden lawmakers around the country to continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.
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The Erasure of Racial Vote Dilution Doctrine<https://electionlawblog.org/?p=105855>
Posted on June 28, 2019 10:18 am<https://electionlawblog.org/?p=105855> by Nicholas Stephanopoulos<https://electionlawblog.org/?author=12>

I?ll have more to say about the Court?s appalling opinion in Rucho in Rick?s symposium next week. But I want to flag one point now: the Court?s erasure of racial vote dilution doctrine. This is the doctrine that allows groups of minority voters to challenge electoral arrangements (including district lines) on the ground that the policies dilute the plaintiffs? votes. When such claims are brought under the Constitution, they require both discriminatory intent and discriminatory effect in the form of cracking and packing that reduce the plaintiffs? electoral influence. And crucially, the claims can be brought under the Constitution, not just the Voting Rights Act. Landmark precedents like White v. Regester and Rogers v. Lodge involve exclusively constitutional?and successful?racial vote dilution suits.

But you wouldn?t know any of this from Rucho. The Court discussed the two other kinds of redistricting claims that can be raised under the Constitution: one person, one vote, and racial gerrymandering. According to the Court, neither of these theories supports the justiciability of partisan gerrymandering claims. That?s because one person, one vote is an individualistic theory from which claims about group power can?t be derived, while racial gerrymandering suits don?t ?ask for a fair share of political power and influence, with all the justiciability conundrums that entails.? In contrast, the Court didn?t say a word about racial vote dilution. It didn?t cite White or Rogers or any other racial vote dilution decision. It didn?t mention the standard for liability in these cases. It didn?t even acknowledge that the doctrine exists.

This omission couldn?t have been accidental. In their briefs, the plaintiffs focused relentlessly on racial vote dilution precedents, arguing that they provided an analytical structure that could be used for partisan gerrymandering claims too. As the League of Women Voters plaintiffs put it, ?that [partisan gerrymandering claims] are not political questions . . . follows from the undisputed justiciability of racial vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not.? It was thus bitterly ironic when the Court asserted that ?Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.? After all, that was never Appellees? contention. Their actual argument, which the Court studiously refused to acknowledge, was that if the Court can adjudicate racial vote
dilution claims, it can also assess analytically identical partisan gerrymandering claims.

Why did the Court refuse to recognize the plaintiffs? actual position? Probably because of its force. The parallels between partisan vote dilution and racial vote dilution go on and on, and make it impossible to distinguish between the doctrines? justiciability. First, both doctrines require proof of discriminatory intent. Second, the vote dilution condemned by both doctrines operates through the cracking and packing of groups of disfavored voters. Third, this dilution can only occur when members of both the favored and disfavored groups are politically cohesive. Fourth, the dilution can only be discerned by looking beyond the boundaries of a single district to the entire region where the disfavored group?s influence is abridged. And fifth, and most fundamentally, both claims ?ask for a fair share of political power and influence? for the targeted group. Both claims, that is, ask for the very thing that, in the Court?s view, poses unsolvable ?justiciability conundrums.?

Rucho?s silence about racial vote dilution, then, is extremely ominous. Does the Court no longer believe the doctrine exists? If so, decades of precedent would have to be discarded and the constitutional foundation of Section 2 of the Voting Rights Act would crumble into nothing. Or, only slightly less radically, does the Court think the doctrine exists but is nonjusticiable because it too involves ?reallocating power and influence between political [groups]?? Then constitutional racial vote dilution claims would be unavailable but Section 2 suits might still be allowed to proceed. Or, probably most plausibly, did the Court fail to mention the doctrine because its existence complicated the Court?s effort to shut the door on partisan gerrymandering claims? Then these dire consequences wouldn?t necessarily follow?but Court?s bad faith would be crystal clear. It?s the epitome of motivated, lawless reasoning to ignore a whole body of precedent just because it points in an awkward direct
ion.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105855&title=The%20Erasure%20of%20Racial%20Vote%20Dilution%20Doctrine>
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?The Census Decision: Institutional Realism, Institutional Formalism, and Judicial Review?<https://electionlawblog.org/?p=105849>
Posted on June 28, 2019 9:57 am<https://electionlawblog.org/?p=105849> by Richard Pildes<https://electionlawblog.org/?author=2>

Yesterday at the Balkinization blog, I put up this<https://balkin.blogspot.com/2019/06/the-census-decision-institutional.html> perspective on the Court?s Census decision. Here is a bit of that analysis:

Today?s decision in the Census case is a powerful example of what I call an ?institutionally realist? approach to judicial review of executive branch action. The Court not only probed deeply beneath the surface of the formal administrative record, which it rarely does, to conclude that the administration?s justification for the citizenship question was ?contrived? and pretextual.

In various other ways, the Court concluded that the ?unusual circumstances? of the case warranted the approach the Court was taking. For example, the Court also concluded that, even though the district judge was wrong to permit discovery outside the record at the stage he did so, it turned out after the fact that there were good reasons for doing, and the Court was therefore willing to rely on the information generated in this way. That the stakes are far higher regarding the Census than ordinary administrative law issues undoubtedly played a major role in why the Court was willing to approach the case as it did. The ?unusual circumstances? that justified a more aggressive application of administrative-law doctrines were thus a realistic recognition of the (1) magnitude of the issues and (2) the signs that there was nothing regular about the processes that led to the Commerce Department?s decision.

I want to put this way of looking at the Census decision in a larger context concerning how courts review the actions of governmental institutions more generally. Back before the Trump administration was a gleam in the eye of American politics, I wrote an article called Institutional Formalism and Realism in Constitutional and Public Law<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411141>. I mention when the piece was written to indicate that it was not written (or gerrymandered) for the Trump administration. But I think it frames the central, underlying issue the courts confront in reviewing many of the actions of the Trump administration, including in today?s Census case.

The central idea of Institutional Formalism and Realism is that, when courts are called up to judge the actions of other governmental institutions or actors, they implicitly confront a choice about whether to adopt a more formalist or more realist stance towards the institution or actor involved. When courts are institutionally formalist, they treat the government institution involved largely as a black box, to which the Constitution (or other sources of law) allocate specific powers or functions. In this mode, courts do not open up that black box to attempt to make more realist assessments of what underlies the way those institutions exercise their powers at any particular moment in time, or how those institutions might function differently in different eras.

This is reflected in doctrines like ?the presumption of regularity,? which courts ordinarily apply in reviewing agency action ? and which Justice Thomas relies heavily on in his critical dissent today. Institutional realism entails the opposite stance: in assessing the legality of government decision-making, courts do take into account their judgments about how specific institutions are actually functioning (or failing to function) at particular moments in time. ?

Today?s Census decision, and the conflict between Chief Justice Roberts and Justice Thomas? dissent, nicely illustrates how strongly this tension between institutional formalism and realism underlies major Court decisions. But the tension is pervasive and inescapable.
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?Trump jokes to Putin: ?Don?t meddle in the election??<https://electionlawblog.org/?p=105847>
Posted on June 28, 2019 9:44 am<https://electionlawblog.org/?p=105847> by Rick Hasen<https://electionlawblog.org/?author=3>

Politico<https://www.politico.com/story/2019/06/28/trump-putin-meeting-1386125>:

Trump spoke to reporters briefly before he and Putin were scheduled to talk for an hour to discuss a series of national security issues, including Iran?s recent aggression<https://www.politico.com/story/2019/06/27/trump-iran-nuclear-deal-1385148>, the civil war in Syria, where the United States and Russia are backing opposing sides, and a new arms control treaty with China.

When Trump did not bring up to reporters whether he would mention election interference, a reporter asked him if he would talk to Putin about it.

?Yes, of course I will,? Trump told reporters. Then he turned to Putin, smiling and wagging his finger in the Russian president?s direction at one point, and said: ?Don?t meddle in the election, president. Don?t meddle in the election.?

But it?s unclear whether Trump actually pressed Putin on Mueller?s findings. A readout from the White House did not include the subject
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?Editorial: N.C. can and must act for fair districts even if high court won?t stop gerrymandering?<https://electionlawblog.org/?p=105845>
Posted on June 28, 2019 9:38 am<https://electionlawblog.org/?p=105845> by Rick Hasen<https://electionlawblog.org/?author=3>

WRAL editorial:<https://www.wral.com/editorial-n-c-can-and-must-act-for-fair-districts-even-if-high-court-won-t-stop-gerrymandering/18478285/>
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Thank You to Peter Overby<https://electionlawblog.org/?p=105843>
Posted on June 28, 2019 9:28 am<https://electionlawblog.org/?p=105843> by Rick Hasen<https://electionlawblog.org/?author=3>

Peter is retiring as the Money and Politics reporter at NPR after a great run. I?ve always benefitted from Peter?s tenacity and his excellent reporting skills.

Happy Retirement and we will miss you on the beat!
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Message: 9
Date: Fri, 28 Jun 2019 18:35:04 -0400
From: Jeff Wice <jmwice@gmail.com>
To: Douglas Johnson <djohnson@nielsenresearch.com>
Cc: Election Law Listserv <lawelections@uci.edu>
Subject: Re: [EL] Equalizing CVAP without citizenship question
Message-ID: <3bd4dc9-86fc-dc7a-a6e8-3b2745f2d4d3@gmail.com>
Content-Type: text/plain; charset="utf-8"

The Census Bureau informed participants at a recent National Conference of State Legislatures (NCSL) redistricting seminar that it has been asked by the Commerce Department to look into providing citizenship data derived from the ACS in the PL 94-171 datafile provided to the states. No decision has yet been made.
I recently came upon an expert statement submitted to a New York federal district court by the late Tom Hofeller where he said: "When the Census Bureau initiated the ACS process, it was made clear that the ACS data were not intended for use in redistricting and were certainly not included in the details? small area tabulations to be released in conjunction with the Public Law 94-171 data generated for the Census Bureau?s Redistricting Data Program.?
Tom elaborated on this in detail in his report submitted to the New York eastern district federal court in the case Boone et al v. Nassau County Legislature et al (see document no. 44-4 in case 2:11-cv-02712). Readers who are interested in reading the entire explanation can email mail me directly for a copy.
Jeff Wice
via Newton Mail [https://cloudmagic.com/k/d/mailapp?ct=ds&cv=10.0.18&pv=10.14.5&source=email_footer_2]
On Thu, Jun 27, 2019 at 10:50 PM, Douglas Johnson <dljohnson@ndcresearch.com> wrote:
All of those options include both measurable and unmeasurable margins of error, the former of which could be calculated and used to determine the odds that all the districts are within the allowed spread. For Congress, that?s near-impossible. It might work for some legislative plans.
- Doug
On Thu, Jun 27, 2019 at 6:53 PM Kogan, Vladimir < kogan.18@osu.edu [kogan.18@osu.edu] > wrote:
Relatedly, is there anything that would prevent the Trump administration from directing the Census Bureau to put out block level CVAP estimates by appending Census counts to other administrative data (which critics of the citizenship questions have argued all along provide more accurate citizenship info) for easy redistricting use?

From: Kogan, Vladimir
Sent: Thursday, June 27, 2019 9:15 PM
To: Election Law Listserv < law-election@uci.edu [law-election@uci.edu] >
Subject: Equalizing CVAP without citizenship question

Question: Suppose that (1) the citizenship question stays off the 2020 census and (2) at least one state decides to redistrict by equalizing CVAP anyway using the American Community Survey citizenship estimates (combined with the 2020 population counts).

Have any courts ruled on the question of how to navigate population equality requirements with data subject to considerable statistical uncertainty due to sampling? I know CVAP is used all the time in the context of VRA compliance; are there any cases from that area that speak to this question? (I realize Evenwel left open the question of whether equalizing CVAP was permissible, but it seems like there are five votes on that question.)

Thanks!

Vlad

Vladimir Kogan , Associate Professor
Department of Political Science

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https://department-lists.uci.edu/mailman/listinfo/law-election [https://department-lists.uci.edu/mailman/listinfo/law-election] --
- Doug

Douglas Johnson
National Demographics Corporation
dljohnson@NDCresearch.com
phone 310-200-2058
fax 818-254-1221
_____ Law-election mailing list Law-election@department-lists.uci.edu https://department-lists.uci.edu/mailman/listinfo/law-election
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Desc: not available
URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/cabf0b9b/attachment-0001.gif>

Message: 10
Date: Fri, 28 Jun 2019 21:07:32 -0400
From: Greg Warrington <gregory.warrington@uvm.edu>
To: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <20190629010731.GC28077@guwarrix-XPS-13-9350>
Content-Type: text/plain; charset=utf-8

Unfortunately, the bare recitation of seats-votes outcomes plays into
the narrative of the majority that a gerrymander exists through the
resulting deviation from proportionality.

On Fri, Jun 28, 2019 at 03:29:40PM -0500, Nicholas Stephanopoulos wrote:
> Though note that Kagan extensively discusses the seat and vote figures from
> which asymmetry metrics are calculated -- and not just in order to compare
> these figures to the performance of the computer-generated maps.
>
> ----------
>
> In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
> House of Representatives, although they received only 49% of the statewide
> vote. In 2014, Republican candidates increased their total to 10 of the 13
> seats, this time based on 55% of the vote.
>
> In 2016, Republican congressional candidates won 10 of North Carolina?s 13
> seats, with 53% of the statewide vote. Two years later,Republican
> candidates won 9 of 12 seats though they received only 50% of the vote.
>
> In the four elections that followed (from 2012 through 2018), Democrats
> have never received more than 65% of the statewide congressional vote. Yet
> in each of those elections, Democrats have won (you guessed it) 7 of
> 8 House seats.
>
> Take Pennsylvania. In the three congressional elections occurring under the
> State?s original districting plan (before the State Supreme Court struck it
> down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
> only5 of 18 House seats.
>
> Or go next door to Ohio. There, in four congressional elections, Democrats
> tallied between 39% and 47% of the statewide vote, but never won more than
> 4 of 16 House seats.
>
> On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> > In light of the exchanges here about how much attention symmetry tests did
> > or didn?t receive in the Roberts opinion, it seems odd not to mention that
> > these tests received *no *attention at all in Justice Kagan?s dissent.
> > When she lays out her approach for how the courts should determine when
> > unconstitutional partisan gerrymandering has occurred, she relies entirely
> > on the use of alternative, non-partisan maps to determine whether an
> > enacted plan is enough of an outlier to be unconstitutional (of course,
> > direct evidence of intent is also relevant).
> >
> >
> >
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> > relegates a brief description of the District Court?s additional reliance
> > on such tests. Even then, she does not actually say anything about whether
> > she endorses this approach. The note just provides a brief description of
> > what the District Court did.
> >
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> >
> > Best,
> >
> > Rick
> >
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> >
> > Richard H. Pildes
> >
> > Sudler Family Professor of Constitutional Law
> >
> > NYU School of Law
> >
> > 40 Washington Sq. So.
> >
> > NYC, NY 10012
> >
> > 212 998-6377
> >
> >
> >
> > *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> > *On Behalf Of *Nicholas Stephanopoulos
> > *Sent:* Friday, June 28, 2019 11:44 AM
> > *To:* Levitt, Justin <justin.levitt@lls.edu>
> > *Cc:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* Re: [EL] symmetry really got short shrift in Rucho
> >
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> >
> > He clearly understood; see all his passages in **Whitford* last year
> > discussing symmetry. But that was a concept in which Kennedy was
> > interested, not Roberts. So with Kennedy off the Court, Roberts could just
> > return to calling everything proportionality if it involved seats and votes
> > (much like Scalia did in **Vieth*).
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> > Relevant to this case, an amicus brief in support of the LULAC plaintiffs
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> > . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> > KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
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> > Aside from that problem, he wrote,the partisan bias standard shed no light
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> > Justice Stevens would have found that the Texas map was a partisan
> > gerrymander based in part on the asymmetric advantage it conferred on
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> > and its review.? Id., at 483?484 (opinion concurring in part and dissenting
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> > Third, the plaintiffs offered evidence concerning the impact that Act 43
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> > This evidence, which made up the heart of the plaintiffs? case, was derived
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> > something else en- tirely: the effect that a gerrymander has on the
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> > wrote:
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> > >
> > >
> > >
> > > *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> > > Behalf Of *Rick Hasen
> > > *Sent:* Thursday, June 27, 2019 9:46 PM
> > > *To:* Election Law Listserv <law-election@uci.edu>
> > > *Subject:* [EL] symmetry really got short shrift in Rucho
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> > >
> > > It is like a reprise of the Gill oral argument and sociological
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> > >
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> > >
> > > Nicholas O. Stephanopoulos
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> > > Herbert and Marjorie Fried Research Scholar
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> > > (773) 702-4226
> > > http://www.law.uchicago.edu/faculty/stephanopoulos
> > > <https://urldefense.proofpoint.com/v2/url?u=https-3A__www.law.uchicago.edu_faculty_stephanopoulos&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&v=3nzBtpMizgP1T8KwLv3YT-_typuaOkdhkRAcIqHR&km=YBlwV86RY-mwyXs6q6g2w2X8mxY2mhCqppM56JyCOs&s=H8NIuoNAvFvf_pheEWcZBKUaf9tZe2N4smkAOuBIuPs&e=>
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> --
> Greg Warrington
> Associate {Chair,Professor}
> Department of Mathematics & Statistics
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> (802) 656-2195
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>
> ------------------------------
>
> Message: 11
> Date: Sat, 29 Jun 2019 02:45:04 +0000
> From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
> To: "Guy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
> <rick.pildes@nyu.edu>
> Cc: Election Law Listserv <law-election@uci.edu>
> Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
> dissent in Rucho
> Message-ID: <DD2C29CA-D116-485C-A5E1-6B2701238BD4@perkinscoie.com>
> Content-Type: text/plain; charset="utf-8"
>
> As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.
>
> --
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> Perkins Coie LLP
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> Washington, DC 20005
> 202-434-1609
> melias@perkinscoie.com<mailto:melias@perkinscoie.com>
> @marcelias<https://twitter.com/marcelias>
>
> For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.
>
>
> From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
> Date: Friday, June 28, 2019 at 5:27 PM
> To: ?Pildes, Rick? <rick.pildes@nyu.edu>
> Cc: Election Law Listserv <law-election@uci.edu>
> Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.
>
>
> On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:
>
> Guy,
> As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.
>
>
> From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
> Sent: Friday, June 28, 2019 4:37 PM
> To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
> Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
> Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own prizes. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.
>
>
>
> On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:
>
> In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).
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>
> From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
> Sent: Friday, June 28, 2019 11:44 AM
> To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
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> He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).
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> To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
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>
>
> --
> Rick Hasen
> Chancellor's Professor of Law and Political Science
> UC Irvine School of Law
> 401 E. Peltason Dr., Suite 1000
> Irvine, CA 92697-8000
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Message: 12
Date: Sat, 29 Jun 2019 02:48:51 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <CO2PR133F960-488@AHC3.55D86522E2C2@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

And to clarify/I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Gey suggests.

--
Marc E. Elias
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melias@perkinscoie.com<mailto:melias@perkinscoie.com>
@marceelias<https://twitter.com/marceelias>

For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own prizes. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be directed to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4833484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Date: Sat, 29 Jun 2019 15:00:50 +0000
From: Michael Latner <platner@calpoly.edu>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Scalia?s Last Laugh
Message-ID:
<BY4PR08MB4726{C7D869D9IE39D45F6B8A9FF6@BY4PR08MB4726.namprd08.prod.outlook.com>

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Our response to Rucho
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Message: 14
Date: Sat, 29 Jun 2019 15:28:35 +0000
From: "Chambers, Hank" <hchamber@richmond.edu>
To: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>, "Guy-Uriel
E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<SN6PR13MB2992B8007F292D832F9EB6AAFF0@SN6PR13MB2992.namprd13.prod.outlook.com>

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I tend to agree with Marc and Guy about the mismatch. I always prefer that courts give a nod to or engage with legal (and other relevant) scholarship, but I am not sure what shrift the symmetry literature should get in the majority opinion (or even the minority opinion) in Rucho.

Assume Chief Justice Roberts fully agrees that the scholarship on symmetry provides evidence/proof of partisan gerrymandering and its severity, but that partisan gerrymandering - even severe partisan gerrymandering - is not unconstitutional under the 1st Amendment/equal protection clause. Assume that CJ Roberts further believes that even if some severe gerrymandering is unconstitutional, symmetry analysis can tell us how severe the gerrymander is, but does not help a court draw the line between a severe and unconstitutional gerrymander and a severe and constitutional gerrymander.

If CJ Roberts believes what is in the paragraph above - the opinion seems to provide justification to think he may - I am not sure he needs to engage the literature on symmetry in his opinion. At least, he is no more derelict in declining to engage the symmetry literature than the Court is in many other opinions where it declines to engage relevant legal scholarship.

-Hank

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Austin E. Owen Research Scholar and Professor of Law

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Elias, Marc (Perkins Coie) <MElias@perkinscoie.com>
Sent: Friday, June 28, 2019 10:48 PM
To: Guy-Uriel E. Charles; Pildes, Rick
Cc: Election Law Listserv
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--

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Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
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Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
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Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own prizes. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,

Rick

Richard H. Pildes

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:

A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

--

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Message: 15
Date: Sat, 29 Jun 2019 13:31:30 -0400
From: Mark <markeash2683@gmail.com>
To: 'Pildes, Rick' <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CACoAXVnhBf_24_9p5Cbc_ny5HkZ0kQfKwhu+xBNxaDnOPPyiAt@mail.gmail.com>
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Is it not even remotely possible that those symmetry tests (and other
similar statewide tests) that SCOTUS rejected in Gill and rejected again in
Rucho need some work? They are based on the assumption that partisan votes
in one district are equatable to partisan votes in another. I know it
takes on the entire profession to say this, but poli sci research has
shown that this is not true.

Getting rid of the single member district and moving to nonpartisan
commissions would go a long way towards resolving our collective concerns
about gerrymandering.

On Fri, Jun 28, 2019 at 4:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

> In light of the exchanges here about how much attention symmetry tests did
> or didn't receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan?s dissent.
> When she lays out her approach for how the courts should determine when
> unconstitutional partisan gerrymandering has occurred, she relies entirely
> on the use of alternative, non-partisan maps to determine whether an
> enacted plan is enough of an outlier to be unconstitutional (of course,
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> The only time she even mentions symmetry tests is in note 4, to which she
> relegates a brief description of the District Court?s additional reliance
> on such tests. Even then, she does not actually say anything about whether
> she endorses this approach. The note just provides a brief description of
> what the District Court did.
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> Best,
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> Rick
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> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> NYU School of Law
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>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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> He clearly understood; see all his passages in *Whitford* last year
> discussing symmetry. But that was a concept in which Kennedy was
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> ?adopting a constitutional standard that invalidates a map based on unfair
> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
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> therefore concluded that ?asymmetry alone is not a reliable measure of
> unconstitutional partisanship.? Ibid.
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> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
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> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
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> symmetry,? which they describe as the ?social scientific tenet that
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> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
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Mark Rush
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From: Law-election on behalf of Nicholas Stephanopoulos
To: Lewis, Justin
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Date: Tuesday, July 2, 2019 3:36:47 PM
Attachments: ATT00001.txt

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A few quick points:

1. Kagan sometimes talks about the median of computer-generated maps -- and sometimes doesn't. She criticizes the MD, OH, and PA maps based only on seat-vote data. I think a fair inference is that she thinks that *both* deviation from the median of the computer-generated distribution *and* asymmetry are problematic.

2. That view also seems reasonable to me. The case for invalidity seems strongest when a map both deviates from the median of the simulated distribution and is asymmetric. If a map only fails one of these two conditions, I don't think there would be consensus that it's normatively problematic. Take Illinois, for example, which has a nearly perfectly symmetric congressional map that's also more pro-Democratic than the median of the simulated distribution. I think many folks would balk at condemning this map, precisely because of its symmetry.

3. Both of these baselines seem like "fair outcomes" approaches to me. They just differ in what that fair outcome is: the median of the simulated distribution or symmetry. A true "fair process" approach, I would think, wouldn't look at results at all. It would solely ask whether districts complied with nonpartisan criteria, and it would condemn districts solely because of their noncompliance -- not because of what seat tallies the noncompliance yielded.

On Tue, Jul 2, 2019 at 2:08 PM Levitt, Justin <Justin.Levitt@lls.edu> wrote:

> And as a slight addition to Rick's point, I still think it's useful to distinguish between legal vehicles for the two normative choices. The Constitution usually privileges process rules over outcome rules. And while there are plenty of statutes that privilege process as well, to the extent that there are outcome choices in the law, I believe those are more often driven by statute.
>
> Justin
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> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Pildes, Rick
> **Sent:** Tuesday, July 02, 2019 11:58 AM
> **To:** Eric McGhee <emcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <platner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> Kagan's point is that the median of a sampling distribution in which each plan is *itself based on normatively desirable criteria* (indeed, the same criteria) has normative force.
>
> And Kagan does not "end up" talking about seat-vote discrepancies. She starts with them, as any sensible discussion would: when you see significant disparities, that gives reason to probe more deeply to see if those disparities are justified or not. As her discussion of MA points out (based on the simulations Moon Duchin's amicus brief reported on), MA Republicans get 35% of the votes statewide but 0 of 9 congressional seats. That might initially look unfair, but when you draw alternative maps based on the appropriate criteria, you learn that the outcome in virtually all cases remains 0 Republican seats. So you start by being worried about the seats/vote ratio but you end up not being concerned because fair plans do not generate a different partisan distribution, given how evenly R voters are spread across MA.
>
> But even though I disagree with Eric's specific substantive points, and think they are not apt descriptions or criticisms of the Kagan dissent, I do agree with the larger point I take him to be ultimately raising here. We can decide that a "fair process" is one based on various normative criteria for how districts should be designed, regardless of the outcomes those process produce in terms of seat/vote measures. Or we can decide that a "fair system" should produce outcomes that honor partisan symmetry, even if that means overriding lots of other potentially valuable normative criteria for how districts should be designed.
>
> Ultimately, there is a normative choice that must be made between these two options (or the appropriate balance between the two). Kagan is most naturally read to be endorsing the former, "fair process" position. It is not an internal criticism of Kagan's approach to say sometimes this will not produce "fair outcomes." As her discussion of MA indicates, she does not think it is unfair that Rs in MA get 0 seats with 35% of the vote. The kind of criticism Eric is making – and that his efficiency gap metric makes – is an external criticism – it's an argument that Kagan (or we) should adopt a "fair outcome" measure instead.
>
> Best,
>
> Rick
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> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Eric McGhee
> **Sent:** Tuesday, July 2, 2019 2:26 PM
> **To:** Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <platner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not an attorney so I can't offer an opinion on the legal issues here. But in my mind the absence of symmetry in Kagan's dissent is problematic from a logical standpoint. The pure sampling approach she advocates is great for the cases that have been in front of us: PA, NC, WI, etc. These are cases where the median outcome in the sampling is pretty fair, and the adopted plan is an unfair one way out in the tails of the distribution. But imagine if the median is pretty ***unfair*** -- say, a plan that gives the majority party 40 percent of the seats for 55 percent of the vote. Could a minority party sue to force the median plan, or does this majority party have the right to draw a plan out in the tails—like one that gives them 55 percent of the seats instead? In my opinion, it's absurd to say the median of a sampling distribution has any per se normative force, which is why Kagan ends up talking about seats-votes discrepancies. She has a symmetry-ish notion of fairness in her head whether she knows it or not. (I suspect she does know it, and also knows it's not worth fighting to promote her particular version at this point.)
>
> Would the solution offered in the Kagan dissent be a disaster? No. It would definitely be an improvement on the status quo. Would the court eventually have to address symmetry-type issues anyway? Probably.Eric
>
> ---
>
> **From:** Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Chambers, Hank
> **Sent:** Sunday, June 30, 2019 6:34 AM
> **To:** Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
> **Cc:** Michael Latner <platner@calpoly.edu>; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> It is fair to say every justice believes that extreme partisan gerrymandering is thoroughly inconsistent with important constitutional principles. To some, inconsistency with constitutional principles is the definition of unconstitutionality; to others, it is not. I suspect some of the justices who agree extreme partisan gerrymandering is inconsistent with important constitutional principles do not believe that extreme partisan gerrymandering violates the Constitution.
>
> Many actions may be inconsistent with important constitutional principles, but not unconstitutional.
>
> -Hank
>
> Henry L. Chambers, Jr.
>
> Austin E. Owen Research Scholar and Professor of Law
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> University of Richmond School of Law
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> 203 Richmond Way
>
> Richmond, Va. 23173
>
> (804) 289-8199
>
> hchamber@richmond.edu
>
> ---
>
> **From:** Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Smith, Brad <BSmith@law.capital.edu>
> **Sent:** Saturday, June 29, 2019 10:18 PM
> **To:** Nicholas Stephanopoulos
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> I'm not sure that every justice has made that decision at all, but for argument's sake, it doesn't much affect my point--the Constitution protects against some forms of political equality in some cases. It's a big jump from there to "therefore gerrymandering--as defined by symmetry, efficiency gaps, or any other particular criteria-- is unconstitutional."
>
> *Bradley A. Smith*
>
> *Josiah H. Blackmore II/Shirley M. Nault*
>
> *Professor of Law*
>
> *Capital University Law School*
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> *303 E. Broad St.*
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> *Columbus, OH 43215*
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> *614.236.6317*
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> *http://law.capital.edu/faculty/bios/bsmith.aspx*
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> ---
>
> **From:** Nicholas Stephanopoulos [nicholas.stephanopoulos@gmail.com]
> **Sent:** Saturday, June 29, 2019 10:02 PM
> **To:** Smith, Brad
> **Cc:** Michael Latner; law-election@department-lists.uci.edu
> **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
>
> - - - - - - - - - - - - - -
> ** [This email originated outside of Capital University] **
> - - - - - - - - - - - - - -
>
> But that's a jump the Court has already made. Every Justice agrees that sufficiently extreme gerrymandering is unconstitutional. The only debate is whether it's possible to distinguish constitutional from unconstitutional gerrymandering.
>
> On Sat, Jun 29, 2019 at 8:38 PM Smith, Brad <BSmith@law.capital.edu> wrote:
>
> > The Constitution protects against some forms of political inequality in some cases. **There is a very, very, very big jump in going from** "the Constitution protects political equality" to "therefore gerrymandering is unconstitutional."
> >
> > *Bradley A. Smith*
> >
> > *Josiah H. Blackmore II/Shirley M. Nault*
> >
> > *Professor of Law*
> >
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> >
> > ---
> >
> > **From:** Law-election [law-election-bounces@department-lists.uci.edu] on behalf of Michael Latner [platner@calpoly.edu]
> > **Sent:** Saturday, June 29, 2019 4:08 PM
> > **To:** law-election@department-lists.uci.edu
> > **Subject:** Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
> >
> > - - - - - - - - - - - - - -
> > ** [This email originated outside of Capital University] **
> > - - - - - - - - - - - - - -
> >
> > Nick, Guy, Marc and others raise important points that I believe highlight a tension between the legal and scientific theory employed in gerrymandering cases. On the one hand the legal consensus is that the Constitution protects political equality but does not require PR as a remedy, so we (social scientists) employ metrics that are alternatives to proportionality.
> >
> > On the other hand, social choice theory shows that equally weighted votes do indeed imply proportional outcomes. And the racial gerrymandering case remedies imply this as well if viewed from the level of the state. Perhaps this is the underlying reason so many legal academics are focusing on the quantitative work, because it has yet to be fully engaged within legal theory.
> >
> > One reason I was particularly impressed by the Gaddie/Grofman brief that essentially reformulated the Gingles Test for partisan gerrymandering, going under the hood of asymmetry to define what it looks like sub-state (as Kagan did in her dissent), was that it pointed out that dilution is dilution, and single-seat systems provide a uniform method of reducing bias (though one that will still fall short of proportionality).

Michael Latner, Ph.D.

Associate Professor of Political Science

California Polytechnic State University, San Luis Obispo

www.michaellatner.com

Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of law-election-request@department-lists.uci.edu <law-election-request@department-lists.uci.edu>
Sent: Saturday, June 29, 2019 12:00 PM
To: law-election@department-lists.uci.edu
Subject: Law-election Digest, Vol 98, Issue 32

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When replying, please edit your Subject line so it is more specific
than "Re: Contents of Law-election digest..."

Today's Topics:

1. Partisan gerrymandering and state courts: discover your inner Federalist! (Wang, Samuel S.)
2. symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
3. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Nicholas Stephanopoulos)
4. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Gay-Uriel E. Charles)
5. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
6. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Gay-Uriel E. Charles)
7. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Michael Parsons)
8. more news 6/28/19 (Rick Hasen)
9. Re: Equalizing CVAP without citizenship question (Jeff Wice)
10. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Greg Warrington)
11. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
12. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
13. Scalia's Last Laugh (Michael Latner)
14. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Chambers, Rank)
15. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Mark)

Message: 1
Date: Fri, 28 Jun 2019 19:43:14 +0000
From: "Wang, Samuel S." <sswang@Princeton.EDU>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Partisan gerrymandering and state courts: discover your inner Federalist!
Message-ID:
<BN8PR04MB6204F1D8F6F2325A3A1AEC8CFC0@BN8PR04MB6020.namprd04.prod.outlook.com>

Content-Type: text/plain; charset="iso-8859-1"

Dear Law-election Digest colleagues:

The Supreme Court decisions in Rucho v. Common Cause and Benisek v. Lamone are a severe disappointment, of course. But they left a second avenue wide open, and even invited it: state courts.

In a forthcoming article in the University of Pennsylvania Journal of Constitutional Law, my colleagues Rick Ober, Ben Williams, and I review the provisions for bringing such a lawsuit in all fifty states: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3355622

In this article, we catalogue provisions that resemble the First-Amendment-like freedoms of association, Fourteenth-Amendment-like equal protections, and other protections such as "free and fair elections" clauses. Overall, we see many promising avenues. In addition, we review close to a hundred cases in which state laws or constitutions were used to force the redrawing of district lines. So there is ample precedent for taking a federalist path.

Warm regards,

Sam

>>>

Samuel S.-H. Wang, Ph.D.

Professor, Neuroscience Institute

Director, Gerrymandering Project

Princeton University

Princeton, NJ 08544

Neuroscience: synapse.princeton.edu

Elections: election.princeton.edu

Redistricting: gerrymander.princeton.edu

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Message: 2
Date: Fri, 28 Jun 2019 20:08:22 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Levitt, Justin" <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Message-ID:
<0C1CC9D5F39878AD4DB908092BE227EAEAGE1C06@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

In light of the exchanges here about how much attention symmetry tests did or didn't receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan's dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

--
Rick Hasen
Chancellor's Professor of Law and Political Science
UC Irvine School of Law
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rhasen@law.uci.edu<mailto:rhasen@law.uci.edu>
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[signature_1987881029]

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Nicholas O. Stephanopoulos
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Size: 6817 bytes
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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/218ff3fd/attachment-0001.png>

Message: 3
Date: Fri, 28 Jun 2019 15:29:40 -0500
From: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's

dissent in Rucho
Message-ID:
<CAKZ9_81Vqp1849cVO-_DH+mTt56mrbsU3Bhn1S9Ga-fY+g4C2MBbw@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Though note that Kagan extensively discusses the seat and vote figures from which asymmetry metrics are calculated -- and not just in order to compare these figures to the performance of the computer-generated maps.

In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote.

In 2016, Republican congressional candidates won 10 of North Carolina?s 13 seats, with 53% of the statewide vote. Two years later,Republican candidates won 9 of 12 seats though they received only 50% of the vote.

In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats.

Take Pennsylvania. In the three congressional elections occurring under the State?s original districting plan (before the State Supreme Court struck it down), Democrats receivedbetween 45% and 51% of the statewide vote, but won only5 of 18 House seats.

Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats.

On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

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> or didn?t receive in the Roberts opinion, it seems odd not to mention that
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>
> Best,
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> Rick
>
>
>
> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> NYU School of Law
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> 40 Washington Sq. So.
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> NYC, NY 10012
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> 212 998-6377
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>
>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
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>
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> --
>
> Rick Hasen
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> Chancellor's Professor of Law and Political Science
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> http://www.law.uci.edu/faculty/full-time/hasen/
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Message: 4
Date: Fri, 28 Jun 2019 20:36:50 +0000
From: "Gay-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <21B0B949-D5DF-420E-B9CB-F9372E65DF48@law.duke.edu>
Content-Type: text/plain; charset="utf-8"

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Best,
Rick

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

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A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 5
Date: Fri, 28 Jun 2019 21:23:56 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<9C0C9D5F39B7B4DAB90889228F227FAE4GE2313@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Gay-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
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Message: 6
Date: Fri, 28 Jun 2019 21:26:25 +0000
From: "Gay-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID: <CBA3A0A6-ADDF-4A2D-BCB4-C77FA13516C1@law.duke.edu>
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My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I've been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

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In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and then review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
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To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 7
Date: Fri, 28 Jun 2019 18:31:49 -0400
From: Michael Parsons <michael@parsons.net>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAEBUvCHWO27=pBsJXYPOPEgSNfQv60deh0tqHLxrOJ8e0KWnr5+Tg@mail.gmail.com>
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To be honest, I think Nick's earlier point -- i.e., that Roberts' opinion
is fundamentally disingenuous in its arguments and reasoning -- maybe
addresses this point too. Roberts feigned ignorance about the meaning of
the outlier method and he feigned ignorance about symmetry, but he also
took "partisan advantage is a legitimate/permissible interest" as a
starting point for his analysis even though the legal/theoretical arguments
contesting this assumption were before him as well (both in the briefs and
in the underlying legal scholarship). Kagan points out in her dissent that
this assumption is unjustified and that all of the "neutral" examples of
"competing visions of electoral fairness" differ in type, not degree.
Roberts attempts to ground this starting-point assumption in precedent
(e.g., *Gaffney*) so that he doesn't have to try and justify it on its own
terms, but (i) the precedent doesn't truly support this position (as
Levitt, Kang, and I have argued), and (2) given the contested state of the
law, the majority could have decided otherwise in *Rucho* anyway since the
arguments were before it.

At the end of the day, I think Roberts wanted this outcome, and so he said
whatever he felt he needed to say, and he declined to engage with any
arguments that might complicate that outcome. I think both the lawyers
involved and the underlying scholarship (legal and otherwise) split in
different directions based on reasonable disagreements over theoretical
first principles *and* lawyering strategies, but the majority opinion
ignores the inconvenient parts from all camps while focusing on the
weaknesses of all camps in a way that's internally inconsistent and
dishonest in its portrayal of what those in each camp were arguing.

Apologies for the cynicism -- reading this opinion really got to me.

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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu
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> --
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> Message: 8
> Date: Fri, 28 Jun 2019 22:31:30 +0000
> From: Rick Hasen <rhasen@law.uci.edu>
> To: Election Law Listserv <law-election@uci.edu>
>
> Subject: [EL] more news 6/28/19
> Message-ID: <B7D20C23-A5E8-4E42-BD37-855578EB7C86@law.uci.edu>
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> Florida Governor Signs SB 7066, Making It Harder for Felons Who Have Completed Time Served to Get Their Voting Rights Restored, And Thinks Amendment 4, Restoring Such Rights, Was Too Generous<https://electionlawblog.org/?p=105866>
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> Posted in felon voting<https://electionlawblog.org/?cat=6>
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> Justice Thomas?s Ugly Accusation (Joined by Justices Gorsuch and Kavanaugh) in the Census Case<https://electionlawblog.org/?p=105862>
> Posted on June 28, 2019 12:38 pm<https://electionlawblog.org/?p=105862> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> Others have made<https://twitter.com/mjs_DC/status/1144350892158951424> this point, but I wanted to flag this gratuitous and unsupported impugning of district court judge Furman in the census case<https://www.supremecourt.gov/opinions/18pdf/18-966_bq7c.pdf>. Thomas painted Furman as a conspiracy theorist in his partial dissent (joined by Gorsuch and Kavanaugh):
>
> The District Court?s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 5677572, 6007664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and?with a jar of pins and a spool of string?create an eye-catching conspiracy web. Cf. id., at 662 (referring ?from the various ways in which [the Secretary] and his aides acted like people with something to hide?). But the Court does not rely on this evidence, and rightly so: It cuts no doubt on whether the Secretary?s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105862&title=Justice%20Thomas%E2%80%99s%20Ugly%20Accusation%20Joined%20by%20Justices%20Gorsuch%20and%20Kavanaugh%20in%20the%20Census%20Case>
> Posted in census litigation<https://electionlawblog.org/?cat=125>, Supreme Court<https://electionlawblog.org/?cat=29>
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>
> ?Why the Supreme Court?s Rulings Have Profound Implications for American Politics?<https://electionlawblog.org/?p=105860>
> Posted on June 28, 2019 11:47 am<https://electionlawblog.org/?p=105860> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> Michael Wines for the NYT: ?<https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html>:
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105860&title=%E2%80%9CWhy%20the%20Supreme%20Court%E2%80%99s%20Rulings%20Have%20Profound%20Implications%20for%20American%20Politics%E2%80%9D>
> Posted in Uncategorized<https://electionlawblog.org/?cat=1>
>
>
> ?With No Supreme Court End to Gerrymandering, Will States Make It More Extreme??<https://electionlawblog.org/?p=105858>
> Posted on June 28, 2019 11:18 am<https://electionlawblog.org/?p=105858> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> NYT:<https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html>:
>
> Thursday?s 5-4 ruling means that North Carolina?s current Republican-drawn map delineating its 13 Congressional districts ? a map that critics have said is among the country?s most egregious examples of hyper-partisanship ? will stand. The decision could also embolden lawmakers around the country to continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105858&title=%E2%80%9CWith%20No%20Supreme%20Court%20End%20to%20Gerrymandering%2C%20Will%20States%20Make%20It%20More%20Extreme%3F%E2%80%9D>
> Posted in Uncategorized<https://electionlawblog.org/?cat=1>
>
>
> The Erasure of Racial Vote Dilution Doctrine<https://electionlawblog.org/?p=105855>
> Posted on June 28, 2019 10:18 am<https://electionlawblog.org/?p=105855> by Nicholas Stephanopoulos<https://electionlawblog.org/?author=12>
>
> I?ll have more to say about the Court?s appalling opinion in Rucho in Rick?s symposium next week. But I want to flag one point now: the Court?s erasure of racial vote dilution doctrine. This is the doctrine that allows groups of minority voters to challenge electoral arrangements (including district lines) on the ground that the policies dilute the plaintiffs? votes. When such claims are brought under the Constitution, they require both discriminatory intent and discriminatory effect in the form of cracking and packing that reduce the plaintiffs? electoral influence. And crucially, the claims can be brought under the Constitution, not just the Voting Rights Act. Landmark precedents like White v. Regester and Rogers v. Lodge involve exclusively constitutional?and successful?racial vote dilution suits.
>
> But you wouldn?t know any of this from Rucho. The Court discussed the two other kinds of redistricting claims that can be raised under the Constitution: one person, one vote, and racial gerrymandering. According to the Court, neither of these theories supports the justiciability of partisan gerrymandering claims. That?s because one person, one vote is an individualistic theory from which claims about group power can?t be derived, while racial gerrymandering suits don?t ?ask for a fair share of political power and influence, with all the justiciability conundrums that entails.? In contrast, the Court didn?t say a word about racial vote dilution. It didn?t cite White or Rogers or any other racial vote dilution decision. It didn?t mention the standard for liability in these cases. It didn?t even acknowledge that the doctrine exists.
>
> This omission couldn?t have been accidental. In their briefs, the plaintiffs focused relentlessly on racial vote dilution precedents, arguing that they provided an analytical structure that could be used for partisan gerrymandering claims too. As the League of Women Voters plaintiffs put it, ?that [partisan gerrymandering claims] are not political questions . . . follows from the undisputed justiciability of racial vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not.? It was thus bitterly ironic when the Court asserted that ?Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.? After all, that was never Appellees? contention. Their actual argument, which the Court studiously refused to acknowledge, was that if the Court can adjudicate racial vote
> dilution claims, it can also assess analytically identical partisan gerrymandering claims.
>
> Why did the Court refuse to recognize the plaintiffs? actual position? Probably because of its force. The parallels between partisan vote dilution and racial vote dilution go on and on, and make it impossible to distinguish between the doctrines? justiciability. First, both doctrines require proof of discriminatory intent. Second, the vote dilution condemned by both doctrines operates through the cracking and packing of groups of disfavored voters. Third, this dilution can only occur when members of both the favored and disfavored groups are politically cohesive. Fourth, the dilution can only be discerned by looking beyond the boundaries of a single district to the entire region where the disfavored group?s influence is abridged. And fifth, and most fundamentally, both claims ?ask for a fair share of political power and influence? for the targeted group. Both claims, that is, ask for the very thing that, in the Court?s view, poses unsolvable ?justiciability conundrums.?
>
> Rucho?s silence about racial vote dilution, then, is extremely ominous. Does the Court no longer believe the doctrine exists? If so, decades of precedent would have to be discarded and the constitutional foundation of Section 2 of the Voting Rights Act would crumble into nothing. Or, only slightly less radically, does the Court think the doctrine exists but is nonjusticiable because it too involves ?reallocating power and influence between political [groups]?? Then constitutional racial vote dilution claims would be unavailable but Section 2 suits might still be allowed to proceed. Or, probably most plausibly, did the Court fail to mention the doctrine because its existence complicated the Court?s effort to shut the door on partisan gerrymandering claims? Then these dire consequences wouldn?t necessarily follow?but Court?s bad faith would be crystal clear. It?s the epitome of motivated, lawless reasoning to ignore a whole body of precedent just because it points in an awkward directi
> on.
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105855&title=The%20Erasure%20of%20Racial%20Vote%20Dilution%20Doctrine>
> Posted in Uncategorized<https://electionlawblog.org/?cat=1>
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> ?The Census Decision: Institutional Realism, Institutional Formalism, and Judicial Review?<https://electionlawblog.org/?p=105849>
> Posted on June 28, 2019 9:57 am<https://electionlawblog.org/?p=105849> by Richard Pildes<https://electionlawblog.org/?author=2>
>
> Yesterday at the Balkinization blog, I put up this<https://balkin.blogspot.com/2019/06/the-census-decision-institutional.html> perspective on the Court?s Census decision. Here is a bit of that analysis:
>
> Today?s decision in the Census case is a powerful example of what I call an ?institutionally realist? approach to judicial review of executive branch action. The Court not only probed deeply beneath the surface of the formal administrative record, which it rarely does, to conclude that the administration?s justification for the citizenship question was ?contrived? and pretextual.
>
> In various other ways, the Court concluded that the ?unusual circumstances? of the case warranted the approach the Court was taking. For example, the Court also concluded that, even though the district judge was wrong to permit discovery outside the record at the stage he did so, it turned out after the fact that there were good reasons for doing, and the Court was therefore willing to rely on the information generated in this way. That the stakes are far higher regarding the Census than ordinary administrative law issues undoubtedly played a major role in why the Court was willing to approach the case as it did. The ?unusual circumstances? that justified a more aggressive application of administrative-law doctrines were thus a realistic recognition of the (1) magnitude of the issues and (2) the signs that there was nothing regular about the processes that led to the Commerce Department?s decision.
>
> I want to put this way of looking at the Census decision in a larger context concerning how courts review the actions of governmental institutions more generally. Back before the Trump administration was a gleam in the eye of American politics, I wrote an article called Institutional Formalism and Realism in Constitutional and Public Law<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411141>. I mention when the piece was written to indicate that it was not written (or gerrymandered) for the Trump administration. But I think it frames the central, underlying issue the courts confront in reviewing many of the actions of the Trump administration, including in today?s Census case.
>
> The central idea of Institutional Formalism and Realism is that, when courts are called up to judge the actions of other governmental institutions or actors, they implicitly confront a choice about whether to adopt a more formalist or more realist stance towards the institution or actor involved. When courts are institutionally formalist, they treat the government institution involved largely as a black box, to which the Constitution (or other sources of law) allocate specific powers or functions. In this mode, courts do not open up that black box to attempt to make more realist assessments of what underlies the way those institutions exercise their powers at any particular moment in time, or how those institutions might function differently in different eras.
>
> This is reflected in doctrines like ?the presumption of regularity,? which courts ordinarily apply in reviewing agency action ? and which Justice Thomas relies heavily on in his critical dissent today. Institutional realism entails the opposite stance: in assessing the legality of government decision-making, courts do take into account their judgments about how specific institutions are actually functioning (or failing to function) at particular moments in time. ?
>
> Today?s Census decision, and the conflict between Chief Justice Roberts and Justice Thomas? dissent, nicely illustrates how strongly this tension between institutional formalism and realism underlies major Court decisions. But the tension is pervasive and inescapable.
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105849&title=%E2%80%9CThe%20Census%20Decision%3A%20Institutional%20Realism%2C%20Institutional%20Formalism%2C%20and%20Judicial%20Review%E2%80%9D>
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>
> ?Trump jokes to Putin: ?Don?t meddle in the election?s?<https://electionlawblog.org/?p=105847>
> Posted on June 28, 2019 9:44 am<https://electionlawblog.org/?p=105847> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> Politico:<https://www.politico.com/story/2019/06/28/trump-putin-meeting-1386123>:
>
> Trump spoke to reporters briefly before he and Putin were scheduled to talk for an hour to discuss a series of national security issues, including Iran?s recent aggression<https://www.politico.com/story/2019/06/27/trump-iran-nuclear-deal-1385148>, the civil war in Syria, where the United States and Russia are backing opposing sides, and a new arms control treaty with China.
>
> When Trump did not bring up to reporters whether he would mention election interference, a reporter asked him if he would talk to Putin about it.
>
> ?Yes, of course I will,? Trump told reporters. Then he turned to Putin, smiling and wagging his finger in the Russian president?s direction at one point, and said: ?Don?t meddle in the election, president. Don?t meddle in the election.?
>
> But it?s unclear whether Trump actually pressed Putin on Mueller?s findings. A readout from the White House did not include the subject
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105847&title=%E2%80%9CTrump%20jokes%20to%20Putin%3A%20%E2%80%98Don%E2%80%99t%20meddle%20in%20the%20election%27%E2%80%9D>
> Posted in fraudulent fraud squad<https://electionlawblog.org/?cat=8>
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>
> ?Editorial: N.C. can and must act for fair districts even if high court won?t stop gerrymandering?<https://electionlawblog.org/?p=105845>
> Posted on June 28, 2019 9:38 am<https://electionlawblog.org/?p=105845> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> WRAL editorial: ?<https://www.wral.com/editorial-n-c-can-and-must-act-for-fair-districts-even-if-high-court-won-t-stop-gerrymandering/18478283/>
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105845&title=%E2%80%9CEditorial%3A%20N.C.%20can%20and%20must%20act%20for%20fair%20districts%20even%20if%20high%20court%20won%27t%20stop%20gerrymandering%E2%80%9D>
> Posted in Uncategorized<https://electionlawblog.org/?cat=1>
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>
> Thank You to Peter Overby<https://electionlawblog.org/?p=105843>
> Posted on June 28, 2019 9:28 am<https://electionlawblog.org/?p=105843> by Rick Hasen<https://electionlawblog.org/?author=3>
>
> Peter is retiring as the Money and Politics reporter at NPR after a great run. I?ve always benefitted from Peter?s tenacity and his excellent reporting skills.
>
> Happy Retirement and we will miss you on the beat!
> [Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105843&title=Thank%20You%20to%20Peter%20Overby>
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>
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> Rick Hasen
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Message: 9
Date: Fri, 28 Jun 2019 18:35:04 -0400
From: Jeff Wice <jmwice@gmail.com>
To: Douglas Johnson <djohnson@ndcresearch.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Equalizing CVAP without citizenship question
Message-ID: <3fbf8a9c9-8d6c-4c7e-a0d8-3b2545b5d44f@gmail.com>
Content-Type: text/plain; charset="utf-8"

The Census Bureau informed participants at a recent National Conference of State Legislatures (NCSL) redistricting seminar that it has been asked by the Commerce Department to look into providing citizenship data derived from the ACS in the PL 94-171 datafile provided to the states. No decision has yet been made.
I recently came upon an expert statement submitted to a New York federal district court by the late Tom Hofeller where he said: "When the Census Bureau initiated the ACS process, it was made clear that the ACS data were not intended for use in redistricting and were certainly not included in the details? small area tabulations to be released in conjunction with the Public Law 94-171 data generated for the Census Bureau?s Redistricting Data Program.?
I've elaborated on this in detail in his report submitted to the New York eastern district federal court in the case Boone et al v. Nassau County Legislature et al (see document no. 44-4 in case 2:11-cv-02712). Readers who are interested in reading the entire explanation can email mail me directly for a copy.
Jeff Wice
via Newton Mail [https://cloudmagic.com/k/d/mailapp?ct=dx&cv=10.0.188&pv=10.14.5&source=email_footer_2]
On Thu, Jun 27, 2019 at 10:50 PM, Douglas Johnson <djohnson@ndcresearch.com> wrote:
All of those options include both measurable and unmeasurable margins of error, the former of which could be calculated and used to determine the odds that all the districts are within the allowed spread. For Congress, that?s near-impossible. It might work for some legislative plans.
- Doug
On Thu, Jun 27, 2019 at 6:53 PM Kogan, Vladimir < kogan.18@osu.edu [kogan.18@osu.edu] > wrote:
Relatedly, is there anything that would prevent the Trump administration from directing the Census Bureau to put out block level CVAP estimates by appending Census counts to other administrative data (which critics of the citizenship questions have argued all along provide more accurate citizenship info) for easy redistricting use?

From: Kogan, Vladimir
Sent: Thursday, June 27, 2019 9:15 PM
To: Election Law Listserv < law-election@uci.edu [law-election@uci.edu] >
Subject: Equalizing CVAP without citizenship question

Question: Suppose that (1) the citizenship question stays off the 2020 census and (2) at least one state decides to redistrict by equalizing CVAP anyway using the American Community Survey citizenship estimates (combined with the 2020 population counts).

Have any courts ruled on the question of how to navigate population equality requirements with data subject to considerable statistical uncertainty due to sampling? I know CVAP is used all the time in the context of VRA compliance; are there any cases from that area that speak to this question? (I realize Evenwel left open the question of whether equalizing CVAP was permissible, but it seems like there are five votes on that question.)

Thanks!

Vlad

Vladimir Kogan , Associate Professor
Department of Political Science

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- Doug

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National Demographics Corporation
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phone 310-200-2058
fax 818-254-1221
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Message: 10
Date: Fri, 28 Jun 2019 21:07:32 -0400
From: Greg Warrington <gregory.scarrington@nsm.edu>
To: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <20190629010731.GC28077@gswarrin-XPS-13-9350>
Content-Type: text/plain; charset=utf-8

Unfortunately, the bare recitation of seats-votes outcomes plays into
the narrative of the majority that a gerrymander exists through the
resulting deviation from proportionality.

On Fri, Jun 28, 2019 at 03:29:40PM -0500, Nicholas Stephanopoulos wrote:
> Though note that Kagan extensively discusses the seat and vote figures from
> which asymmetry metrics are calculated -- and not just in order to compare
> these figures to the performance of the computer-generated maps.
>
> ----------
>
> In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
> House of Representatives, although they received only 49% of the statewide
> vote. In 2014, Republican candidates increased their total to 10 of the 13
> seats, this time based on 55% of the vote.
>
> In 2016, Republican congressional candidates won 10 of North Carolina?s 13
> seats, with 53% of the statewide vote. Two years later,Republican
> candidates won 9 of 12 seats though they received only 50% of the vote.
>
> In the four elections that followed (from 2012 through 2018), Democrats
> have never received more than 65% of the statewide congressional vote. Yet
> in each of those elections, Democrats have won (you guessed it) 7 of
> 8 House seats.
>
> Take Pennsylvania. In the three congressional elections occurring under the
> State?s original districting plan (before the State Supreme Court struck it
> down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
> only5 of 18 House seats.
>
> Or go next door to Ohio. There, in four congressional elections, Democrats
> tallied between 39% and 47% of the statewide vote, but never won more than
> 4 of 16 House seats.
>
> On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> > In light of the exchanges here about how much attention symmetry tests did
> > or didn?t receive in the Roberts opinion, it seems odd not to mention that
> > these tests received *no *attention at all in Justice Kagan?s dissent.
> > When she lays out her approach for how the courts should determine when
> > unconstitutional partisan gerrymandering has occurred, she relies entirely
> > on the use of alternative, non-partisan maps to determine whether an
> > enacted plan is enough of an outlier to be unconstitutional (of course,
> > direct evidence of intent is also relevant).
> >
> >
> >
> > The only time she even mentions symmetry tests is in note 4, to which she
> > relegates a brief description of the District Court?s additional reliance
> > on such tests. Even then, she does not actually say anything about whether
> > she endorses this approach. The note just provides a brief description of
> > what the District Court did.
> >
> >
> >
> > Best,
> >
> > Rick
> >
> >
> >
> > Richard H. Pildes
> >
> > Sudler Family Professor of Constitutional Law
> >
> > NYU School of Law
> >
> > 40 Washington Sq. So.
> >
> > NYC, NY 10012
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> > 212 998-6377
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> >
> >
> > *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> > *On Behalf Of *Nicholas Stephanopoulos
> > *Sent:* Friday, June 28, 2019 11:44 AM
> > *To:* Levitt, Justin <justin.levitt@lls.edu>
> > *Cc:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* Re: [EL] symmetry really got short shrift in Rucho
> >
> >
> >
> > He clearly understood; see all his passages in *Whitford* last year
> > discussing symmetry. But that was a concept in which Kennedy was
> > interested, not Roberts. So with Kennedy off the Court, Roberts could just
> > return to calling everything proportionality if it involved seats and votes
> > (much like Scalia did in *Vieth*).
> >
> >
> >
> > ---------------------
> >

> >
> >
> > Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> > proposed a ?asymmetry standard? to ?measure partisan bias? by comparing how
> > the two major political parties ?would fare hypothetically if they each . .
> > . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> > KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> > ?adopting a constitutional standard that invalidates a map based on unfair
> > results that would occur in a hypothetical state of affairs.? Id., at 420.
> > Aside from that problem, he wrote,the partisan bias standard shed no light
> > on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> > therefore concluded that ?asymmetry alone is not a reliable measure of
> > unconstitutional partisanship.? Ibid.
> >
> >
> > Justice Stevens would have found that the Texas map was a partisan
> > gerrymander based in part on the asymmetric advantage it conferred on
> > Republicans in converting votes to seats. Id., at 460/467, 471/473 (opinion
> > concurring in part and dissenting in part). Justice Souter, writing for
> > himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> > of a criterion of symmetry,? and that ?further attention could be devoted
> > to the administrability of such a criterion at all levels of redistricting
> > and its review.? Id., at 483/484 (opinion concurring in part and dissenting
> > in part).
> >
> >
> >
> > Third, the plaintiffs offered evidence concerning the impact that Act 43
> > had in skewing Wisconsin?s statewide political map in favor of Republicans.
> > This evidence, which made up the heart of the plaintiffs? case, was derived
> > from partisan-asymmetry studies similar to those discussed in LULAC. The
> > plaintiffs contend that these studies measure deviations from ?partisan
> > symmetry,? which they describe as the ?social scientific tenet that
> > [districting] maps should treat parties symmetrically.? Brief for Appellees
> > 37.
> >
> >
> >
> > We need not doubt the plaintiffs? math. The difficulty for standing
> > purposes is that these calculations are an average measure. They do not
> > address the effect that a gerrymander has on the votes of particular
> > citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> > something else en- tirely: the effect that a gerrymander has on the
> > fortunes of political parties.
> >
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> >
> >
> > On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> > wrote:
> >
> > A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> > require proportionality? is a handy strawman.
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> > *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> > Behalf Of *Rick Hasen
> > *Sent:* Thursday, June 27, 2019 9:46 PM
> > *To:* Election Law Listserv <law.election@uci.edu>
> > *Subject:* [EL] symmetry really got short shrift in Rucho
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> > It is like a reprise of the Gill oral argument and sociological
> > gobbledygook: does the Chief Justice not understand the difference between
> > proportional representation arguments and symmetry arguments, or did he
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> > Nicholas O. Stephanopoulos
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> > Herbert and Marjorie Fried Research Scholar
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http://www.cems.uvm.edu/~gwarrin/
(802) 656-2195

Message: 11
Date: Sat, 29 Jun 2019 02:45:04 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <BD2C2BC4-E916-495C-A5F1-68270123BBD4@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
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Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
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Best,
Rick

Richard H. Pildes
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NYU School of Law
40 Washington Sq. So.
NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

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Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

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Message: 12
Date: Sat, 29 Jun 2019 02:48:51 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <CH2PR133-F960-4889-ABC3-55D86522E2C2@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--
Marc E. Elias
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202-434-1609
melias@perkinscoie.com<mailto:melias@perkinscoie.com>
@marcelias<https://twitter.com/marcelias>

For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Gay-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional gerrymandering.? Ibid.

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Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

--
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http://www.law.uci.edu/faculty/full-time/hasen/<https://urldefense.proofpoint.com/v2/url?u=https-3A__linkprotect.cudasvc.com_url-3Fa-3Dhttp-253a-252f-252fwww.law.uci.edu-252ffaculty-2520full-2Dtime-252fhasen-252f-26c-3DE-2C1-2CuVSaqs0R2vqn8S376CZOFPX50ZR1U-2D16bFdmU2bd5VFFWLXvDTIRzOnCOd865C011mYoUU7mTIRu0n6AuTF3gnexMycvRuVf0bNZOAGeKM-5Fs1qYAc-26sym-2D18id-3DncMFqDbc-26h-3DTqBJbaOlq-2QRcvv3ze9hpMizgPTTBKwLv3YT-_iypxaOkdthkRAclqHRk&m=YBlwV86RY-mwcXsfqi6g2w2X8mvY2mhCpppM56JqOOs&s=MV2Uoz1ZEqE-YVQpnX2NRqvdPMfGfq3TOc4BgLPcbp4c&e=>
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Message: 13
Date: Sat, 29 Jun 2019 15:00:50 +0000
From: Michael Lamer <mlamer@calpoly.edu>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Scalia?s Last Laugh
Message-ID:
<BYAPR08MB4726%7D860D09E39D45F6B8A9FF0@BYAPR08MB4726.namprd08.prod.outlook.com>

Content-Type: text/plain; charset="windows-1252"

Our response to Rucho
https://blogs.lse.ac.uk/usappblog/2019/06/28/the-supreme-courts-partisan-gerrymandering-decision-is-justice-scalias-last-laugh-democratic-restoration-now-depends-on-the-people-alone/
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Message: 14
Date: Sat, 29 Jun 2019 15:20:35 +0000
From: "Chambers, Hank" <hchamber@richmond.edu>
To: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>, "Guy-Uriel
E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<SN6PR13MB2399B8007F292DD32F0FB6AA2FF0@SN6PR13MB2399.namprd13.prod.outlook.com>

Content-Type: text/plain; charset="windows-1252"

I tend to agree with Marc and Guy about the mismatch. I always prefer that courts give a nod to or engage with legal (and other relevant) scholarship, but I am not sure what shrift the symmetry literature should get in the majority opinion (or even the minority opinion) in Rucho.

Assume Chief Justice Roberts fully agrees that the scholarship on symmetry provides evidence/proof of partisan gerrymandering and its severity, but that partisan gerrymandering - even severe partisan gerrymandering - is not unconstitutional under the 1st Amendment/equal protection clause. Assume that CJ Roberts further believes that even if some severe gerrymandering is unconstitutional, symmetry analysis can tell us how severe the gerrymander is, but does not help a court draw the line between a severe and unconstitutional gerrymander and a severe and constitutional gerrymander.

If CJ Roberts believes what is in the paragraph above - the opinion seems to provide justification to think he may - I am not sure he needs to engage the literature on symmetry in his opinion. At least, he is no more derelict in declining to engage the symmetry literature than the Court is in many other opinions where it declines to engage relevant legal scholarship.

-Hank

Henry L. Chambers, Jr.

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203 Richmond Way

Richmond, Va. 23173

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Elias, Marc (Perkins Coie) <MElias@perkinscoie.com>
Sent: Friday, June 28, 2019 10:48 PM
To: Guy-Uriel E. Charles; Pildes, Rick
Cc: Election Law Listserv
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--

Marc E. Elias

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@marceelias<https://twitter.com/marceelias>

For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles , "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bulstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

--

Marc E. Elias

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,

As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own prizes. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,

Rick

Richard H. Pildes

Sudler Family Professor of Constitutional Law

NYU School of Law

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NYC, NY 10012

212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4713473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

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--

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Message: 15
Date: Sat, 29 Jun 2019 13:31:30 -0400
From: Mark <markrush2983@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law.election@uci.edu>
Subject: Re: [EL] symmetry got no sheltt at all in Justice Kagan's
dissent in Rucho
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Is it not even remotely possible that those symmetry tests (and other
similar statewide tests) that SCOTUS rejected in Gill and rejected again in
Rucho need some work? They are based on the assumption that partisan votes
in one district are equatable to partisan votes in another. I know it
takes on the entire profession to say this, but poli sci research has
shown that this is not true.

Getting rid of the single member district and moving to nonpartisan
commissions would go a long way towards resolving our collective concerns
about gerrymandering.

On Fri, Jun 28, 2019 at 4:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

> In light of the exchanges here about how much attention symmetry tests did
> or didn?t receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan?s dissent.
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> what the District Court did.
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>
>
> Best,
>
> Rick
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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law.election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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>
> He clearly understood; see all his passages in *Whitford* last year
> discussing symmetry. But that was a concept in which Kennedy was
> interested, not Roberts. So with Kennedy off the Court, Roberts could just
> return to calling everything proportionality if it involved seats and votes
> (much like Scalia did in *Vieth*).
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>
> Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> the two major political parties ?would fare hypothetically if they each . .
> . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> ?adopting a constitutional standard that invalidates a map based on unfair
> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
> on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> therefore concluded that ?asymmetry alone is not a reliable measure of
> unconstitutional partisanship.? Ibid.
>
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>
> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 468?467, 471?473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 483?484 (opinion concurring in part and dissenting
> in part).
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>
> Third, the plaintiffs offered evidence concerning the impact that Act 43
> had in skewing Wisconsin?s statewide political map in favor of Republicans.
> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
> plaintiffs contend that these studies measure deviations from ?partisan
> symmetry,? which they describe as the ?social scientific tenet that
> [districting] maps should treat parties symmetrically.? Brief for Appellees
> 37.
>
>
>
> We need not doubt the plaintiffs? math. The difficulty for standing
> purposes is that these calculations are an average measure. They do not
> address the effect that a gerrymander has on the votes of particular
> citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> something else en- tirely: the effect that a gerrymander has on the
> fortunes of political parties.
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>
> On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> wrote:
>
> A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> require proportionality? is a handy strawman.
>

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>
> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
>
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>
> It is like a reprise of the Gill oral argument and sociological
> gobbledygook: does the Chief Justice not understand the difference between
> proportional representation arguments and symmetry arguments, or did he
> just willfully misrepresent the position of many of the plaintiffs? They
> couldn't have made it clearer.
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> Mark Rush
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From: law-election on behalf of Levitt, Justin
To: Pildes, Rick; Eric McGhee; Chambers, Hank; Smith, Brad; Nicholas Stephanopoulos
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Date: Tuesday, July 2, 2019 3:12:17 PM
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And as a slight addition to Rick's point, I still think it's useful to distinguish between legal vehicles for the two normative choices. The Constitution usually privileges process rules over outcome rules. And while there are plenty of statutes that privilege process as well, to the extent that there are outcome choices in the law, I believe those are more often driven by statute.

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Pildes, Rick
Sent: Tuesday, July 02, 2019 11:58 AM
To: Eric McGhee <mcghee@ppic.org>; Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Kagan's point is that the median of a sampling distribution in which each plan *is itself based on normatively desirable criteria* (indeed, the same criteria) has normative force.

And Kagan does not "end up" talking about seat-vote discrepancies. She starts with them, as any sensible discussion would: when you see significant disparities, that gives reason to probe more deeply to see if those disparities are justified or not. As her discussion of MA points out (based on the simulations Moon Duchin's amicus brief reported on), MA Republicans get 35% of the votes statewide but 0 of 9 congressional seats. That might initially look unfair, but when you draw alternative maps based on the appropriate criteria, you learn that the outcome in virtually all cases remains 0 Republican seats. So you start by being worried about the seats/vote ratio but you end up not being concerned because fair plans do not generate a different partisan distribution, given how evenly R voters are spread across MA.

But even though I disagree with Eric's specific substantive points, and think they are not apt descriptions or criticisms of the Kagan dissent, I do agree with the larger point I take him to be ultimately raising here. We can decide that a "fair process" is one based on various normative criteria for how districts should be designed, regardless of the outcomes those process produce in terms of seat/vote measures. Or we can decide that a "fair system" should produce outcomes that honor partisan symmetry, even if that means overriding lots of other potentially valuable normative criteria for how districts should be designed.

Ultimately, there is a normative choice that must be made between these two options (or the appropriate balance between the two). Kagan is most naturally read to be endorsing the former, "fair process" position. It is not an internal criticism of Kagan's approach to say sometimes this will not produce "fair outcomes." As her discussion of MA indicates, she does not think it is unfair that Rs in MA get 0 seats with 35% of the vote. The kind of criticism Eric is making – and that his efficiency gap metric makes – is an external criticism – it's an argument that Kagan (or we) should adopt a "fair outcome" measure instead.

Best,
Rick

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Eric McGhee
Sent: Tuesday, July 2, 2019 2:26 PM
To: Chambers, Hank <hchamber@richmond.edu>; Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

I'm not an attorney so I can't offer an opinion on the legal issues here. But in my mind the absence of symmetry in Kagan's dissent is problematic from a logical standpoint. The pure sampling approach she advocates is great for the cases that have been in front of us: PA, NC, WI, etc. These are cases where the median outcome in the sampling is pretty fair, and the adopted plan is an unfair one way out in the tails of the distribution. But imagine if the median is pretty ***unfair*** --say, a plan that gives the majority party 40 percent of the seats for 55 percent of the vote. Could a minority party sue to force the median plan, or does this majority party have the right to draw a plan out in the tails—like one that gives them 55 percent of the seats instead? In my opinion, it's absurd to say the median of a sampling distribution has any per se normative force, which is why Kagan ends up talking about seats-votes discrepancies. She has a symmetry-ish notion of fairness in her head whether she knows it or not. (I suspect she does know it, and also knows it's not worth fighting to promote her particular version at this point.)

Would the solution offered in the Kagan dissent be a disaster? No. It would definitely be an improvement on the status quo. Would the court eventually have to address symmetry-type issues anyway? Probably.Eric

---

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Chambers, Hank
Sent: Sunday, June 30, 2019 6:34 AM
To: Smith, Brad <BSmith@law.capital.edu>; Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Michael Latner <mlatner@calpoly.edu>; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

It is fair to say every justice believes that extreme partisan gerrymandering is thoroughly inconsistent with important constitutional principles. To some, inconsistency with constitutional principles is the definition of unconstitutionality; to others, it is not. I suspect some of the justices who agree extreme partisan gerrymandering is inconsistent with important constitutional principles do not believe that extreme partisan gerrymandering violates the Constitution.

Many actions may be inconsistent with important constitutional principles, but not unconstitutional.

-Hank

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Smith, Brad <BSmith@law.capital.edu>
Sent: Saturday, June 29, 2019 10:18 PM
To: Nicholas Stephanopoulos
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

I'm not sure that every justice has made that decision at all, but for argument's sake, it doesn't much affect my point--the Constitution protects against some forms of political equality in some cases. It's a big jump from there to "therefore gerrymandering--as defined by symmetry, efficiency gaps, or any other particular criteria-- is unconstitutional."

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From: Nicholas Stephanopoulos [nicholas.stephanopoulos@gmail.com]
Sent: Saturday, June 29, 2019 10:02 PM
To: Smith, Brad
Cc: Michael Latner; law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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But that's a jump the Court has already made. Every Justice agrees that sufficiently extreme gerrymandering is unconstitutional. The only debate is whether it's possible to distinguish constitutional from unconstitutional gerrymandering.

On Sat, Jun 29, 2019 at 8:38 PM Smith, Brad <BSmith@law.capital.edu> wrote:

> The Constitution protects against some forms of political inequality in some cases. There is a very, very, very big jump in going from "the Constitution protects political equality" to "therefore gerrymandering is unconstitutional."
>
> *Bradley A. Smith*
> *Josiah H. Blackmore II/Shirley M. Nault*
> *Professor of Law*
> *Capital University Law School*
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From: Law-election [law-election-bounces@department-lists.uci.edu] on behalf of Michael Latner [mlatner@calpoly.edu]
Sent: Saturday, June 29, 2019 4:08 PM
To: law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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Nick, Guy, Marc and others raise important points that I believe highlight a tension between the legal and scientific theory employed in gerrymandering cases. On the one hand the legal consensus is that the Constitution protects political equality but does not require PR as a remedy, so we (social scientists) employ metrics that are alternatives to proportionality.

On the other hand, social choice theory shows that equally weighted votes do indeed imply proportional outcomes. And the racial gerrymandering case remedies imply this as well if viewed from the level of the state. Perhaps this is the underlying reason so many legal academics are focusing on the quantitative work, because it has yet to be fully engaged within legal theory.

One reason I was particularly impressed by the Gaddie/Grofman brief that essentially reformulated the Gingles Test for partisan gerrymandering, going under the hood of asymmetry to define what it looks like sub-state (as Kagan did in her dissent), was that it pointed out that dilution is dilution, and single-seat systems provide a uniform method of reducing bias (though one that will still fall short of proportionality).

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Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of law-election-request@department-lists.uci.edu <law-election-request@department-lists.uci.edu>
Sent: Saturday, June 29, 2019 12:00 PM
To: law-election@department-lists.uci.edu
Subject: Law-election Digest, Vol 98, Issue 32

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Today's Topics:

1. Partisan gerrymandering and state courts: discover your inner Federalist! (Wang, Samuel S.)
2. symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
3. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Nicholas Stephanopoulos)
4. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
5. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
6. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
7. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Michael Parsons)
8. more news 6/28/19 (Rick Hasen)
9. Re: Equalizing CVAP without citizenship question (Jeff Wice)
10. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Greg Warrington)
11. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
12. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
13. Scalia's Last Laugh (Michael Latner)
14. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Chambers, Hank)
15. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Mark)

Message: 1
Date: Fri, 28 Jun 2019 19:43:14 +0000
From: "Wang, Samuel S." <sswang@Princeton.EDU>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Partisan gerrymandering and state courts: discover your inner Federalist!
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Dear Law-election Digest colleagues:

The Supreme Court decisions in Rucho v. Common Cause and Benisek v. Lamone are a severe disappointment, of course. But they left a second avenue wide open, and even invited it: state courts.

In a forthcoming article in the University of Pennsylvania Journal of Constitutional Law, my colleagues Rick Ober, Ben Williams, and I review the provisions for bringing such a lawsuit in all fifty states: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622

In this article, we catalogue provisions that resemble the First-Amendment-like freedoms of association, Fourteenth-Amendment-like equal protections, and other protections such as "free and fair elections" clauses. Overall, we see many promising avenues. In addition, we review close to a hundred cases in which state laws or constitutions were used to force the redrawing of district lines. So there is ample precedent for taking a federalist path.

Warm regards,

Sam

>>>

Samuel S.-H. Wang, Ph.D.

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Director, Gerrymandering Project

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Princeton, NJ 08544

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Elections: election.princeton.edu

Redistricting: gerrymander.princeton.edu

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Message: 2
Date: Fri, 28 Jun 2019 20:08:22 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Levitt, Justin" <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] symmetry got no shrift at all in Justice Kagan's dissent
in Rucho
Message-ID:
<DGC3D5F39378454AB9B0892BF2277AEA6E1C86@XCHMB01.ad.law.nyu.edu>
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In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4713473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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[signature_1987881029]

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https://department-lists.uci.edu/mailman/listinfo/law-election<https://urldefense.proofpoint.com/v2/url?u=https-3A__department-2Dlists.uci.edu_mailman_listinfo_law-2Delection&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=v3ue9hpMzqPTTBKwLv3YT-_iypuaCkdbkRAclqHR&m=YRlwV86RY-mwqXxfqi6g2w2X8mqY2mhCqppM56JpOQs&s=H8NIuuN4vFrf_phxEWxZBKUaf9tTzZN4unkAOxRJwPs&e=>

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Message: 3
Date: Fri, 28 Jun 2019 15:29:40 -0500
From: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAKOh_RtVeqH49vVO-_DH+mT66uohvL3Hhu1S95a-dY+v4CPM8w@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Through note that Kagan extensively discusses the seat and vote figures from which asymmetry metrics are calculated -- and not just in order to compare these figures to the performance of the computer-generated maps.

In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S. House of Representatives, although they received only 49% of the statewide vote. In 2014, Republican candidates increased their total to 10 of the 13 seats, this time based on 55% of the vote.

In 2016, Republican congressional candidates won 10 of North Carolina?s 13 seats, with 53% of the statewide vote. Two years later,Republican candidates won 9 of 12 seats though they received only 50% of the vote.

In the four elections that followed (from 2012 through 2018), Democrats have never received more than 65% of the statewide congressional vote. Yet in each of those elections, Democrats have won (you guessed it) 7 of 8 House seats.

Take Pennsylvania. In the three congressional elections occurring under the State?s original districting plan (before the State Supreme Court struck it down), Democrats receivedbetween 45% and 51% of the statewide vote, but won only5 of 18 House seats.

Or go next door to Ohio. There, in four congressional elections, Democrats tallied between 39% and 47% of the statewide vote, but never won more than 4 of 16 House seats.

On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

> In light of the exchanges here about how much attention symmetry tests did
> or didn?t receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan?s dissent.
> When she lays out her approach for how the courts should determine when
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> on the use of alternative, non-partisan maps to determine whether an
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>
> Best,
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> Rick
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> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> NYU School of Law
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> NYC, NY 10012
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> 212 998-6377
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>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
> on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
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> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
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> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law.election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
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> Herbert and Marjorie Fried Research Scholar
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> http://www.law.uchicago.edu/faculty/stephanopoulos
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> ------------------------------
>
> Message: 4
> Date: Fri, 28 Jun 2019 20:36:50 +0000
> From: "Goy-Uriel E. Charles" <charles@law.duke.edu>
> To: "Pildes, Rick" <rick.pildes@nyu.edu>
> Cc: Election Law Listserv <law-election@uci.edu>
> Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
> dissent in Rucho
> Message-ID: <11B0E6A5-D6DE-428F-BBCB-F9372E65DF48@law.duke.edu>
> Content-Type: text/plain; charset="utf-8"
>
> Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rohwer among others) attempted to raise. We all tend to see Rucho through our own prisms. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.
>
> On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:
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> http://electionlawblog.org<https://urldefense.proofpoint.com/v2/url?u=https-3A__linkprotect.cudasvc.com_url-3Fa-3Dhttp-253a-252f-252felectionlawblog.org-252f-26c-3DE-2C1-2CwtR1V0XZf1Sme-5FfcDKZNy7w0ckB-2Dpo6BuOzaHy-2DGeIwcfYtVDddHheYL6A9PCQv3-5FvVba1WoUI6oRqRMUH2H2-5F0JeOBocWgeekocE-2DkJVOCMIuo-5F2-26tyqu-3D1&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=v3uo9hpMizqPT1BKwLv3YT-_iypuaOkdhhkRAcIqHlRk&m=YRlwV86RY-mwyXsfq4g2w2XBmyY2mhCppqMS6JqOQs&s=fVzFWZ-VIzCfc-whJMuDzEzN0IBhT2mnXFCEzjc0sKA&e=>
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Message: 5
Date: Fri, 28 Jun 2019 21:23:56 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<BL0C9D5F39B784DAB90809228F227EAE6E2313@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

Guy,
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To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
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Message: 6
Date: Fri, 28 Jun 2019 21:26:25 +0000
From: "Guy-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <C8A3AB8A-ADDF-4A2D-BC84-C77FA13516C1@law.duke.edu>
Content-Type: text/plain; charset="utf-8"

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Message: 7
Date: Fri, 28 Jun 2019 18:31:49 -0400
From: Michael Parsons <michael@parsons.net>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID:
<CAEBUvChWO27=a0xJXYPJPEqNHOv60ds0t9q0LsnObr6KWuv5=Tg@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

To be honest, I think Nick's earlier point -- i.e., that Roberts' opinion
is fundamentally disingenuous in its arguments and reasoning -- maybe
addresses this point too. Roberts feigned ignorance about the meaning of
the outlier method and he feigned ignorance about symmetry, but he also
took "partisan advantage is a legitimate/permissible interest" as a
starting point for his analysis even though the legal/theoretical arguments
contesting this assumption were before him as well (both in the briefs and
in the underlying legal scholarship). Kagan points out in her dissent that
this assumption is unjustified and that all of the "neutral" examples of
"competing visions of electoral fairness" differ in type, not degree.
Roberts attempts to ground this starting-point assumption in precedent
(e.g., "Gaffney") so that he doesn't have to try and justify it on its own
terms, but (1) the precedent doesn't truly support this position (as
Levitt, Kang, and I have argued), and (2) given the contested state of the
law, the majority could have decided otherwise in *Rucho* anyway since the
arguments were before it.

At the end of the day, I think Roberts wanted this outcome, and so he said
whatever he felt he needed to say, and he declined to engage with any
arguments that might complicate that outcome. I think both the lawyers
involved and the underlying scholarship (legal and otherwise) split in
different directions based on reasonable disagreements over theoretical
first principles *and* lawyering strategies, but the majority opinion
ignores the inconvenient parts from all camps while focusing on the
weaknesses of all camps in a way that's internally inconsistent and
dishonest in its portrayal of what those in each camp were arguing.

Apologies for the cynicism -- reading this opinion really got to me.

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> on such tests. Even then, she does not actually say anything about whether
> she endorses this approach. The note just provides a brief description of
> what the District Court did.
>
> Best,
> Rick
>
> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
> NYU School of Law
> 40 Washington Sq. So.
> NYC, NY 10012
> 212 998-6377
>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu
> <law-election-bounces@department-lists.uci.edu>] *On Behalf Of *Nicholas
> Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
>
> He clearly understood; see all his passages in *Whitford* last year
> discussing symmetry. But that was a concept in which Kennedy was
> interested, not Roberts. So with Kennedy off the Court, Roberts could just
> return to calling everything proportionality if it involved seats and votes
> (much like Scalia did in *Vieth*).
>
> ---------- Forwarded message ---------
>
> Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> the two major political parties ?would fare hypothetically if they each . .
> . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> ?adopting a constitutional standard that invalidates a map based on unfair
> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
> on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> therefore concluded that ?asymmetry alone is not a reliable measure of
> unconstitutional partisanship.? Ibid.
>
> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 466?467, 473?473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> in part).
>
> Third, the plaintiffs offered evidence concerning the impact that Act 43
> had in skewing Wisconsin?s statewide political map in favor of Republicans.
> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
> plaintiffs contend that these studies measure deviations from ?partisan
> symmetry,? which they describe as the ?social scientific tenet that
> [districting] maps should treat parties symmetrically.? Brief for Appellees
> 37.
>
> We need not doubt the plaintiffs? math. The difficulty for standing
> purposes is that these calculations are an average measure. They do not
> address the effect that a gerrymander has on the votes of particular
> citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> something else en- tirely: the effect that a gerrymander has on the
> fortunes of political parties.
>
>
> On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> wrote:
>
> A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> require proportionality? is a handy strawman.
>
> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
>
> It is like a reprise of the Gill oral argument and sociological
> gobbledygook: does the Chief Justice not understand the difference between
> proportional representation arguments and symmetry arguments, or did he
> just willfully misrepresent the position of many of the plaintiffs? They
> couldn?t have made it clearer.
>
>
> --
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Message: 8
Date: Fri, 28 Jun 2019 22:31:30 +0000
From: Rick Hasen <rhasen@law.uci.edu>
To: Election Law Listserv <lawelection@uci.edu>
Subject: [EL] more news 6/28/19
Message-ID: <B7920F25-A7E8-4E42-BD37-855576EB7CB6@law.uci.edu>
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Florida Governor Signs SB 7066, Making It Harder for Felons Who Have Completed Time Served to Get Their Voting Rights Restored, And Thinks Amendment 4, Restoring Such Rights, Was Too Generous<https://electionlawblog.org/?p=105866>
Posted on June 28, 2019 3:30 pm<https://electionlawblog.org/?p=105866> by Rick Hasen<https://electionlawblog.org/?author=3>

From the Governor?s signing statement<https://www.flgov.com/wp-content/uploads/2019/06/E.282.pdf> (via Steve Bousquet<https://twitter.com/stevebousquet/status/1144731377432236039>) issued late on a Friday afternoon:
[https://electionlawblog.org/wp-content/uploads/Screen-Shot-2019-06-28-at-3.29.02-PM-1024x216.png]

I am sure the lawsuits will be filed almost immediately.
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<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105866&title=Florida%20Governor%20Signs%20SB%207066%2C%20Making%20It%20Harder%20for%20Felons%20Who%20Have%20Completed%20Time%20Served%20to%20Get%20Their%20Voting%20Rights%20Restored%2C%20And%20Thinks%20Amendment%204%2C%20Restoring%20Such%20Rights%2C%20Was%20Too%20Generous>
Posted in felon voting<https://electionlawblog.org/?cat=66>

Justice Thomas?s Ugly Accusation (Joined by Justices Gorsuch and Kavanaugh) in the Census Case<https://electionlawblog.org/?p=105862>
Posted on June 28, 2019 12:38 pm<https://electionlawblog.org/?p=105862> by Rick Hasen<https://electionlawblog.org/?author=3>

Others have made<https://twitter.com/mjs_DC/status/1144359892158951424> this point, but I wanted to flag this gratuitous and unsupported impugning of district court judge Furman in the census case<https://www.supremecourt.gov/opinions/18pdf/18-966_hg7c.pdf>. Thomas painted Furman as a conspiracy theorist in his partial dissent (joined by Gorsuch and Kavanaugh):

The District Court?s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 5677572, 660?664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and?with a jar of pins and a spool of string?create an eye-catching conspiracy web. Cf. id., at 662 (inferring ?from the various ways in which [the Secretary] and his aides acted like people with something to hide that they did have something to hide?). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary?s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105862&title=Justice%20Thomas%E2%80%99s%20Ugly%20Accusation%20%28Joined%20by%20Justices%20Gorsuch%20and%20Kavanaugh%29%20in%20the%20Census%20Case>
Posted in census litigation<https://electionlawblog.org/?cat=125>, Supreme Court<https://electionlawblog.org/?cat=29>

?Why the Supreme Court?s Rulings Have Profound Implications for American Politics?<https://electionlawblog.org/?p=105860>
Posted on June 28, 2019 11:47 am<https://electionlawblog.org/?p=105860> by Rick Hasen<https://electionlawblog.org/?author=3>

Michael Wines for the NYT,<https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html>
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?With No Supreme Court End to Gerrymandering, Will States Make It More Extreme??<https://electionlawblog.org/?p=105858>
Posted on June 28, 2019 11:18 am<https://electionlawblog.org/?p=105858> by Rick Hasen<https://electionlawblog.org/?author=3>

NYT<https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html>:

Thursday?s 5-4 ruling means that North Carolina?s current Republican-drawn map delineating its 13 Congressional districts ? a map that critics have said is among the country?s most egregious examples of hyper-partisanship ? will stand. The decision could also embolden lawmakers around the country to continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.
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The Erasure of Racial Vote Dilution Doctrine<https://electionlawblog.org/?p=105855>
Posted on June 28, 2019 10:18 am<https://electionlawblog.org/?p=105855> by Nicholas Stephanopoulos<https://electionlawblog.org/?author=12>

I?ll have more to say about the Court?s appalling opinion in Rucho in Rick?s symposium next week. But I want to flag one point now: the Court?s erasure of racial vote dilution doctrine. This is the doctrine that allows groups of minority voters to challenge electoral arrangements (including district lines) on the ground that the policies dilute the plaintiffs? votes. When such claims are brought under the Constitution, they require both discriminatory intent and discriminatory effect in the form of cracking and packing that reduce the plaintiffs? electoral influence. And crucially, the claims can be brought under the Constitution, not just the Voting Rights Act. Landmark precedents like White v. Regester and Rogers v. Lodge involve exclusively constitutional?and successful?racial vote dilution suits.

But you wouldn?t know any of this from Rucho. The Court discussed the two other kinds of redistricting claims that can be raised under the Constitution: one person, one vote, and racial gerrymandering. According to the Court, neither of these theories supports the justiciability of partisan gerrymandering claims. That?s because one person, one vote is an individualistic theory from which claims about group power can?t be derived, while racial gerrymandering suits don?t ?ask for a fair share of political power and influence, with all the justiciability conundrums that entails.? In contrast, the Court didn?t say a word about racial vote dilution. It didn?t cite White or Rogers or any other racial vote dilution decision. It didn?t mention the standard for liability in these cases. It didn?t even acknowledge that the doctrine exists.

This omission couldn?t have been accidental. In their briefs, the plaintiffs focused relentlessly on racial vote dilution precedents, arguing that they provided an analytical structure that could be used for partisan gerrymandering claims too. As the League of Women Voters plaintiffs put it, ?that [partisan gerrymandering claims] are not political questions . . . follows from the undisputed justiciability of racial vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not.? It was thus bitterly ironic when the Court asserted that ?Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.? After all, that was never Appellees? contention. Their actual argument, which the Court studiously refused to acknowledge, was that if the Court can adjudicate racial vote
 dilution claims, it can also assess analytically identical partisan gerrymandering claims.

Why did the Court refuse to recognize the plaintiffs? actual position? Probably because of its force. The parallels between partisan vote dilution and racial vote dilution go on and on, and make it impossible to distinguish between the doctrines? justiciability. First, both doctrines require proof of discriminatory intent. Second, the vote dilution condemned by both doctrines operates through the cracking and packing of groups of disfavored voters. Third, this dilution can only occur when members of both the favored and disfavored groups are politically cohesive. Fourth, the dilution can only be discerned by looking beyond the boundaries of a single district to the entire region where the disfavored group?s influence is abridged. And fifth, and most fundamentally, both claims ?ask for a fair share of political power and influence? for the targeted group. Both claims, that is, ask for the very thing that, in the Court?s view, poses unsolvable ?justiciability conundrums.?

Rucho?s silence about racial vote dilution, then, is extremely ominous. Does the Court no longer believe the doctrine exists? If so, decades of precedent would have to be discarded and the constitutional foundation of Section 2 of the Voting Rights Act would crumble into nothing. Or, only slightly less radically, does the Court think the doctrine exists but is nonjusticiable because it too involves ?reallocating power and influence between political [groups]?? Then constitutional racial vote dilution claims would be unavailable but Section 2 suits might still be allowed to proceed. Or, probably most plausibly, did the Court fail to mention the doctrine because its existence complicated the Court?s effort to shut the door on partisan gerrymandering claims? Then these dire consequences wouldn?t necessarily follow?but Court?s bad faith would be crystal clear. It?s the epitome of motivated, lawless reasoning to ignore a whole body of precedent just because it points in an awkward direct
 on.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105855&title=The%20Erasure%20of%20Racial%20Vote%20Dilution%20Doctrine>
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?The Census Decision: Institutional Realism, Institutional Formalism, and Judicial Review?<https://electionlawblog.org/?p=105849>
Posted on June 28, 2019 9:53 am<https://electionlawblog.org/?p=105849> by Richard Pildes<https://electionlawblog.org/?author=2>

Yesterday at the Balkinization blog, I put up this<https://balkin.blogspot.com/2019/06/the-census-decision-institutional.html> perspective on the Court?s Census decision. Here is a bit of that analysis:

Today?s decision in the Census case is a powerful example of what I call an ?institutionally realist? approach to judicial review of executive branch action. The Court not only probed deeply beneath the surface of the formal administrative record, which it rarely does, to conclude that the administration?s justification for the citizenship question was ?contrived? and pretextual.

In various other ways, the Court concluded that the ?unusual circumstances? of the case warranted the approach the Court was taking. For example, the Court also concluded that, even though the district judge was wrong to permit discovery outside the record at the stage he did so, it turned out after the fact that there were good reasons for doing, and the Court was therefore willing to rely on the information generated in this way. That the stakes are far higher regarding the Census than ordinary administrative law issues undoubtedly played a major role in why the Court was willing to approach the case as it did. The ?unusual circumstances? that justified a more aggressive application of administrative-law doctrines were thus a realistic recognition of the (1) magnitude of the issues and (2) the signs that there was nothing regular about the processes that led to the Commerce Department?s decision.

I want to put this way of looking at the Census decision in a larger context concerning how courts review the actions of governmental institutions more generally. Back before the Trump administration was a gleam in the eye of American politics, I wrote an article called Institutional Formalism and Realism in Constitutional and Public Law<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411141>. I mention when the piece was written to indicate that it was not written (or gerrymandered) for the Trump administration. But I think it frames the central, underlying issue the courts confront in reviewing many of the actions of the Trump administration, including in today?s Census case.

The central idea of Institutional Formalism and Realism is that, when courts are called up to judge the actions of other governmental institutions or actors, they implicitly confront a choice about whether to adopt a more formalist or more realist stance towards the institution or actor involved. When courts are institutionally formalist, they treat the government institution involved largely as a black box, to which the Constitution (or other sources of law) allocate specific powers or functions. In this mode, courts do not open up that black box to attempt to make more realist assessments of what underlies the way those institutions exercise their powers at any particular moment in time, or how those institutions might function differently in different eras.

This is reflected in doctrines like ?the presumption of regularity,? which courts ordinarily apply in reviewing agency action ? and which Justice Thomas relies heavily on in his critical dissent today. Institutional realism entails the opposite stance: in assessing the legality of government decision-making, courts do take into account their judgments about how specific institutions are actually functioning (or failing to function) at particular moments in time. ?

Today?s Census decision, and the conflict between Chief Justice Roberts and Justice Thomas? dissent, nicely illustrates how strongly this tension between institutional formalism and realism underlies major Court decisions. But the tension is pervasive and inescapable.
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?Trump jokes to Putin: ?Don?t meddle in the election??<https://electionlawblog.org/?p=105847>
Posted on June 28, 2019 9:44 am<https://electionlawblog.org/?p=105847> by Rick Hasen<https://electionlawblog.org/?author=3>

Politico<https://www.politico.com/story/2019/06/28/trump-putin-meeting-1386123>:

Trump spoke to reporters briefly before he and Putin were scheduled to talk for an hour to discuss a series of national security issues, including Iran?s recent aggression<https://www.politico.com/story/2019/06/27/trump-iran-nuclear-deal-1385148>, the civil war in Syria, where the United States and Russia are backing opposing sides, and a new arms control treaty with China.

When Trump did not bring up to reporters whether he would mention election interference, a reporter asked him if he would talk to Putin about it.

?Yes, of course I will,? Trump told reporters. Then he turned to Putin, smiling and wagging his finger in the Russian president?s direction at one point, and said: ?Don?t meddle in the election, president. Don?t meddle in the election.?

But it?s unclear whether Trump actually pressed Putin on Mueller?s findings. A readout from the White House did not include the subject
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?Editorial: N.C. can and must act for fair districts even if high court won?t stop gerrymandering?<https://electionlawblog.org/?p=105845>
Posted on June 28, 2019 9:38 am<https://electionlawblog.org/?p=105845> by Rick Hasen<https://electionlawblog.org/?author=3>

WRAL editorial,<https://www.wral.com/editorial-n-c-can-and-must-act-for-fair-districts-even-if-high-court-won-t-stop-gerrymandering/18429285/>
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Thank You to Peter Overby<https://electionlawblog.org/?p=105843>
Posted on June 28, 2019 9:28 am<https://electionlawblog.org/?p=105843> by Rick Hasen<https://electionlawblog.org/?author=3>

Peter is retiring as the Money and Politics reporter at NPR after a great run. I?ve always benefitted from Peter?s tenacity and his excellent reporting skills.

Happy Retirement and we will miss you on the beat!
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Message: 9
Date: Fri, 28 Jun 2019 18:35:04 -0400
From: Jeff Wice <jmwice@gmail.com>
To: Douglas Johnson <dljohnson@ndcresearch.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Equalizing CVAP without citizenship question
Message-ID: <2bffdbc9-885c-4c3e-abe8-3b254f3d44b2@gmail.com>
Content-Type: text/plain; charset="utf-8"

The Census Bureau informed participants at a recent National Conference of State Legislatures (NCSL) redistricting seminar that it has been asked by the Commerce Department to look into providing citizenship data derived from the ACS in the PL 94-171 datafile provided to the states. No decision has yet been made.
I recently came upon an expert statement submitted to a New York federal district court by the late Tom Hofeller where he said: "When the Census Bureau initiated the ACS process, it was made clear that the ACS data were not intended for use in redistricting and were certainly not included in the details? small area tabulations to be released in conjunction with the Public Law 94-171 data generated for the Census Bureau?s Redistricting Data Program. ?
Tom elaborated on this in detail in his report submitted to the New York eastern district federal court in the case Boone et al v. Nassau County Legislature et al (see document no. 44-4 in case 2:11-cv-02712). Readers who are interested in reading the entire explanation can email mail me directly for a copy.
Jeff Wice
via Newton Mail [https://cloudmagic.com/k/d/mailapp?ct=dx&cv=10.0.18&pv=10.14.5&source=email_footer_2]
On Thu, Jun 27, 2019 at 10:50 PM, Douglas Johnson <dljohnson@ndcresearch.com> wrote:
All of those options include both measurable and unmeasurable margins of error, the former of which could be calculated and used to determine the odds that all the districts are within the allowed spread. For Congress, that?s near-impossible. It might work for some legislative plans.
- Doug
On Thu, Jun 27, 2019 at 6:53 PM Kogan, Vladimir < kogan_1@osu.edu [kogan_1@osu.edu] > wrote:
Relatedly, is there anything that would prevent the Trump administration from directing the Census Bureau to put out block level CVAP estimates by appending Census counts to other administrative data (which critics of the citizenship questions have argued all along provide more accurate citizenship info) for easy redistricting use?

From: Kogan, Vladimir
Sent: Thursday, June 27, 2019 9:15 PM
To: Election Law Listserv < law-election@uci.edu [law-election@uci.edu] >
Subject: Equalizing CVAP without citizenship question

Question: Suppose that (1) the citizenship question stays off the 2020 census and (2) at least one state decides to redistrict by equalizing CVAP anyway using the American Community Survey citizenship estimates (combined with the 2020 population counts).

Have any courts ruled on the question of how to navigate population equality requirements with data subject to considerable statistical uncertainty due to sampling? I know CVAP is used all the time in the context of VRA compliance; are there any cases from that area that speak to this question? (I realize Evenwel left open the question of whether equalizing CVAP was permissible, but it seems like there are five votes on that question.)

Thanks!

Vlad

Vladimir Kogan , Associate Professor
Department of Political Science

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- Doug

Douglas Johnson
National Demographics Corporation
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fax 818-254-1221

_____ Law-election mailing list Law-election@department-lists.uci.edu https://department-lists.uci.edu/mailman/listinfo/law-election
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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/cabf0f8c/attachment-0001.html>
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Size: 3605 bytes
Desc: not available
URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/cabf0f8c/attachment-0001.png>
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A non-text attachment was scrubbed...
Name: image002.gif
Type: image/gif
Size: 1351 bytes
Desc: not available
URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/cabf0f8c/attachment-0001.gif>

Message: 10
Date: Fri, 28 Jun 2019 21:07:32 -0400
From: Greg Warrington <gregory.warrington@uvm.edu>
To: Nicholas Stephanopoulos <nicholas.stephanopoulos6@gmail.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <20190629010731.GC28077@gswarrin-XPS-13-9350>
Content-Type: text/plain; charset=utf-8

Unfortunately, the bare recitation of seats-votes outcomes plays into
the narrative of the majority that a gerrymander exists through the
resulting deviation from proportionality.

On Fri, Jun 28, 2019 at 03:29:469PM -0500, Nicholas Stephanopoulos wrote:
> Though note that Kagan extensively discusses the seat and vote figures from
> which asymmetry metrics are calculated -- and not just in order to compare
> these figures to the performance of the computer-generated maps.
>
> ----------------
>
> In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
> House of Representatives, although they received only 49% of the statewide
> vote. In 2014, Republican candidates increased their total to 10 of the 13
> seats, this time based on 55% of the vote.
>
> In 2016, Republican congressional candidates won 10 of North Carolina?s 13
> seats, with 53% of the statewide vote. Two years later,Republican
> candidates won 9 of 12 seats though they received only 50% of the vote.
>
> In the four elections that followed (from 2012 through 2018), Democrats
> have never received more than 65% of the statewide congressional vote. Yet
> in each of those elections, Democrats have won (you guessed it) 7 of
> 8 House seats.
>
> Take Pennsylvania. In the three congressional elections occurring under the
> State?s original districting plan (before the State Supreme Court struck it
> down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
> only5 of 18 House seats.
>
> Or go next door to Ohio. There, in four congressional elections, Democrats
> tallied between 39% and 47% of the statewide vote, but never won more than
> 4 of 16 House seats.
>
> On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> > In light of the exchanges here about how much attention symmetry tests did
> > or didn?t receive in the Roberts opinion, it seems odd not to mention that
> > these tests received *no *attention at all in Justice Kagan?s dissent.
> > When she lays out her approach for how the courts should determine when
> > unconstitutional partisan gerrymandering has occurred, she relies entirely
> > on the use of alternative, non-partisan maps to determine whether an
> > enacted plan is enough of an outlier to be unconstitutional (of course,
> > direct evidence of intent is also relevant).
> >
> >
> >
> > The only time she even mentions symmetry tests is in note 4, to which she
> > relegates a brief description of the District Court?s additional reliance
> > on such tests. Even then, she does not actually say anything about whether
> > she endorses this approach. The note just provides a brief description of
> > what the District Court did.
> >
> >
> >
> > Best,
> >
> > Rick
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> >
> >
> > Richard H. Pildes
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> > Sudler Family Professor of Constitutional Law
> >
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> > NYC, NY 10012
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> > 212 998-6377
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> >
> > *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> > *On Behalf Of *Nicholas Stephanopoulos
> > *Sent:* Friday, June 28, 2019 11:44 AM
> > *To:* Levitt, Justin <justin.levitt@lls.edu>
> > *Cc:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* Re: [EL] symmetry really got short shrift in Rucho
> >
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> >
> > He clearly understood; see all his passages in *Whitford* last year
> > discussing symmetry. But that was a concept in which Kennedy was
> > interested, not Roberts. So with Kennedy off the Court, Roberts could just
> > return to calling everything proportionality if it involved seats and votes
> > (much like Scalia did in *Vieth*).
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> > Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> > proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> > the two major political parties ?would fare hypothetically if they each . .
> > . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> > KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> > ?adopting a constitutional standard that invalidates a map based on unfair
> > results that would occur in a hypothetical state of affairs.? Id., at 420.
> > Aside from that problem, he wrote,the partisan bias standard shed no light
> > on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> > therefore concluded that ?asymmetry alone is not a reliable measure of
> > unconstitutional partisanship.? Ibid.
> >
> >
> > Justice Stevens would have found that the Texas map was a partisan
> > gerrymander based in part on the asymmetric advantage it conferred on
> > Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> > concurring in part and dissenting in part). Justice Souter, writing for
> > himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> > of a criterion of symmetry,? and that ?further attention could be devoted
> > to the administrability of such a criterion at all levels of redistricting
> > and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> > in part).
> >
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> >
> > Third, the plaintiffs offered evidence concerning the impact that Act 43
> > had in skewing Wisconsin?s statewide political map in favor of Republicans.
> > This evidence, which made up the heart of the plaintiffs? case, was derived
> > from partisan-asymmetry studies similar to those discussed in LULAC. The
> > plaintiffs contend that these studies measure deviations from ?partisan
> > symmetry,? which they describe as the ?social scientific tenet that
> > [districting] maps should treat parties symmetrically.? Brief for Appellees
> > 37.
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> >
> > We need not doubt the plaintiffs? math. The difficulty for standing
> > purposes is that these calculations are an average measure. They do not
> > address the effect that a gerrymander has on the votes of particular
> > citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> > something else en- tirely: the effect that a gerrymander has on the
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> > wrote:
> >
> > A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> > require proportionality? is a handy strawman.
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> >
> > *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> > Behalf Of *Rick Hasen
> > *Sent:* Thursday, June 27, 2019 9:46 PM
> > *To:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* [EL] symmetry really got short shrift in Rucho
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> > It is like a reprise of the Gill oral argument and sociological
> > gobbledygook: does the Chief Justice not understand the difference between
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> > just willfully misrepresent the position of many of the plaintiffs? They
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> > > Nicholas O. Stephanopoulos
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Message: 11
Date: Sat, 29 Jun 2019 02:45:04 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <DD2C28C4-D316-4F5C-A5E1-6B2701238BD4@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Gay-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Gay-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

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Best,
Rick

Richard H. Pildes
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40 Washington Sq. So.
NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

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Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and in review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

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On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

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--
Rick Hasen
Chancellor's Professor of Law and Political Science
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949.824.3072 - office
rhasen@law.uci.edu<mailto:rhasen@law.uci.edu>
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Message: 12
Date: Sat, 29 Jun 2019 02:48:51 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <C027B133-F969-4899-ABC3-55D86522E2C2@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--
Marc E. Elias
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melias@perkinscoie.com<mailto:melias@perkinscoie.com>

@marcerelias<https://twitter.com/marcerelias>

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowler among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4713473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?ocial scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:
A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Date: Sat, 29 Jun 2019 15:00:50 +0000
From: Michael Lamer <mlamer@calpoly.edu>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Scalia?s Last Laugh
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Our response to Rucho
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Message: 14
Date: Sat, 29 Jun 2019 15:28:35 +0000
From: "Chambers, Hank" <hchamber@richmond.edu>
To: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>, "Guy-Uriel
E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
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I tend to agree with Marc and Guy about the mismatch. I always prefer that courts give a nod to or engage with legal (and other relevant) scholarship, but I am not sure what shrift the symmetry literature should get in the majority opinion (or even the minority opinion) in Rucho.

Assume Chief Justice Roberts fully agrees that the scholarship on symmetry provides evidence/proof of partisan gerrymandering and its severity, but that partisan gerrymandering - even severe partisan gerrymandering - is not unconstitutional under the 1st Amendment/equal protection clause. Assume that CJ Roberts further believes that even if some severe gerrymandering is unconstitutional, symmetry analysis can tell us how severe the gerrymander is, but does not help a court draw the line between a severe and unconstitutional gerrymander and a severe and constitutional gerrymander.

If CJ Roberts believes what is in the paragraph above - the opinion seems to provide justification to think he may - I am not sure he needs to engage the literature on symmetry in his opinion. At least, he is no more derelict in declining to engage the symmetry literature than the Court is in many other opinions where it declines to engage relevant legal scholarship.

-Hank

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Elias, Marc (Perkins Coie) <MElias@perkinscoie.com>
Sent: Friday, June 28, 2019 10:48 PM
To: Guy-Uriel E. Charles; Pildes, Rick
Cc: Election Law Listserv
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Goy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Goy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Goy,

As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Goy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,

Rick

Richard H. Pildes

Sadler Family Professor of Constitutional Law

NYU School of Law

40 Washington Sq. So.

NYC, NY 10012

212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 466?467, 471?473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 483?484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:

A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

--

Rick Hasen

Chancellor's Professor of Law and Political Science

UC Irvine School of Law

401 E. Peltason Dr., Suite 1000

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Nicholas O. Stephanopoulos
Professor of Law

Herbert and Marjorie Fried Research Scholar
University of Chicago Law School
nstephan@uchicago.edu<mailto:nstephan@uchicago.edu>
(773) 702-4226

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Message: 15
Date: Sat, 29 Jun 2019 13:31:30 -0400
From: Mark <markusb2983@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAC-kASVtqhBf_24_9pSFbe_ayShk29qOKwhv+zBNxqDuOfPfvA@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Is it not even remotely possible that those symmetry tests (and other
similar statewide tests) that SCOTUS rejected in Gill and rejected again in
Rucho need some work? They are based on the assumption that partisan votes
in one district are equatable to partisan votes in another. I know it
takes on the entire profession to say this, but poli sci research has
shown that this is not true.

Getting rid of the single member district and moving to nonpartisan
commissions would go a long way towards resolving our collective concerns
about gerrymandering.

On Fri, Jun 28, 2019 at 4:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

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> or didn?t receive in the Roberts opinion, it seems odd not to mention that
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> Best,
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> Rick
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>
>
> Richard H. Pildes
>
> Sudler Family Professor of Constitutional Law
>
> NYU School of Law
>
> 40 Washington Sq. So.
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> NYC, NY 10012
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> 212 998-6377
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>
> *From:* Law-election [mailto:law-elections-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
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> Rick Hasen
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> Nicholas O. Stephanopoulos
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> Herbert and Marjorie Fried Research Scholar
> University of Chicago Law School
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> http://www.law.uchicago.edu/faculty/stephanopoulos
> <https://urldefense.proofpoint.com/v2/url?u=http-3A__www.law.uchicago.edu_faculty_stephanopoulos&d=DwMFaQ&c=slrrB7dE8n7gBJbeO0g-IQ&r=v3uz9bpMizgP1TBKwLv3YT-_iypzaOkdthkRAclqHRk&m=YBlwV86RY-mwpXsfqifg2w2X0mvY2mhCzppnM56JnQOs&s=TBODxtWRXAIJ25_ejGJE2UJQgGIBPgGeUkgohIxxCBQ&e=>
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Mark Rush
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End of Law-election Digest, Vol 98, Issue 32
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Nicholas O. Stephanopoulos
Professor of Law
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nstephl@uchicago.edu
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http://www.law.uchicago.edu/faculty/stephanopoulos

From: law-election on behalf of Levitt, Justin
To: Michael Latner; law-election@department-lists.uci.edu
Subject: [External] Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Date: Saturday, June 29, 2019 6:50:01 PM
Attachments: untitled-[1].txt

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Three quick thoughts on Michael's engaging note. There was what I would have hoped was a legal consensus that the Constitution protects against massive political inequality. That is very different than protecting political equality. In many doctrinal arenas, the Constitution generally operates in a mode of boundary policing around a broad center of theory-agnostic permission, rather than attempting to build from a single correct theory out. That's been a rather consistent disconnect, and a recurring point of contention in the language used to describe the desired end state. (It's true in the zone of independent commissions too: they're designed far more to preclude unfair incumbent-favoring states than to affirmatively generate fair ones, given how contested the notion of "fair" is.) That said, after *Rucho*, I'm not sure how much consensus there is around the first, rather more modest, point that the Constitution protects against massive political inequality.

That's related to the concept of "equally weighted votes," too. The Court uses that phrase (or similar phrases) a fair amount. But Justice Ginsburg called it a "slogan" in *Evenwel*, for good reason: it has (several different) conceptions in political science literature, but none of them have thus far had substantial teeth in any legally coherent context (and I think that's also correct as a matter of constitutional theory). Both Joey Fishkin and Sandy Levinson have magnificent pieces on this issue – I cribbed from both here.

And finally, the Voting Rights Act may be a constitutional-ish superstatute, but it is distinct from the Constitution. Particularly after 1982, it's a clearer affirmative legislative mandate for equitable political efficacy than the constitution contains. Nick correctly pointed out the constitutional vote dilution cases – *White v. Regester* and *Rogers v. Lodge*, for example – in his post yesterday, and the fact that they're absolutely nowhere in *Rucho*, which would have been inexplicable if the Court were meaningfully grappling with the possibilities and not committed first to a designated outcome. Because of the VRA, those cases are apparently beyond the judiciary's muscle memory. I can't help but wonder if the Court would be more comfortable embracing the social science mentioned frequently here over the last few days if there were a (relatively open-ended) statute oriented toward equitable political efficacy on the basis of partisanship – a clearer statutory command forcing some kind of resolution beyond throwing up of hands. And absent such a federal statute, we may well see the utility of some of the social science in interpreting the increasing number of state constitutional or statutory provisions aimed at partisan fairness.

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Michael Latner
Sent: Saturday, June 29, 2019 1:09 PM
To: law-election@department-lists.uci.edu
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Nick, Guy, Marc and others raise important points that I believe highlight a tension between the legal and scientific theory employed in gerrymandering cases. On the one hand the legal consensus is that the Constitution protects political equality but does not require PR as a remedy, so we (social scientists) employ metrics that are alternatives to proportionality.

On the other hand, social choice theory shows that equally weighted votes do indeed imply proportional outcomes. And the racial gerrymandering case remedies imply this as well if viewed from the level of the state. Perhaps this is the underlying reason so many legal academics are focusing on the quantitative work, because it has yet to be fully engaged within legal theory.

One reason I was particularly impressed by the Gaddie/Grofman brief that essentially reformulated the Gingles Test for partisan gerrymandering, going under the hood of asymmetry to define what it looks like sub-state (as Kagan did in her dissent), was that it pointed out that dilution is dilution, and single-seat systems provide a uniform method of reducing bias (though one that will still fall short of proportionality).

Michael Latner, Ph.D.
Associate Professor of Political Science
California Polytechnic State University, San Luis Obispo
www.michaellatner.com

Gerrymandering in America: The House of Representatives, the Supreme Court, and the Future of Popular Sovereignty

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of law-election-request@department-lists.uci.edu <law-election-request@department-lists.uci.edu>
Sent: Saturday, June 29, 2019 12:00 PM
To: law-election@department-lists.uci.edu
Subject: Law-election Digest, Vol 98, Issue 32

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Today's Topics:

1. Partisan gerrymandering and state courts: discover your inner Federalist! (Wang, Samuel S.)
2. symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
3. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Nicholas Stephanopoulos)
4. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
5. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Pildes, Rick)
6. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Goy-Uriel E. Charles)
7. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Michael Parsons)
8. more news 6/28/19 (Rick Hasen)
9. Re: Equalizing CVAP without citizenship question (Jeff Wice)
10. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Greg Warrington)
11. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
12. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Elias, Marc (Perkins Coie))
13. Scalia?s Last Laugh (Michael Latner)
14. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Chambers, Hank)
15. Re: symmetry got no shrift at all in Justice Kagan's dissent in Rucho (Mark)

Message: 1
Date: Fri, 28 Jun 2019 19:43:14 +0000
From: "Wang, Samuel S." <sswang@Princeton.EDU>
To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Partisan gerrymandering and state courts: discover your inner Federalist!
Message-ID:
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Dear Law-election Digest colleagues:

The Supreme Court decisions in Rucho v. Common Cause and Benisek v. Lamone are a severe disappointment, of course. But they left a second avenue wide open, and even invited it: state courts.

In a forthcoming article in the University of Pennsylvania Journal of Constitutional Law, my colleagues Rick Ober, Ben Williams, and I review the provisions for bringing such a lawsuit in all fifty states: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3335622

In this article, we catalogue provisions that resemble the First-Amendment-like freedoms of association, Fourteenth-Amendment-like equal protections, and other protections such as "free and fair elections" clauses. Overall, we see many promising avenues. In addition, we review close to a hundred cases in which state laws or constitutions were used to force the redrawing of district lines. So there is ample precedent for taking a federalist path.

Warm regards,

Sam

>>>

Samuel S.-H. Wang, Ph.D.

Professor, Neuroscience Institute

Director, Gerrymandering Project

Princeton University

Princeton, NJ 08544

Neuroscience: synapse.princeton.edu

Elections: election.princeton.edu

Redistricting: gerrymander.princeton.edu

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Message: 2
Date: Fri, 28 Jun 2019 20:08:22 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Levitt, Justin" <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho
Message-ID:
<9F3C9D5F3987B4DAB9089228F227EAEAGF1C06@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="us-ascii"

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

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Best,
Rick

Richard H. Pildes
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NYC, NY 10012
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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results it would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

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[signature_1987881029]

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Message: 3
Date: Fri, 28 Jun 2019 15:29:40 -0500
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To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAKZh_81Vpq8449vYO-_DH+mT66asbsU3Hxa1S9Ge-dY+y4CPMBw@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Though note that Kagan extensively discusses the seat and vote figures from
which asymmetry metrics are calculated -- and not just in order to compare
these figures to the performance of the computer-generated maps.

In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
House of Representatives, although they received only 49% of the statewide
vote. In 2014, Republican candidates increased their total to 10 of the 13
seats, this time based on 55% of the vote.

In 2016, Republican congressional candidates won 10 of North Carolina?s 13
seats, with 53% of the statewide vote. Two years later,Republican
candidates won 9 of 12 seats though they received only 50% of the vote.

In the four elections that followed (from 2012 through 2018), Democrats
have never received more than 65% of the statewide congressional vote. Yet
in each of those elections, Democrats have won (you guessed it) 7 of
8 House seats.

Take Pennsylvania. In the three congressional elections occurring under the
State?s original districting plan (before the State Supreme Court struck it
down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
only5 of 18 House seats.

Or go next door to Ohio. There, in four congressional elections, Democrats
tallied between 39% and 47% of the statewide vote, but never won more than
4 of 16 House seats.

On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.leavitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
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> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
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> *Subject:* [EL] symmetry really got short shrift in Rucho
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Message: 4
Date: Fri, 28 Jun 2019 20:36:50 +0000
From: "Gay-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
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Message-ID: <31B0B549-D6DE-42BF-BBCB-F9372E65DF4B@law.duke.edu>
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Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/a2babf8e/attachment-0001.html>

Message: 5
Date: Fri, 28 Jun 2019 21:23:56 +0000
From: "Pildes, Rick" <rick.pildes@nyu.edu>
To: "Gay-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<09C5CD5F398T84DAB9080928F227FAEA6E2313@XCHMB01.ad.law.nyu.edu>
Content-Type: text/plain; charset="utf-8"

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

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The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?social scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

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A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Rick Hasen
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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/49d3e5b5/attachment-0001.html>

Message: 6
Date: Fri, 28 Jun 2019 21:26:25 +0000
From: "Goy-Uriel E. Charles" <charles@law.duke.edu>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <C9A3A04A-ADDF-4A20-BCB4-C77FA13516C1@law.duke.edu>
Content-Type: text/plain; charset="utf-8"

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Goy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Goy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

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Richard H. Pildes
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212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
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URL: <http://department-lists.uci.edu/pipermail/law-election/attachments/20190628/df8c058e/attachment-0001.html>

Message: 7
Date: Fri, 28 Jun 2019 18:31:49 -0400
From: Michael Parsons <michael@parsons.net>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CAEBUvCHWO27=u8vJXYPOPEgNHQv6fddeh9gfLxzQb6KWwr5=Tg@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

To be honest, I think Nick's earlier point -- i.e., that Roberts' opinion
is fundamentally disingenuous in its arguments and reasoning -- maybe
addresses this point too. Roberts feigned ignorance about the meaning of
the outlier method and he feigned ignorance about symmetry, but he also
took "partisan advantage is a legitimate/permissible interest" as a
starting point for his analysis even though the legal/theoretical arguments
contesting this assumption were before him as well (both in the briefs and
in the underlying legal scholarship). Kagan points out in her dissent that
this assumption is unjustified and that all of the "neutral" examples of
"competing visions of electoral fairness" differ in type, not degree.
Roberts attempts to ground this starting-point assumption in precedent
(e.g., *Gaffney*) so that he doesn't have to try and justify it on its own
terms, but (1) the precedent doesn't truly support this position (as
Levitt, Kang, and I have argued), and (2) given the contested state of the
law, the majority could have decided otherwise in *Rucho* anyway since the
arguments were before it.

At the end of the day, I think Roberts wanted this outcome, and so he said
whatever he felt he needed to say, and he declined to engage with any
arguments that might complicate that outcome. I think both the lawyers
involved and the underlying scholarship (legal and otherwise) split in
different directions based on reasonable disagreements over theoretical
first principles *and* lawyering strategies, but the majority opinion
ignores the inconvenient parts from all camps while focusing on the
weaknesses of all camps in a way that's internally inconsistent and
dishonest in its portrayal of what those in each camp were arguing.

Apologies for the cynicism -- reading this opinion really got to me.

On Fri, Jun 28, 2019 at 5:27 PM Goy-Uriel E. Charles <charles@law.duke.edu>
wrote:

> My point is not about lawyering. It?s about scholarship and specifically
> about legal scholarship.
>
> On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> Goy,
> As part of the Common Cause legal team in the North Carolina case, I can
> tell you that the work of Michael Kang and Justin Levitt significantly and
> directly influenced the structure of arguments Common Cause made.
>
>
> *From:* Goy-Uriel E. Charles [mailto:charles@law.duke.edu
> <charles@law.duke.edu>]
> *Sent:* Friday, June 28, 2019 4:37 PM
> *To:* Pildes, Rick <rick.pildes@nyu.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry got no shrift at all in Justice Kagan's
> dissent in Rucho
>
> Rick raises an interesting point. I?ve been struck by the mismatch
> between the substantive focus of the opinions in Rucho and the legal
> academic literature. I wonder if legal academics were insufficiently
> attentive to the legal/theoretical questions raised by the cases and too
> focused on the empirical/political science issues. To be a bit more
> precise, I wonder if the focus on EG and symmetry standards overshadowed
> what should have been a healthy debate about the legal/theoretical
> questions that a number of legal academics, (C. Elmendorf, M. Kang, J.
> Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all
> tend to see Rucho through our own priors. And I will admit to that bias in
> this case. But again, I was surprised by what seemed to me to an asymmetry
> (sorry) between the focus of the opinions in Rucho and the legal academic
> literature.
>
>
> On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> In light of the exchanges here about how much attention symmetry tests did
> or didn?t receive in the Roberts opinion, it seems odd not to mention that
> these tests received *no *attention at all in Justice Kagan?s dissent.
> When she lays out her approach for how the courts should determine when
> unconstitutional partisan gerrymandering has occurred, she relies entirely
> on the use of alternative, non-partisan maps to determine whether an
> enacted plan is enough of an outlier to be unconstitutional (of course,
> direct evidence of intent is also relevant).
>
> The only time she even mentions symmetry tests is in note 4, to which she
> relegates a brief description of the District Court?s additional reliance
> on such tests. Even then, she does not actually say anything about whether

> she endorses this approach. The note just provides a brief description of
> what the District Court did.
>
> Best,
> Rick
>
> Richard H. Pildes
> Sudler Family Professor of Constitutional Law
> NYU School of Law
> 40 Washington Sq. So.
> NYC, NY 10012
> 212 998-6377
>
> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu
> <law-election-bounces@department-lists.uci.edu>] *On Behalf Of *Nicholas
> Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
>
> He clearly understood; see all his passages in *Whitford* last year
> discussing symmetry. But that was a concept in which Kennedy was
> interested, not Roberts. So with Kennedy off the Court, Roberts could just
> return to calling everything proportionality if it involved seats and votes
> (much like Scalia did in *Vieth*).
>
> ---------------------
>
> Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> the two major political parties ?would fare hypothetically if they each . .
> . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> ?adopting a constitutional standard that invalidates a map based on unfair
> results that would occur in a hypothetical state of affairs.? Id., at 420.
> Aside from that problem, he wrote,the partisan bias standard shed no light
> on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> therefore concluded that ?asymmetry alone is not a reliable measure of
> unconstitutional partisanship.? Ibid.
>
> Justice Stevens would have found that the Texas map was a partisan
> gerrymander based in part on the asymmetric advantage it conferred on
> Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> concurring in part and dissenting in part). Justice Souter, writing for
> himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> of a criterion of symmetry,? and that ?further attention could be devoted
> to the administrability of such a criterion at all levels of redistricting
> and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> in part).
>
> Third, the plaintiffs offered evidence concerning the impact that Act 43
> had in skewing Wisconsin?s statewide political map in favor of Republicans.
> This evidence, which made up the heart of the plaintiffs? case, was derived
> from partisan-asymmetry studies similar to those discussed in LULAC. The
> plaintiffs contend that these studies measure deviations from ?partisan
> symmetry,? which they describe as the ?social scientific tenet that
> [districting] maps should treat parties symmetrically.? Brief for Appellees
> 37.
>
> We need not doubt the plaintiffs? math. The difficulty for standing
> purposes is that these calculations are an average measure. They do not
> address the effect that a gerrymander has on the votes of particular
> citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> something else en- tirely: the effect that a gerrymander has on the
> fortunes of political parties.
>
>
> On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> wrote:
>
> A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> require proportionality? is a handy strawman.
>
> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
>
> It is like a reprise of the Gill oral argument and sociological
> gobbledygook: does the Chief Justice not understand the difference between
> proportional representation arguments and symmetry arguments, or did he
> just willfully misrepresent the position of many of the plaintiffs? They
> couldn?t have made it clearer.
>
>
>
> --
> Rick Hasen
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> Message: 8
> Date: Fri, 28 Jun 2019 22:31:30 +0000
> From: Rick Hasen <rhasen@law.uci.edu>
> To: Election Law Listserv <law-election@uci.edu>
> Subject: [EL] more news 6/28/19
> Message-ID: <B7D20C23-A5E8-4E42-BD37-855576EB7C86@law.uci.edu>
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Florida Governor Signs SB 7066, Making It Harder for Felons Who Have Completed Time Served to Get Their Voting Rights Restored, And Thinks Amendment 4, Restoring Such Rights, Was Too Generous<https://electionlawblog.org/?p=105866>
Posted on June 28, 2019 3:30 pm<https://electionlawblog.org/?p=105866> by Rick Hasen<https://electionlawblog.org/?author=3>

From the Governor?s signing statement<https://www.flgov.com/wp-content/uploads/2019/06/fs.282.pdf> (via Steve Bousquet<https://twitter.com/stevebousquet/status/1144731377432236039>) issued late on a Friday afternoon:
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I am sure the lawsuits will be filed almost immediately.
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Justice Thomas?s Ugly Accusation (Joined by Justices Gorsuch and Kavanaugh) in the Census Case<https://electionlawblog.org/?p=105862>
Posted on June 28, 2019 12:38 pm<https://electionlawblog.org/?p=105862> by Rick Hasen<https://electionlawblog.org/?author=3>

Others have made<https://twitter.com/mjs_DC/status/1144358892158951424> this point, but I wanted to flag this gratuitous and unsupported impugning of district court judge Furman in the census case<https://www.supremecourt.gov/opinions/18pdf/18-966_hg7c.pdf>. Thomas painted Furman as a conspiracy theorist in his partial dissent (joined by Gorsuch and Kavanaugh):

The District Court?s lengthy opinion pointed to other facts that, in its view, supported a finding of pretext. 351 F. Supp. 3d, at 567?572, 6607664 (discussing the statements, e-mails, acts, and omissions of numerous people involved in the process). I do not deny that a judge predisposed to distrust the Secretary or the administration could arrange those facts on a corkboard and ?with a jar of pins and a spool of string?create an eye-catching conspiracy web. Cf. id., at 662 (inferring ?from the various ways in which [the Secretary] and his aides acted like people with something to hide that they did have something to hide?). But the Court does not rely on this evidence, and rightly so: It casts no doubt on whether the Secretary?s stated rationale factored into his decision. The evidence suggests, at most, that the Secretary had multiple reasons for wanting to include the citizenship question on the census.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105862&title=Justice%20Thomas%E2%80%99s%20Ugly%20Accusation%20Joined%20by%20Justices%20Gorsuch%20and%20Kavanaugh%20in%20the%20Census%20Case>
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?Why the Supreme Court?s Rulings Have Profound Implications for American Politics?<https://electionlawblog.org/?p=105860>
Posted on June 28, 2019 11:47 am<https://electionlawblog.org/?p=105860> by Rick Hasen<https://electionlawblog.org/?author=3>

Michael Wines for the NYT:<https://www.nytimes.com/2019/06/27/us/supreme-court-gerrymandering-census.html>
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?With No Supreme Court End to Gerrymandering, Will States Make It More Extreme??<https://electionlawblog.org/?p=105858>
Posted on June 28, 2019 11:18 am<https://electionlawblog.org/?p=105858> by Rick Hasen<https://electionlawblog.org/?author=3>

NYT:<https://www.nytimes.com/2019/06/28/us/supreme-court-gerrymandering-north-carolina.html>

Thursday?s 5-4 ruling means that North Carolina?s current Republican-drawn map delineating its 13 Congressional districts ? a map that critics have said is among the country?s most egregious examples of hyper-partisanship ? will stand. The decision could also embolden lawmakers around the country to continue to push the envelope and craft seats for their respective parties with the aid of increasingly sophisticated computer mapping tools.
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The Erasure of Racial Vote Dilution Doctrine<https://electionlawblog.org/?p=105855>
Posted on June 28, 2019 10:18 am<https://electionlawblog.org/?p=105855> by Nicholas Stephanopoulos<https://electionlawblog.org/?author=12>

I?ll have more to say about the Court?s appalling opinion in Rucho in Rick?s symposium next week. But I want to flag one point now: the Court?s erasure of racial vote dilution doctrine. This is the doctrine that allows groups of minority voters to challenge electoral arrangements (including district lines) on the ground that the policies dilute the plaintiffs? votes. When such claims are brought under the Constitution, they require both discriminatory intent and discriminatory effect in the form of cracking and packing that reduce the plaintiffs? electoral influence. And crucially, the claims can be brought under the Constitution, not just the Voting Rights Act. Landmark precedents like White v. Regester and Rogers v. Lodge involve exclusively constitutional?and successful?racial vote dilution suits.

But you wouldn?t know any of this from Rucho. The Court discussed the two other kinds of redistricting claims that can be raised under the Constitution: one-person, one vote, and racial gerrymandering. According to the Court, neither of these theories supports the justiciability of partisan gerrymandering claims. That?s because one person, one vote is an individualistic theory from which claims about group power can?t be derived, while racial gerrymandering suits don?t ?ask for a fair share of political power and influence, with all the justiciability conundrums that entails.? In contrast, the Court didn?t say a word about racial vote dilution. It didn?t cite White or Rogers or any other racial vote dilution decision. It didn?t mention the standard for liability in these cases. It didn?t even acknowledge that the doctrine exists.

This omission couldn?t have been accidental. In their briefs, the plaintiffs focused relentlessly on racial vote dilution precedents, arguing that they provided an analytical structure that could be used for partisan gerrymandering claims too. As the League of Women Voters plaintiffs put it, ?that [partisan gerrymandering claims] are not political questions . . . follows from the undisputed justiciability of racial vote-dilution cases. Racial vote dilution, just like partisan vote dilution, works by cracking and packing disfavored voters and thus abridging their electoral influence. The former cannot be justiciable and the latter not.? It was thus bitterly ironic when the Court asserted that ?Appellees contend that if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims.? After all, that was never Appellees? contention. Their actual argument, which the Court unanimously refused to acknowledge, was that if the Court can adjudicate racial vote
 dilution claims, it can also assess analytically identical partisan gerrymandering claims.

Why did the Court refuse to recognize the plaintiffs? actual position? Probably because of its force. The parallels between partisan vote dilution and racial vote dilution go on and on, and make it impossible to distinguish between the doctrines? justiciability. First, both doctrines require proof of discriminatory intent. Second, the vote dilution condemned by both doctrines operates through the cracking and packing of groups of disfavored voters. Third, this dilution can only occur when members of both the favored and disfavored groups are politically cohesive. Fourth, the dilution can only be discerned by looking beyond the boundaries of a single district to the entire region where the disfavored group?s influence is abridged. And fifth, and most fundamentally, both claims ?ask for a fair share of political power and influence? for the targeted group. Both claims, that is, ask for the very thing that, in the Court?s view, poses unsolvable ?justiciability conundrums.?

Rucho?s silence about racial vote dilution, then, is extremely ominous. Does the Court no longer believe the doctrine exists? If so, decades of precedent would have to be discarded and the constitutional foundation of Section 2 of the Voting Rights Act would crumble into nothing. Or, only slightly less radically, does the Court think the doctrine exists but is nonjusticiable because it too involves ?reallocating power and influence between political [groups]?? Then constitutional racial vote dilution claims would be unavailable but Section 2 suits might still be allowed to proceed. Or, probably most plausibly, did the Court fail to mention the doctrine because its existence complicated the Court?s effort to shut the door on partisan gerrymandering claims? Then these dire consequences wouldn?t necessarily follow?but Court?s bad faith would be crystal clear. It?s the epitome of motivated, lawless reasoning to ignore a whole body of precedent just because it points in an awkward direc
 on.
[Share]<https://www.addtoany.com/share#url=https%3A%2F%2Felectionlawblog.org%2F%3Fp%3D105855&title=The%20Erasure%20of%20Racial%20Vote%20Dilution%20Doctrine>
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?The Census Decision: Institutional Realism, Institutional Formalism, and Judicial Review?<https://electionlawblog.org/?p=105849>
Posted on June 28, 2019 9:57 am<https://electionlawblog.org/?p=105849> by Richard Pildes<https://electionlawblog.org/?author=2>

Yesterday at the Balkinization blog, I put up this<https://balkin.blogspot.com/2019/06/the-census-decision-institutional.html>: perspective on the Court?s Census decision. Here is a bit of that analysis:

Today?s decision in the Census case is a powerful example of what I call an ?institutionally realist? approach to judicial review of executive branch action. The Court not only probed deeply beneath the surface of the formal administrative record, which it rarely does, to conclude that the administration?s justification for the citizenship question was ?contrived? and pretextual.

In various other ways, the Court concluded that the ?unusual circumstances? of the case warranted the approach the Court was taking. For example, the Court also concluded that, even though the district judge was wrong to permit discovery outside the record at the stage he did so, it turned out after the fact that there were good reasons for doing, and the Court was therefore willing to rely on the information generated in this way. That the stakes are far higher regarding the Census than ordinary administrative law issues undoubtedly played a major role in why the Court was willing to approach the case as it did. The ?unusual circumstances? that justified a more aggressive application of administrative-law doctrines were thus a realistic recognition of the (1) magnitude of the issues and (2) the signs that there was nothing regular about the processes that led to the Commerce Department?s decision.

I want to put this way of looking at the Census decision in a larger context concerning how courts review the actions of governmental institutions more generally. Back before the Trump administration was a gleam in the eye of American politics, I wrote an article called Institutional Formalism and Realism in Constitutional and Public Law<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2411141>. I mention when the piece was written to indicate that it was not written (or gerrymandered) for the Trump administration. But I think it frames the central, underlying issue the courts confront in reviewing many of the actions of the Trump administration, including in today?s Census case.

The central idea of Institutional Formalism and Realism is that, when courts are called up to judge the actions of other governmental institutions or actors, they implicitly confront a choice about whether to adopt a more formalist or more realist stance towards the institution or actor involved. When courts are institutionally formalist, they treat the government institution involved largely as a black box, to which the Constitution (or other sources of law) allocate specific powers or functions. In this mode, courts do not open up that black box to attempt to make more realist assessments of what underlies the way those institutions exercise their powers at any particular moment in time, or how those institutions might function differently in different eras.

This is reflected in doctrines like ?the presumption of regularity,? which courts ordinarily apply in reviewing agency action ? and which Justice Thomas relies heavily on in his critical dissent today. Institutional realism entails the opposite stance: in assessing the legality of government decision-making, courts do take into account their judgments about how specific institutions are actually functioning (or failing to function) at particular moments in time. ?

Today?s Census decision, and the conflict between Chief Justice Roberts and Justice Thomas? dissent, nicely illustrates how strongly this tension between institutional formalism and realism underlies major Court decisions. But the tension is pervasive and inescapable.
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?Trump jokes to Putin: ?Don?t meddle in the election?<https://electionlawblog.org/?p=105847>
Posted on June 28, 2019 9:44 am<https://electionlawblog.org/?p=105847> by Rick Hasen<https://electionlawblog.org/?author=3>

Politico<https://www.politico.com/story/2019/06/28/trump-putin-meeting-1386123>:

Trump spoke to reporters briefly before he and Putin were scheduled to talk for an hour to discuss a series of national security issues, including Iran?s recent aggression<https://www.politico.com/story/2019/06/27/trump-iran-nuclear-deal-1385148>, the civil war in Syria, where the United States and Russia are backing opposing sides, and a new arms control treaty with China.

When Trump did not bring up to reporters whether he would mention election interference, a reporter asked him if he would talk to Putin about it.

?Yes, of course I will,? Trump told reporters. Then he turned to Putin, smiling and wagging his finger in the Russian president?s direction at one point, and said: ?Don?t meddle in the election, president. Don?t meddle in the election.?

But it?s unclear whether Trump actually pressed Putin on Mueller?s findings. A readout from the White House did not include the subject
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?Editorial: N.C. can and must act for fair districts even if high court won?t stop gerrymandering?<https://electionlawblog.org/?p=105845>
Posted on June 28, 2019 9:38 am<https://electionlawblog.org/?p=105845> by Rick Hasen<https://electionlawblog.org/?author=3>

WRAL editorial: <https://www.wral.com/editorial-n-c-can-and-must-act-for-fair-districts-even-if-high-court-won-t-stop-gerrymandering/18478283/>
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Thank You to Peter Overby<https://electionlawblog.org/?p=105843>
Posted on June 28, 2019 9:28 am<https://electionlawblog.org/?p=105843> by Rick Hasen<https://electionlawblog.org/?author=3>

Peter is retiring as the Money and Politics reporter at NPR after a great run. I?ve always benefitted from Peter?s tenacity and his excellent reporting skills.

Happy Retirement and we will miss you on the beat!
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Message: 9
Date: Fri, 28 Jun 2019 18:35:04 -0400
From: Jeff Wice <jmwice@gmail.com>
To: Douglas Johnson <djohnson@ndcresearch.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] Equalizing CVAP without citizenship question
Message-ID: <3fbf8dc9-8f5c-4c7e-a8e8-3b2545b5d449@gmail.com>
Content-Type: text/plain; charset="utf-8"

The Census Bureau informed participants at a recent National Conference of State Legislatures (NCSL) redistricting seminar that it has been asked by the Commerce Department to look into providing citizenship data derived from the ACS in the PL 94-171 datafile provided to the states. No decision has yet been made.
I recently came upon an expert statement submitted to a New York federal district court by the late Tom Hofeller where he said: "When the Census Bureau initiated the ACS process, it was made clear that the ACS data were not intended for use in redistricting and were certainly not included in the details? small area tabulations to be released in conjunction with the Public Law 94-171 data generated for the Census Bureau?s Redistricting Data Program.?
Tom elaborated on this in detail in his report submitted to the New York eastern district federal court in the case Boone et al v. Nassau County Legislature et al (see document no. 44-4 in case 2:11-cv-02712). Readers who are interested in reading the entire explanation can email mail me directly for a copy.
Jeff Wice
via Newton Mail [https://cloudmagic.com/k/d/mailapp?ct=dx&cv=10.0.18&pv=10.14.5&source=email_footer_2]
On Thu, Jun 27, 2019 at 10:50 PM, Douglas Johnson <djohnson@ndcresearch.com> wrote:
All of those options include both measurable and unmeasurable margins of error, the former of which could be calculated and used to determine the odds that all the districts are within the allowed spread. For Congress, that?s near-impossible. It might work for some legislative plans.
- Doug
On Thu, Jun 27, 2019 at 6:53 PM Kogan, Vladimir < kogan.18@osu.edu [kogan.18@osu.edu] > wrote:
Relatedly, is there anything that would prevent the Trump administration from directing the Census Bureau to put out block level CVAP estimates by appending Census counts to other administrative data (which critics of the citizenship questions have argued all along provide more accurate citizenship info) for easy redistricting use?

From: Kogan, Vladimir
Sent: Thursday, June 27, 2019 9:15 PM
To: Election Law Listserv < law-election@uci.edu [law-election@uci.edu] >
Subject: Equalizing CVAP without citizenship question

Question: Suppose that (1) the citizenship question stays off the 2020 census and (2) at least one state decides to redistrict by equalizing CVAP anyway using the American Community Survey citizenship estimates (combined with the 2020 population counts).

Have any courts ruled on the question of how to navigate population equality requirements with data subject to considerable statistical uncertainty due to sampling? I know CVAP is used all the time in the context of VRA compliance; are there any cases from that area that speak to this question? (I realize Evenwel left open the question of whether equalizing CVAP was permissible, but it seems like there are five votes on that question.)

Thanks!

Vlad

Vladimir Kogan , Associate Professor
Department of Political Science

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- Doug

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National Demographics Corporation
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Message: 10
Date: Fri, 28 Jun 2019 21:07:32 -0400
From: Greg Warrington <gregory.warrington@uvm.edu>
To: Nicholas Stephanopoulos <nicholas.stephanopoulos@gmail.com>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <20190628010731.GC28077@gswarrin-XPS-13-9350>
Content-Type: text/plain; charset=utf-8

Unfortunately, the bare recitation of seats-votes outcomes plays into
the narrative of the majority that a gerrymander exists through the
resulting deviation from proportionality.

On Fri, Jun 28, 2019 at 03:29:40PM -0500, Nicholas Stephanopoulos wrote:
> Though note that Kagan extensively discusses the seat and vote figures from
> which asymmetry metrics are calculated -- and not just in order to compare
> these figures to the performance of the computer-generated maps.
>
> ----------
>
> In 2012, Republican candidates won 9 of the State?s 13 seats in the U. S.
> House of Representatives, although they received only 49% of the statewide
> vote. In 2014, Republican candidates increased their total to 10 of the 13
> seats, this time based on 55% of the vote.
>
> In 2016, Republican congressional candidates won 10 of North Carolina?s 13
> seats, with 53% of the statewide vote. Two years later,Republican
> candidates won 9 of 12 seats though they received only 50% of the vote.
>
> In the four elections that followed (from 2012 through 2018), Democrats
> have never received more than 45% of the statewide congressional vote. Yet
> in each of those elections, Democrats have won (you guessed it) 7 of
> 8 House seats.
>
> Take Pennsylvania. In the three congressional elections occurring under the
> State?s original districting plan (before the State Supreme Court struck it
> down), Democrats receivedbetween 45% and 51% of the statewide vote, but won
> only5 of 18 House seats.
>
> Or go next door to Ohio. There, in four congressional elections, Democrats
> tallied between 39% and 47% of the statewide vote, but never won more than
> 4 of 16 House seats.
>
> On Fri, Jun 28, 2019 at 3:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:
>
> > In light of the exchanges here about how much attention symmetry tests did
> > or didn?t receive in the Roberts opinion, it seems odd not to mention that
> > these tests received *no *attention at all in Justice Kagan?s dissent.
> > When she lays out her approach for how the courts should determine when
> > unconstitutional partisan gerrymandering has occurred, she relies entirely
> > on the use of alternative, non-partisan maps to determine whether an
> > enacted plan is enough of an outlier to be unconstitutional (of course,
> > direct evidence of intent is also relevant).
> >
> >
> >
> > The only time she even mentions symmetry tests is in note 4, to which she
> > relegates a brief description of the District Court?s additional reliance

> > on such tests. Even then, she does not actually say anything about whether
> > she endorses this approach. The note just provides a brief description of
> > what the District Court did.
> >
> >
> >
> > Best,
> >
> > Rick
> >
> >
> >
> > Richard H. Pildes
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> > Sudler Family Professor of Constitutional Law
> >
> > NYU School of Law
> >
> > 40 Washington Sq. So.
> >
> > NYC, NY 10012
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> > 212 998-6377
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> >
> > *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> > *On Behalf Of *Nicholas Stephanopoulos
> > *Sent:* Friday, June 28, 2019 11:44 AM
> > *To:* Levitt, Justin <justin.levitt@lls.edu>
> > *Cc:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* Re: [EL] symmetry really got short shrift in Rucho
> >
> >
> >
> > He clearly understood; see all his passages in *Whitford* last year
> > discussing symmetry. But that was a concept in which Kennedy was
> > interested, not Roberts. So with Kennedy off the Court, Roberts could just
> > return to calling everything proportionality if it involved seats and votes
> > (much like Scalia did in *Vieth*).
> >
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> >
> > Relevant to this case, an amicus brief in support of the LULAC plaintiffs
> > proposed a ?symmetry standard? to ?measure partisan bias? by comparing how
> > the two major political parties ?would fare hypothetically if they each . .
> > . received a given percentage of the vote.? 548 U. S., at 419 (opinion of
> > KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of
> > ?adopting a constitutional standard that invalidates a map based on unfair
> > results that would occur in a hypothetical state of affairs.? Id., at 420.
> > Aside from that problem, he wrote,the partisan bias standard shed no light
> > on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY
> > therefore concluded that ?asymmetry alone is not a reliable measure of
> > unconstitutional partisanship.? Ibid.
> >
> >
> >
> > Justice Stevens would have found that the Texas map was a partisan
> > gerrymander based in part on the asymmetric advantage it conferred on
> > Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion
> > concurring in part and dissenting in part). Justice Souter, writing for
> > himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility
> > of a criterion of symmetry,? and that ?further attention could be devoted
> > to the administrability of such a criterion at all levels of redistricting
> > and its review.? Id., at 4837484 (opinion concurring in part and dissenting
> > in part).
> >
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> >
> > Third, the plaintiffs offered evidence concerning the impact that Act 43
> > had in skewing Wisconsin?s statewide political map in favor of Republicans.
> > This evidence, which made up the heart of the plaintiffs? case, was derived
> > from partisan-asymmetry studies similar to those discussed in LULAC. The
> > plaintiffs contend that these studies measure deviations from ?partisan
> > symmetry,? which they describe as the ?social scientific tenet that
> > [districting] maps should treat parties symmetrically.? Brief for Appellees
> > 37.
> >
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> >
> > We need not doubt the plaintiffs? math. The difficulty for standing
> > purposes is that these calculations are an average measure. They do not
> > address the effect that a gerrymander has on the votes of particular
> > citizens. Partisan-asymmetry metrics such as the efficiency gap measure
> > something else en- tirely: the effect that a gerrymander has on the
> > fortunes of political parties.
> >
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> > On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu>
> > wrote:
> >
> > A vote for willful misrepresentation. Claiming ?the Constitution doesn?t
> > require proportionality? is a barely strawman.
> >
> >
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> >
> > *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> > Behalf Of *Rick Hasen
> > *Sent:* Thursday, June 27, 2019 9:46 PM
> > *To:* Election Law Listserv <law-election@uci.edu>
> > *Subject:* [EL] symmetry really got short shrift in Rucho
> >
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> >
> > It is like a reprise of the Gill oral argument and sociological
> > gobbledygook: does the Chief Justice not understand the difference between
> > proportional representation arguments and symmetry arguments, or did he
> > just willfully misrepresent the position of many of the plaintiffs? They
> > couldn?t have made it clearer.
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> > --
> >
> > Rick Hasen
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> > Nicholas O. Stephanopoulos
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> > Herbert and Marjorie Fried Research Scholar
> > University of Chicago Law School
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> > (773) 702-4226
> > http://www.law.uchicago.edu/faculty/stephanopoulos
> > <https://urldefense.proofpoint.com/v2/url?u=http-3A__www.law.uchicago.edu_faculty_stephanopoulos&d=DwMFaQ&c=slnIF7dEIbx7gRlbeO0g-IQ&v=v3uz9bpMizqP1TBKwLvJYT-_tqvraOkehhkRAclqHRk&m=YRbvV86RY-mwyXsfqifg2w2X8tmyY2mhCzppnM5fdpOOu&s=TROIDn1WRXAJI25_zgZiF2UfQqSHPgGeUkgnbJvxCIRQ&e=>
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Greg Warrington
Associate (Chair,Professor)
Department of Mathematics & Statistics
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Message: 11
Date: Sat, 29 Jun 2019 02:45:04 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Goy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <DD2C28C4-D316-4B5C-A5E1-6827012BBD4@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Goy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

--
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For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Goy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>

Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
Sudler Family Professor of Constitutional Law
NYU School of Law
40 Washington Sq. So.
NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

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From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

It is like a reprise of the Gill oral argument and sociological gobbledygook: does the Chief Justice not understand the difference between proportional representation arguments and symmetry arguments, or did he just willfully misrepresent the position of many of the plaintiffs? They couldn?t have made it clearer.

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Message: 12
Date: Sat, 29 Jun 2019 02:48:51 +0000
From: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>
To: "Guy-Uriel E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID: <C1027B133-F960-4889-ABC3-55D86522E2C2@perkinscoie.com>
Content-Type: text/plain; charset="utf-8"

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--
Marc E. Elias
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@marceelias<https://twitter.com/marceelias>

For scheduling assistance, or if its urgent, contact Allie Rothenberg: ARothenberg@perkinscoie.com<mailto:ARothenberg@perkinscoie.com> or 908-377-7531.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Guy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

As a practicing lawyer with four recent Supreme Court cases involving racial gerrymandering, I think Guy is exactly right. As an observer to the partisan gerrymandering claims, I was struck at how much the law professors morphed into quantitative social scientists ? like the ones lawyers typically use as expert witnesses. While political scientists play an essential role in these cases, it?s not clear why the legal scholars didn?t spend more time bolstering a coherent legal theory and let the political scientists handle the math. That is not to say that the legal theories advanced in these cases were not coherent (they largely were), but the contribution by law professors seemed less legal and more quantitative.

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Guy-Uriel Charles <charles@law.duke.edu>
Date: Friday, June 28, 2019 at 5:27 PM
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,
As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Guy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,
Rick

Richard H. Pildes
Sudler Family Professor of Constitutional Law
NYU School of Law
40 Washington Sq. So.
NYC, NY 10012
212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

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Subject: [EL] symmetry really got short shrift in Rucho

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Rick Hasen
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To: "law-election@department-lists.uci.edu"
<law-election@department-lists.uci.edu>
Subject: [EL] Scalia?s Last Laugh
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Our response to Rucho
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Message: 14
Date: Sat, 29 Jun 2019 15:28:35 +0000
From: "Chambers, Hank" <hchamber@richmond.edu>
To: "Elias, Marc (Perkins Coie)" <MElias@perkinscoie.com>, "Goy-Uriel
E. Charles" <charles@law.duke.edu>, "Pildes, Rick"
<rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
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I tend to agree with Marc and Guy about the mismatch. I always prefer that courts give a nod to or engage with legal (and other relevant) scholarship, but I am not sure what shrift the symmetry literature should get in the majority opinion (or even the minority opinion) in Rucho.

Assume Chief Justice Roberts fully agrees that the scholarship on symmetry provides evidence/proof of partisan gerrymandering and its severity, but that partisan gerrymandering - even severe partisan gerrymandering - is not unconstitutional under the 1st Amendment/equal protection clause. Assume that CJ Roberts further believes that even if some severe gerrymandering is unconstitutional, symmetry analysis can tell us how severe the gerrymander is, but does not help a court draw the line between a severe and unconstitutional gerrymander and a severe and constitutional gerrymander.

If CJ Roberts believes what is in the paragraph above - the opinion seems to provide justification to think he may - I am not sure he needs to engage the literature on symmetry in his opinion. At least, he is no more derelict in declining to engage the symmetry literature than the Court is in many other opinions where it declines to engage relevant legal scholarship.

-Hank

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Elias, Marc (Perkins Coie) <MElias@perkinscoie.com>
Sent: Friday, June 28, 2019 10:48 PM
To: Goy-Uriel E. Charles, Pildes, Rick
Cc: Election Law Listserv
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

And to clarify?I don?t mean the law professors acting as counsel in the cases. I mean the legal scholarship?as Guy suggests.

--

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From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Marc Elias <MElias@perkinscoie.com>
Date: Friday, June 28, 2019 at 10:45 PM
To: Goy-Uriel Charles <charles@law.duke.edu>, "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
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To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

My point is not about lawyering. It?s about scholarship and specifically about legal scholarship.

On Jun 28, 2019, at 5:23 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

Guy,

As part of the Common Cause legal team in the North Carolina case, I can tell you that the work of Michael Kang and Justin Levitt significantly and directly influenced the structure of arguments Common Cause made.

From: Goy-Uriel E. Charles [mailto:charles@law.duke.edu]
Sent: Friday, June 28, 2019 4:37 PM
To: Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's dissent in Rucho

Rick raises an interesting point. I?ve been struck by the mismatch between the substantive focus of the opinions in Rucho and the legal academic literature. I wonder if legal academics were insufficiently attentive to the legal/theoretical questions raised by the cases and too focused on the empirical/political science issues. To be a bit more precise, I wonder if the focus on EG and symmetry standards overshadowed what should have been a healthy debate about the legal/theoretical questions that a number of legal academics, (C. Elmendorf, M. Kang, J. Levitt, Charles/Fuentes-Rowher among others) attempted to raise. We all tend to see Rucho through our own priors. And I will admit to that bias in this case. But again, I was surprised by what seemed to me to an asymmetry (sorry) between the focus of the opinions in Rucho and the legal academic literature.

On Jun 28, 2019, at 4:08 PM, Pildes, Rick <rick.pildes@nyu.edu<mailto:rick.pildes@nyu.edu>> wrote:

In light of the exchanges here about how much attention symmetry tests did or didn?t receive in the Roberts opinion, it seems odd not to mention that these tests received no attention at all in Justice Kagan?s dissent. When she lays out her approach for how the courts should determine when unconstitutional partisan gerrymandering has occurred, she relies entirely on the use of alternative, non-partisan maps to determine whether an enacted plan is enough of an outlier to be unconstitutional (of course, direct evidence of intent is also relevant).

The only time she even mentions symmetry tests is in note 4, to which she relegates a brief description of the District Court?s additional reliance on such tests. Even then, she does not actually say anything about whether she endorses this approach. The note just provides a brief description of what the District Court did.

Best,

Rick

Richard H. Pildes

Sudler Family Professor of Constitutional Law

NYU School of Law

40 Washington Sq. So.

NYC, NY 10012

212 998-6377

From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] On Behalf Of Nicholas Stephanopoulos
Sent: Friday, June 28, 2019 11:44 AM
To: Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>>
Cc: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: Re: [EL] symmetry really got short shrift in Rucho

He clearly understood; see all his passages in Whitford last year discussing symmetry. But that was a concept in which Kennedy was interested, not Roberts. So with Kennedy off the Court, Roberts could just return to calling everything proportionality if it involved seats and votes (much like Scalia did in Vieth).

Relevant to this case, an amicus brief in support of the LULAC plaintiffs proposed a ?symmetry standard? to ?measure partisan bias? by comparing how the two major political parties ?would fare hypothetically if they each . . . received a given percentage of the vote.? 548 U. S., at 419 (opinion of KENNEDY, J.). JUSTICE KENNEDY noted some wariness at the prospect of ?adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs.? Id., at 420. Aside from that problem, he wrote,the partisan bias standard shed no light on ?how much partisan dominance is too much.? Ibid. JUSTICE KENNEDY therefore concluded that ?asymmetry alone is not a reliable measure of unconstitutional partisanship.? Ibid.

Justice Stevens would have found that the Texas map was a partisan gerrymander based in part on the asymmetric advantage it conferred on Republicans in converting votes to seats. Id., at 4667467, 4717473 (opinion concurring in part and dissenting in part). Justice Souter, writing for himself and JUSTICE GINSBURG, noted that he would not ?rule out the utility of a criterion of symmetry,? and that ?further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review.? Id., at 4837484 (opinion concurring in part and dissenting in part).

Third, the plaintiffs offered evidence concerning the impact that Act 43 had in skewing Wisconsin?s statewide political map in favor of Republicans. This evidence, which made up the heart of the plaintiffs? case, was derived from partisan-asymmetry studies similar to those discussed in LULAC. The plaintiffs contend that these studies measure deviations from ?partisan symmetry,? which they describe as the ?ocial scientific tenet that [districting] maps should treat parties symmetrically.? Brief for Appellees 37.

We need not doubt the plaintiffs? math. The difficulty for standing purposes is that these calculations are an average measure. They do not address the effect that a gerrymander has on the votes of particular citizens. Partisan-asymmetry metrics such as the efficiency gap measure something else en- tirely: the effect that a gerrymander has on the fortunes of political parties.

On Thu, Jun 27, 2019 at 11:50 PM Levitt, Justin <justin.levitt@lls.edu<mailto:justin.levitt@lls.edu>> wrote:

A vote for willful misrepresentation. Claiming ?the Constitution doesn?t require proportionality? is a handy strawman.

From: Law-election <law-election-bounces@department-lists.uci.edu<mailto:law-election-bounces@department-lists.uci.edu>> On Behalf Of Rick Hasen
Sent: Thursday, June 27, 2019 9:46 PM
To: Election Law Listserv <law-election@uci.edu<mailto:law-election@uci.edu>>
Subject: [EL] symmetry really got short shrift in Rucho

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Rick Hasen

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Professor of Law

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Message: 15
Date: Sat, 29 Jun 2019 13:31:30 -0400
From: Mark <markrush7983@gmail.com>
To: "Pildes, Rick" <rick.pildes@nyu.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] symmetry got no shrift at all in Justice Kagan's
dissent in Rucho
Message-ID:
<CACzkSVtghBf_24_9p5Ehw_ayShKj3hQKwho+sBNoqDoOPPriA@mail.gmail.com>
Content-Type: text/plain; charset="utf-8"

Is it not even remotely possible that those symmetry tests (and other
similar statewide tests) that SCOTUS rejected in Gill and rejected again in
Rucho need some work? They are based on the assumption that partisan votes
in one district are equatable to partisan votes in another. I know it
takes on the entire profession to say this, but poli sci research has
shown that this is not true.

Getting rid of the single member district and moving to nonpartisan
commissions would go a long way towards resolving our collective concerns
about gerrymandering.

On Fri, Jun 28, 2019 at 4:13 PM Pildes, Rick <rick.pildes@nyu.edu> wrote:

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> or didn?t receive in the Roberts opinion, it seems odd not to mention that
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> Best,
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> Rick
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> Richard H. Pildes
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> Sudler Family Professor of Constitutional Law
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> NYU School of Law
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> NYC, NY 10012
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> *From:* Law-election [mailto:law-election-bounces@department-lists.uci.edu]
> *On Behalf Of *Nicholas Stephanopoulos
> *Sent:* Friday, June 28, 2019 11:44 AM
> *To:* Levitt, Justin <justin.levitt@lls.edu>
> *Cc:* Election Law Listserv <law-election@uci.edu>
> *Subject:* Re: [EL] symmetry really got short shrift in Rucho
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> *From:* Law-election <law-election-bounces@department-lists.uci.edu> *On
> Behalf Of *Rick Hasen
> *Sent:* Thursday, June 27, 2019 9:46 PM
> *To:* Election Law Listserv <law-election@uci.edu>
> *Subject:* [EL] symmetry really got short shrift in Rucho
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> Rick Hasen
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> Mark Rush
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> **

From: Law-election on behalf of Levitt, Justin
To: Rick Hasen; Election Law Listserv
Subject: [External] Re: [EL] symmetry really got short shrift in Rucho
Date: Friday, June 28, 2019 12:50:09 AM
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http://electionlawblog.org

From: Law-election on behalf of Nicholas Stephanopoulos
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] symmetry really got short shrift in Rucho
Date: Friday, June 28, 2019 11:44:56 AM
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From:	Law-election on behalf of David Keating
To:	Allison Hayward; Levitt, Justin; Rick Hasen; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject:	[External] Re: [EL] Uber/Lyft to the polls
Date:	Tuesday, November 6, 2018 11:00:44 AM
Attachments:	ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless verified. Send all suspicious email as an attachment to Report Spam.

Three cheers for Uber and Lyft for offering rides today. It's a shame that the law is terrible.

I looked in to this a bit and the question of whether Uber/Lyft can offer rides illustrates much of what is wrong with campaign finance law. It is absurdly complex and chills ordinary political activity we ought to encourage.

There are legal risks for Uber not yet discussed in this thread. Pretty clearly only giant companies like Uber can afford the legal help and the PR advice to likely avoid problems. But there is still legal risk, even to Uber. Some local taxi company or local group could easily botch it if it tried to make the same offer without the legal guidance Uber has likely bought.

Unfortunately, the short version is that a pretty strong argument could be made that Uber might be doing something wrong under federal campaign finance law that regulates corporate and union spending. If a complaint is filed making these arguments, some commissioners might even find a reason to believe a violation has occurred in the poll ride program. These commissioners might want to authorize an investigation.

If the person who filed such a complaint believed that the relevant FEC regulations are too permissive compared to the statute (as they arguably are here), he could take the matter to court if the FEC dismissed his complaint based on compliance with the regulation.

I would disagree with these arguments, but the fact that an argument can be made illustrates the dangerous complexity and chill in something that should be simple and clear. Or not regulated at all.

And these ride discounts would be federal election activity. Hopefully for Uber's sake, no elected official asked them to do it. I didn't look at that issue, which would likely open another can of worms.

So with that introduction, here is a dive into the law and regs.

Uber's press release is here. https://www.uber.com/newsroom/update-uber-drives-vote/.

Rides from the polls are not exempt under the regulations. That could explain why Uber is not offering a ride back. The regulation is § 114.4(d). https://www.fec.gov/regulations/114-4/2018-annual-114#114-4-d. Here are the relevant parts:
Voter registration and get-out-the-vote drives—
1. VOTER REGISTRATION AND GET-OUT-THE-VOTE DRIVES PERMITTED. A corporation or labor organization may support or conduct voter registration and get-out-the-vote drives that are aimed at employees outside its restricted class and the general public. Voter registration and get-out-the-vote drives include providing transportation to the polls or to the place of registration.
*****

*2. ii. *** The get-out-the-vote drive shall not be directed primarily to individuals currently registered with the political party favored by the corporation or labor organization.*

2. iii. These services shall be made available without regard to the voter's political preference. Information and other assistance regarding registering or voting, including transportation and other services offered, shall not be withheld or refused on the basis of support for or opposition to particular candidates or a particular political party.
***
2.v. The corporation or labor organization shall notify those receiving information or assistance of the requirements of paragraph (d)(2)(iii) of this section. The notification shall be made in writing at the time of the registration or get-out-the-vote drive.
Uber appears to not be complying with (d)(2)(v). When I opened the app this morning and set up a ride to the polling place, there was no such a disclaimer. Maybe they forgot or perhaps this requirement is widely ignored.

Doug Johnson earlier noted a risk that the rides might tilt to a party. Given the demographics of Uber riders, this is a non-trivial risk. That's because its riders appear to heavily skew young and urban, both strongly correlated with Democrats.

Note that (d)(2)(ii) says that "The get-out-the-vote drive shall not be directed primarily to individuals currently registered with the political party favored by the corporation or labor organization."

There is more than one interpretation of that sentence. If Uber knows that its customers skew to Democrats (or are "primarily" Democrats), would offering this poll-riding service trigger a violation? Perhaps.

Let's pretend that George Soros or Michael Bloomberg and wanted to drive up Democratic turnout using money from a corporation they own. One of them figures out that 70% of the Uber riders are likely to be Democrats and gives money to Uber to offer the same discount code. Would that be a violation for them? If so, why not for Uber on its own?

And then there is the risk to Uber from its drivers, who are not employees. What happens if some drivers tell the rider how to vote on a federal race ((d)(2)(i) says no express advocacy is allowed)? Or if some poll riding customers are wearing MAGA hats and often drivers in San Francisco refuse to take them? Or a pro-lifer driver refusing to take a Planned Parenthood supporter?

But let's say that Uber drivers behave according to the regs, it turns out that users don't skew to a one party and so on.

There is still more risk. Thanks to the Crossroads GPS decision, people can't even rely on valid FEC regulations to avoid penalties for violating the law.

And the FEC regulation allowing the activity here arguably goes beyond the law.

And once again it is a problem generated in part by the phrase "anything of value," most recently heard in the Stormy Daniels payments.
In relevant part, 52 USC 30118 says:
(2) For purposes of this section and section 79l(h) of title 15,[1] the term "contribution or expenditure"… includes… anything of value… in connection with any election to any of the offices referred to in this section… but shall not include… (B) nonpartisan registration and get-out-the-vote campaigns by a corporation aimed at its stockholders and executive or administrative personnel and their families, or by a labor organization aimed at its members and their families….
The regulation goes beyond the restricted class allowed in the statute. The statute defines a contribution or expenditure as "anything of value" "in connection with any election" unless aimed at a restricted class. So what Uber/Lyft is doing arguably is plaining illegal under the statute's text.

It appears the FEC did not update § 114.4(d) in the wake of *Citizens United* because § 114.4(d)(2)(i) bans express advocacy by corporations and labor unions as part of the GOTV.
I don't know if there are any court decisions on this or not. And I doubt CLC or CREW or anyone else would file a complaint. But the law does seem to ban it.

My guess is a lot of lawyering went in to the Uber program. And even with all that, they probably didn't get a certain answer, but decided the risk was low enough to be worth the benefit to their image. And that a complainant would look like a Grinch.

David

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From: Law-election [mailto:law-election-bounces@department-lists.uci.edu] **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 2:11 PM
To: Levitt, Justin; Rick Hasen; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

But see, that's just it. A ride sharing company doesn't function like the charity/good government bus to the polls, or the volunteer driving team that scours the precinct for their voters. So I think for the ride sharing companies there is potential exposure different from the conventional voter transportation scenarios we've all dealt with as counsel or as activists.

I am most assuredly NOT arguing that there's a rule prohibiting the ride home always and everywhere. I don't think anybody is. That's just silly.

A.

From: Levitt, Justin <justin.levitt@lls.edu>
Sent: Friday, November 2, 2018 11:02 AM
To: Rick Hasen; Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: RE: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

If the only thing the voter has done at the destination is vote, I think it's perfectly legal to give rides in either direction, just as it would be perfectly legal to give a ride to, wait, and give a ride back.

(And I think it's likely also fine for the companies to presume that the only thing the voter has done at the destination is vote – or to set up the app so that any ride back within XX time of a free dropoff at the polls is presumed to be just for voting.)

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 02, 2018 10:57 AM
To: Levitt, Justin <justin.levitt@lls.edu>; Allison Hayward <ahayward@fppc.ca.gov>; Paul Gronke

<paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

And I would just add that it is nonsensical sophistry to argue that it is legal to give voters a ride TO the polls but not BACK to where they started.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Date: Friday, November 2, 2018 at 10:55 AM
To: "Levitt, Justin" <justin.levitt@lls.edu>, Allison Hayward <ahayward@fppc.ca.gov>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] * RE: * Re: * Re: Uber/Lyft to the polls

I certainly understand the ***business*** reason that these companies might want to not offer rides back from the polls, but to hang it on the illegality of the practice will lead to terrible results. The next thing we will see will be arguments that buses taking people to vote (think "souls to the polls") must abandon their riders at the polling place. I understand the nice distinctions Justin is trying to draw below, but I fear that this will now be used to essentially shut down all rides to the polls as illegal.

From: "Levitt, Justin" <justin.levitt@lls.edu>
Date: Friday, November 2, 2018 at 10:47 AM
To: Allison Hayward <ahayward@fppc.ca.gov>, Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * RE: * Re: * Re: Uber/Lyft to the polls

I can't answer Allison's request for a case (and I don't think the arguments on either side are frivolous). But I think there are distinctions between two different things that may be being conflated:

- If the service has value beyond voting, it's got to be offered to voters and non-voters alike, lest it be construed as an inducement. So you can't offer ice cream or pizza or [insert X] to people only upon proof of voting – that's the circumstance that comes up more frequently. You can offer the benefit near the polls to any passerby (including voters), but not only to those who vote.

- If the service doesn't have value beyond voting, then it's likely not a reward/inducement even if offered only to voters. So giving a free postage stamp to be placed on an absentee ballot isn't an inducement because the voter has no use for the stamp if they're not voting. (It's discussed in the federal manual for prosecuting election offenses, here.) Same with giving a ride **to** the polls. And if the ride is truly round-trip (go to the polls, wait, come back), that

probably implicates the same principle – the person wouldn't need the ride but for the voting, and isn't using the ride for anything except the voting.

The ride-sharing companies, though, don't usually have a model that encourages the driver to wait while the voter votes. And it becomes hard for the companies to tell whether someone who needs a pickup at the George Washington Elementary School needs that pickup because they just voted, or because they were just in the neighborhood, or because they voted a few hours before and did errands for a couple of hours. If it were clear that the voter were only at the school because they were voting, and would otherwise have been home all day, it'd probably be fine to give a free ride home just as it would be fine to take the voter to the polls, wait, and complete the round-trip. But in a world where the ride-sharing companies can't tell, it becomes (at least theoretically) risky for them to only offer a ride home to people who can prove they voted, in the event that the individual had other non-voting reasons to be at the place where they ordered a pickup. It's not crazy for the companies to just offer voters the ride to the polls, which is clearer.

Of course, under the first principle, the companies could also offer anyone (voter or not) a ride home from the location of any polling place. The fact that they don't do that means they're also looking to save money, in addition to avoiding any liability.

So maybe you're both right?

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Allison Hayward
Sent: Friday, November 02, 2018 10:03 AM
To: Rick Hasen <rhasen@law.uci.edu>; Paul Gronke <paul.gronke@gmail.com>; edu law-election@uci. edu law-election@uci. <law-election@uci.edu>
Subject: Re: [EL] * Re: * Re: Uber/Lyft to the polls

And I respectfully believe there is a nontrivial argument to the contrary, and apparently the counsel for these ride sharing companies believe that too. I think to assert that by not providing free return trips these programs show some interest is "saving money" rather than a genuine interest in getting it right is unjustified.

I do not believe transportation is categorically different. I think there are cases where transportation can be provided without that service being contingent on a voter proving they voted.

If you know of a case where proof of voting is required, yet the gift of transporation is still allowed under the Act, I would love to know about it. As is always the case, I could be wrong.

A.

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:55 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: * Re: Uber/Lyft to the polls

Transportation to (and I'd say from) the polls is different, according to a long line of cases. I don't think your distinction between facilitating and requiring voting works here. It is totally fine for Uber to say: we will only give rides to the polls to people who will be voting.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:54 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: * Re: Uber/Lyft to the polls

But there nobody is holding the voter accountable for actually having voted. The free busses take people to and from the polls, but in the cases with which I am familiar there's no requirement that you have to prove you voted to take the bus home. It is exactly the difference between *facilitating* and *requiring* voting that I am trying to elucidate.

There was a situation involving free pizza years ago, to voters who could show they voted. It was a Bad Thiing as I recall - how bad, I don't recall. Jail? Unlikely. Embarrassment? Possibly. I'll try to find the reference.

A

From: Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:24 AM
To: Allison Hayward; Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: Re: * Re: Uber/Lyft to the polls

I don't think this logic works. Those who provide free transportation are giving a ride to the polling place to facilitate voting. That's ok according to many court cases construing the vote buying statute and DOJ guidance. It's not like they have to pretend it is for something else. In the case I cited, the allegation was that people were getting full 10 gallon tanks of gas in rural areas to go vote, but the polling place was only 12 miles away, and the court said that this could violate the statute. I presume giving a gallon to go round trip would be just fine.

From: Allison Hayward <ahayward@fppc.ca.gov>
Date: Friday, November 2, 2018 at 9:18 AM
To: Rick Hasen <rhasen@law.uci.edu>, Paul Gronke <paul.gronke@gmail.com>, Election Law Listserv <law-election@uci.edu>
Subject: * Re: Uber/Lyft to the polls

I believe the issue arises when the Uber or Lyft driver, in order to assess whether the passenger qualifies, demands proof of that passenger having voted before the passenger can ride for free.

The ride to the polls is just that. The passenger leaves the vehicle, and then does whatever he or she wants to do. That may include voting. It may not.

The ride home? You had better have voted, right? So the program would be giving voters something because they had voted. Which is a no-no.

Allison

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Rick Hasen <rhasen@law.uci.edu>
Sent: Friday, November 2, 2018 9:06 AM
To: Paul Gronke; edu law-election@uci. edu law-election@uci.
Subject: [EL] Uber/Lyft to the polls

Each offers rides only TO the polls.

From: Law-election <law-election-bounces@department-lists.uci.edu> on behalf of Paul Gronke <paul.gronke@gmail.com>
Date: Friday, November 2, 2018 at 9:05 AM
To: Election Law Listserv <law-election@uci.edu>
Subject: [EL] [UCI-DISCARD?] Re: ELB News and Commentary 11/2/18

Can you take Lyft one way and Uber the other?

Paul Gronke
Professor, Reed College
Director, Early Voting Information Center
http://earlyvoting.net

General Inquiries: Laura Swann swannla@reed.edu

Media Inquiries: Kevin Myers myersk@reed.edu

On Nov 2, 2018, at 8:50 AM, Rick Hasen <rhasen@law.uci.edu> wrote:

Ostensibly To Avoid Laws Against Vote Buying, Lyft and Uber Offer Only One-Way Free Transportation to the Polls

Posted on November 2, 2018 8:44 am by **Rick Hasen**

Clark.com:

Much has been made recently about the good deed being offered by two of America's most popular ridesharing services. Uber and Lyft have both announced that they are going to give voters in the midterm elections rides to the polls on Tuesday, November 6.

But what Uber and Lyft aren't saying, at least not as loud, is that those free rides to the polling stations are one way. In other words, once you take one of these companies up on their offer, they won't take you back home — for free, at least….

Team Clark reached out to Lyft, as well, about the free rides. A Lyft spokeswoman replied via email that free or discounted transportation back from the polls could be construed as a gift for voting.

"The ride only covers the way there. Voting is every citizen's right, which means there are a number of regulations in place to protect against voter fraud or buying someone's vote. There are strict rules against gifts or incentives, and providing free or discounted transportation back from the polls falls into that category," she wrote.

The question of whether return trips are illegal is one I have not seen before. The federal prohibition on vote buying. The relevant statute, among other things, makes it a crime for one who willfully "pays or offers to pay or accepts payment either for registration to vote or for voting." The statute has long been interpreted to allow payments for transportation to the polls. As one court explained:

In United States v. Lewin, 467 F.2d 1132, 1136 (7th Cir.1972), the court classified providing transportation to the polls as "assistance rendered by civic groups to prospective voters," rather than payment, and held that § 1973i(c) does not proscribe "efforts by civic groups or employers to encourage people to register." The United States Department of Justice appears to agree with this analysis.

[T]he concept of "payment" does not reach things such as rides to the polls or time off from work which are given to make it easier for those who have decided to vote to cast their ballots. Such "facilitation payments" are to be distinguished from gifts made personally to prospective voters for the specific purpose of stimulating or influencing the more fundamental decision to participate in an election.Craig C. Donsanto, Federal Prosecution of Election Offenses 18 (5th ed. 1988).

The distinction between "facilitative" programs and "gift" programs seems based in part on historical factors which preceded the passage of most voting rights

legislation. See Day-Brite Lighting v. State of Missouri, 342 U.S. 421, 424-25, 72 S. Ct.405, 407-08, 96 L. Ed. 469 (1952) (upholding state law requiring employer to allow employees four hours of paid leave on election day in order to vote); 111 Cong.Rec.S. 8986 (daily ed. April 29, 1965) (Section 1973i(c) does not prohibit the "practice that has been recognized and has been accepted by both political parties and all organizations with respect to helping to transport people who do not have means of transportation to the polls in order to cast their ballots"). See also Parsley v. Cassady, 300 Ky. 603, 189S.W.2d 947, 948 (1945) (upholding candidates' contribution of cars and trucks to assist in voter transportation as reasonable due to bad roads and wartime exigencies); Watkins v. Holbrook, 311 Ky. 236, 223 S.W.2d 903, 903-04 (1949) (upholding disbursement of money to provide for transport to polls to "get out the vote").
Perhaps more importantly, this distinction reflects the difficulty in balancing the need to minimize undue pecuniary influence in elections with the desire to encourage and facilitate maximum political participation…..

I think a good faith argument could be made that the exemption for transportation to the polls includes a return trip. Indeed, most groups that offer rides to the polls (on buses or otherwise) offer a round trip. I wonder whether this is just a way for Lyft and Uber to save some money. Hard for me to believe they'd be in legal jeopardy for offering round trip transportation. Would be great to find a way to test this.

(Thanks to Matt Weil for asking the question.)

<image001.png>
Posted in vote buying

"North Dakota Voter ID Law Stands After Last-Ditch Lawsuit"

Posted on November 2, 2018 8:21 am by **Rick Hasen**
NYT:
The judge, Daniel L. Hovland of the United States District Court for the District of North Dakota, wrote in a brief, two-page order that it was simply too close to Election Day to do so. He noted that "federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching."
His order was in response to a lawsuit that the Campaign Legal Center and the Native American Rights Fund filed Tuesday on behalf of the Spirit Lake Tribe and six individuals. The suit described mass confusion and bureaucratic obstacles as Native Americans tried to obtain the addresses and corresponding identification now required.
North Dakota officials maintain that any voter without a residential address can obtain one easily from their county's 911 coordinator. But the lawsuit identified multiple instances in which people were unable to obtain an address through that

process; obtained one but were denied an absentee ballot because election officials deemed the state-issued address invalid; or were denied an absentee ballot because the address they had used for years could not be found in the state's database.

<image001.png>
Posted in The Voting Wars, voter id

"The speculation among GOP elites in this state capital town is that Kobach will probably lose narrowly and Trump will quickly appoint him to an administration job."

Posted on November 2, 2018 8:17 am by **Rick Hasen**
WaPo.
<image001.png>
Posted in fraudulent fraud squad

"Voting Rights, Election Law, and the Midterms"

Posted on November 2, 2018 8:07 am by **Rick Hasen**
Constitution Daily Podcast:
As Americans prepare to head to the polls next week, We the People partnered with Ballotpedia for a rundown of the election law and voting rights issues most relevant to the 2018 midterms. Ballotpedia's News Editor Sarah Rosier joins election law scholars Franita Tolson and Michael Morley to break down all sides of the legal arguments surrounding voter ID laws, gerrymandering, "signature matching," the purging of voter rolls, and felon disenfranchisement. Jeffrey Rosen hosts.

PARTICIPANTS

Sarah Rosier *is Ballotpedia's news editor. She's been at Ballotpedia since 2013, where she has served as director of the Congress Project, and has covered everything from presidential elections and the executive cabinet to the federal courts.*
Michael T. Morley *is an assistant professor at Florida State University College of Law, specializing in election law, constitutional law, and federal courts. He is the author of numerous publications on election law issues including* Prophylactic Redistricting? Section 2 of the Voting Rights Act and the New Equal Protection Right to Vote*.*
Franita Tolson *is a professor at USC Gould School of Law, where her scholarship and teaching focuses on election law and constitutional law. She was previously the Betty T. Ferguson Professor of Voting Rights at Florida State University College of Law. Her forthcoming book,* A Promise Unfulfilled: Section 2 of the Fourteenth Amendment and the Future of the Right to Vote*, will be published in 2019.*
Jeffrey Rosen *is the President and Chief Executive Officer of the National Constitution Center, the only institution in America chartered by Congress "to disseminate information about the United States Constitution on a nonpartisan basis."*

Posted in Uncategorized

“Well-financed foes give Michigan Supreme Court justices a fight”

Posted on November 2, 2018 8:05 am by **Rick Hasen**
Detroit News:

The campaign was roiled in early August when the state’s high court ruled 4-3 to let Proposal 2 on the Nov. 6 ballot, despite arguments from Republican officials and the Michigan Chamber of Commerce that it would change too many parts of the Michigan Constitution and should be subject to a constitutional convention.

The plan would create a redistricting commission to draw political boundaries instead of the party in power, which has been the GOP for the past two decades.

Clement was booed at the Republican nominating convention later that month and told The Detroit News editorial board that unnamed “special interests” attempted to coerce her into supporting the GOP-leaning business groups who challenged Proposal 2 in court. Her name has not appeared on certain Republican Party circulars urging party members’ votes on absentee ballots, while Wilder’s name has.

The Democratic-nominated candidates in this non-partisan race have tried to take advantage and have raised competitive amounts of money.
Sam Bagenstos, a Democratic nominee and University of Michigan law professor, was the top fundraiser through July 21. He had received more than $791,000 contributions for the cycle and had more than $500,000 in cash reserves heading into the final weeks of the election. Megan Cavanagh, an appellate attorney, had raised roughly $406,000 and had $308,000 left in her campaign coffers.

Clement, who is completing a term for now-6th Circuit U.S. Court of Appeals Judge Joan Larsen, has been the strongest fundraiser among Republicans, who are likely to enjoy the benefit of being designated as incumbents on the ballot. She had pulled in $555,490 in contributions as of July 21 and had roughly $101,000 in cash reserves.

Wilder, who is completing the term for retired Supreme Court Chief Justice Robert Young Jr., had raised $468,000 and a cash balance of more than $186,000.

Those numbers are on pace with 2016, when Republican incumbents David

Viviano and Joan Larsen reported $501,000 and $543,000 in contributions, respectively, by the same point. That race was also marked by outside spending from groups that pumped "dark money" into television ads, with half of the $3.4 million spent coming from sources that were required to disclose their own donors to the state.

<image001.png>
Posted in judicial elections

"Day after Arkansas Supreme Court justice takes stand, judge says he won't block attack ads"

Posted on November 2, 2018 8:01 am by **Rick Hasen**
Arkansas Online:
A federal judge on Thursday denied Arkansas Supreme Court Justice Courtney Goodson's request for an injunction to stop attack ads that have been airing against Goodson during her re-election campaign.

The ruling, by U.S. District Judge Brian Miller, came a day after Goodson took to the stand and testified that at least one of the claims about her — that she had requested a raise in 2017 — was false.
I cannot think of a single instance where a judge ordered an attack ad off the air during a campaign on grounds it was false and made with actual malice. Kind of crazy to think that the judge asked for this.

<image001.png>
Posted in campaigns

"Just 56 Megadonors Funnel Nearly Half a Billion Dollars to Super PACs"

Posted on November 2, 2018 7:58 am by **Rick Hasen**
Public Citizen:
Fifty-six rich election donors have poured at least $2 million each into super PAC groups this election season, more than double the level in the 2014 midterms and a record for any midterm election, according to a report (PDF) by Public Citizen. Contributions to super PACs from these 56 individuals add up to nearly $481 million spent by the wealthiest Americans to influence our elections.
The biggest individual contributor is Republican casino billionaire Sheldon Adelson, who has provided more than $112 million to super PACs so far this year, followed far behind by Democratic donor Tom Steyer at about $50 million and Republican donor Richard Uihlein at nearly $37 million.

Additionally, the top five contributors have spent more than $251 million to influence the 2018 midterms, and since 2012, these billionaires have spent more than $700 million to influence elections.

Posted in campaign finance, campaigns, Plutocrats United

"Hoboken developer 'Pupie' Raia indicted in alleged cash-for-votes scheme"

Posted on November 2, 2018 7:57 am by **Rick Hasen**

NJ.com:

Frank "Pupie" Raia, a real-estate developer and major figure in Hoboken politics for decades, was indicted by a federal grand jury Wednesday and accused of overseeing a cash-for-votes operation during the city's 2013 municipal race. Prosecutors allege Raia, 67, directed an associate, Dio Braxton and others to promise voters that they would be paid $50 if they cast mail-in ballots in Hoboken's 2013 race. Braxton, 43, was also indicted today.

Posted in absentee ballots, chicanery

"Citizenship Question May Be 'Major Barrier' To 2020 Census Participation"

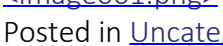
Posted on November 2, 2018 7:54 am by **Rick Hasen**

Hansi Lo Wang for NPR:

The controversial new citizenship question the Trump administration added to the 2020 census may turn out to be a "major barrier" to the country's full participation in the upcoming national head count, according to a national study commissioned by the Census Bureau….

In focus groups conducted in March and April to inform the government's outreach efforts for the census, some participants identified that question as a significant reason why they would avoid taking part in the head count.

"They tended to both believe that the purpose of the question was to find undocumented immigrants and that the political discourse is targeting their ethnic group," explained Sarah Evans, a lead researcher at PSB, a firm that is affiliated with census contractor Young & Rubicam. "This was an idea we heard across audiences," she added.


Posted in Uncategorized

"Too Poor to Vote; If you've committed a crime and are rich, you can pay court fees and cast a ballot. If you don't have money, you might be left out of democracy."

Posted on November 2, 2018 7:47 am by **Rick Hasen**
Danielle Lang and Thea Sebastian NYT oped.
<image001.png>
Posted in voting

"An End to Spoiler Candidates"

Posted on November 2, 2018 7:30 am by **Rick Hasen**
Dave Daley for Democracy Journal, with the subhead: "If more states adopted ranked-choice voting, far fewer elections would include unsatisfactory, binary choices and minority-backed winners."
<image001.png>
Posted in alternative voting systems

North Dakota Ad Apparently Run By Democrats on Facebook Says Hunters Could Lose Out-of State Licenses by Voting in North Dakota; Controversy Shows Value of Disclosure

Posted on November 1, 2018 3:20 pm by **Rick Hasen**
This is interesting.
Also interesting: the use that is being made of Facebook's disclosure requirements. Sure seems to me to be an argument for mandatory disclosure of campaign ads. Don't voters want to know who is behind these messages.

<image001.png>
Posted in campaigns

"Here's Why Democrats Have Made Secretary Of State Elections One Priority"

Posted on November 1, 2018 2:39 pm by **Rick Hasen**
Iowa Public Radio reports.
<image001.png>
Posted in Uncategorized

Dodge City, KS Moved Polling Place Because of "Construction," But…. (Bonus Spurious Claim of Risk of Double Voting)

Posted on November 1, 2018 1:09 pm by **Rick Hasen**
<image002.jpg>
<image003.jpg>

Maddow Blog
✓@MaddowBlog

They say that Dodge City voters can't vote in their usual polling location because it is inaccessible due to construction. So we went there to see for ourselves. Wanna guess what we found?
6:27 PM - Oct 31, 2018

- 30.1K
- 20.8K people are talking about this

Twitter Ads info and privacy
Now election officials are claiming having two polling places would open up the possibility of double voting. Wow.
<image001.png>
Posted in election administration, fraudulent fraud squad

"Someone Paid Thousands Of Foreigners 20 Cents Each To Hide HuffPost's Negative Coverage Of A Democratic PAC"

Posted on November 1, 2018 12:57 pm by **Rick Hasen**
HuffPost:
HuffPost's April 2016 report investigated the tactics of End Citizens United, a political action committee founded by three former staffers at the Democratic Congressional Campaign Committee, the party's official organ dedicated to electing Democrats to the House of Representatives. ECU, which worked to elect Democratic candidates who support campaign finance reform, used aggressive and expansive email campaigns to rake in millions of dollars in online donations. The PAC's pushy tactics angered other nonprofits working toward campaign finance reform, which came to think of the PAC as an arm of the Democratic Party stealing their donors with deceptive email marketing.
Until this spring, HuffPost's story was the second to come up in a generic Google search for "End Citizens United." But in the spring of 2018, an anonymous U.S.-based contractor paid at least 3,800 workers in countries around the world through the crowdsourcing firm Microworkers to manipulate what stories would come up when people searched for the PAC in Google. The contractor paid each of the workers 20 cents to click on stories and sites that portrayed the PAC positively, bumping those stories up in Google at the expense of critical coverage. HuffPost's story dropped from the second place on the first page of the Google search to the second page of search results.
End Citizens United did not respond to HuffPost's request for comment before publication.

<image001.png>
Posted in campaign finance, chicanery

Federal District Court, Citing Purcell Principle, Rejects New Relief in North Dakota Residential Address for Voting Case

Posted on November 1, 2018 12:38 pm by **Rick Hasen**

The order is here and is not a surprise given the timing:

The federal courts are unanimous in their judgment that it is highly important to preserve the status quo when elections are fast approaching. See Purcell v. Gonzalez, 549 U.S. 1, 4-5 (2006); Williams v. Rhodes, 393 U.S. 23, 34-35 (1968); Veasey v. Perry, 769 F.3d 890, 892-95 (5th Cir. 2014). "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." Purcell, 549 U.S. at 4–5. In this case, early voting has already begun. Election day is less than one week away. The allegations in the complaint, the motion for a temporary restraining order, and the attached affidavits give this Court great cause for concern.

The allegations will require a detailed response from the Secretary of State as this case proceeds. The litany of problems identified in this new lawsuit were clearly predictable and certain to occur as the Court noted in its previous orders in Brakebill v. Jaeger.

However, a further injunction on the eve of the election will create as much confusion as it will alleviate, and is foreclosed by precedent which is hesitant to permit "eleventh-hour changes to election laws." See Veasey, 769 F.3d at 895. The Court has carefully reviewed the entire record and finds the issuance of an emergency temporary restraining order unwarranted given the importance of avoiding further confusion and chaos on the eve of an election.

<image001.png>

Posted in Uncategorized

Ohio Will Not Appeal Divided 6th Circuit Ruling on Provisional Ballots

Posted on November 1, 2018 9:37 am by **Rick Hasen**

I had been expecting an emergency stay request from Ohio, but it's not going to happen:

Ohio Secretary of State Jon Husted, a Republican, said he disagreed with the ruling but called it "temporary and narrow." He said he would not mount a further appeal "because that would serve as an unnecessary source of contention with an election only five days away."

<image001.png>

Posted in election administration

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http://electionlawblog.org
<image004.png>

Law-election mailing list
Law-election@department-lists.uci.edu
https://department-lists.uci.edu/mailman/listinfo/law-election

From: Law-election on behalf of John Tanner
To: Levitt, Justin
Cc: Election Law Listserv
Subject: [External] Re: [EL] Why not just pick a pretext from the EO?
Date: Friday, July 12, 2019 10:56:11 AM
Attachments: ATT00001.txt

CAUTION: External email. Do not click links or open attachments unless you verify. Send all suspicious email as an attachment to report.spam@nc.gov

Or they could have changed the executive order to tailor it to legitimate interests in getting more fine/grained data.

Sent from my iPhone

On Jul 12, 2019, at 3:38 AM, Levitt, Justin <justin.levitt@lls.edu> wrote:

> To Marty's question about why Commerce didn't just originally pick a pretext from the array in the EO: I think the TL;DR answer is that the EO answers are only surface-level plausible for what they wanted to do. Either they don't actually explain the need for putting the question on the enumeration, or they don't fit the pre-existing OMB preference for uses reflecting strong federal enforcement needs.
>
> And now the overly long version:
>
> Obviously, I have no insight into Commerce's actual decision-making process beyond what's been revealed in litigation. And so what follows represents the attempt to reverse-engineer a rational search for a purpose to put forward. YMMV for whether you think this resembles any plausible consideration in the decision making process that actually went on, in whole or in part.
>
> <!--[if !supportLists]-->1. <!--[endif]-->Despite the assertions in today's press conference, the Secretary's March 2018 decision was not a decision for the Census Bureau to start collecting citizenship information from the public. The census's American Community Survey already collects citizenship information from the public on a rolling (and hence regularly updated) and fairly detailed basis (country of birth, year of entry). Instead, the March 2018 decision was a decision to collect information on citizenship (alone) from the public on the decennial household-to-household 100% enumeration form.
>
> That sort of collection risks fomenting inaccuracy (inaccuracy quantified by Census Bureau experts in what they explicitly designated as an exceptionally conservative estimate, and undersold by SCOTUS as a predictive figure, without that same caveat). The size of the inaccuracy was disputed, but not the fact of the inaccuracy. So the decision to forge ahead despite that inaccuracy required at least some articulable benefit from asking for the information on the enumeration, over and above either administrative records or surveys. The

ostensible benefit they settled on was the illusion of block-by-block precision purportedly needed for Section 2.

Beyond redistricting, none of the other uses in pp. 5-8 of the Executive Order (overall national immigration policy, overall national benefits expenditures, various broad legislative purposes concerning the undocumented population) seem to offer a plausible meaningful incremental benefit (over surveys or administrative records) for household-by-household collection of the one incremental citizenship question sufficient to justify the lapse in accuracy. That is, the other uses beyond redistricting in the EO are pitched at state or national estimates (where the ACS margins of error are really quite small) rather than block-level estimates, and often require information about year of entry, country of origin, or immigration status that the single citizenship question wasn't designed to get.

Or more simply: except for redistricting, these other applications might explain why the Administration would want ACS data it's already got. But they don't really purport to explain why they'd need one extra household-by-household question on citizenship. The VRA pretext offers an excuse for block-level data on citizenship (without the extra questions on year of entry or status or the like).

<!--[if !supportLists]-->2. <!--[endif]-->I don't know offhand the process for reviewing content on the household-to-household enumeration, but there's a rather detailed OMB-fostered process for reviewing content on the ACS. It privileges information to be used by federal agencies, and particularly privileges with the following priority: 1) data explicitly required by statute to be gleaned from the census, 2) data required by statute or case law and naturally derived from the census, and only thereafter 3) data useful for programmatic planning. Data without mandatory or required uses by federal agencies, and only programmatic uses at geographic levels larger than counties, were lowest priority, and essentially flagged for likely deletion from the ACS. And would have been tricky to sell as prime candidates for elevation to the household-to-household enumeration.

This means that in the existing OMB procedure, the gold standard (at least for ACS content) was information needed by a federal agency in small levels of geography in order to perform a function specifically required by statute or caselaw. (I'm assuming that the process for enumeration content – to the extent there was a process -- was at least as restrictive.)

That explains why Commerce first went shopping to federal agencies – DOJ, DHS, DOJ again – for some requested justification, rather than just saying "hey, we're adding the question because this stuff might be useful for someone." The VRA pretext met that threshold of caselaw requirement for data in small

levels of geography needed for federal agency enforcement.

None of the other uses in pp. 5-8 of the EO do the same thing. The first few have to do with changing laws and appropriations and broad national policies, but not enforcing existing statutes at the local level. The rationales in the EO seem pitched primarily at helping Congress pass better laws. But if Congress needs information to inform its policymaking, Congress can add whatever information it wishes (which may well be why the OMB process privileges data to assist executive functions). And the redistricting rationale in the EO isn't a federal agency rationale either – it's entirely dependent on the cited interest of "some State officials."

I'm not suggesting that there aren't other hypothetical pretexts that would both 1) fit the preference for data required for federal agencies to do their existing jobs and 2) make the case for a single question on citizenship collected at the block level, yielding information ostensibly more suitable than the stuff already collected on the ACS. But in that respect, the VRA nonsense did deliver a two-fer. (To be clear, it doesn't hold up either. But on these two axes, it might hold up a bit better than the EO alternatives.)

Justin

From: Law-election <law-election-bounces@department-lists.uci.edu> **On Behalf Of** Marty Lederman
Sent: Thursday, July 11, 2019 7:25 PM
To: Rick Hasen <rhasen@law.uci.edu>
Cc: Election Law Listserv <law-election@uci.edu>
Subject: Re: [EL] The Trump (Second) Cave on the Citizenship Question is a Double Victory for the Rule of Law

Here's the great mystery (unless I'm overlooking something): Why didn't Commerce in the first instance, back in early 2018, cite the purposes articulated at pp. 5-8 of the Executive Order (or at least all of them other than the redistricting rationale), instead of the patently bullshit "to help CRT enforce Section 2 of the Voting Rights Act" fiction, as justifications for adding the question to the census--something the Court probably would have upheld?

On Thu, Jul 11, 2019 at 6:15 PM Rick Hasen <rhasen@law.uci.edu> wrote:

> **The Trump (Second) Cave on the Citizenship Question is a Double Victory for the Rule of Law**
> Posted on July 11, 2019 3:08 pm by **Rick Hasen**
>
> President Trump's Speech this afternoon in which he said that the Administration would give up on efforts to add a citizenship question to the census is a victory for the rule of law. Many people were predicting

that Trump would use an Executive Order in an effort to force people in the Census Bureau to ignore multiple court orders which barred the inclusion of the question. I had been saying to wait and see, and fortunately, the Administration did not provoke a constitutional crisis by ignoring the judiciary and judicial review.

This is the second victory for the rule of law. The first was that the Supreme Court, likely thanks to the Hofeller files, refused to go along with the charade that the government wanted to add the census question to help Hispanic voters in Voting Rights Act lawsuits. In fact, it was quite the opposite: it was an attempt to maximize, in Hofeller's terms, white Republican voting power at the expense of Hispanics and Democrats. The pretext was too much for even Chief Justice Roberts to handle.
Sure it is not all good news. Four Justices were willing to go along with this charade. Roberts' majority opinion created an easy path for inclusion of the citizenship question in future decades, so long as the government learns to lie better. The government will still collect citizenship data to give Republican states a way to draw districts with equal numbers of voter eligible citizens, rather than all persons, thereby diminishing Hispanic (and Democratic) voting power. (The question of whether that is permissible will have to be decided by the Supreme Court, where the odds are good that drawing such discriminatory district would be allowed.) And attorney general William Barr further lied when he said that the Administration would have won its lawsuits, if only they had more time. (Not only would they have had a difficult time manufacturing a new pretext; the were amateurs in trying to fix things, and had no good explanation for why they could extend the deadline for printing after telling the Supreme Court it had to take the case on an expedited basis and skip the Court of Appeals given the time crunch.)

So it is not all good news. But it is good news for the census (where the real work of getting people to answer the survey is just beginning, given all of the dirt Trump has thrown up in the air, and all the intimidation of non-citizens to participate).

And it is good news for the rule of law. Even the Trump Administration listened to the courts. We shouldn't lose sight of that significant victory.

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Posted in census litigation, Supreme Court

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