

**ONE PERSON, NO VOTES:
UNOPPOSED CANDIDATE STATUTES AND THE STATE
OF ELECTION LAW**

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In thirty-eight states and the District of Columbia, state laws allow candidates running unopposed for certain offices to be “declared elected” without appearing on the ballot. These “unopposed candidate statutes” come in many varieties, but all deny people the ability to vote for the affected offices. This Article surveys the nation’s unopposed candidate statutes for the first time, exploring their idiosyncrasies and their interactions with other election laws. It then analyzes the statutes under four constitutional doctrines—the Burdick right-to-vote doctrine; the congressional voting clauses; one person, one vote; and the Guarantee Clause—showing how the statutes illuminate, and could change, the scope of each. Finally, the Article uses unopposed candidate statutes as a lens through which to examine two major debates in election law: whether courts should focus on encouraging competitiveness, and whether the purpose of voting is tabulative or expressive. Across both doctrine and theory, these unusual laws force us to reconsider our approach to the act of voting, stripped of its ability to affect the outcome of an election.

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INTRODUCTION

Buried deep within their election codes, a number of states play host to a curious little provision of law. In these states, candidates who run unopposed for certain offices are simply “declared elected” without having to appear on the ballot.¹ If you find yourself shrugging your shoulders at this revelation, you’re not alone. These provisions are so obscure, so uncontroversial, that they rarely attract attention. No court

1. A full list of these laws is as follows: ALA. CONST. art. IV, § 46(b); HAW. CONST. art. III, § 4; WASH. CONST. art. IV, § 29; ALA. CODE §§ 11-46-26, 11-46-97, 17-13-5(c) (2017); ARK. CODE ANN. §§ 7-7-313, 7-5-207(a)(2)(A), 7-7-304(d), 7-11-107, 14-123-303 (2017); CAL. ELEC. CODE §§ 8203, 10229(a)–(b), 10515, 10705 (West 2017); COLO. REV. STAT. ANN. §§ 1-4-104.5, 1-5-208, 31-10-507 (West 2017); CONN. GEN. STAT. §§ 9-416, 9-417, 9-419, 9-422, 9-224a (2017); DEL. CODE ANN. tit. 15, §§ 3105, 3301(a) (2017); D.C. CODE § 1-1001.09(h) (2017); FLA. STAT. §§ 101.151(7), 101.252(1), 105.051(1)(a) (2017); GA. CODE ANN. §§ 21-2-153.1(b), 21-2-285(J), 21-2-291, 21-2-545 (2017); HAW. REV. STAT. §§ 12-41(a), 12-42 (2017); IDAHO CODE ANN. § 34-904 (2017); 10 ILL. COMP. STAT. 5 / 7-5(b)–(c) (2017); 65 ILL. COMP. STAT. 5 / 3.1-20-45; IND. CODE §§ 3-10-1-5, 3-10-6-4(c), 3-10-6-7.5(d) (2017); IOWA CODE § 376.6(1) (2017); KAN. STAT. ANN. §§ 25-2021, 25-2108a (2017); KY. REV. STAT. ANN. § 118.185 (West 2017); LA. STAT. ANN. §§ 18:511(B)–(C), 18:512(B) (2017); MICH. COMP. LAWS §§ 168.539–41 (2017); MINN. STAT. §§ 204D.03, 204D.07, 204D.20 (2017); MISS. CODE ANN. §§ 23-15-299(7), 23-15-309(5), 23-15-359(10), 23-15-361(6), 23-15-837, 23-15-839 (2017); MO. REV. STAT. § 115.124(1) (2017); MONT. CODE ANN. §§ 13-1-204, 13-10-209(2), 13-14-115(2)(a)–(b), 13-38-201(4)–(5) (2017); NEB. REV. STAT. § 32-811(3) (2017); NEV. REV. STAT. §§ 293.260(3)–(5), 293C.180(1)–(2) (2017); N.H. REV. STAT. ANN. § 655:82 (2017); N.Y. ELEC. LAW § 6-160(2) (McKinney 2017); N.C. GEN. STAT. §§ 163-110, 163-294 (2017); OHIO REV. CODE ANN. §§ 3513.02, 3513.32 (West 2017); OKLA. STAT. tit. 26, §§ 6-102, 11-110, 12-109 (2017); OR. REV. STAT. § 249.091(1) (2017); 17 R.I. GEN. LAWS §§ 17-15-11, 17-15-12 (2017); S.C. CODE ANN. §§ 5-15-63, 7-11-90 (2017); S.D. CODIFIED LAWS § 9-13-5, 12-5-4.1, 12-6-9, 12-9-8, 12-16-1.1 (2017); TEX. ELEC. CODE ANN. § 2.053(a)–(b), 2.055(a), 2.056(c), 171.0221(a) (West 2017); UTAH CODE ANN. §§ 20A-1-206, 20A-9-403(5)(c), 20A-9-404(2) (West 2017); VT. STAT. ANN. tit. 17, §§ 2587(f), 2660(b) (2017); VA. CODE ANN. § 24.2-526 (2017); WASH. REV. CODE §§ 29A.52.112(3), 29A.52.220(1) (2017); WIS. STAT. §§ 8.11(d), 8.50(3)(b) (2015–16).

has passed on their validity in four decades.² Not a single legal scholar has ever bothered to analyze them.³ They just sit there, shortening our ballots, and nobody pays them any mind.

But what if I told you that, in the 2016 general election, over one-third of the Florida state legislature was “elected” without receiving a single vote?⁴ Fifteen of forty state senators and forty-two of 120 representatives ran unopposed in the general election that year. Because Florida has an unopposed candidate statute,⁵ they were all declared elected without appearing on the ballot.⁶ A significant portion of Florida’s population was denied the ability to vote for its representatives in the state legislature.

The Florida Constitution does try to remedy this problem: it allows all registered voters to participate in a party’s primary for an office if the nominee from that primary will be unopposed in the general election.⁷ Yet, in 2016, thirteen of the fifteen senators who were unopposed in the general election were also unopposed in the primary—so they did not appear on the primary ballot, either. The same goes for

2. See *Lawlor v. Chi. Bd. of Election Comm’rs*, 395 F. Supp. 692, 694–97 (N.D. Ill. 1975) (holding unconstitutional two statutes eliminating primary elections when only one candidate of each party qualified for primary ballot); see also *Binns v. Hite*, 389 P.2d 947, 949 (Cal. 1964) (upholding statute that automatically reelected incumbent judges unless one hundred voters petitioned for write-in candidate); *North v. Cady*, 161 N.W. 377, 378 (Mich. 1917) (upholding unopposed candidate statute for circuit court primaries). Several suits have invoked these laws, either to try to block a candidate’s election, see, e.g., *Wood v. Booth*, 990 So. 2d 314, 316–19 (Ala. 2008); to assert that a candidate was or was not elected by a certain date, see, e.g., *In re Advisory Op. to the Governor re Judicial Vacancy Due to Resignation*, 42 So. 3d 795, 797 (Fla. 2010); or to defend against a suit, see, e.g., *Braddock v. Kostelka*, 568 So. 2d 248, 251 (La. Ct. App. 1990).

3. The closest any scholar has come to analyzing these laws is in an article exploring the question of when candidates are considered elected under Florida law. See generally Paul D. Asfour, *When is a Candidate for Public Office in Florida Officially Elected?*, 37 NOVA L. REV. 79 (2012).

4. *Candidates and Races*, FLA. DEP’T ST. DIVISION ELECTIONS, <http://election.dos.state.fl.us/candidate/Index.asp> [https://perma.cc/RLH5-HBM5] (choose “2016 Election” from the “General Election” dropdown menu; then click the “View List” button). Technically, they each received one vote; Florida’s unopposed candidate statute says that each unopposed candidate “is deemed to have voted for himself or herself.” FLA. STAT. § 101.151(7) (2017).

5. *Candidates and Races*, *supra* note 4. For Florida’s unopposed candidate statute for primary elections, see FLA. STAT. § 101.252.

6. *Candidates and Races*, *supra* note 4 (choose “2016 Election” from the “General Election” dropdown menu; then click the “View List” button).

7. FLA. CONST. art. VI, § 5(b). If challenged by a political party, Florida’s universal primary provision could well be declared unconstitutional, because it forces parties to associate with voters who are not party members—and some of whom are even members of other parties. See *Cal. Dem. Party v. Jones*, 530 U.S. 567, 577 (2000).

thirty-one of the forty-two unopposed state representatives.⁸ All that these forty-four men and women had to do was file for office. Once the filing deadline passed, they were declared elected—without a single ballot being cast.

And what about the case of Larry Glenn? Glenn was a Democrat who represented District Seven in the Oklahoma House of Representatives.⁹ In 2004, Glenn won a four-way primary after going through a runoff.¹⁰ However, Glenn had no Republican opponent, and so did not appear on the general election ballot.¹¹ He never appeared on a ballot again. Glenn was reelected four times—in 2006, 2008, 2010, and 2012—but ran unopposed in both the primary and the general in all four elections.¹² Under Oklahoma law, unopposed candidates are “deemed to have been nominated or elected, as the case may be,” and their names do not appear on the ballot.¹³ Glenn represented the Seventh District in the Oklahoma House for ten years until he retired in 2014.¹⁴ But nobody had actually *voted* for him since the Democratic primary in 2004.

8. *Candidates and Races*, *supra* note 4.

9. *All Members of the Oklahoma House of Representative*, OKLA. ST. LEGIS. 14 (2017), <https://www.okhouse.gov/Documents/ALLHOUSE-LIST.pdf> [<https://perma.cc/63L5-GY5Z>].

10. *Primary Election: July 27, 2004*, OKLA. ST. ELECTION BOARD, http://www.ok.gov/elections/The_Archives/Election_Results/2004_Election_Results/Primary_Election_2004.html [<https://perma.cc/997P-3C5D>]; *Runoff Primary Election: August 24, 2004*, OKLA. STATE ELECTION BOARD, http://www.ok.gov/elections/The_Archives/Election_Results/2004_Election_Results/Runoff_Primary_Election_2004.html [<https://perma.cc/7V4A-BWAZ>].

11. *Unopposed Candidates Elected in 2004*, OKLA. ST. ELECTION BOARD 7, <https://www.ok.gov/elections/documents/04unopp.pdf> [<https://perma.cc/8EXV-T683>].

12. *Official Results (June 26, 2012)*, ST. OKLA. (July 6, 2012, 3:42:29 PM), <http://results.enr.clarityelections.com/OK/39733/90635/Web01/en/summary.html> [<https://perma.cc/332Y-XY5Q>] (races with unopposed candidates not listed); *Official Results: Federal, State, Legislative and Judicial Races General Election—November 6, 2012*, OKLA. ST. ELECTION BOARD (Nov. 20, 2012, 9:45:34 AM), https://www.ok.gov/elections/support/12gen_seb.html [<https://perma.cc/5ZZF-KSVG>] (same); *SUMMARY RESULTS: General Election—November 2, 2010*, OKLA. ST. ELECTION BOARD, <http://www.ok.gov/elections/support/10gen.html> [<https://perma.cc/6SVH-D2Z9>] (same); *SUMMARY RESULTS: Primary Election—July 27, 2010*, OKLA. ST. ELECTION BOARD, <https://www.ok.gov/elections/support/10pri.html> [<https://perma.cc/X47M-S3V4>] (same); *Unopposed Candidates Elected in 2006*, OKLA. ST. ELECTION BOARD, <https://www.ok.gov/elections/documents/06unopp.pdf> [<https://perma.cc/2EPJ-M4KL>]; *Unopposed Candidates Elected in 2008*, OKLA. ST. ELECTION BOARD, <https://www.ok.gov/elections/documents/08unopp.pdf> [<https://perma.cc/6S7U-FQYZ>]; *All Members of the Oklahoma House of Representative*, *supra* note 9.

13. OKLA. STAT. tit. 26, § 6-102 (2017).

14. Glenn declined to run for reelection in 2014. See *Candidates for Federal, State and Legislative Offices*, OKLA. ST. ELECTION BOARD,

Unopposed candidate statutes significantly affect the way in which people vote (or not) in the United States, and how candidates can gain office. People do not vote only when their vote matters, or only *because* it matters, to the ultimate outcome. To the contrary, all evidence suggests that voting is not a “rational” decision for most people, and that we instead vote mainly to express our beliefs or to feel part of a larger community.¹⁵ Unopposed candidate statutes view elections solely as outcome-determination vehicles, ignoring the major reasons why people actually vote.

The harms these laws create by doing so are varied and significant. For those who support an unopposed candidate, the statutes deprive them of their right to cast a vote for their chosen representative. For those who find the sole candidate unacceptable, the statutes likewise deprive them of their right *not* to vote for that person. People take this decision seriously. Analyses have found that thirteen to sixteen percent more voters cast blank ballots in uncontested races than in races with multiple candidates.¹⁶ Sometimes the numbers are even greater: for instance, over thirty percent of Alabama voters cast blank ballots when then-Senator Jeff Sessions ran unopposed in 2014,¹⁷ and thirty-four percent cast blank ballots against New York Congresswoman Nita Lowey in 2016.¹⁸ In Eugene, Oregon’s 2016 primary elections, nearly

http://www.ok.gov/elections/support/2014_ok_filing.html [https://perma.cc/E6XQ-X25W]; *Oklahoma House of Representatives Elections, 2014*, BALLOTPEdia, https://ballotpedia.org/Oklahoma_House_of_Representatives_elections_2014 [https://perma.cc/M5WU-YQWY].

15. Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1332–33 (2011); see *infra* note 417 and accompanying text.

16. See, e.g., Theodore Landsman, *Running Elections with RCV Does Not Increase “Undervote,”* FAIRVOTE (Nov. 8, 2016), http://www.fairvote.org/undervote_in_rcv_elections [https://perma.cc/D9WU-AM22]; Richard Winger, *Blank Ballots More Likely in Races with Same-Party Candidates*, IVN (Mar. 21, 2013), <https://ivn.us/2013/03/21/blank-ballots-more-likely-in-races-with-same-party-candidates-2> [https://perma.cc/JSB3-VB2F].

17. The combination of votes for Senator Sessions and write-in votes for Senate equals 69.3 percent of the votes cast for candidates or write-ins in the gubernatorial race. See STATE CANVASSING BD., STATE OF ALABAMA: CANVASS OF RESULTS: GENERAL ELECTION NOVEMBER 4, 2014 at 1 (2014), <http://sos.alabama.gov/sites/default/files/voter-pdfs/2014/2014GeneralResults-WithoutWriteIn.pdf> [https://perma.cc/7E86-FZ25].

18. *NYS Board of Elections Rep. in Congress Election Returns Nov. 8, 2016*, N.Y. ST. BOARD OF ELECTIONS 19 (Mar. 7, 2017), <https://www.elections.ny.gov/NYSBOE/elections/2016/General/2016Congress.pdf> [https://perma.cc/H CJ6-ABWY].

half cast either blank ballots or write-ins in two unopposed city council races.¹⁹

These laws also eliminate the possibility of fusion candidacies, in which citizens can express their policy preferences by voting for the same candidate on one of multiple party lines.²⁰ In states with fusion laws, votes on alternate party lines constitute up to a tenth of candidates' vote totals.²¹ Unopposed candidate statutes cut off the few available avenues by which voters in uncontested races can declare whom they want to govern them and how.

The statutes also hurt candidates and parties. For one thing, they deprive candidates of crucial knowledge about their constituents. Variations in blank ballot percentages, for example, provide information on the candidates' popularity. Unsurprisingly, candidates and their potential future opponents look to this data for signs of voter dissatisfaction and electoral weakness.²² Unopposed candidate statutes, by cutting off the voting process, also cut off this information source. Additionally, many political theorists believe that individuals are more willing to accept existing political authority because they are able to participate in free and fair elections.²³ Unopposed candidate statutes deny individuals the right to vote for their supposedly "elected" officials, which in turn denies those officials the legitimacy conferred by popular election. And the parties cannot "use the ballot to communicate information about [themselves] and [their] candidate[s] to the voters"²⁴

19. David Monk & Bonny Bettman McCornack, *Undervote a Useful Tool in Uncontested Races*, REGISTER-GUARD (Oct. 25, 2016), <http://registerguard.com/rg/opinion/34910225-78/undervote-a-useful-tool-in-uncontested-races.html.csp> [<https://perma.cc/85YQ-X3J4>].

20. Eight states allow for fusion candidacies. *How Fusion Voting Played a Role in American Politics*, MSNBC (Apr. 14, 2014, 12:33 PM), <http://www.msnbc.com/the-daily-rundown/fusion-votings-role-american-politics> [<https://perma.cc/9YKT-2E28>].

21. Conn. Sec'y of State, *November 8, 2016 Presidential Election Results (Online System)*, ELECTION CTR., <http://ctemspublic.pcctg.net/#/home> [<https://perma.cc/S5EY-9CT2>]; *NYS Board of Elections Rep. in Congress Election Returns Nov. 8, 2016*, *supra* note 18.

22. *How to Win 99.6% of the Vote*, ECONOMIST (Oct. 25, 2014), <http://www.economist.com/news/united-states/21627661-too-many-members-congress-are-running-unopposed-how-win-996-vote> [<https://perma.cc/RXS7-5CQ2>].

23. Bo Rothstein, *Creating Political Legitimacy: Electoral Democracy Versus Quality of Government*, 53 AM. BEHAV. SCIENTIST 311, 313 (2009); Maria Paula Saffon & Nadia Urbinati, *Procedural Democracy, the Bulwark of Equal Liberty*, 41 POL. THEORY 441, 460 (2013); Jennifer Wolak, *How Campaigns Promote the Legitimacy of Elections*, 34 ELECTORAL STUD. 205, 205 (2014) (collecting sources).

24. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

Unopposed candidate statutes, therefore, are worth studying in their own right. But they also provide a useful lens through which to examine—and, perhaps, reexamine—several of the constitutional doctrines that govern voting, as well as major academic debates about electoral competitiveness and the basic purpose of elections. These laws operate in extreme circumstances, with extreme effect. They, therefore, test the limits of current doctrine and of the arguments made in some important scholarly disputes.

Part I of this Article introduces the unopposed candidate statutes themselves. Most states have these laws in some form, affecting different types of elections and different offices. Part I will explore these provisions, their interaction with other election laws, and their continued evolution.

Parts II and III will then provide a doctrinal critique of unopposed candidate statutes. Part II will analyze these provisions through the Supreme Court's traditional vote denial doctrine, under the balancing test laid out in *Anderson v. Celebrezze*²⁵ and refined in *Burdick v. Takushi*²⁶ and *Crawford v. Marion County Election Board*.²⁷ The Court has instructed judges to weigh the “character and magnitude” of the harm²⁸ to voting rights against the state's interest in vote denial cases, but the Justices disagree on how, exactly, to conduct this burden analysis.²⁹ Whether unopposed candidate statutes survive or fall under the *Burdick* test will likely depend on how judges view the character of the harm they impose on voters. And this inquiry itself turns on whether judges analyze voting under the fundamental rights strand or the suspect class strand of equal protection doctrine.

Part III will expand the constitutional examination begun in Part II. Unopposed candidate statutes are so oddly situated that they interact with a number of constitutional voting rights doctrines. Part III shows that unopposed candidate statutes could impinge on rights provided by Article I, Section 2 and the Seventeenth Amendment; the one person, one vote doctrine; and the Guarantee Clause. To get at these statutes, however, courts would have to apply each doctrine to harms with which it is not usually associated. The congressional voting clauses and the one person, one vote doctrine would have to expand from their usual vote dilution bailiwicks to cover vote denial, as well. Courts would also have to find that the Guarantee Clause protects governance through

25. 460 U.S. 780 (1983).

26. 504 U.S. 428 (1992).

27. 553 U.S. 181 (2008) (plurality opinion).

28. *Burdick*, 504 U.S. at 434 (quoting *Anderson*, 460 U.S. at 789).

29. See *Crawford*, 553 U.S. at 208 (Scalia, J., concurring); *id.* at 211 (Souter, J., dissenting); *id.* at 238 (Breyer, J., dissenting).

elections and majoritarian principles. Part III will explore these possible doctrinal shifts.

Part IV will then analyze unopposed candidate statutes in relation to the academic debate over electoral competition. Scholars disagree about whether the recent dearth of competition in elections is a bad thing, and whether greater competition would be beneficial.³⁰ Unopposed candidate statutes throw this debate into stark relief because they translate lack of competition into a complete denial of the right to vote. The laws are uncontroversial because they appear harmless. But the logic underlying them—that we know who the winner will be, so holding an election for the office would be pointless—has potentially disturbing consequences if applied to uncompetitive elections more broadly. Unopposed candidate statutes also pose a challenge for those who would eschew competitiveness in favor of maximizing voter satisfaction, since creating politically homogenous districts could sound the death knell for elections in many instances.

Part V turns to a different question: what is the purpose of voting? The Supreme Court has declared that the purpose of voting is solely to whittle down the number of candidates until there is a winner.³¹ If this is the case, then unopposed candidate statutes are unproblematic. In fact, they would *further* the purpose of voting by making this whittling process more efficient. However, others argue that voting includes an informational and expressive component and that voters should be able to “participat[e] in . . . elections in a meaningful manner.”³² If this conception of voting is correct, then unopposed candidate statutes are more troublesome. The laws prevent voters from expressing their preferences, whether through fusion voting, write-in voting, or simply voting for (or refusing to vote for) the candidate. They also prevent the voters and the candidates from gaining valuable information about one another through the ballot box. By studying these statutes, we can gain insight into the state of American election law.

I. WHAT IS AN UNOPPOSED CANDIDATE STATUTE?

In thirty-eight states and the District of Columbia, certain candidates who run unopposed can simply be “declared elected.”³³ These laws have one thing in common: when they apply, the voters have no say. In their particulars, however, the statutes are as varied as the states that implement them. They may apply to federal, state, or

30. See *infra* Part IV.

31. *Burdick*, 504 U.S. at 438.

32. *Id.* at 443 (Kennedy, J., dissenting).

33. See *supra* note 1 and accompanying text.

Table 1: Unopposed Candidate Statutes by Type of Election and Office

	Federal, State, & Local	State & Local	Local	Other
All	Arkansas Florida Louisiana Oklahoma		Indiana* Nevada	Washington <i>(superior court judges)</i>
General (gen.)		Texas*	Alabama Hawaii <i>(county)</i> South Dakota Vermont <i>(some)*</i>	Hawaii <i>(state leg.)</i> Nevada <i>(nonpartisan)</i> California <i>(special-purpose district)</i>
Primary (prim.)	Alabama Connecticut Delaware Illinois Kentucky Minnesota Nevada New York North Carolina South Carolina South Dakota Utah Virginia	Wisconsin <i>(local and nonpartisan state)</i>	Georgia Iowa Kansas Mississippi Nebraska <i>(some offices)</i> Rhode Island	D.C. <i>(party offices)*</i> Kansas <i>(sch. board)</i> Oregon <i>(certain nonpartisan)</i> South Dakota <i>(party precinct)</i> Texas <i>(party precinct)</i> Vermont <i>(justice of the peace, only if all are unopposed)</i> Washington <i>(nonpartisan)</i>
Special	Connecticut Georgia Hawaii Mississippi <i>(gen.)</i> New Hampshire <i>(prim.)</i> Ohio <i>(prim.)</i> Oklahoma <i>(gen.)</i> South Carolina Wisconsin <i>(prim.)</i>	Minnesota <i>(state leg. prim.)</i> Texas	Washington <i>(county)</i>	Alabama <i>(state leg.)</i> California <i>(federal, state leg.)</i> Illinois <i>(Cong.)</i> Virginia <i>(special prim. held on regular prim. day)</i>

	Federal, state, and local	State and Local	Local	Other
Election Canceled if No Contested Races	Arkansas (<i>prim.</i>)* Colorado (<i>prim.</i>)* Delaware (<i>prim.</i>) Georgia (<i>gen.</i>) Idaho (<i>prim.</i>) Indiana (<i>prim.</i>)* Michigan (<i>prim.</i>) Minnesota (<i>prim.</i>)* Mississippi Montana (<i>prim.</i>)* Rhode Island (<i>prim.</i>) South Dakota (<i>prim.</i>)		Arkansas (<i>gen.</i>) Colorado (<i>gen.</i>)* California (<i>gen.</i>)* Illinois (<i>prim.</i>) Missouri (<i>prim.</i>)* Ohio (<i>prim.</i>) Oklahoma South Dakota (<i>gen.</i>) Utah (<i>gen.</i>) Texas (<i>gen.</i>)*	Connecticut (<i>town council, justice of peace prim.</i>)

An asterisk (*) means that authorities *choose* whether to place unopposed candidates on the ballot.

As can be seen from Table 1, there is a great deal of variety among the unopposed candidate statutes. However, when one examines these laws, patterns emerge. Unopposed candidate statutes can be divided roughly into five categories, which I refer to as (1) core statutes, (2) primary-only statutes, (3) peripheral statutes, (4) optional statutes, and (5) cancellation statutes.

1. CORE STATUTES

Four states have “core” unopposed candidate statutes. These are the most straightforward—and the most extreme—of the laws we will examine in this Part. The core statutes apply to all types of elections, at all levels of government. Unopposed candidates in everything from city council primaries³⁵ to congressional general elections³⁶ are simply

35. For example, LaToya Cantrell ran unopposed for a seat on the New Orleans City Council in 2014 and was declared elected. See *Candidate Inquiry*, LA. SECRETARY ST., <https://voterportal.sos.la.gov/CandidateInquiry> [<https://perma.cc/DT3Y-B2VY>] (click “Election Date 02/01/2014”) (listing Cantrell as “Unopposed” for Councilmember District B); La. Sec’y of State, *Official Election Results, Results for Election Date: 2/1/2014*, http://staticresults.sos.la.gov/02012014/02012014_36.html [<https://perma.cc/NM3B-D5NJ>] (showing no vote totals for District B councilmember).

36. For instance, five U.S. House members, four from Florida and one from Oklahoma, were declared elected in 2014 without appearing on the ballot. See OFFICE OF THE CLERK U.S. HOUSE OF REPRESENTATIVES, STATISTICS OF THE CONGRESSIONAL ELECTION FROM OFFICIAL SOURCES FOR THE ELECTION OF NOVEMBER 4, 2014 at 10–11,

declared elected. Arkansas,³⁷ Florida,³⁸ Louisiana,³⁹ and Oklahoma⁴⁰ all have these core statutes. In these four states, nobody may vote in uncontested races.

Until recently, Arkansas employed a more unusual method of disposing of unopposed candidacies. The names and positions of unopposed candidates were listed together on the ballot below the phrase “Unopposed Candidates”; voters could check a box to vote for them all at once.⁴¹ This meant, however, that voters could not choose to vote for some unopposed candidates and not for others. Moreover, while people could *vote* for the candidates, Arkansas did not actually *count* the votes. The Arkansas election code explicitly stated that votes for unopposed candidates “shall not be counted or tabulated by the election officials.”⁴² Instead, it told individual jurisdictions to simply insert “[t]he word ‘UNOPPOSED’ . . . on the tally sheet.”⁴³ In 2016, however, over seventy percent of Arkansas voters approved a state constitutional amendment that, among other things, gave the legislature authority to pass a traditional core unopposed candidate statute.⁴⁴ The legislature quickly used this new authority to enact the same voter-bypassing form of core statute used in Florida, Louisiana, and Oklahoma.⁴⁵

38 (2015), http://clerk.house.gov/member_info/electionInfo/2014/114-statistics.pdf [<https://perma.cc/A7BC-MRDF>].

37. ARK. CODE ANN. §§ 7-5-207(a)(2)(A), 7-5-315(a)(2), 7-7-304(d), 7-11-107(a)(2), 14-123-303(a) (2017). The general-election statute applies to all offices except mayor, governor, and circuit clerk. *Id.* § 7-5-207(a)(2)(B).

38. FLA. STAT. §§ 101.151(7), 101.252(1), 105.051(1)(a) (2017).

39. LA. STAT. ANN. §§ 18:511(B)–(C), 18:512(B) (2017). Louisiana uses a blanket primary system and a runoff that the state refers to as a general election. *See id.* §§ 18:401(B), 18:402, 18:511(A).

40. OKLA. STAT. tit. 26, § 6-102 (2017).

41. ARK. CODE ANN. § 7-5-207(a)(3)(A) (2016).

42. *Id.* § 7-5-315(a).

43. *Id.*

44. H.J.R. 1027 § 1, 90th Gen. Assemb., Reg. Sess. (Ark. 2015); 2016 *General Election and Nonpartisan Runoff Election: Official County Results*, ARK. SECRETARY ST.,

<http://results.enr.clarityelections.com/AR/63912/184685/Web01/en/summary.html> [<https://perma.cc/XR5C-ET4L>] (last updated Feb. 8, 2017, 1:08 PM). The sponsor of the law, Representative Charlotte Douglas, had run unopposed for the previous two elections, and said that “[v]oting for unopposed candidates ‘just seems like an extra step in the process that we could eliminate.’” David A. Lieb, *Possible Effects of Gerrymandering Seen in Uncontested Races*, ASSOCIATED PRESS (June 25, 2017), <https://apnews.com/amp/6457eb05aa68484b87d56c5e94beddd5> [<https://perma.cc/4HZY-B5LD>].

45. H.B. 1892, 91st Gen. Assemb., Reg. Sess. (Ark. 2017) (enacted).

2. PRIMARY-ONLY STATUTES

A much larger group of states keeps all of its unopposed candidates off the ballot, but only for primaries. Thirteen states have these “primary-only” unopposed candidate statutes, which generally operate in the same way as the core statutes.⁴⁶ When combined with the four core-statute jurisdictions, approximately one-third of the states—with thirty-six percent of the nation’s registered voters⁴⁷—do not count primary votes for unopposed candidates.

The core and primary-only statutes are spread throughout the country, but they are particularly concentrated in the South.⁴⁸ Of the seventeen states with either core or primary-only statutes, ten are in the South.⁴⁹ Seven of the eleven former Confederate states likewise have one or the other of these forms of unopposed candidate statute.⁵⁰ This might, however, be merely a correlation with a more relevant attribute: historical one-party dominance. Five of the seventeen states with core or primary-only statutes remained “heavily” in the control of one party during the partisan realignment between 1964 and 1978, and another eight were “predominantly” in the control of one party during that period.⁵¹ Only four—Delaware, Utah, Illinois, and New York—were considered competitive.⁵² A full examination of the time of passage of

46. These states are Alabama, Connecticut, Delaware, Illinois, Kentucky, Minnesota, Nevada, New York, North Carolina, South Carolina, South Dakota, Utah, and Virginia. See ALA. CODE § 17-13-5(c) (2017); CONN. GEN. STAT. §§ 9-416, 9-417 (2017); DEL. CODE ANN. tit. 15, § 3301(a) (2017); 10 ILL. COMP. STAT. 5 / 7-5(b) (2017); KY. REV. STAT. ANN. §§ 118.185, 118A.060(10) (West 2017); MINN. STAT. §§ 204D.03(3)(a), 204D.07(3) (2017); NEV. REV. STAT. §§ 293.260(1), (4)–(5), 293C.180, 304.010, 304.040, 304.240 (2017); N.Y. ELEC. LAW §§ 6-160(2), 7-102(1) (McKinney 2017); N.C. GEN. STAT. § 163-110 (2017); S.C. CODE ANN. § 7-11-90 (2017); S.D. CODIFIED LAWS § 12-6-9 (2017); UTAH CODE ANN. §§ 20A-9-403(5)(c), 20A-9-404(2) (West 2017); VA. CODE ANN. § 24.2-526 (2017).

47. This number is calculated based on estimates of voter registration by state as of 2016. See *Voting and Registration in the Election of November 2016: Table 4a*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html> [<https://perma.cc/NAX4-LMSU>].

48. By “the South,” I mean the region as defined by the U.S. Census Bureau. See U.S. CENSUS BUREAU, CENSUS REGIONS AND DIVISIONS OF THE UNITED STATES, https://www2.census.gov/geo/pdfs/maps-data/maps/reference/us_regdiv.pdf [<https://perma.cc/9G45-BDRN>]. The states are Alabama, Arkansas, Delaware, Florida, Kentucky, Louisiana, North Carolina, Oklahoma, South Carolina, and Virginia. *Id.*

49. *Id.*

50. See *Maps, The Confederate States of America*, PBS <http://www.pbs.org/kenburns/civil-war/war/maps/#/detail/the-confederate-states-of-america> [<https://perma.cc/ZY56-KZ69>].

51. MALCOLM E. JEWELL & SARAH M. MOREHOUSE, POLITICAL PARTIES AND ELECTIONS IN AMERICAN STATES 29-31 & tbl. 2-1 (4th ed. 2000).

52. *Id.* at 30–31 tbl. 2-1.

each unopposed candidate statute and the reasons why each was passed is beyond the scope of this Article.⁵³ However, these one-party states likely saw large crops of unopposed candidates. The temptation to save money while easing the election of the dominant party's candidates may have been too good to pass up.

3. PERIPHERAL STATUTES

Core and primary-only statutes affect the broadest swath of candidates, but there are other laws that lurk in more shadowy corners of our electoral edifice. These are the “peripheral” unopposed candidate statutes. They apply only to lesser offices, ones to which voters likely do not pay much attention.

The most common of the peripheral statutes apply to municipal or county elections. Four states that do not have core unopposed candidate statutes—Alabama, Hawaii, Nevada, and South Dakota—nevertheless omit unopposed candidates for *local* offices from the general election ballot.⁵⁴ Similarly, seven states that do not have primary-only statutes—Georgia, Iowa, Kansas, Mississippi, Nebraska, Rhode Island, and Wisconsin—still have peripheral statutes that apply to primaries for local offices.⁵⁵ Even a few states that have primary-only statutes for other offices have passed separate peripheral statutes to ensure their local primaries are covered.⁵⁶

A number of states have peripheral statutes that affect other sorts of candidates. Hawaii allows unopposed state legislative nominees to avoid a general election.⁵⁷ Most other peripheral statutes apply to nonpartisan offices, either in the primary⁵⁸ or in the general.⁵⁹ Some,

53. It may, in fact, be impossible, given the paucity of legislative history available from most state legislatures. A bare examination of the time of first passage for each law, on the other hand, would be possible.

54. ALA. CODE §§ 11-46-26 (2017); HAW. REV. STAT. § 12-41(a) (2017) (county offices); NEV. REV. STAT. § 293C.180(1) (2017); S.D. CODIFIED LAWS §12-16-1.1 (2017) (municipal and county offices).

55. GA. CODE ANN. § 21-2-153.1(b) (2017); IOWA CODE § 376.6(1) (2017); KAN. STAT. ANN. § 25-2108a (2017); MISS. CODE ANN. § 23-15-309(5) (2017); NEB. REV. STAT. § 32-811 (2017) (for cities of 800-100,000 people); R.I. GEN. LAWS § 17-15-12 (2017); WIS. STAT. §§ 8.05(5), 8.11 (2015-16).

56. See ARK. CODE ANN. §§ 7-7-304(d), 7-5-315(a) (2017); CONN. GEN. STAT. § 9-417 (2017); 65 ILL. COMP. STAT. 5 / 3.1-20-45 (2017); NEV. REV. STAT. § 293C.180(2); S.C. CODE ANN. § 5-15-63 (2017) (nonpartisan); UTAH CODE ANN. § 20A-9-404(2) (West 2017).

57. HAW. CONST. art. III, § 4.

58. See MICH. COMP. LAWS § 168.540 (2017); MINN. STAT. § 204D.07(3) (2017); N.C. GEN. STAT. § 163-294 (2017); ORE. REV. STAT. § 249.091(1) (2017) (primaries for sheriff, county treasurer, or county clerk; special primaries for

however, are concerned with even narrower sets of positions, including state judgeships,⁶⁰ school boards,⁶¹ precinct chairmanships,⁶² and directorships of certain special-purpose districts.⁶³ These peripheral unopposed candidate statutes play an important if underappreciated role, since municipal races tend to be even less competitive than partisan state or federal races.⁶⁴

4. OPTIONAL STATUTES

All of the statutes we have examined so far have been mandatory: if a candidate is unopposed, the requisite election authority is required to remove the relevant office and candidate from the ballot. Another set of laws—the “optional” unopposed candidate statutes—lets election directors *choose* whether or not to place unopposed candidates on the ballot. The most widely applicable of these statutes is Texas’s, which permits officials to declare unopposed candidates elected to statewide, district, county, or precinct offices.⁶⁵ California, Indiana, Missouri, Montana, and the District of Columbia, meanwhile, have optional statutes that affect only municipal, county, or party offices,⁶⁶ and

nonpartisan offices); WASH. REV. CODE § 29A.52.220(1) (2017); WIS. STAT. § 8.11 (2015–16).

59. See NEV. REV. STAT. § 293.260(5)(b) (2017) (determining that nonpartisan candidates who are unopposed for office and receive any votes in primary are omitted from general election ballot).

60. See CAL. ELEC. CODE § 8203 (West 2017) (superior court judges in primary or general); FLA. STAT. § 105.051(1)(a) (2014) (circuit judge, county court judge, and school board positions in general election); OKLA. STAT. tit. 26, § 11-110 (2014) (judicial primaries); S.D. CODIFIED LAWS § 12-9-8 (2017) (same); WASH. CONST. art. IV, § 29 (superior court judges in high-population counties).

61. See FLA. STAT. § 105.051(1)(a) (circuit judge, county court judge, and school board positions in general election); KAN. STAT. ANN. § 25-2021 (2014) (school board primaries); S.D. CODIFIED LAWS § 13-7-9 (2014) (single-step school board elections).

62. S.D. CODIFIED LAWS § 12-5-4.1 (2017); TEX. ELEC. CODE ANN. § 171.0221(a) (West 2014).

63. ARK. CODE ANN. § 14-123-303 (2017) (general elections for directors and commissioners of levee districts); CAL. ELEC. CODE § 10515 (West 2017) (general elections); NEB. REV. STAT. § 32-811 (2014) (primaries for directors of natural resources districts, directors of public power districts, some school and college board positions).

64. See, e.g., David Schleicher, *Why Is There No Partisan Competition in City Council Elections?: The Role of Election Law*, 23 J.L. & POL. 419, 419 (2007).

65. TEX. ELEC. CODE ANN. § 2.056 (West 2017); see also TEX. CONST. art. XVI, §§ 13–13A (authorizing legislature to provide for the taking or assuming of office of unopposed candidates without election).

66. CAL. ELEC. CODE § 10229(a)–(b) (West 2017) (municipal general elections); D.C. CODE § 1-1001.09(h) (2017) (primaries for party offices); IND. CODE

Arkansas has one for special elections.⁶⁷ In both Texas and the District of Columbia, the names of those unopposed candidates that officials have declared nominated or elected are still listed together on the ballot, for the voters' information.⁶⁸

Vermont has perhaps the nation's most unusual optional statutes—and the most deferential to the voters' wishes. If a candidate is unopposed for an office chosen at a town meeting, the voters may choose to tell the town clerk to cast a single vote for the candidate, after which the candidate is declared elected.⁶⁹ Additionally, when there are only as many candidates for justice of the peace in a given jurisdiction as there are positions, Vermont takes a course similar to that of Arkansas's old core statute. Election officials may declare all of the justice of the peace candidates elected without tallying the votes—but only if all of the announced candidates received more votes than did the most successful write-in candidate.⁷⁰ Vermont's laws do allow for some voter control. However, they share the same basic characteristic of all optional statutes: they give the discretion to prevent the casting or counting of votes for unopposed candidates.

5. CANCELLATION STATUTES

The final stop on our Magical Mystery Tour⁷¹ is the “cancellation” form of unopposed candidate statute. These provisions allow or require election administrators to cancel elections when all of the candidates for certain offices in a jurisdiction are unopposed. This is a particularly popular option for handling special elections. Fourteen states employ cancellation statutes for at least some of their special elections,⁷²

§§ 3-10-6-7.5(d), 3-10-7-6(e) (2017) (municipal general elections); § 3-10-6-4(c) (municipal primaries); MO. REV. STAT. § 115.124(1) (2017) (nonpartisan subdivision and small-town municipal elections); MONT. CODE ANN. § 13-14-115(2)(b) (2017) (primaries for county offices).

67. ARK. CODE ANN. § 7-11-107 (2017).

68. D.C. CODE § 1-1001.09(h); TEX. ELEC. CODE ANN. § 2.056(e) (West 2017).

69. VT. STAT. ANN. tit. 17, § 2660(b) (2017).

70. *Id.* § 2587(f).

71. THE BEATLES, *MAGICAL MYSTERY TOUR* (Capitol Records 1967).

72. ALA. CONST. art. IV, § 46(b); CAL. ELEC. CODE § 10705(b) (West 2017) (state legislative special general elections); CONN. GEN. STAT. § 9-224a (2017) (state, district, and municipal special elections); GA. CODE ANN. §§ 21-2-285(j), 21-2-291, 21-2-545 (2017) (all special elections); HAW. REV. STAT. § 12-42 (2017) (all special elections); 10 ILL. COMP. STAT. 5 / 7-5(c) (2017) (special U.S. House primaries); MINN. STAT. § 204D.20(2) (2017) (state legislative primaries); MISS. CODE ANN. §§ 23-15-837, 23-15-839 (2017) (state district special general elections); N.H. REV. STAT. ANN. § 655:82 (2017) (special primaries); OHIO REV. CODE ANN. § 3513.32 (West 2017)

including two states—New Hampshire and Ohio—that do not have any of the forms of unopposed candidate statute surveyed above. It is unsurprising that states would use cancellation statutes for special elections, as they are usually held on a separate day from primary or general elections and often involve only one office. To declare unopposed special-election candidates nominated or elected would, in many cases, equate to canceling the special election.

However, a number of states also employ cancellation statutes in elections with larger slates of offices. In Delaware,⁷³ Mississippi,⁷⁴ Rhode Island,⁷⁵ and South Dakota,⁷⁶ election administrators must cancel any party primary in which all candidates are unopposed. In Minnesota, officials have the option to do so.⁷⁷ Similarly, Georgia⁷⁸ and Mississippi⁷⁹ require administrators to cancel *general* elections in which all candidates are unopposed. A hodgepodge of statutes in other states either allows or mandates cancellation—of either primaries⁸⁰ or general elections⁸¹—for local, nonpartisan, political party, or special-purpose district offices.

(special primaries); OKLA. STAT. tit. 26, § 12-109 (2017) (special general elections); TEX. ELEC. CODE ANN. § 2.055(a) (West 2017) (state legislative special elections); WASH. REV. CODE § 29A.52.112(3) (2017) (county special primaries); WIS. STAT. § 8.50(b) (2015–16) (special primaries).

73. DEL. CODE ANN. tit. 15, § 3105 (2017).

74. MISS. CODE ANN. § 23-15-299(7) (2017).

75. 17 R.I. GEN. LAWS § 17-15-11 (2017).

76. S.D. CODIFIED LAWS § 12-6-9 (2017).

77. MINN. STAT. § 204D.03(3)(a) (2017).

78. GA. CODE ANN. § 21-2-291 (2017) (mandatory cancellation of general elections); *id.* § 21-2-285(j) (mandatory cancellation of general municipal elections).

79. MISS. CODE ANN. § 23-15-359(10) (2017) (mandatory cancellation of federal and state general elections); *id.* § 23-15-361(6) (mandatory cancellation of municipal general elections).

80. CONN. GEN. STAT. § 9-421 (2017) (mandatory cancellation of town committee primaries if fewer than 1/4 of slots have non-party-endorsed candidate); *id.* § 9-422 (mandatory cancellation of justice of peace primaries if fewer than half slots have non-party-endorsed candidate); 10 ILL. COMP. STAT. 5 / 7-5(b) (2017) (mandatory cancellation of municipal partisan primaries); MICH. COMP. LAWS § 168.539 (2017) (mandatory cancellation of primaries for city and county offices if all races for all parties are uncontested); MONT. CODE ANN. § 13-38-201(4)–(5) (2017) (optional cancellation of primaries for party precinct committees); OHIO REV. CODE ANN. § 3513.02 (West 2017) (mandatory cancellation of municipal primaries); OKLA. STAT. tit. 11, § 16-111 (2017) (mandatory cancellation of municipal primaries).

81. ARK. CODE ANN. § 14-123-303(b) (2017) (mandatory cancellation of general elections for directors and commissioners of levee districts if all election in a county are unopposed); COLO. REV. STAT. § 1-5-208 (2017) (option to cancel general nonpartisan elections); *id.* § 31-10-507 (option to cancel general municipal elections); CONN. GEN. STAT. § 9-419 (2017) (mandatory cancellation of town committee elections if party has not endorsed full slate of candidates and more than 1/4 of slots but fewer

These cancellation statutes require that every single race be uncontested. However, four states have laws that need an even less competitive environment to take effect. In Colorado and Indiana, officials either can (Colorado) or must (Indiana) cancel a primary only if *every* race in *every* major party is unopposed.⁸² And in Idaho and Montana, administrators are only required to cancel primaries if there are *no* candidates for over half the available offices and the rest of the candidates are unopposed.⁸³ As these unusual laws illustrate, cancellation statutes have more stringent criteria for operation than do other unopposed candidate statutes. With the possible exception of special elections, they are therefore the least likely to be used. However, given the lack of competition in many races, they are far from irrelevant. For instance, in any given year nearly half the cities in El Paso County, Colorado cancel their municipal elections.⁸⁴ And, with twenty-two states possessing some form of cancellation statute, they remain—like the rest of the unopposed candidate statutes—a significant and under-appreciated aspect of American election law.

B. Unopposed Candidate Statutes in Transition and in Context

Unopposed candidate statutes are not merely a set of quirky legal oddities, lying staid and dormant, to be safely ignored. These statutes haunt the legal codes of three-quarters of the states, with the potential to affect thousands of elections. As we will see in this Section, unopposed candidate statutes remain a dynamic part of the law, as states update their election codes to further entrench the unique perks of running unopposed. These statutes also interact with a number of other

than those without party-endorsed candidate have non-party-endorsed candidate); MO. REV. STAT. § 115.124 (2017) (option to cancel nonpartisan subdivision and small-town municipal elections); MONT. CODE ANN. § 13-1-403(4) (2017) (option to cancel municipal elections); *id.* § 13-1-502(4)(a) (mandatory cancellation of special district elections unless resolution passed to hold election); OKLA. STAT. tit. 11, § 16-106 (2017) (mandatory cancellation of municipal general elections); S.D. CODIFIED LAWS § 9-13-5 (2017) (mandatory cancellation of municipal general elections); *id.* § 13-7-9 (mandatory cancellation of school board elections); TEX. ELEC. CODE ANN. § 2.053(a)–(b) (West 2017) (optional cancellation of municipal and special-purpose district general elections); UTAH CODE ANN. § 20A-1-206(1)–(2) (West 2017) (optional cancellation of municipal general elections).

82. COLO. REV. STAT. § 1-4-104.5(1) (2017); IND. CODE § 3-10-1-5 (2017); *see* COLO. CODE REGS. § 1505-1:4.8.3(a) (2017) (clarifying Colorado's cancellation statute).

83. IDAHO CODE § 34-904(3) (2017) (federal and state offices); MONT. CODE ANN. § 13-10-209(2) (2017) (partisan offices).

84. Megan Schrader, *Ballots in Uncontested Races Costly But Required by Law*, GAZETTE (June 20, 2014, 9:59 AM) <http://gazette.com/ballots-in-uncontested-races-costly-but-required-by-law/article/1521734> [<https://perma.cc/FS2R-J4PZ>].

provisions, creating an electoral system that looks significantly different than it would if the unopposed were treated the same as other candidates.

1. NEW DEVELOPMENTS

Given the lack of attention paid to unopposed candidate statutes, one could be forgiven for picturing them as quaint products of a colonial town-meeting-style preference for consensus, or of ruthless machine politics. Indeed, some of the provisions have a long history. Michigan, for instance, has had a version of an unopposed candidate statute for over a century.⁸⁵ However, not all have such a distinguished pedigree. The Utah legislature passed a primary-only statute in 2014 that affects federal, state, and county offices.⁸⁶ Likewise, Nevada passed a bill in 2015 that included peripheral statutes for its nonpartisan elections.⁸⁷ Legislators in Colorado have been fighting—so far unsuccessfully—to expand that state’s cancellation statute.⁸⁸ On the other side of the ledger, South Carolina voted in early 2017 to remove its cancellation statute for municipal general elections.⁸⁹

Nor have these changes been without controversy. In 2011, Indiana passed a sixty-seven-page election reform package, into which one legislator slipped a provision that required county clerks to remove unopposed municipal candidates from the ballot.⁹⁰ When state legislative leaders found out about the provision, they balked, with the Speaker of the House calling it “terrible public policy.”⁹¹ The sponsor of the law defended it as an efficient measure that would save counties money.⁹² However, according to media reports, the new provision

85. See *North v. Cady*, 161 N.W. 377 (Mich. 1917).

86. See S.B. 54, § 12, 60th Leg., 2014 Gen. Sess. (Utah 2014).

87. S.B. 5, § 1, 2015 Leg., 78th Sess. (Nev. 2015).

88. See Schrader, *supra* note 82.

89. See 2017 S.C. Laws Act 15, § 2.

90. See P.L. 225-2011, §§ 47–48, 117th Gen. Assemb., 1st Reg. Sess., 2011 Ind. Acts 3211, 3248–50; Andrea Neal, *Election Law ‘Slipped By’ GOP Leaders*, SOUTH BEND TRIBUNE (Oct. 5, 2011), <http://tinyurl.com/q3oa6eu> [<https://perma.cc/RU26-5EU3>].

91. Neal, *supra* note 87.

92. Editorial, *Removing Unopposed Candidates from City Election Ballot is a Truly Silly Law*, EVANSVILLE COURIER & PRESS (Aug. 30, 2011, 3:00 AM), <http://archive.courierpress.com/opinion/editorials/editorial-removing-unopposed-candidates—from-city-election-ballot—is-a-truly-silly-law-ep-44521093-327338801.html> [<https://perma.cc/9CT2-FRPF>]; Neal, *supra* note 87. Other states’ laws have also been defended as providing greater efficiency and cost-savings. See, e.g., PUB. POLICY CTR. AT THE UNIV. OF ARK. SYS. DIV. OF AGRIC., 2016 VOTER GUIDE: ARKANSAS BALLOT ISSUES 6 (2016), <https://www.uaex.edu/business-communities/voter>

“prompted outrage from Hoosiers who still wanted to vote, even for unopposed candidates.”⁹³ Indeed, “[a]cross the state, almost nobody seem[ed] to like the law except some county clerks.”⁹⁴ Early in the next year’s session, the legislature acted to reverse the change.⁹⁵ As Indiana’s recent experience illustrates, unopposed candidate statutes are not relics of a bygone era. They are very much alive: fluid and, at times, controversial.

2. INTERACTION EFFECTS

Unopposed candidate statutes do not act on their own. Rather, they operate within a larger web of laws that both create and regulate uncontested races. One prominent example is partisan gerrymandering, which packs voters from the minority party—or from both parties, in the case of incumbent-protective gerrymandering—into safe districts.⁹⁶ Another, less obvious, interaction occurs with sore loser laws, which prohibit candidates who do not prevail in a primary from appearing on the ballot in the general election.⁹⁷ These laws can end up working in tandem with unopposed candidate statutes that apply to general elections. In all but five of the states with sore loser laws, candidates can only appear on a single primary ballot and cannot run as either an independent candidate or the nominee of another party if they lose in the primary.⁹⁸ This eliminates the possibility of spoiler candidacies in the general election. It also makes it more likely that primary winners in one-party jurisdictions will run unopposed in the general—and, with unopposed candidate statutes in place, that the primary winner will simply be declared elected.

While sore loser laws directly prohibit candidates from appearing on the ballot, strict ballot access laws may also help create unopposed candidacies. A number of states—at least ten with unopposed candidate

education/ArkansasBallotIssuesVoterGuide-2016-Final.pdf [https://perma.cc/2HD7-C8MG]; Charlynn Anderson, *Few Candidates Mean No General Election for 5 Utah County Towns*, DAILY HERALD (Nov. 2, 2013), <http://tinyurl.com/pmdezsp> [https://perma.cc/5AXM-NCQC].

93. Dan Carden, *Indiana Senate Votes to Put All Candidates on Ballot*, W. IND. TIMES (Feb. 23, 2012), http://www.nwitimes.com/news/local/govt-and-politics/elections/ind-senate-votes-to-put-all-candidates-on-ballot/article_022f8aa6-98bc-52f2-9a7b-1de0d9271fab.html [https://perma.cc/N39M-PXSY].

94. Neal, *supra* note 87.

95. Carden, *supra* note 90.

96. See Lieb, *supra* note 44; *infra* note 347 and accompanying text.

97. See Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013, 1042 (2011).

98. The exceptions are Arizona, Delaware, Florida, Montana, and Vermont. *Id.* at 1046.

statutes—require that candidates either receive approval from a party convention or collect a certain number of signatures to make it onto the primary ballot.⁹⁹ A larger number of states require candidates to pay filing fees, though some waive the fees if a candidate receives enough signatures on a nomination petition.¹⁰⁰ Moreover, in 2014 states required candidates for the state legislature to file their nominating petitions anywhere from sixty-one to one hundred thirty three days before the primary,¹⁰¹ while state executive¹⁰² and U.S. congressional¹⁰³ candidates had to file between fifty-three and one hundred thirty three days in advance. None of these ballot access requirements necessarily prevents a candidate from appearing on the ballot, as sore loser laws do. However, the courts have rightly recognized “the tendency of ballot access restrictions ‘to limit the field of candidates from which voters might choose.’”¹⁰⁴ Access requirements limit the number of candidates qualifying for the ballot, so that in some cases only one is left in a primary or general election—triggering unopposed candidate statutes.

The above laws have a positive interaction effect with unopposed candidate statutes: they make it more likely that candidates will run without opposition, and therefore without being voted on. However, other election regulations can have the opposite effect, discouraging or disadvantaging unopposed candidacies. Perhaps the most direct example is Section 2.054 of the Texas Election Code. This provision makes it a criminal offense to use intimidation or coercion to influence (or intend to influence) someone not to file, or to withdraw his or her application, for candidacy.¹⁰⁵ It lies within the subchapter of the code devoted to unopposed candidates,¹⁰⁶ providing evidence that the provision is aimed at preventing anyone from manufacturing uncontested races. California has a similar law.¹⁰⁷ It also has a second, more expansive statute, which prohibits anyone from “pay[ing], solicit[ing], or receiv[ing]” “any money or other valuable consideration” “in order to induce a person

99. See Mark R. Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 OHIO ST. L.J. 1281, 1284–85 n.11 (1997).

100. *Id.* at 1284–86 & nn.12–14.

101. *Signature Requirements and Deadlines for 2014 State Government Elections*, BALLOTPEDIA, https://ballotpedia.org/Signature_requirements_and_deadlines_for_2014_state_government_elections [<https://perma.cc/3B9H-BVPW>] (click “State legislatures” tab).

102. *Id.* (click “State executives” tab).

103. *Id.* (click “Congress” tab).

104. *Anderson v. Celebrezze*, 460 U.S. 780, 786 (1983) (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

105. TEX. ELEC. CODE ANN. § 2.054 (West 2017).

106. See *id.*

107. CAL. ELEC. CODE § 18204 (West 2017).

not to become or to withdraw as a candidate for public office.”¹⁰⁸ In Texas and California, at least, one cannot keep oneself off the ballot by forcing others off of it.

While not so directly discouraging of uncontested races, campaign finance laws can also disadvantage unopposed candidates. For instance, Montana specifies limits on the “aggregate contributions for each election in a campaign by a political committee or by an individual.”¹⁰⁹ This allows candidates to receive up to a maximum contribution for both the primary and general election. However, under Montana law, “[i]f there is not a contested primary, there is only one election to which the contribution limits apply.”¹¹⁰ Unopposed candidates can therefore only receive half as much from any contributor over the course of an election cycle as can someone with merely token opposition in the primary. Florida law makes the same distinction for candidates who are unopposed in the general election.¹¹¹

In Connecticut, those subject to the state’s primary-only unopposed candidate statute cannot receive primary grants from the state’s public financing system.¹¹² In 2014, that lost unopposed candidates anywhere from \$11,140 for a state representative race to \$1,354,250 for a governor’s race.¹¹³ This equates to between seventeen and thirty-three percent of what could have been their total public financing for the election cycle.¹¹⁴ While candidates can remain privately funded in the primary and seek grants for the general election,¹¹⁵ this would require unopposed candidates to spend time and effort raising money instead of

108. *Id.* § 18205. Colorado has a similar law, which only applies to withdrawals of candidacy. COLO. REV. STAT. § 1-45-115 (2017).

109. MONT. CODE ANN. § 13-37-216(1) (2017).

110. *Id.* § 13-37-216(6).

111. FLA. STAT. ANN. § 106.08(1)(c) (2017); *see id.* § 106.011(18) (defining “unopposed candidate” as one “without opposition *in the election at which the office is to be filled*” (emphasis added)); *Shin v. Florida Elections Comm’n*, 924 So. 2d 72, 73 (Fla. Dist. Ct. App. 2006) (interpreting this definition to mean those unopposed in the general election).

112. CONN. GEN. STAT. § 9-705(a)(1), (b)(1) (2017) (limiting eligibility to candidates who “ha[ve] a primary for nomination”); *id.* § 9-706(a)(1)–(2) (allowing candidates to file for primary grants only “if a primary is required under chapter 153”).

113. CONN. STATE ELECTIONS ENF’T COMM’N, UNDERSTANDING CONNECTICUT CAMPAIGN FINANCE LAWS: A 2014 GUIDE FOR STATEWIDE OFFICE AND GENERAL ASSEMBLY CANDIDATES PARTICIPATING IN THE CITIZENS’ ELECTION PROGRAM 62 (2014), http://www.ct.gov/seec/lib/seec/2014gaandstatewide/2014_cep_guide_final_march_2014.pdf [<https://perma.cc/M7A9-AE7L>].

114. *See id.* at 62–64. Percentages were derived by dividing the primary grant by the total of the primary and general election grants.

115. *See id.* at 64.

campaigning—as those with even token opposition in the primary get to do.

Campaign finance laws like these disincentivize unopposed candidacies. Candidates who will simply be declared elected do not, of course, need to run a campaign to win. However, it is still in a candidate's interest to introduce herself to the public through television ads and mass mailings. Laws that limit or cut off unopposed candidates' ability to raise funds prevent them from selling themselves in the same way that those with opposition could. This creates a real disadvantage for unopposed candidates, and could even convince them to encourage others who have little chance of winning to run against them.

* * *

As this Part shows, unopposed candidate statutes are far more pervasive than their lack of scholarly attention might suggest. They operate, to one extent or another, in three-quarters of the states. Legislatures continue to amend and expand them to this day. And they permeate the rest of the election code, operating with or against other statutes to affect the likelihood that candidates will be omitted from the ballot. Despite all of this variety and change, unopposed candidate statutes have two things in common: they prevent electors from voting for unopposed candidates, and they deny candidates the legitimacy of the voters' sanction.

II. MEASURING *BURDICK* BURDENS

The previous Part surveyed the odd, varied landscape of unopposed candidate statutes. This Part discusses the statutes' effect on the fundamental right to vote, and on the freedom to associate with candidates and fellow voters, as protected by the First and Fourteenth Amendments.¹¹⁶ Unopposed candidate statutes undoubtedly burden both the right to vote and the right to associate (or not to associate) with candidates through the ballot box. But any constitutional analysis under the First or Fourteenth Amendment becomes complicated by the standard that the Court uses for right-to-vote cases. The test focuses in part on the "character and magnitude" of the harm alleged,¹¹⁷ but the Justices have displayed two very different views of how to measure that harm. Ultimately, the fate of unopposed candidate statutes depends on which vision judges follow.

116. See *Anderson v. Celebrezze*, 460 U.S. 780, 788–89 (1983).

117. *Id.* at 789.

A. Character and Magnitude in the Burdick Test

The current test for analyzing state right-to-vote claims was first articulated in *Anderson v. Celebrezze*¹¹⁸ and *Burdick v. Takushi*,¹¹⁹ and was most recently refined in *Crawford v. Marion County Election Board*.¹²⁰ To evaluate a constitutional challenge to a state's election law, a court must undertake a two-step inquiry. First, it must "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate."¹²¹ Second, it "must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."¹²² The state's interests are not simply taken at face value, however. A court "also must consider the extent to which those interests make it necessary to burden the plaintiff's rights."¹²³

This balancing test between burden and interest is clear enough in the abstract—if, as others have noted, open to the whims of judicial philosophy.¹²⁴ Focusing on the injury side of the equation, however, one soon discovers that the standard is deceptively complex. Examining closely the Justices' dueling opinions in *Crawford*, one finds that they disagree on a fundamental question: whether to analyze *Burdick* harms under the suspect class or the fundamental rights strand of equal protection doctrine.

To analyze a *Burdick* claim, one must first ask whether the law at issue burdens an identifiable group of voters, candidates, or parties. The Justices disagree, however, on which groups count. In *Crawford*, Justices Scalia, Thomas, and Alito equated the *Burdick* test with suspect class equal protection analysis: to invoke a heightened level of scrutiny, a statute must have been intended to discriminate against a suspect class.¹²⁵ As these Justices saw it, "[t]he Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. *A fortiori* it does not do so when . . . the classes complaining of disparate impact are not even protected."¹²⁶ If a statute does not intentionally

118. *Id.* at 780.

119. 504 U.S. 428, 434 (1992).

120. 553 U.S. 181 (2008).

121. *Anderson*, 460 U.S. at 789.

122. *Id.*

123. *Id.*

124. See, e.g., Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 675 (2008).

125. 553 U.S. 181, 207 (2008) (Scalia, J., concurring).

126. *Id.* at 207 (Scalia, J., concurring) (emphasis omitted).

discriminate against a suspect class—as the Justices claimed Indiana’s voter ID law did not¹²⁷—then no injury can trigger heightened scrutiny.¹²⁸

The rest of the Justices, however, appeared to reject this view. Instead, they looked at whether a challenged statute imposes a burden solely, or disproportionately, on *any* identifiable group.¹²⁹ In *Crawford*, these Justices analyzed the effect that Indiana’s voter ID law would have on the indigent, the immobile, and the old.¹³⁰ Some even characterized the relevant group as “persons who are eligible to vote but do not possess a current photo identification that complies with the requirements of” the law—in other words, all those that the law actually burdens.¹³¹ The lead opinion, indeed, tackled both sets of individuals.¹³² As Justice Scalia’s opinion pointed out, none of these groups are classes protected by the Equal Protection Clause.¹³³ But the opinions took their cue from older cases that focus on voting’s status as a fundamental right rather than on traditional suspect classifications.¹³⁴ Because the lead and dissenting opinions allow for the consideration of many more groups, their tests are far more likely than Justice Scalia’s to see a particular burden as severe.

The lead and dissenting opinions likewise allowed courts to scrutinize laws that only have disparate *impacts* on particular groups. The Justices’ position may stem in part from *Anderson*, which noted that “it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”¹³⁵ This statement could be read to support an intent standard; Justice Scalia himself cited *Anderson* in coming to his conclusion that intentional discrimination is required to trigger strict scrutiny.¹³⁶ But *Anderson* imposed heightened scrutiny because a statute created “[a] burden that f[ell] unequally” on certain groups.¹³⁷ This

127. *Id.* at 205 (Scalia, J., concurring).

128. *Id.* at 208 (Scalia, J., concurring).

129. *Id.* at 199–200 (plurality opinion); *id.* at 236–37 (Souter, J., dissenting); *id.* at 237 (Breyer, J., dissenting).

130. *Id.* at 199 (plurality opinion); *id.* at 216, 237 (Souter, J., dissenting).

131. *Id.* at 198 (plurality opinion); *accord. id.* at 237 (Breyer, J., dissenting).

132. *Id.* at 198–99 (plurality opinion).

133. *Id.* at 207 (Scalia, J., concurring).

134. *Id.* at 210. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964).

135. *Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983); *see also Crawford*, 533 U.S. at 236 (Souter, J., dissenting) (quoting the *Anderson* language).

136. *Crawford*, 533 U.S. at 207 (Scalia, J., concurring).

137. *Anderson*, 460 U.S. at 793–94.

standard, which comes from the fundamental rights strand of cases,¹³⁸ covers disparate impact as well as disparate treatment. And because the lead and dissenting opinions' tests scrutinize disparate impact as well as treatment, they are more likely to find severe harms.

After determining whose burdens count, one must determine the relevant population for comparison. May courts focus *only* on the affected group's injury, or must they submerge it into an analysis of the broader population's (inevitably lesser) burden?

On this question, a majority of the Justices again parted ways with Justices Scalia, Thomas, and Alito. The lead opinion in *Crawford* began by looking only at those "who may experience a special burden under the statute."¹³⁹ Only after finding that they lacked enough evidence to measure this burden did the lead Justices discuss the law's "broad application to all Indiana voters."¹⁴⁰ Similarly, the dissenting Justices looked only at the burden on those who did not have IDs, or on the elderly and indigent, without considering the burden on the broader electorate.¹⁴¹ Under these Justices' analysis, one must not prove that a law burdens the general electorate in a significant way to obtain heightened scrutiny.¹⁴² This view is consistent with Justice Kennedy's dissent in *Burdick*, which focused solely on those "individual voters" who wanted to cast write-in votes,¹⁴³ as well as with several other voting cases that focused on those most affected by the challenged statutes.¹⁴⁴ It is also consistent with the Court's jurisprudence in other areas, such as abortion rights. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁴⁵ for instance, the Court held that "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant."¹⁴⁶ This similarity makes sense if analyzing voting rights cases under "the

138. *Id.* at 786 n.7.

139. *Crawford*, 553 U.S. at 200 (plurality opinion).

140. *Id.* at 202–03.

141. *See id.* at 220–21, 236–37 (Souter, J., dissenting); *id.* at 241 (Breyer, J., dissenting).

142. *Cf. Ohio State Conf. of NAACP v. Husted*, 768 F.3d 524, 544 (6th Cir. 2014) ("[A] majority of the justices in *Crawford* did not expressly reject or in fact endorse the idea that a burden on only a subgroup of voters [generally] could trigger balancing review under *Anderson-Burdick*."), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014).

143. *Burdick v. Takushi*, 504 U.S. 428, 448 (1992) (Kennedy, J., dissenting).

144. *E.g., Norman v. Reed*, 502 U.S. 279, 288–89 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 792 (1983); *Williams v. Rhodes*, 393 U.S. 23, 31 (1968).

145. 505 U.S. 833 (1992).

146. 505 U.S. at 894.

‘fundamental rights’ strand of equal protection analysis,”¹⁴⁷ since the Court also views abortion statutes through a fundamental rights framework.¹⁴⁸

Justice Scalia’s concurrence, on the other hand, insisted on analyzing the injuries “categorically” across the electorate.¹⁴⁹ Thus, unless a statute intentionally discriminates against a protected class, it must “impose[] a severe and unjustified *overall* burden” on voters to warrant heightened scrutiny.¹⁵⁰ This is much closer to suspect class equal protection analysis than it is to fundamental rights analysis.¹⁵¹ And, because Justice Scalia also opposed separating out the injuries to traditionally unprotected groups, or the harms imposed through disparate impact, his view would usually see burdens as light. The majority’s view, on the other hand, separates out the harms of *any* identifiable group and focuses *solely* on that group’s harm, rather than factoring in the lesser injury imposed on other voters. Burdens are much more likely to appear severe under this reading. Most of the courts that have grappled with this subgroup-versus-total-population aspect of *Crawford* have sided with the lead and dissenting opinions.¹⁵²

B. Application to Unopposed Candidate Statutes

The two contrasting approaches laid out in *Crawford* would have very different consequences for unopposed candidate statutes. Under the fundamental rights view, one would likely focus on the voters whose officials were “declared elected,” since those voters would face a disproportionate harm. The statutes flatly deny the constituents of

147. *Anderson*, 460 U.S. at 786 n.7.

148. *See, e.g., Casey*, 505 U.S. at 846–47.

149. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 205 (2008) (Scalia, J., concurring).

150. *Id.* at 208 (emphasis added).

151. *Id.* at 207 (“A voter complaining about such a [nondiscriminatory] law’s effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional.”).

152. *See, e.g., Pub. Integrity All., Inc. v. City of Tucson*, 836 F.3d 1019, 1025 n.2 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 1331 (2017); *Ohio Conf. of NAACP v. Husted*, 768 F.3d 524, 544 (6th Cir. 2014); *Veasey v. Perry*, 71 F. Supp. 3d 627, 686 (S.D. Tex. 2014), *aff’d in part, vacated in part on other grounds, remanded sub nom. Veasey v. Abbott*, 796 F.3d 487, 487–88 (5th Cir. 2015), *aff’d in part, vacated in part on other grounds, rev’d in part Veasey v. Abbott*, 830 F.3d 216, 225 (5th Cir. 2016) (en banc); *see also Ohio Democratic Party v. Husted*, 834 F.3d 620, 627 (6th Cir. 2016) (analyzing burden of law on African-Americans specifically). *But cf. Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 631 (6th Cir. 2016) (“Zeroing in on the abnormal burden experienced by a small group of voters is problematic at best, and prohibited at worst.”), *cert. denied*, 137 S. Ct. 2265 (2017).

unopposed candidates the right to vote for uncontested offices. Nobody may cast ballots for those candidates, cast blank ballots, or write names in. Nor can citizens associate with their candidates and parties “at the crucial juncture at which the appeal to common principles may be translated into concerted action.”¹⁵³ Cancellation statutes impose a particularly heavy burden, since they eliminate entire elections.¹⁵⁴ Depending on the state and the type of statute being challenged, a great number of voters could be affected. Viewed in this way, unopposed candidate statutes impose significant burdens on voting rights, and states must demonstrate compelling interests to justify the harm.

Those following the suspect class view, however, would likely see things differently. Because unopposed candidate statutes do not intentionally discriminate against any suspect class, such judges would look only to their effect on the full electorate. Depending on the number of elections to which the statutes applied, this burden might appear minimal. Courts might also decide that unopposed candidate statutes should be analyzed in the context of the states’ overall ballot access systems.¹⁵⁵ If there are few barriers to ballot access, judges could declare that “any burden . . . is borne only by those who fail to identify their candidate of choice,” or who don’t decide to run “until days before the [filing deadline].”¹⁵⁶ The Court has not looked kindly on alleged burdens that are framed in this way.¹⁵⁷ Likely determining that the harm is minimal, these judges would subject unopposed candidate statutes to something like rational basis review.¹⁵⁸

Finally, any court examining unopposed candidate statutes under the *Burdick* test would balance the harm the statutes create against the state’s proffered interests. The main state interest in passing unopposed candidate statutes is likely cost savings.¹⁵⁹ Unfortunately for the states, the Court has been skeptical of costs as a state interest in right-to-vote

153. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 216 (1986).

154. *See supra* Part I.A.5.

155. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).

156. *Id.* at 436–37.

157. *Id.* at 437–38.

158. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008) (Scalia, J., concurring).

159. *See, e.g.,* Lauren Coleman, *Right to a Write-In Vote in South Carolina?*, WM. & MARY LAW SCH.: STATE OF ELECTIONS (Oct. 30, 2015), <http://tinyurl.com/zau5d27> [<https://perma.cc/3JF3-VAEW>]; Michelle L. Price, *65 Utah Cities Canceling Local Elections This Year*, KSL.COM (Oct. 20, 2015, 9:23 PM), <http://tinyurl.com/z8e53w5> [<https://perma.cc/9G2Z-QAYQ>]; Cindi Ross Scoppe, *Election Called Due to Lack of Interest? In South Carolina, It’s All Too Common*, THE STATE (Sept. 26, 2015, 6:11 PM), <http://tinyurl.com/jvwxwrc> [<https://perma.cc/D7L3-QXMA>]; *Anderson, supra* note 92; *Neal, supra* note 90.

cases.¹⁶⁰ The level of scrutiny may matter a great deal: the Court has indicated that saving money is “a legitimate state objective,” so this interest might suffice under rational basis review;¹⁶¹ but, under a more heightened level of scrutiny, “there must be a showing of necessity” rather than of mere pecuniary convenience.¹⁶² Additionally, because the only savings come from lower amounts of ink, saved employee time, and (possibly) less paper for ballots, the only significant marginal savings would come from cancellation statutes, because they save the cost of holding an entire election.¹⁶³ Cost containment might suffice to sustain unopposed candidate statutes if judges follow the *Crawford* concurrence. But for those who use the *Crawford* lead/dissent framework, the desire to save money will not justify the burdens these statutes impose.

The other interests that states might claim are more awkward fits. For instance, a state might allege that its unopposed candidate statutes help protect the integrity of its elections. In recent years, courts have begun accepting the vague concept of electoral integrity at face value.¹⁶⁴ However, this exceptionally broad interest would be exceptionally out of place here. In previous cases, states invoking the electoral integrity interest claimed that they sought to prevent voter fraud or to ensure some sort of fairness in the political process.¹⁶⁵ Unopposed candidate statutes do neither of these things. They merely allow election officials to save the time that they would otherwise spend tallying votes for those who are already on the ballot, and who are already unopposed.¹⁶⁶

Perhaps a state could make the more specific claim that its unopposed candidate statutes preserve “political stability.”¹⁶⁷ After all, they do ensure that write-in candidates cannot muck up an election or defeat an otherwise unopposed candidate. They thus prevent surprise and channel political activity through the normal ballot-filing process. But this is something of a moot point, since the Court already determined in *Burdick* that states could ban write-in voting.¹⁶⁸

160. See *Bullock v. Carter*, 405 U.S. 134, 147 (1972); see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 218 (1986) (“[T]he possibility of future increases in the cost of administering the election system is not a sufficient basis here for infringing appellees’ First Amendment rights.”).

161. *Bullock*, 405 U.S. at 147.

162. *Id.*

163. See, e.g., Neal, *supra* note 90.

164. See Joshua A. Douglas, *(Mis)Trusting States to Run Elections*, 92 WASH. U.L. REV. 553, 561–62 (2015).

165. See *id.* at 563–65.

166. See, e.g., Coleman, *supra* note 156.

167. Douglas, *supra* note 161, at 560.

168. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).

Moreover, many states require write-in candidates to file like any other candidate;¹⁶⁹ unopposed candidate statutes in these states only apply if nobody has filed to run as a write-in candidate, either.¹⁷⁰ *Burdick*'s reasoning was questionable, but as long as it is on the books, unopposed candidate statutes themselves do little to further any interest in either political stability or electoral integrity.

Perhaps states would have more luck by claiming that the statutes help reduce the overall informational burden that voters face. Longer ballots can mean more roll-off, as voters become too impatient to vote in races further down the ballot.¹⁷¹ They can also lead to longer lines. Courts have treated both roll-off and long lines as *Burdick*-worthy burdens,¹⁷² and the *Burdick* Court itself credited Hawaii's interest in "focus[ing] the attention of voters upon contested races."¹⁷³ It is an open question whether these interests would suffice to justify unopposed candidate statutes if a court found their harms to be moderate-to-severe, rather than minimal. Ultimately, this determination may depend on judges' views about whether voting serves a tabulative or an expressive purpose, a question taken up in Part V.¹⁷⁴

Given all of this, it is less than clear how a court would rule on a right-to-vote challenge to an unopposed candidate statute. The Supreme Court has only once mentioned these laws. In *Burdick*, the Court stated that "Hawaii further promotes the two-stage, primary-general election process of winnowing out candidates . . . by permitting the unopposed victors in certain primaries to be designated office-holders."¹⁷⁵ The statute, the Court said, "focuses the attention of voters upon contested races in the general election."¹⁷⁶ Hawaii's desire to prop up its unopposed candidate statute was, therefore, a legitimate interest that justified its ban on write-in voting.¹⁷⁷ Justice Kennedy's dissent rejected this rationale, but not by questioning the unopposed candidate statutes

169. *See id.* at 450 (Kennedy, J., dissenting); *see also* Mark R. Brown, *Policing Ballot Access: Lessons from Nader's 2004 Run for President*, 35 CAP. U.L. REV. 163, 190 n.182 (2006) (comparing states' deadlines for declaring write-in candidacies).

170. *E.g.*, CAL. ELEC. CODE § 8203 (West 2017); CONN. GEN. STAT. § 9-224a (2017); GA. CODE ANN. § 21-2-291 (2017).

171. *See* Erik J. Engstrom & Jason M. Roberts, *The Politics of Ballot Choice*, 77 OHIO ST. L.J. 839, 859 (2016).

172. *See, e.g.*, *Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 665 (6th Cir. 2016).

173. *Burdick*, 504 U.S. at 439.

174. *See* text accompanying notes 409–427.

175. *Burdick*, 504 U.S. at 439.

176. *Id.*

177. *Id.*

themselves. Rather, he said that the statutes' existence "makes it all the more important to allow write-in voting in the primary elections because primaries are often dispositive."¹⁷⁸

Thus, no Justice appears to have had any qualms about unopposed candidate statutes during the *Burdick* litigation. On the other hand, the case did not concern those statutes; they were lightly briefed and were barely discussed at oral argument.¹⁷⁹ The fate of unopposed candidate statutes, it seems, depends upon which *Crawford* opinion—and which strand of equal protection doctrine—a court decides to follow.

III. EXPANDING ELECTION LAW DOCTRINE

In the previous Part, we examined how challenges to unopposed candidate statutes might fare under the *Burdick* test. But one could analyze these laws under a number of other doctrines. Indeed, unopposed candidate statutes touch on most of the constitutional rules governing elections. This Part will discuss three of them: (1) the congressional voting clauses—Article I, Section 2 and the Seventeenth Amendment; (2) the one person, one vote doctrine under the Equal Protection Clause; and (3) the Guarantee Clause of Article IV, Section 4.¹⁸⁰ In analyzing unopposed candidate statutes under these provisions,

178. *Id.* at 449 (Kennedy, J., dissenting).

179. *See* Brief for Petitioner at 38–39 & n.28, *Burdick*, 504 U.S. 428 (No. 91-535); Reply Brief for Petitioner at 11 n.8, 12, *Burdick*, 504 U.S. 428 (No. 91-535); Brief for Respondent at 12–13, 43–44, *Burdick*, 504 U.S. 428 (No. 91-535); Transcript of Oral Argument at 10–11, 14, 33, *Burdick*, 504 U.S. 428 (No. 91-535). *Burdick* noted "serious reservations with respect to the legitimacy" of the unopposed candidate statutes, and asserted that their legitimacy was implicated to the extent they were put forward as justification for Hawaii's write-in ban; but *Burdick* ultimately acknowledged that the unopposed candidate statutes were "not challenged directly in th[e] case." Brief for Petitioner, *supra*, at 39 n.29.

180. Though this Article will not cover the issue, unopposed candidate statutes as applied to primaries also implicate the First Amendment doctrine protecting political party rights. The Court has ruled numerous times that political parties, "and not someone else," have the right to choose their own standard-bearers. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997). Unopposed candidate statutes deny the parties this right. If a candidate has no qualifying opponent, she is nominated by state fiat. Neither her party nor its voters have any say in the matter. On the other hand, the Court's greatest concern in the political party cases is that state laws could lead the party to nominate different people or to adopt different positions—a concern that is not present when the same candidate will be nominated whether the party's voters vote or not. *See, e.g., Cal. Democratic Party v. Jones*, 530 U.S. 567, 577, 579–80 (2000). Moreover, unopposed candidate statutes appear to threaten only the associational relationship between the party's voters and its candidates. It is not clear that the party apparatus has the same First Amendment interest in the relationship between its voters and its candidates as it does in maintaining *its own* relationship with one or the other.

we can melt the doctrines down into their fundamental parts, expose their imperfections—and, perhaps, even expand their reach.

A. The Congressional Voting Clauses

In examining the constitutionality of unopposed candidate statutes, one would do well to look to Article I, Section 2 and the Seventeenth Amendment, referred to here as the congressional voting clauses. The constitutional right to vote has its strongest textual basis in the context of congressional elections, and it is because of these provisions. Article I, Section 2 of the Constitution specifies that “[t]he House of Representatives shall be composed of Members *chosen* every second Year *by the People* of the several States,” and describes qualifications for “the *Electors* in each State.”¹⁸¹ This language suggests that representatives may not merely be declared elected in the name of the people, but must actually be voted into office.

The language and history of the Seventeenth Amendment provide a similar argument for a senatorial voting requirement. The Constitution originally allowed state legislatures to choose U.S. Senators;¹⁸² but, after a groundswell of support for reform,¹⁸³ the states ratified the Seventeenth Amendment, which mandated that each state’s senators be “elected by the people thereof.”¹⁸⁴ The context of the amendment’s enactment, and its clear language means that the voters—not state legislatures—get to choose United States Senators. The Supreme Court has likewise read a voting requirement into these two provisions: it has long stated that Article I, Section 2, “like the parallel provision of the Seventeenth Amendment,”¹⁸⁵ “gives persons qualified to vote a constitutional right to vote and to have their votes counted” in congressional elections.¹⁸⁶ These protections apply to the entire election process, including to primaries.¹⁸⁷ Given this strong textual protection of the right to vote in federal elections, unopposed candidate statutes that affect congressional elections may require especially strong countervailing state interests to survive review.

181. U.S. CONST. art. I, § 2, cl. 1 (emphases added).

182. *Id.* § 3, cl. 1, amended by *id.* amend. XVII.

183. *Art and History, Direct Election of Senators*, SENATE HIST. OFF. <http://tinyurl.com/6qvvh> [<https://perma.cc/9BUX-8S73>].

184. U.S. CONST. amend. XVII.

185. *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 227 (1986).

186. *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964); accord. *United States v. Classic*, 313 U.S. 299, 315 (1941).

187. *Tashjian*, 479 U.S. at 227.

A closer look, however, reveals an anomaly in the Supreme Court's approach to the congressional voting clauses. Though Article I, Section 2 remains a lively part of the one person, one vote doctrine,¹⁸⁸ the Court rarely makes use of either provision in fundamental right-to-vote cases. Indeed, the Court has not based a right-to-vote opinion on the congressional voting clauses in nearly six decades.¹⁸⁹ Federal appeals courts, meanwhile, have rejected the few right-to-vote challenges they have decided under these clauses.¹⁹⁰

Some of this may be the fault of litigants, rather than the courts. *Crawford*, for instance—one of the most important right-to-vote cases the Supreme Court has heard in recent years—was brought only as a Fourteenth Amendment challenge, even though the voter ID laws at issue applied to federal as well as state elections.¹⁹¹ And many of the cases litigants *have* brought involved off-the-wall claims: that Article I, Section 2 mandates federal representatives for Puerto Rico¹⁹² or the District of Columbia,¹⁹³ or requires an equality-based campaign finance system,¹⁹⁴ or mandates popular election of *state* or *territorial* legislators.¹⁹⁵

But the Court has also done little to encourage the flourishing of a congressional right-to-vote jurisprudence. Since *Wesberry v. Sanders*,¹⁹⁶

188. See, e.g., *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 5 (2012).

189. See *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 50–53 (1959) (rejecting a Seventeenth Amendment challenge to a literacy test requirement for voter registration).

190. See *Igartua v. United States*, 626 F.3d 592, 596 (1st Cir. 2010); *Albanese v. FEC*, 78 F.3d 66, 69 (2d Cir. 1996); *Trinsey v. Pennsylvania*, 941 F.2d 224, 234 (3d Cir. 1991); *Republican Party of State of Conn. v. Tashjian*, 770 F.2d 265, 274 (2d Cir. 1985), *aff'd on other grounds sub nom. Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986); *Skeen v. Hooper*, 631 F.2d 707, 709 (10th Cir. 1980); *Valenti v. Rockefeller*, 292 F. Supp. 851, 853–54 (W.D.N.Y. 1968) (three-judge court); *summarily aff'd*, 393 U.S. 405 (1969) (per curiam).

191. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 187 (2008) (lead opinion). The plaintiffs also alleged violations of the First Amendment, the Voting Rights Act, the National Voter Registration Act, and the Help America Vote Act. See Second Amended Complaint for Declaratory and Injunctive Relief, *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006) (No. 1:05-CV-0634-SEB-VSS), 2005 WL 3708056, at *12.

192. *Igartua*, 626 F.3d at 596.

193. *Adams v. Clinton*, 90 F. Supp. 2d 35, 37, 65 (D.D.C. 2000) (three-judge panel), *aff'd*, 531 U.S. 941 (2000).

194. *Albanese*, 78 F.3d at 69. This argument may be a bit more on-the-wall than the others: election law scholar Rick Hasen points to the one person, one vote doctrine as providing support for an equality-based campaign finance jurisprudence. See RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 67–69 (2016).

195. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 & n.8 (1982).

196. 376 U.S. 1 (1964).

the Court has developed a clear set of rules for one person, one vote cases under Article I, Section 2. Congressional redistricting must come “as nearly as is practicable” to mathematical equality;¹⁹⁷ if the plaintiffs can prove that there is a deviation that “could practicably be avoided,” the state must “‘show with some specificity’ that the population differences ‘were necessary to achieve some legitimate state objective.’”¹⁹⁸ Yet there is no equivalent set of rules for vote denial cases under the congressional voting clauses.

Indeed, the Court has been downright confusing about the scope of these clauses. On the one hand, the Court’s early cases repeatedly affirmed that Article I, Section 2 creates a right to vote for federal offices.¹⁹⁹ But on the other, the Court has said that “the Constitution ‘does not confer the right of suffrage upon any one,’ . . . and that ‘the right to vote, *per se*, is not a constitutionally protected right.’”²⁰⁰ To the extent the Court has reconciled these contradictory statements, it has done so by giving the same limited protection to the federal as to the state voter. The congressional voting clauses link the qualifications for federal electors to those of state legislative electors;²⁰¹ the Court has therefore given states the same latitude to determine both sets of qualifications, so long as they do not discriminate against protected groups or violate federal law.²⁰²

But this leads to as many questions as it does answers. Do the congressional voting clauses provide *only* the same level of protection as the Fourteenth Amendment does for state elections? Or does the explicit textual basis for the federal right to vote guarantee some protection beyond that of the Equal Protection Clause? And what rights do the congressional voting clauses give to voters once they are deemed qualified under state law? The answer to this last question will determine whether unopposed candidate statutes, as applied to federal legislative elections, can survive review under these clauses. Those affected by unopposed candidate statutes are already qualified to vote. The only question is whether states can deny them the right to vote for

197. *Id.* at 7–8.

198. *Tennant v. Jefferson Cty. Comm’n*, 567 U.S. 758, 760 (2012) (*per curiam*).

199. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665 (1966); *Wesberry*, 376 U.S. at 17; *United States v. Classic*, 313 U.S. 299, 314–15 (1941); *Ex parte Yarbrough (The Ku Klux Cases)*, 110 U.S. 651, 663–64 (1884).

200. *Rodriguez*, 457 U.S. at 9 (citations omitted).

201. U.S. CONST. art. I, § 2, cl. 1; *id.* amend. XVII.

202. *See Harper*, 383 U.S. at 665 (1966) (Equal Protection Clause); *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45, 51 (1959) (congressional voting clauses).

their members of Congress based solely on how many people decide to run for those positions.

The Court has heard so few cases in this area that the answer is far from clear. The Court has allowed governors to appoint people to fill the entire remaining terms of elected Senators who die or resign.²⁰³ But these decisions were based at least in part on two factors: the provision of the Seventeenth Amendment that grants governors the right of appointment; and the “minimal,” “infrequent” nature of the intrusion on voters’ rights.²⁰⁴ In *United States v. Classic*,²⁰⁵ by contrast, the Court explicitly recognized “the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections”—a “constitutional command” that “is without restriction or limitation.”²⁰⁶ More recently, the opinion in *U.S. Term Limits, Inc. v. Thornton*²⁰⁷ included a paean to the idea that members of Congress must be “chosen directly, not by States, but by the people.”²⁰⁸ The Court’s Article I, Section 2 cases, in particular, emphasize “the importance of the sovereignty of the people in selecting freely their own representatives.”²⁰⁹ If the Court’s rhetoric truly has substance, it should at least ensure that members of Congress are elected by the voters—not by state declaration. Properly read as protecting the substantive right to vote, the congressional voting clauses could well invalidate unopposed candidate statutes as applied to congressional elections.

B. The One Person, One Vote Doctrine

As we have seen from the previous Section, the congressional voting clauses might invalidate some unopposed candidate statutes if they were made to apply beyond one person, one vote claims. But the one person, one vote concept *itself* could also become a potent weapon against these statutes. First, though, courts must be convinced to apply the doctrine to vote denial as well as vote dilution. This line of attack could prove useful against unopposed candidate statutes that apply to

203. *Valenti v. Rockefeller*, 393 U.S. 405 (1969) (per curiam), *summarily aff’g* 292 F. Supp. 851, 853–54 (W.D.N.Y. 1968) (three-judge court); *see also Rodriguez*, 457 U.S. at 10–11 (endorsing *Valenti*).

204. *Rodriguez*, 457 U.S. at 11–12.

205. 313 U.S. 299 (1941).

206. *Id.* at 315.

207. 514 U.S. 779 (1995).

208. 514 U.S. at 821; *see id.* at 842 (Kennedy, J., concurring); *The Klu Klux Klan Cases*, 110 U.S. 651, 663–64 (1884).

209. Richard H. Pildes, *The Constitution and Political Competition*, 30 NOVA L. REV. 253, 268 (2006).

legislative bodies, or to any other election in which ability to vote depends on where one lives.

On the face of it, the one person, one vote doctrine seems directly applicable to unopposed candidate statutes. Announced in *Gray v. Sanders*²¹⁰ and *Reynolds v. Sims*,²¹¹ the one person, one vote rule forbids states from giving some areas greater voting power than others.²¹² It is most often applied to legislative bodies in which districts are drawn with unequal populations,²¹³ though *Gray* was concerned with a Georgia law that gave some counties greater voting power than others for individual statewide offices.²¹⁴ In essence, one person, one vote is meant to stop states from “[w]eighting the votes of citizens differently, by any method or means, merely because of where they happen to reside.”²¹⁵ Unopposed candidate statutes prevent those who live in some areas from voting for an office while those in other areas do get to vote. Challenges to these laws seem to fit snugly into the one person, one vote framework.

Yet this is not how the doctrine is traditionally conceived. Prominent election law casebooks describe one person, one vote as an “equipopulation principle,”²¹⁶ a rule that ensures “the equal weighting of votes” by requiring “that seats . . . be apportioned on a substantially equal population basis.”²¹⁷ They thus treat one person, one vote as a doctrine of vote *dilution*, to be kept separate from vote *denial*.²¹⁸ Scholars likewise treat vote denial and vote dilution as separate concepts, with the one person, one vote doctrine applying to the latter.²¹⁹ The Court’s cases have often characterized one person, one vote as a vote dilution rule, as well.²²⁰

210. 372 U.S. 368 (1963).

211. 377 U.S. 533 (1964).

212. *Gray*, 372 U.S. at 381.

213. See, e.g., *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970) (local legislative bodies); *Reynolds*, 377 U.S. at 577 (state legislatures); *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964) (Congress).

214. *Gray*, 372 U.S. at 370.

215. *Reynolds*, 377 U.S. at 563.

216. SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 142 (3d ed. 2007).

217. DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 65–66 (4th ed. 2008).

218. See ISSACHAROFF ET AL., *supra* note 216, at 112; LOWENSTEIN ET AL., *supra* note 217, at 65.

219. See, e.g., Joseph Fishkin, *Weightless Votes*, 121 *YALE L.J.* 1888, 1893 (2012); Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 *HARV. C.R.-C.L. L. REV.* 439, 442 (2015). *But see* Laurence H. Tribe, Comment, *eroG .v hsuB and Its Disguises: Freeing Bush v. Gore from Its Hall of Mirrors*, 115 *HARV. L. REV.*

And, indeed, it may be puzzling to conceive of the concept as applying to vote denial. After all, in a typical one person, one vote case, the harm stems from a state's decision to apportion districts using unequal populations.²²¹ The claims sound either in voter equality, arguing that the people in one district have lower voting power than those in another; or in representational equality, arguing that legislators should represent the same number of people.²²² And the usual remedy in one person, one vote cases is to institute a new apportionment plan that equalizes population across districts.²²³ Unopposed candidate statutes do not fit in with this view. Individuals in districts with unopposed candidates still enjoy equal representation in the relevant governing body. Moreover, any remedy would involve enfranchisement rather than reapportionment. If one person, one vote only covered traditional dilution claims, unopposed candidate statutes would be safe from attack.

But vote dilution and vote denial are far more similar than this dichotomy suggests. First, at the theoretical level, both are treated as similar Equal Protection Clause violations.²²⁴ Just as one can view the death penalty as one extreme along a continuum of cruel and unusual punishments,²²⁵ one can characterize vote denial as one extreme on the broader spectrum of vote dilution. Rather than weighting votes in some districts at, say, one-third of those in other districts, as in *Wesberry v. Sanders*,²²⁶ vote denial simply weights the votes of those affected at *zero percent* of those in other districts.²²⁷ This conception of one person, one vote reflects the fact that vote denial and vote dilution cases are cut from the same cloth. Indeed, the Court first conceived of malapportionment as a more "sophisticated" version of the same mathematical discrimination occasioned by denying the right to vote

170, 226 & n.216 (2001) (stating that vote denial "can be regarded as a specific form of vote dilution").

220. See, e.g., *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123–24 (2016); *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688, 692–93 (1989).

221. See, e.g., *Morris*, 489 U.S. at 690.

222. *Evenwel*, 136 S. Ct. at 1126. Recently, in *Evenwel v. Abbott*, the Court put a large thumb on the scale in favor of representational over voter equality, though it suggested that the two theories are not incompatible. *Id.* at 1131.

223. See *Reynolds v. Sims*, 377 U.S. 533, 586 (1964).

224. Compare *id.* at 566 (vote dilution), with *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 622 (1969) (vote denial).

225. See, e.g., *Furman v. Georgia*, 408 U.S. 238, 305 (1972) (Brennan, J., concurring).

226. 376 U.S. 1 (1964).

227. *Id.* at 2.

outright, or by giving some voters multiple votes while others get only one.²²⁸

Moreover, at the practical level, the Court's one person, one vote cases are not actually limited to vote dilution. Rather, the Court has said, the doctrine "requires that each qualified voter must be given an equal opportunity to participate in [each] election."²²⁹ Denying the right to vote to those in one district while allowing it to those in another certainly violates this principle. Indeed, the Court has applied one person, one vote whenever it has encountered either "denial *or* dilution of voting power" based on "group characteristics—geographic location and property ownership—that bore no valid relation to the interest of those groups in the subject matter of the election."²³⁰ Lower courts have occasionally recognized this dual focus of the one person, one vote doctrine.²³¹

Most telling is a series of cases in which the Court had to determine whether one person, one vote applied to elections for so-called "special-purpose" districts. The first case of this kind, *Salyer Land Co. v. Tulare Lake Basin Water Storage District*,²³² involved elections for a water-district board of directors. Only landholders were allowed to vote, and their votes were weighted based on the assessed value of their land.²³³ Landless residents sued, claiming that both the vote denial and vote dilution elements of this system violated the Equal Protection Clause.²³⁴ The Court examined both claims simultaneously, under the one person, one vote doctrine. It ultimately determined that the water district, "by reason of its special limited purpose and of the disproportionate effect of its activities on landowners as a group," was not subject to one person, one vote.²³⁵ Five years later, in *Ball v. James*,²³⁶ the Court conducted a similar analysis of an agricultural improvement and power district with the same voting scheme as in

228. *Reynolds*, 377 U.S. at 562–63.

229. *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 56 (1970).

230. *Gordon v. Lance*, 403 U.S. 1, 4 (1971) (emphasis added); see also *id.* at 4 n.1 ("While *Cipriano* involved a denial of the vote, a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective.").

231. See, e.g., *Mixon v. Ohio*, 193 F.3d 389, 404 (6th Cir. 1999).

232. 410 U.S. 719 (1973).

233. *Id.* at 724–25.

234. *Id.* at 724–26.

235. *Id.* at 728.

236. 451 U.S. 355 (1981).

Salyer.²³⁷ The Court determined that this district, too, was exempt from one person, one vote.²³⁸

Two aspects of these cases are noteworthy. First, in comparing these special-purpose district suits with existing precedent, the Court repeatedly characterized vote denial cases as falling within the one person, one vote doctrine.²³⁹ In *Salyer*, the Court discussed *Cipriano v. City of Houma*²⁴⁰ and *Phoenix v. Kolodziejcki*,²⁴¹ in which the Court struck down laws that restricted who could vote in certain kinds of bond elections.²⁴² The *Salyer* Court described these cases as “application[s] of the ‘one person, one vote’ principle.”²⁴³ Similarly, the Court in *Kramer v. Union Free School District Number 15*²⁴⁴ had struck down a law limiting school district elections to property owners and parents of children in the district.²⁴⁵ Yet, in *Salyer*, the Court described *Kramer* as “extend[ing] the ‘one person, one vote’ principle to school districts.”²⁴⁶ And, in *Ball*, the Court characterized *Salyer* itself as part of the line of one person, one vote cases beginning with *Reynolds*.²⁴⁷ By categorizing these vote denial cases as one person, one vote cases, the Court provided strong evidence that one person; one vote applies to disenfranchisement as well as vote dilution.

The special-purpose district cases are also important because of their own analyses and holdings. To reiterate: the voting schemes in these cases denied the plaintiffs the right to vote. There could be no claims about loss of representational equality—non-landholders were still represented by the officials who ran the districts, and were represented on an equal basis with others in those districts. Yet, unlike the parties and amici themselves,²⁴⁸ the Court did not differentiate between the vote *denial* claims and the vote *dilution* claims. The Court could have determined that the decision to restrict voting to landowners was not properly analyzed under the one person, one vote framework.

237. *Id.* at 357.

238. *Id.* at 357, 371.

239. *Id.* at 373 (Powell, J., concurring).

240. 395 U.S. 701 (1969).

241. 399 U.S. 204 (1970).

242. *Id.* at 212–13; *Cipriano*, 395 U.S. at 703, 706.

243. *Salyer*, 410 U.S. at 727.

244. 395 U.S. 621 (1969).

245. *Id.* at 633.

246. *Salyer*, 410 U.S. at 727.

247. *See Ball v. James*, 451 U.S. 355, 362–64 (1981).

248. Brief for the Appellants at 13–18, *Salyer*, 410 U.S. 719 (No. 71-1456); Brief for the Appellee at 16–27, 410 U.S. 719 (No. 71-1456); Brief of American Civil Liberties Union and the South Texas Project of the American Civil Liberties Union Foundation *Amicus Curiae* at 10–19, 410 U.S. 719 (No. 71-1456).

It may instead have drawn on a line of cases involving wealth-based restrictions on voting rights,²⁴⁹ or else determined that restrictions based on wealth or property ownership are subject only to rational basis review.²⁵⁰ But instead, the Court determined that the districts' "special limited purpose," and the "disproportionate effect of [their] activities on landowners as a group," exempted them from the requirements of *Reynolds*.²⁵¹ It was the districts' forms and powers, rather than any limitation of the doctrine to vote dilution claims, which rendered one person, one vote inapplicable.

From both a theoretical and a doctrinal standpoint, then, it appears that we could subject vote denial to the one person, one vote doctrine. But what, exactly, does this gain us? After all, as Part II showed, the Court has already developed the *Burdick* test for handling right-to-vote claims. It seems duplicative, if not silly, to expend so much effort expanding one doctrine to cover claims already covered by another.

Yet there are good reasons to do so, and they stem from the Court's opinions in *Crawford*. To the concurring Justices, burdens on the right to vote should receive heightened scrutiny only if they are purposefully directed at a suspect class or severely affect the entire electorate.²⁵² As we discovered in the last Section,²⁵³ the Court has upheld statutes that grant appointment power to fill legislative vacancies—and it did so in part because these laws did "not have a special impact on any discrete group of voters or candidates."²⁵⁴ Unopposed candidate statutes appear unobjectionable under this version of the *Burdick* test: they are not aimed at a suspect class, and they apply equally to any district in which a candidate runs without opposition.

The benefit of the one person, one vote doctrine in this situation is that it subjects geographical classifications to a similar level of scrutiny as other suspect classifications.²⁵⁵ Unopposed candidate statutes divvy voters up by geographic jurisdiction: they deny voting rights to those in districts in which a candidate runs without an opponent, and grant voting rights to people in other districts. They do not pre-select the districts that will be disadvantaged, and they focus on the number of candidates running rather than on geography; but they do have the

249. See *Kramer*, 395 U.S. at 633; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966).

250. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 29 (1973).

251. *Salyer*, 410 U.S. at 728, 730; see also *Ball*, 451 U.S. at 366–67, 371.

252. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 205–07 (2008) (Scalia, J., concurring).

253. See *supra* notes 203–204 and accompanying text.

254. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 10 & n.10 (1982).

255. See *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

effect of differentiating between voters on the basis of location. Even those who subscribe to the suspect class view of the *Burdick* test would likely have to scrutinize unopposed candidate statutes more closely under one person, one vote.

One further barrier to making a one person, one vote claim—or, indeed, to making a vote denial claim under *Burdick* or the congressional voting clauses—is that states have leeway to decide which positions are elected. In a series of cases, the Court has given states explicit power to determine whether an official should be elected or appointed.²⁵⁶ In *Fortson v. Morris*,²⁵⁷ the Court upheld a Georgia state constitutional provision that let the legislature choose the governor after an election if no candidate received a majority of the vote.²⁵⁸ The three-page opinion, issued only a month after the 1966 gubernatorial election that triggered the suit,²⁵⁹ provided very little analysis. The Court merely said: “There is no provision of the United States Constitution or any of its amendments which either expressly or impliedly dictates the method a State must use to select its Governor.”²⁶⁰ This proposition, unsupported by any citation to text or case law, was enough to sustain the appointment provision. Because “elections cost time and money,” the Court opined, it was reasonable for the legislature “to avoid repeated elections” by appointing the governor, rather than holding a runoff or simply letting the leader win by plurality vote.²⁶¹

The Court has reaffirmed the *Fortson* principle in multiple cases, though always in abnormal situations. *Fortson* itself applied to the rare instance in which no gubernatorial candidate met the state’s threshold for winning office.²⁶² In *Sailors v. Board of Education of Kent County*,²⁶³ the Court held that “officers of the nonlegislative character”—in that case, a county school board performing “essentially administrative functions”—may “be chosen by . . . appointive means rather than by an election.”²⁶⁴ The Court repeated *Fortson*’s broad dicta

256. See *Rodriguez*, 457 U.S. at 9; *Fortson v. Morris*, 385 U.S. 231, 234 (1966).

257. 385 U.S. 231 (1966).

258. *Id.* at 232–33.

259. *Id.* at 231–32.

260. *Id.* at 234.

261. *Id.*

262. *Id.* Two years after the *Fortson* decision came down, the voters repealed the constitutional appointment provision and passed a statute allowing for runoffs in cases in which no candidate received a majority of the vote. 4 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW § 18.36(a) n.2 (2016).

263. 387 U.S. 105 (1967).

264. *Id.* at 108, 110.

in *Rodriguez v. Democratic Party*,²⁶⁵ but applied it only to the “infrequent problem” of filling legislative vacancies.²⁶⁶ These cases all dealt with situations that were somewhat removed from the core of our republican system. It remains to be seen whether the Court would go so far as to allow a state legislature to appoint a governor in total disregard of the voters’ will, or to allow a governor to appoint the members of the state legislature.²⁶⁷ As will be further explained in the next Section,²⁶⁸ there are reasons to believe that the Constitution limits the states’ freedom to remove from the voters the selection of certain officials. Unopposed candidate statutes, operating in a polity so divided that state legislators representing thirty-seven percent of Americans run unopposed,²⁶⁹ affect a far greater swath of elections than were at issue in the *Fortson* line of cases.

The question of whether positions must be elected in the first place matters as much to the one person, one vote doctrine as it does to the more traditional vote denial doctrines. The Court has said that “where a State chooses to select members of an official body by appointment rather than election, *and that choice does not itself offend the Constitution*,” there is no equal protection violation.²⁷⁰ Thus, much of the one person, one vote analysis for unopposed candidate statutes turns on how one sees the statutes. Are they merely exercising the states’ legitimate power to restrict which offices are subject to election from the get-go? Or are they taking away from people in certain districts a voting power that had already been granted to the electorate at large? If the former, then there is no Fourteenth Amendment claim to make. If the latter, then one person, one vote claims against unopposed candidate statutes are viable.

Unopposed candidate statutes go further than did the laws examined in *Fortson*, *Sailors*, and *Rodriguez*. They often apply to legislative bodies, at every regular primary and general election.²⁷¹ Some cancellation statutes even prevent voters in certain areas from casting a ballot for an unopposed citywide or statewide candidate,

265. 457 U.S. 1, 9 (1982).

266. *Id.* at 12.

267. *See Fortson*, 385 U.S. at 246–47 (Fortas, J., dissenting).

268. *See infra* notes 321–23 and accompanying text.

269. *See* Carl Klarner, *Competitiveness of State Legislative Elections: 1972–2014*, *BALLOTPEdia* (May 6, 2015), https://ballotpedia.org/Competitiveness_in_State_Legislative_Elections:_1972-2014 [<https://perma.cc/9GQC-5K6B>]; Russell Mokhiber, *Alaska’s Lesson for the Left*, *THE NATION*, Apr. 3, 2013, at 24.

270. *Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 58 (1970) (emphasis added).

271. *See supra* Parts I.A.1–3.

because all the *other* races in their precinct are also uncontested, while those in other precincts can vote for that same candidate.²⁷² Unopposed candidate statutes allow the switch of elective office to be turned on and off based on how many people decide to run for a position in a given district. They thereby generate an imbalance in voting power that is based upon where one lives—which, as the Court has said in its reapportionment cases, is presumptively suspect.

C. The Guarantee Clause

Ah, the Guarantee Clause: the last refuge of desperate plaintiffs. If the *Burdick* analysis, the congressional voting clauses, and the one person, one vote doctrine are not enough to void an election law, challengers can try this last constitutional Hail Mary. The clause, which provides that “[t]he United States shall guarantee to every State in this Union a Republican Form of Government,”²⁷³ has an illustrious history of irrelevance. In *Luther v. Borden*,²⁷⁴ an early Guarantee Clause case, the Court ruled that “it rests with Congress to decide what government is the established one in a State.”²⁷⁵ In the intervening years, “this limited holding metamorphosed into the sweeping assertion that ‘[v]iolation of the great guaranty of a republican form of government in States cannot be challenged in the courts.’”²⁷⁶ In other words, the clause was deemed nonjusticiable.

Given this history, analyzing unopposed candidate statutes under the Guarantee Clause might seem like a mere academic exercise. But the clause has seen something of a resurgence of late. No longer are Guarantee Clause claims *per se* nonjusticiable. Instead, judges must search either for manageable standards, in a process reminiscent of the Court’s partisan gerrymandering doctrine, or else for the substantive content of the clause, similar to the way the Court approaches substantive due process claims. Challenges to unopposed candidate statutes are uniquely well positioned to advance this revival. By almost any definition, a republican form of government includes state officials who are accountable to the people. But unopposed candidate statutes create officials who are not accountable to anyone for their positions.

272. See, e.g., COLO. REV. STAT. § 1-5-208 (2017); GA. CODE ANN. § 21-2-291 (2017); 10 ILL. COMP. STAT. 5 / 7-5(b) (2017); MICH. COMP. LAWS § 168.541 (2017).

273. U.S. CONST. art. IV, § 4.

274. 48 U.S. 1 (1849).

275. *Id.* at 42.

276. *New York v. United States*, 505 U.S. 144, 184 (1992).

The expansive readings of *Luther* that defined Guarantee Clause doctrine for a century are on their way out. As the Supreme Court made clear in *Baker v. Carr*,²⁷⁷ past Guarantee Clause claims were rejected not because the clause was inherently nonjusticiable, but rather because those cases ran afoul of the political question doctrine.²⁷⁸ The Court took things a step further in *New York v. United States*—it noted that the Court had litigated a number of Guarantee Clause cases on the merits in the past,²⁷⁹ and stated that “perhaps not all claims under the Guarantee Clause present nonjusticiable political questions.”²⁸⁰ The Court assumed justiciability and rejected New York’s Guarantee Clause claim on the merits.²⁸¹ Thanks to these cases, specific claims can actually be decided—if they can clear the political question hurdle.

Other courts have taken up this challenge. The Tenth Circuit recently found justiciable a claim that an initiative requiring voter approval of tax increases violated the Guarantee Clause.²⁸² Other circuit courts have weighed in on the merits of Guarantee Clause claims, albeit often in summary fashion or only after assuming justiciability.²⁸³ State courts, meanwhile, have had little compunction about ruling on Guarantee Clause claims for the past several decades.²⁸⁴ We may no longer simply be able to read the Guarantee Clause out of judicial existence.

Unopposed candidate statutes have a direct, negative effect on republican government, making them prime candidates for Guarantee Clause challenges. There are two ways in which to conceptualize this

277. *Baker v. Carr*, 369 U.S. 186 (1962).

278. *Id.* at 229.

279. *New York v. United States*, 505 U.S. at 184.

280. *Id.* at 185.

281. *Id.* at 185–86.

282. *Kerr v. Hickenlooper*, 744 F.3d 1156, 1181 (10th Cir. 2014), judgment vacated, 135 S. Ct. 2927 (2015).

283. See *U.S. ex rel. Anti-Discrimination Ctr. of Metro. New York, Inc. v. Westchester Cty.*, 712 F.3d 761, 774 (2d Cir. 2013); *Cty. of Charles Mix v. U.S. Dep’t of Interior*, 674 F.3d 898, 902 (8th Cir. 2012); *Largess v. Supreme Jud. Ct. for State of Mass.*, 373 F.3d 219, 226–29 (1st Cir. 2004); *New Jersey v. United States*, 91 F.3d 463, 468 (3d Cir. 1996); *Adams v. Clinton*, 90 F. Supp. 2d 35, 71 (D.D.C.) (three-judge court), *aff’d*, 531 U.S. 941 (2000).

284. See, e.g., *W.E. Tucker Oil Co. v. Portland Bank*, 688 S.W.2d 293, 294 (Ark. 1985) (holding that constitutional amendment abolishing limits on interest rates did not violate Guarantee Clause); *Ventura Grp. Ventures, Inc. v. Ventura Port Dist.*, 16 P.3d 717, 724 (Cal. 2001) (deciding on merits claim that California’s Proposition XIII violated Guarantee Clause); *In re Interrogatories Propounded by Senate Concerning House Bill 1078*, 536 P.2d 308, 316 (Colo. 1975) (en banc) (holding that Guarantee Clause does not require separation of powers); *VanSickle v. Shanahan*, 511 P.2d 223, 241 (Kan. 1973) (holding that Guarantee Clause guarantees separation of powers).

claim. The first is most easily understood through a thought exercise. As mentioned in the Introduction, over one-third of Florida's state legislators were not actually elected to their current terms of office.²⁸⁵ What if, sometime in the future, fifty-one percent of the legislators ran unopposed and were "declared elected," as is already the reality for the current Louisiana House of Representatives?²⁸⁶ A majority of the legislature would then hold power without receiving a single vote. What if two-thirds of the legislators were so "elected," as is already the case for the Arkansas State Legislature?²⁸⁷ Seventy-five percent? All of them? At what point do unopposed candidate statutes, by removing voters from the electoral process, transform a state's government from a republic into something else?

This last question, of course, is more than rhetorical: it is the central problem that one must solve to bring a Guarantee Clause claim. Even though the clause is no longer a dead letter, the political question doctrine still requires that courts develop "judicially enforceable standards of republicanism," which may be a difficult task.²⁸⁸ What frame of reference should courts employ when analyzing unopposed candidate statutes under the Guarantee Clause? The most obvious might be majoritarianism: if enough candidates run unopposed that a majority of a legislative body is not elected by the people, then the body as a whole—and, by extension, the state government—is no longer republican in form. But this definition may be too facile. After all, the other legislators remain elected, and a bare majority of unelected legislators does not translate into a *working* majority. Moreover, such an extreme result could be a fluke, one that could be remedied at the next election. Perhaps a legislature, therefore, would have to maintain a majority of unelected legislators for more than one election to be deemed un-republican. Both numbers and temporality complicate any attempt to develop an acceptable standard.

If this discussion feels familiar, that is because it is. Almost the exact same problem plagues the Court's partisan gerrymandering jurisprudence. (This is particularly fitting given that some forms of political gerrymandering, by making legislative districts less

285. See *supra* notes 4–8 and accompanying text.

286. See *Louisiana House of Representatives Elections, 2015*, BALLOTPEdia, https://ballotpedia.org/Louisiana_House_of_Representatives_elections,_2015, [https://perma.cc/GZ2S-VP5H].

287. See *Arkansas State Senate Elections, 2016*, BALLOTPEdia, https://ballotpedia.org/Arkansas_State_Senate_elections,_2016 [https://perma.cc/6PPN-2YJ6].

288. WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 299 (1972). The Court indicated in *Baker* that such standards might be found in specific cases. *Baker v. Carr*, 369 U.S. 186, 222–23 n.48 (1962).

competitive, may increase the relevance of unopposed candidate statutes.²⁸⁹) Indeed, in *Vieth v. Jubelirer*,²⁹⁰ Justice Breyer illustrated his proposed standard for gerrymandering claims with an example that looks quite similar to the one just discussed for handling unopposed candidate statutes. In Justice Breyer's view, if a party wins a majority of the votes cast in two straight elections, but fails both times to obtain a majority of legislative seats, then a constitutional claim is viable.²⁹¹ This did not go much of anywhere, however. Both the *Vieth* plurality—which would hold all partisan-gerrymandering claims nonjusticiable²⁹²—and Justice Kennedy's concurrence²⁹³ rejected this standard as unworkable. The *Vieth* plurality even cited Guarantee Clause claims as an example of a nonjusticiable issue.²⁹⁴

However, in yet another similarity, courts have explicitly remained open to the possibility of developing manageable standards for both doctrines.²⁹⁵ In words that could just as easily apply to the Guarantee Clause, Justice Kennedy said of gerrymandering claims: “It is not in our tradition to foreclose the judicial process from the attempt to define standards and remedies where it is alleged that a constitutional right is burdened or denied.”²⁹⁶ Indeed, the Court is currently considering a challenge to Wisconsin's State Assembly map, which could finally provide a justiciable test.²⁹⁷ The de-republicanizing effect of unopposed candidate statutes provides one place to start searching for such a standard in the Guarantee Clause context.

There is a second means of conceptualizing Guarantee Clause claims, however—one that could make it far easier to challenge unopposed candidate statutes. Instead of focusing on developing manageable standards, per se, courts would instead focus on determining the *content* of the Guarantee Clause. In some sense, this is a necessary first step: it is difficult to develop standards for an abstract idea like republicanism without first fleshing out what republican

289. See *infra* notes 347–350 and accompanying text.

290. 541 U.S. 267 (2004).

291. *Id.* at 365–66 (Breyer, J., dissenting).

292. *Id.* at 281, 299–300 (plurality opinion).

293. *Id.* at 308 (Kennedy, J., concurring).

294. *Id.* at 277 (plurality opinion). The plurality cited to *Pacific States Telephone & Telegraph Co. v. Oregon*, 223 U.S. 118 (1912), a case whose relevance to Guarantee Clause jurisprudence is questionable, at best, in light of *Baker* and *New York v. United States*. See, e.g., *Kerr v. Hickenlooper*, 744 F.3d 1156, 1174–76 (10th Cir. 2014), *judgment vacated*, 135 S. Ct. 2927 (2015).

295. E.g., *Vieth*, 541 U.S. at 313 (Kennedy, J., concurring); *Kerr*, 744 F.3d at 1179.

296. *Vieth*, 541 U.S. at 309–10.

297. *Gill v. Whitford*, No. 16-1161 (U.S. argued Oct. 3, 2017).

government means.²⁹⁸ But content determinations can become ends in themselves, as judges identify substantive rights or doctrines that the Clause protects as fundamental. Particular state policies would then be subject to increased scrutiny if they violated one of these rights or doctrines. This method of analysis is abstract, but is far from alien to the courts. Indeed, it is the standard model for both substantive due process²⁹⁹ and Eighth Amendment³⁰⁰ jurisprudence, as well as for “other constitutional provisions that set forth broad principles rather than specific requirements.”³⁰¹

The Guarantee Clause is such a provision. Its assurance of a republican government gives the Clause a “protean potential” similar to that of many other broad sections of the Constitution.³⁰² What Justice Kennedy recently said of the Due Process Clause is also true of the Guarantee Clause: those who drafted it “did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.”³⁰³ Dynamic interpretation may be the most natural means of analyzing Guarantee Clause claims for this reason.³⁰⁴ Such a reading is, however, at odds with the Court’s opinion in *Minor v. Happersett*,³⁰⁵ which implied that anything that state governments did in 1787 is automatically republican.³⁰⁶

Luckily, it is unnecessary to choose between those methods of interpretation at this point, as unopposed candidate statutes would likely violate the Guarantee Clause under either the *Minor* standard or the

298. For instance, the Court is currently determining whether the First Amendment and Equal Protection Clause contain manageable standards for adjudicating partisan gerrymandering suits. *Id.* As part of this inquiry, the Court must determine whether those standards derive from voters’ right to a district map that treats the parties symmetrically with respect to their ability to translate votes into seats, and from a corresponding harm when maps do not meet this requirement. Brief for Appellees at 11-12, 37, *Gill*, No. 16-1161.

299. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2598 (2015).

300. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 311-12 (2002).

301. *Obergefell*, 135 S. Ct. at 2598.

302. WIECEK, *supra* note 288, at 303.

303. *Obergefell*, 135 S. Ct. at 2598.

304. See JACK M. BALKIN, *LIVING ORIGINALISM* 240-41 (2011); WIECEK, *supra* note 288, at 290; *Obergefell*, 135 S. Ct. at 2598.

305. 88 U.S. 162 (1874).

306. *Id.* at 175-76; see AKHIL REED AMAR, *AMERICA’S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 82 (2012). *But see* WIECEK, *supra* note 288, at 62 (“The guarantee clause was not meant to solidify republican government in the mold of existing political institutions. It obviously could not, if only because the state governmental structures in 1787 were too varied and too changing to share any but the broadest common characteristics.”).

dynamic interpretation model. As James Madison wrote in *Federalist* 39, a republican government requires that “the persons administering it be appointed, either directly or indirectly, by the people.”³⁰⁷ At the Framing, at least one house—and, except in Maryland, both houses—of each state’s legislature was directly elected.³⁰⁸ Either the voters or the elected legislators chose the governor in each state.³⁰⁹ Even legislative appointment of governors, however, “met scattered resistance in 1776, which grew in the coming years” because the ability to choose the governor was seen as “too dangerous a power” to leave in legislators’ hands.³¹⁰ By 1787, “[t]he word *republican* . . . meant a representative government with regular elections,”³¹¹ and the second criterion was necessary to achieve the first. Founding-era Americans “clearly believed that ‘the right of representing is conferred by the act of electing’”³¹²—that “the elected are not representatives in their own right, but [only] by virtue of their election.”³¹³ To the Founding generation, then, “the process of voting was not incidental to representation but was at the heart of it.”³¹⁴ A provision that would allow legislators or governors to gain office without *any* dependence on the people would strike the Founding generation as singularly un-republican. Thus, even if the only criterion for analyzing Guarantee Clause claims were the states’ practices at the Framing, unopposed candidate statutes would fare poorly.

Alternatively, one could ask what rights or structures we *now* believe the Guarantee Clause guarantees. Using this mode of analysis, it quickly becomes clear that democratically elected state officials and, perhaps, local officials, are a requirement for republicanism. *The Federalist* declared accountability to the people to be the very definition of a republic, though that definition included both direct election and appointment of officials.³¹⁵ In the decades after *Minor*, the Supreme

307. THE FEDERALIST NO. 39 237 (James Madison) (Clinton Rossiter ed., 2003).

308. *Id.* at 238.

309. AMAR, *supra* at note 301, 529 n.19; THE FEDERALIST NO. 39, *supra* note 307, at 237–38 (James Madison).

310. GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787 at 139 (1998).

311. BALKIN, *supra* note 304, at 240.

312. WOOD, *supra* note 310, at 597.

313. *Id.* at 182.

314. *Id.*; see AMAR, *supra* note 301, at 279 (“[T]he essence of the Article IV guarantee of each state’s ‘Republican form of government . . . was to shore up popular sovereignty.”); BALKIN, *supra* note 304, at 240 (“The guarantee of republican government protected popular sovereignty and the right of the people to govern their affairs through majority rule.”).

315. THE FEDERALIST NO. 39, *supra* note 302, at 237.

Court explicitly acknowledged that “the right of the people to choose their own officers for governmental administration”³¹⁶—so that power “is exercised by representatives *elected* by them”³¹⁷—is “the distinguishing feature of” the republican form.³¹⁸ This indicates a move toward direct elections, and away from using even an appointive system for key officials like state legislators and governors.

By the time the Court began the reapportionment revolution in the 1960s, this idea had become firmly entrenched. “The right to vote freely for the candidate of one’s choice,” the Court declared, “is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”³¹⁹ Recently, in approving the use of independent redistricting commissions to curb partisan gerrymandering, the Court justified these efforts as vindicating “‘the core principle of republican government,’ namely, ‘that the voters should choose their representatives, not the other way around.’”³²⁰ Lower courts³²¹ and legal scholars³²² have similarly identified the

316. *Duncan v. McCall*, 139 U.S. 449, 461 (1891).

317. *Downes v. Bidwell*, 182 U.S. 244, 279 (1901) (emphasis added).

318. *Duncan*, 139 U.S. at 461; cf. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 842 (1995) (Kennedy, J., concurring) (“The federal character of congressional elections flows from the political reality that our National Government is republican in form . . .”). Similarly, the Court in *New York* rejected the state’s Guarantee Clause claim in part because “state government officials remain[ed] accountable to the local electorate.” *New York v. United States*, 505 U.S. 144, 185 (1992).

319. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964); see *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

320. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm’n*, 135 S. Ct. 2652, 2677 (2015) (citations omitted). The Court highlighted this aspect of republicanism multiple times. See *id.* at 2674–75.

321. See, e.g., *Morrissey v. State*, 951 P.2d 911, 916 (Colo. 1998) (en banc); *Adkins v. Huckabay*, 755 So. 2d 206, 211 (La. 2000); *Harris v. Shanahan*, 387 P.2d 771, 789 (Kan. 1963); *Friedman v. Cuomo*, 346 N.E.2d 799, 802 (N.Y. 1976); see also *Cty. of Charles Mix v. U.S. Dep’t of Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (rejecting Guarantee Clause claim because challenged action had not “limited the ability of [the county’s] citizens to elect their own representatives”).

322. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 118 n.*, 240 n.78 (1980); WIECEK, *supra* note 288, at 62–63; Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 760 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should Be Justiciable*, 65 U. COLO. L. REV. 849, 868 (1994); Fred O. Smith, Jr., *Awakening the People’s Giant: Sovereign Immunity and the Constitution’s Republican Commitment*, 80 FORDHAM L. REV. 1941, 1955 (2012); see also Nathaniel Persily, *The Place of Competition in American Election Law*, in *THE MARKETPLACE OF DEMOCRACY* 171, 174 (Michael P. McDonald & John Samples eds., 2006) (“[T]he notion that totally uncompetitive elections might suggest something less than republicanism does not constitute a radical idea.”).

holding of popular elections—and the corresponding right to vote in them—as essential to republican government. A number of scholars have gone so far as to say that the Supreme Court’s voting rights cases from the 1960s and 1970s, decided under the Equal Protection Clause, fit more naturally under the Guarantee Clause.³²³ Put simply, the Guarantee Clause guarantees a government accountable to the people.

Of course, as discussed in the previous Section, the Court has “rejected claims that the Constitution compels a fixed method of choosing state or local officers or representatives.”³²⁴ These cases, however, did not seriously consider the Guarantee Clause as a source for such a requirement.³²⁵ Regardless, the most extreme procedure approved by any of those cases was appointment by officials who were themselves elected.³²⁶ None of the cases contemplated, nor would the Guarantee Clause appear to allow, a system in which state officials can gain office without anyone else’s approval. Elected officials—even those who are unopposed—ultimately owe their positions to, and are thereby accountable to, the people. Those who are appointed owe their positions to other government actors, who are then accountable for their choices of appointees come Election Day. Those who are “declared elected” by unopposed candidate statutes, on the other hand, are accountable to nobody for their offices. If there is any system that the Guarantee Clause forbids, short of a monarchy or other such scenario, it is this one.

323. See, e.g., AMAR, *supra* note 306, at 190–91; ELY, *supra* note 317, at 118 n.*; 122; Amar, *supra* note 322, at 754; Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1717–18 (1999); Michael W. McConnell, *The Redistricting Cases: Original Mistakes and Current Consequences*, 24 HARV. J.L. & PUB. POL’Y 103, 105–06 (2000).

324. *Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 9 (1982); see *Gordon v. Lance*, 403 U.S. 1, 6 (1971); *Sailors v. Bd. of Educ. of Kent Cty.*, 387 U.S. 105, 108 (1967); *Fortson v. Morris*, 385 U.S. 231, 234 (1966). *But cf. Hadley v. Junior Coll. Dist. of Metro. Kan. City*, 397 U.S. 50, 58 (1970) (“We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not ‘represent’ the same number of people does not deny those people equal protection of the laws.” (emphasis added)).

325. *Fortson*, *Lance*, and *Sailors* were Equal Protection Clause cases. *Lance*, 403 U.S. at 3; *Sailors*, 387 U.S. at 107; *Fortson*, 385 U.S. at 233. *Rodriguez* was based on a confusing mix of provisions, including the Guarantee Clause. *Rodriguez*, 457 U.S. at 9 n.8, 10 n.10. The Court simply replied that the Guarantee Clause was “largely irrelevant, since Puerto Rico has in fact established a legislature ‘whose members shall be elected by direct vote at each general election.’” *Id.* at 9 n.8 (citation omitted).

326. See *Rodriguez*, 457 U.S. at 5–6; *Sailors*, 387 U.S. at 106–07; *Fortson*, 385 U.S. at 232.

* * *

The congressional voting clauses, one person, one vote, and the Guarantee Clause all could pose constitutional problems for unopposed candidate statutes. But, because these statutes are different from many other election laws, they do not fit neatly into the doctrinal frameworks that courts have already developed. Instead, they test the boundaries of how each doctrine operates, and what harms they encompass. As this Part has shown, however, there are significant textual, theoretical, and jurisprudential bases for expanding the doctrines. Unopposed candidate statutes thus reveal both the limits and the possibilities of modern election law.

IV. UNOPPOSED CANDIDATE STATUTES AND THE ELECTORAL COMPETITION DEBATE

Beyond their implications for doctrine, unopposed candidate statutes provide a unique lens through which to view some of the most important theoretical debates in the field. This Part examines one of them: whether election law should seek to promote competitiveness.

As we saw in Part I, unopposed candidate statutes have one common characteristic: they apply only when there is no competition for an otherwise elected position. Many political scientists and election law scholars have argued that competitive elections are necessary to a democratic system and that, therefore, election law doctrine should focus on encouraging them.³²⁷ Competition, these writers say, has several derivative benefits: it moderates candidates' policy views, and thereby reduces polarization; makes politicians more responsive to their constituents; ensures greater accountability by providing alternative candidates with a greater chance to win; increases voter turnout and engagement with government; and educates voters about candidates and their positions.³²⁸ Others, however, challenge the relevance of competition—some on empirical grounds, arguing that competitive

327. See, e.g., HEATHER K. EVANS, *COMPETITIVE ELECTIONS AND DEMOCRACY IN AMERICA: THE GOOD, THE BAD, AND THE UGLY* 8 (2014); WILLIAM M. SALKA, *REFORMING STATE LEGISLATIVE ELECTIONS: CREATING A NEW DYNAMIC* 3–4 (2009); Todd Donovan, *A Goal for Reform*, in *DEMOCRACY IN THE STATES: EXPERIMENTS IN ELECTION REFORM* 186, 195–97 (Bruce E. Cain et al. eds., 2008); see also JUSTIN BUCHLER, *HIRING AND FIRING PUBLIC OFFICIALS: RETHINKING THE PURPOSE OF ELECTIONS* 23 (2011) (“Most scholars and observers would agree that competitive elections are important for a democracy.”).

328. EVANS, *supra* note 327, at 9, 42, 78; SALKA, *supra* note 327, at 7–9; Donovan, *supra* note 327, at 197.

elections are not all they are cracked up to be,³²⁹ and others on theoretical grounds, asserting that competition is the wrong framework through which to view election law.³³⁰

One particularly important exchange in this broader debate occurred in the *Harvard Law Review*, between Samuel Issacharoff and Nate Persily.³³¹ Issacharoff, in a groundbreaking article with Rick Pildes, had argued that election law should concern itself not with the granting of substantive rights, but rather with the protection of the political process itself.³³² Issacharoff and Pildes reimagined politics as a market, in which voters choose between options presented to them by different parties and candidates.³³³ As in antitrust law, any attempt to restrict this market—to unduly reduce political competition to the advantage of one party—should be legally suspect.³³⁴ While this view of elections is common in political theory, economics, and political

329. See, e.g., BUCHLER, *supra* note 327, at 14, 23–57, 88, 112–15, 150, 169 (questioning the empirics underlying the assumed benefits of five different conceptions of competitiveness); DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 65–90 (1992) (noting that different goals of districting, including competitiveness, are to some degree mutually exclusive); Thomas L. Brunell, *Rethinking Redistricting: How Drawing Uncompetitive Districts Eliminates Gerrymanders, Enhances Representation, and Improves Attitudes Toward Congress*, 39 P.S.: POL. SCI. & POL. 77, 81–82 (2006) (showing no relationship between size of victory of House members and ideological extremism).

330. See, e.g., BUCHLER, *supra* note 327, at 5 (“[A]n election is quite different from a market. Instead, the literal function of an election is to hire and fire public officials.”); THOMAS BRUNELL, REDISTRICTING AND REPRESENTATION: WHY COMPETITIVE ELECTIONS ARE BAD FOR AMERICA 1–2, 14 (2008) (arguing that districts should be drawn to be politically homogenous, so as to maximize overall voter happiness); Bruce E. Cain, *Garrett’s Temptation*, 85 VA. L. REV. 1589 (1999) (“The election law community should worry less about preventing lockups—except in the highly unusual cases of systematic exclusion—and more about preventing lockins of particular theories of representation.”); Richard L. Hasen, *The “Political Market” Metaphor and Election Law: A Comment on Issacharoff and Pildes*, 50 STAN. L. REV. 719, 727 (1998) (arguing that, when dealing with two-party dominance, “there is no obvious escape from the balancing of individual rights and state interests in election law cases.”); Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 COLUM. L. REV. 283, 287, 302 (2014) (arguing that election law should focus, not on competitiveness, but on ensuring alignment between representatives and voters).

331. For the full debate see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002) [hereinafter Issacharoff, *Gerrymandering*], Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649 (2002), and Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684 (2002) [hereinafter Issacharoff, *Why Elections*].

332. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 648 (1998).

333. *Id.* at 646.

334. *Id.*

science,³³⁵ Issacharoff and Pildes transmuted it to the field of election law.

Leading off the *Harvard Law Review* debate, Issacharoff applied this theory to the phenomenon of gerrymandering. He argued that “political market manipulation threatens a core tenet of democratic legitimacy: accountability to shifting voter preferences.”³³⁶ Only through truly competitive elections, Issacharoff said, can changes in voters’ views translate into different electoral outcomes. Districts drawn to help one political party, or to aid the incumbents of both major parties at the expense of competition should, therefore, receive greater constitutional scrutiny.³³⁷

Persily took issue with Issacharoff’s model. As Persily saw it, “[a] system that seeks to maximize district-level competitiveness promises to make the greatest number of voters unhappy with the outcome of the election.”³³⁸ Instead of focusing on competition, Persily argued for a form of political utilitarianism. “Most voters,” he argued, “would prefer to be placed in a district where they vote for the winner rather than the loser.”³³⁹ Therefore, redistricting authorities should seek to maximize total voter satisfaction, drawing districts so as to place as many individuals as possible in districts with their fellow party members.³⁴⁰ We can refer to Issacharoff’s and Persily’s arguments, respectively, as the *political competition theory* and the *voter satisfaction theory*.

Unopposed candidate statutes, which convert noncompetitive elections into nonexistent ones, test the limits of both of these views. Let us start with the voter satisfaction theory, which has adherents among both political scientists and legal scholars.³⁴¹ Unopposed

335. BUCHLER, *supra* note 327, at 8; see IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 6 (2003) (arguing that we should “conceive of bipartisan agreement in antitrust terms as collusion in restraint of democracy”).

336. Issacharoff, *Gerrymandering*, *supra* note 331, at 600.

337. *Id.*

338. Persily, *supra* note 331, at 668.

339. *Id.* at 679.

340. *Id.* at 670 (“[B]ipartisan gerrymanders are desirable precisely because they tend to give the voters what they want: a candidate closer to their ideological preferences.”).

341. See, e.g., BRUNELL, *supra* note 330, at 1–2, 14; Brunell, *supra* note 329, at 79–80; Thomas L. Brunell & Justin Buchler, *Ideological Representation and Competitive Congressional Elections*, 28 *ELECTORAL STUD.* 448, 449 (2009); Daniel H. Lowenstein, *Competition and Competitiveness in American Elections*, 6 *Election L.J.* 278, 280, 289 (2007) (reviewing *THE MARKETPLACE OF DEMOCRACY: ELECTORAL COMPETITION AND AMERICAN POLITICS* (Michael P. McDonald & John Samples eds., 2006)); see also Stephanopoulos, *supra* note 330, at 344 (asserting that “policy misalignment may develop if highly demographically, socioeconomically, or

candidacies expose two problems with this model of election law. First, the theory relies on the assumption that voter satisfaction can be equated with party affiliation. But it is perfectly possible to pack a district full of Democrats, elect a Democrat as its representative, and yet see widespread dissatisfaction with that representative's personal behavior or policy views. A landslide win is not necessarily an indication that the voters are happy with the winner. It could mean that the alternative was also undesirable—or that the alternative could not get her message out.³⁴²

The assumption of voter satisfaction becomes even shakier when a candidate runs unopposed. Since there is no opponent to channel any latent discontent, one must look to indirect signs, like the number of people who leave their ballots blank, to determine whether voters are truly satisfied by the dominant candidate. Even these indirect methods, however, are unavailable when unopposed candidate statutes come into play, since the voters are never formally presented with their single choice.

Nor is the very fact of the candidate's lack of opposition a sign of voter satisfaction. Potential opponents may decide not to run because they do not believe they can raise the money needed to energize any latent discontent in the district, or because the party told them not to run. This is particularly true in primaries, where incumbents have a strong advantage³⁴³ and lack of elite support often prevents disfavored candidates from running.³⁴⁴ At best, then, unopposed candidacies can be said to show *elite* satisfaction with the dominant candidate. (Or, at least, elite apathy.) The voter satisfaction theory is in danger of mistaking institutional support for the popular kind.

Even if partisan affiliation did equate to satisfaction with a candidate, there is a second, deeper concern. Voter *choice* has little place in the voter satisfaction theory, so long as voters are ultimately happy with their representatives. A majority of voters need not control a majority of legislative seats, so long as most people in each district are satisfied with their own representative.³⁴⁵ The theory therefore needs little of the traditional architecture of American democracy. As

ideologically heterogeneous constituencies are drawn," because "representatives . . . may be unsure how to act in accordance with the wishes of the median voter.").

342. See BUCHLER, *supra* note 327, at 6.

343. Stephen Ansolabehere et al., *The Incumbency Advantage in U.S. Primary Elections*, 26 ELECTORAL STUD. 660, 663 (2007) (finding that incumbency advantage in primaries, as measured by candidates' "sophomore surge" in vote percentage from their first to their second election, rose to fourteen percent by the 1990s).

344. Hans J. G. Hassell, *Party Control of Party Primaries: Party Influence in Nominations for the U.S. Senate*, 78 J. POL. 75, 77–78, 82–84 (2015).

345. Persily, *supra* note 331, at 672.

Issacharoff recognized, governments can accomplish the theory's main object through clever district mapping alone, without the bothersome task of consulting the voters.³⁴⁶

Unopposed candidate statutes make this theoretical problem real. Candidates run unopposed only when potential opponents believe that they will have little chance to win office. Over the past several decades, incumbents seeking job protection have pushed this natural phenomenon along through bipartisan gerrymandering, creating districts "so safe" on either side as to be "uncontested by the other major party."³⁴⁷ Already, forty-two percent of state legislators run without major-party opposition,³⁴⁸ and at least one-third receive no opposition at all.³⁴⁹ A voter-satisfaction model would encourage bipartisan gerrymandering, precisely *because* it packs voters of the same party together into politically homogenous districts. More voters might then be satisfied with their representatives—or, at least, those representatives would be of the same party as the voters. But potential challengers would also have little incentive to run against heavily favored incumbents. In states with unopposed candidate statutes this would translate to fewer elections as more candidates are "declared elected" by fiat.

If one truly believes in the voter satisfaction theory of politics, then the increased application of unopposed candidate statutes should pose no problem. The idea that a majority of a state's legislators—or, hypothetically, all of them—could take office without input from their constituents should not matter. All that this would mean is that the people are sufficiently happy with their representation that races go uncontested. But if a voter satisfaction model were widely implemented, "election" by fiat could become the default, while actual elections become a rarely-used secondary method—the equivalent of a presidential race today being thrown into the House of Representatives.³⁵⁰ Given our republican traditions, most Americans

346. Issacharoff, *Why Elections*, *supra* note 331, at 694 ("[I]f at some level there is not a commitment to electoral competition, it is hard to fathom why we bother to hold elections.").

347. Issacharoff, *Gerrymandering*, *supra* note 331, at 624–25.

348. *2016 State Legislative Elections Analyzed Using a Competitiveness Index*, BALLOTPEdia, https://ballotpedia.org/2016_state_legislative_elections_analyzed_using_a_Competitiveness_Index [<https://perma.cc/4BMG-RUUQ>].

349. *See* Mokhiber, *supra* note 269, at 24.

350. *See* U.S. CONST. art. II, § 2, cl. 1. This contingency plan has been implemented only twice, in 1800 and 1824. *Electoral College & Indecisive Elections*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES, <http://history.house.gov/Institution/Origins-Development/Electoral-College/> [<https://perma.cc/857G-AXGV>].

would likely blanch at the thought of such a world. Voter satisfaction theorists must, therefore, ask themselves whether and how to fit the need for direct voter approval into their model.

However, unopposed candidate statutes pose no less of a challenge for political competition theorists. This challenge stems from a certain lack of precision in the theory's normative underpinnings. As critics have noted, the markets-based theory has "no agreed upon indicator for political market breakdown."³⁵¹ Scholars have employed a number of metrics including: (1) the percentage of elections that are contested, (2) incumbent reelection rates, (3) margins of victory, (4) levels of turnover in individual seats, and (5) frequency of changes in party control of legislatures.³⁵² They have said that electoral uncertainty and close margins of victory, in particular, are the marks of sufficient competition.³⁵³ They have also pointed to political scientists who calculate the number of competitive districts, with seats in which winners receive above fifty-five percent or sixty percent of the vote considered uncompetitive.³⁵⁴ But proponents of the theory have not themselves specified how much competition is enough.

It is clear, however, that political competition theory requires more than just two candidates running against each other. Theorists believe that courts should focus on ensuring competition because competitive races educate voters,³⁵⁵ and because they provide a strong accountability mechanism that gives the winners the legitimacy required to wield power.³⁵⁶ This latter factor is also believed to make representatives more responsive to—and representative of—their constituents.³⁵⁷ These benefits cannot accrue when districts are considered so safe that, even when more than one candidate runs, the dominant candidate feels no real pressure. It is no surprise, therefore, that scholars like Issacharoff have spoken not just of competition, but of

351. Persily, *supra* note 322, at 177.

352. *Id.* at 172–73.

353. BUCHLER, *supra* note 327, at 23; EVANS, *supra* note 327, at 7; SALKA, *supra* note 327, at 3–4, 6.

354. See Gary C. Jacobson, *Competition in U.S. Congressional Elections*, in THE MARKETPLACE OF DEMOCRACY, *supra* note 322, at 27, 28; Richard G. Niemi et al., *Competition in State Legislative Elections, 1992–2002*, in THE MARKETPLACE OF DEMOCRACY, *supra* note 322, at 53, 65.

355. EVANS, *supra* note 327, at 42; SALKA, *supra* note 327, at 9; Issacharoff, *Why Elections*, *supra* note 331, at 685; Michael P. McDonald & John Samples, *The Marketplace of Democracy: Normative and Empirical Issues*, in THE MARKETPLACE OF DEMOCRACY, *supra* note 322, at 1, 7.

356. EVANS, *supra* note 327, at 78; SALKA, *supra* note 327, at 7; Issacharoff, *Why Elections*, *supra* note 331, at 685; McDonald & Samples, *supra* note 355, at 4.

357. EVANS, *supra* note 312, at 9; SALKA, *supra* note 312, at 7–9.

“real competition,”³⁵⁸ “robust competition,”³⁵⁹ or “appropriately competitive” elections.³⁶⁰

This reasoning is strangely consonant with the theory that undergirds unopposed candidate statutes. The rationale behind the statutes is simple: we know going in who will win these “races,” so there is little reason to actually hold the elections. Better, one might think, to save the time and money that would otherwise be spent administering a single-candidate race.³⁶¹ If we took the logic of political competition theory far enough, however, then there would be no reason to limit the statutes to unopposed candidates. Instead, they could just as easily apply to any race that lacks educative or responsiveness benefits. We could then take as the true definition of “competitive” the break point at which we are no longer comfortable with simply declaring the dominant candidate elected.

For instance, the Supreme Court has ruled that states need not allow write-in voting,³⁶² and many states require write-in candidates to petition ahead of time in order for any votes cast for them to count.³⁶³ Suppose that, instead of declaring elected only candidates with no opponent at all, we expanded the unopposed candidate statutes to cover situations in which only one party candidate and one or more write-in candidates qualify for an office? Lisa Murkowski excepted,³⁶⁴ write-in candidates almost never win. They are not even placed on the ballot, and they do not have the apparatus to educate voters or to put up a real fight. Why not spare election officials and voters the bother of holding elections in such circumstances?

Let’s go one step further. Suppose a state decides to declare elected any major-party candidate who, after the filing deadline, has no major-party opponent. Leave aside First or Fourteenth Amendment discrimination concerns—concerns from which, incidentally, political competition theorists urge courts to step away.³⁶⁵ As a matter of

358. Issacharoff, *Gerrymandering*, *supra* note 316, at 599.

359. *Id.* at 614.

360. *Id.* at 615.

361. *E.g.*, Neal, *supra* note 87 (“Across the state, almost nobody seems to like the law except some county clerks, who lobbied for the measure to save money in a time of tight election budgets.”).

362. *Burdick v. Takushi*, 504 U.S. 428, 441–42 (1992).

363. *See, e.g.*, GA. CODE § 21-2-133 (2014); 10 ILL. COMP. STAT. 5 / 7-5(d) (2016); *id.* 5 / 7-12(10)(d).

364. *See* Yereth Rosen, *Senator Lisa Murkowski Wins Alaska Write-In Campaign*, REUTERS (Nov. 17, 2010, 6:52 PM), <http://www.reuters.com/article/us-usa-elections-murkowski/senator-lisa-murkowski-wins-alaska-write-in-campaign-idUSTRE6AG51C20101118> [<https://perma.cc/YK39-MZSE>].

365. *See* Issacharoff & Pildes, *supra* note 317, at 648.

competitiveness, these elections are not *that* different from those in which only write-in candidates oppose a single major-party candidate. Our electoral system has many attributes that combine to give minor-party candidates essentially no chance of winning elections.³⁶⁶ In a theory of democracy based upon meaningful competition, such races would seem to have little value. Minor-party candidates have a great deal of trouble attracting the attention needed to educate the electorate or enough voter support to pose a threat to major-party candidates.³⁶⁷ The lack-of-competition rationale that underlies unopposed candidate statutes may also apply when a major-party candidate faces only minor-party opposition.

What if we then expanded the statutes yet again? Take a congressional district like the New Jersey 10th. The district has a Partisan Voting Index of D+36, meaning that it receives a Democratic presidential vote that is thirty-six points higher than the national average.³⁶⁸ Since 2000, no Democratic congressional candidate has received less than 84.5 percent of the vote in the general election.³⁶⁹ Republicans have zero chance of winning the seat, or even of attracting attention. If we are okay with simply declaring unopposed candidates elected, why not do the same every two years for the Democratic nominee in the New Jersey Tenth?

Indeed, political competition theorists' complaints extend beyond even these supremely safe seats. Competition scholars focus on the vanishing number of districts in which officials are elected by less than five, ten, or twenty percentage points.³⁷⁰ In 2014, for instance, 318 of the nation's 435 House members won by at least twenty points, and 386

366. Paul S. Herrnson, *Minor-Party Candidates in Congressional Elections*, in *THE MARKETPLACE OF DEMOCRACY* 102 (Michael P. McDonald & John Samples eds., 2006); Persily, *supra* note 307, at 180–81.

367. Cf. David Weigel, *Third-Party Candidates Miss Cut for First Presidential Debate*, WASH. POST (Sept. 16, 2016), https://www.washingtonpost.com/news/post-politics/wp/2016/09/16/third-party-candidates-miss-cut-for-first-presidential-debates/?utm_term=.99bc4e6251b4 [<https://perma.cc/BK5D-3XH6>] (reporting that no 2016 third-party presidential candidate made polling cutoff to appear in first presidential debate).

368. COOK POLITICAL REPORT, *PARTISAN VOTING INDEX: DISTRICTS OF THE 115TH CONGRESS* at 2A.5 (2017), <https://www.docdroid.net/4vS5iWM/arranged-by-state-district-1.pdf> [<https://perma.cc/JC3M-HLXT>].

369. *New Jersey's 10th Congressional District*, BALLOTEDIA, https://ballotpedia.org/New_Jersey%27s_10th_Congressional_District [<https://perma.cc/6Y7L-PRHW>].

370. See, e.g., Samuel Issacharoff & Jonathan Nagler, *Protected from Politics: Diminishing Margins of Electoral Competition in U.S. Congressional Elections*, 68 OHIO ST. L.J. 1121, 1124 (2007); *supra* note 339.

won by at least ten.³⁷¹ The numbers for 2012 were similar, at 285 and 372 members, respectively.³⁷² Sixty percent of gubernatorial elections from 2003–2014, and eighty-nine percent of state legislative races from 2011–2014, also had margins greater than ten percent.³⁷³ Pick one of these thresholds—say, ten points. Suppose we could then determine which districts and states have populations that guarantee one party’s candidate a margin of victory above that level. In other words, even in a party’s worst performing year, its candidate would win by more than ten percent of the vote. We then declare the dominant party’s nominee in those states or districts elected without requiring people to vote.

Many would likely feel queasy at the idea of eliminating so many elections. And, indeed, political competition theorists like Issacharoff and Pildes warn against laws like the ones just proposed, because they ensure two-party dominance and erect high barriers to entry for non-dominant parties.³⁷⁴ But this warning merely lays bare the disconnects between the *conceptual basis* for the competition theory and its *application* to specific legal issues, and between the latter and the *methods* by which competition theorists suggest courts apply the theory.

For instance, one might simply reject the premise of the above thought exercise. There is a big difference, one might argue, between declaring elected candidates who are literally unopposed and those who have opposition, no matter how trivial. After all, even a token opponent could force a dominant candidate to constrain her behavior in order to avoid an unlikely upset. Candidates in uncontested races may not feel these constraints.

Still, this may not be a sufficient objection within the realm of competition theory. First, it is not clear how much of an incentive a token opponent would give a dominant candidate to remain responsive to voters. It could well rein in egregious personal conduct—it is reasonable to think that committing a violent crime, for instance, could

371. *Margin of Victory Analysis for the 2014 Congressional Elections*, BALLOTPEdia, https://ballotpedia.org/Margin_of_victory_analysis_for_the_2014_congressional_elections [https://perma.cc/LQS8-UH7T].

372. *United States House of Representatives Elections, 2012*, BALLOTPEdia, https://ballotpedia.org/United_States_House_of_Representatives_elections_2012 [https://perma.cc/5V7W-6SUK].

373. CARL E. KLARNER & HEATHER EVANS, *THE POLARIZATION AND NATIONALIZATION OF STATE ELECTIONS, 1971–2014*, at 5 (2014), http://klarnerpolitics.com/uploads/3/8/5/0/3850983/featured_manuscript_klarner_politics.pdf [https://perma.cc/RP2T-UW8GN].

374. Issacharoff & Pildes, *supra* note 317, at 673, 680.

pend any contested race.³⁷⁵ But it is far from clear that dominant candidates would respond to voters' policy preferences any differently in a safe contested race than they would in an uncontested race.³⁷⁶ The difference might not be that great on the personal behavior front, either: unopposed candidates know that a major slip-up could attract better competition in the next election.

The larger issue, however, is that political competition theorists tend to frame the problem with our current electoral system as a lack of *robust* contestation: we know what the results of so many races will be beforehand that we risk systemic apathy.³⁷⁷ In this reading, there is little conceptual difference between what we consider "normal" safe districts and unopposed candidacies. Theorists have, in fact, compared American levels of competition to "nations where candidates run unopposed or with token opposition," which are "condemn[ed] as lacking truly democratic or legitimate elections."³⁷⁸ Issacharoff himself hypothesized a system that distributes seats based on constituent partisanship, without holding elections. Rather than claim that such an arrangement was harmful because it shuts off voting, he condemned it as evading an "appropriately competitive electoral process" that "ensure[s] the responsiveness of elected officials."³⁷⁹ Political competition theory endeavors to guarantee something more than just multiple candidates running against one another. It is based on a view of democratic legitimacy that depends upon true accountability to the people.³⁸⁰ Such a view requires races that are close enough, and

375. *But see* Jonathan Martin & Alexander Burns, *Greg Gianforte, Montana Republican, Captures House Seat Despite Assault Charge*, N.Y. Times (May 25, 2017), <https://www.nytimes.com/2017/05/25/us/montana-special-election.html> [<https://perma.cc/LZ2G-3FNW>]; *but cf.* Jeremy Diamond, *Trump: I Could 'Shoot Somebody and I Wouldn't Lose Voters'*, CNN (Jan. 24, 2016, 12:03 PM), <http://www.cnn.com/2016/01/23/politics/donald-trump-shoot-somebody-support/index.html> [<https://perma.cc/J276-QJRY>] ("I could stand in the middle of 5th Avenue and shoot somebody and I wouldn't lose voters.").

376. *Cf.* Devin Caughey et al., *Partisan Gerrymandering and the Political Process: Effects on Roll-Call Voting and State Policies*, 16 ELECTION L.J. (forthcoming 2017) (manuscript at 4) ("As abundant research has shown, however, the theoretical prediction of median convergence is not borne out by the empirical realities of contemporary American politics. Rather, due to the pull of their partisan subconstituencies, the constraints imposed by national party brands, and other factors, the campaign platforms and legislative behavior of Democrats and Republicans representing the same constituency diverge substantially from each other and from the constituency's median voter.").

377. *See* Issacharoff, *Gerrymandering*, *supra* note 316, at 623–26; Persily, *supra* note 316, at 658.

378. McDonald & Samples, *supra* note 340, at 4.

379. Issacharoff, *Gerrymandering*, *supra* note 316, at 615.

380. *Id.* at 615–16.

uncertain enough, to guarantee information-filled and participatory campaigns that render meaningful the people's selection of a winner.

This conceptual underpinning of the theory is at odds with the general manner in which theorists apply it. The idea of robust accountability fits well with the theory's condemnation of both partisan and bipartisan gerrymandering, since both distort what would otherwise be meaningful, natural competition. Bipartisan gerrymanders, in particular, prevent both major parties from fielding competitive candidates in what could otherwise be truly competitive districts.³⁸¹ But the desire for robust competition fits less well with the theory's hostility toward other laws, like write-in bans or certain ballot access restrictions,³⁸² which only affect competition at the margins. Like unopposed candidate statutes, these laws prevent contests that would have little to no effect on voter education, candidate responsiveness, or official accountability. Write-ins, third-party candidates, and even major-party candidates in safe districts have little more relevance to a robustly competitive system than do nonexistent opponents. The structure of our political system encourages "continuing two-party dominance,"³⁸³ and people's geographic self-sorting ensures a large number of natural one-party states and districts.³⁸⁴ From the point of view of competition theory, then, we would miss little by eliminating elections for those in naturally safe seats, just as we miss little by declaring unopposed candidates elected.³⁸⁵

Political competition theory exacerbates this disconnect by adding a second, methodological one. At least some theorists instruct judges to scrutinize *any* intentionally uncompetitive act, even if it has no uncompetitive effects.³⁸⁶ But an intent-only doctrine of competition, depending on how it is applied, is either too broad or too narrow for the theory. If courts cast the intent net as widely as scholars suggest they should—so as to capture laws intended to cause *any* restriction on competition—then it would extend far wider than the concept of

381. *Id.* at 598–99.

382. Issacharoff & Pildes, *supra* note 317, at 670–71, 680–81.

383. *Id.* at 680.

384. *C.f.* Persily, *supra* note 307, at 665–66 (districts and races not subject to redistricting still have a high number of incumbent winners).

385. Of course, one might wish to protect the ability of minor parties to grow, in the same way that one would not want the law to allow states to stifle start-ups just because many will never be able to compete with Microsoft. My only claim is that, as a *descriptive* matter, we are less likely to see robust competition between more than two parties in the political market than we are between multiple companies in the economic market.

386. Issacharoff, *Gerrymandering*, *supra* note 316, at 600–01; Issacharoff & Pildes, *supra* note 317, at 681.

promoting robust competition would dictate. Indeed, such a system in practice would cover essentially the same scenarios as current First Amendment doctrine,³⁸⁷ but without paying heed to states' countervailing interests.

If, on the other hand, courts limit themselves to striking down only laws that are intended to prevent *robust* competition, then there is little reason to strike down even an expanded version of an unopposed candidate statute. Say we eliminated the laws that are primarily responsible for competitive skew, such as gerrymanders and onerous ballot access requirements, such that the contours of any particular race result from the natural makeup of the local population. It would then be difficult to see how declaring candidates in safe seats elected is intentionally restrictive of robust competition. How are judges to say that legislatures are acting with an uncompetitive intent in declaring such candidates elected, when the normal rationale for doing so is simply to save money, and when the anti-competitive effect of declaring dominant candidates elected would be so minimal?

What we find, then, is that neither political competition theory nor voter satisfaction theory has developed a complete role for voting. In each theory, elections serve only as means to achieve other ends. For voter satisfaction theory, that end is constituent happiness, achieved by pairing residents with officials from their party. For political competition theory, it is a candidate-constituent feedback loop, achieved through voter education in the crucible of closely fought contests. In the first model, we could jettison elections so long as people are divided into districts that place them with representatives they like. In the second, a large percentage of elections are incapable of creating the needed feedback loop, and are therefore functionally indistinct from a system without elections. In the extreme circumstances created by unopposed candidate statutes, neither theory provides a thick normative justification for voting—at bottom, neither actually conceives of voting as an inherent good.³⁸⁸ This is one advantage of current jurisprudence, which at least conceptualizes voting as a fundamental right, albeit one that states may burden with sufficient justification.³⁸⁹

387. See Persily, *supra* note 307, at 180–81.

388. Ironically, Issacharoff faults Persily for this failure of voter satisfaction theory, yet does not quite bridge the gap between his own justification for the existence of elections and the political competition theory he espouses. See Issacharoff, *Why Elections*, *supra* note 316, at 686–87, 694–95. He says that elections ensure legitimacy and accountability, but he ties these concepts to the need for competition, rather than to freestanding democratic values. *Id.* at 694.

389. See *Budick v. Takushi*, 504 U.S. 428, 433 (1992).

In criticizing Persily, Issacharoff claims that “if at some level there is not a commitment to electoral competition, it is hard to fathom why we bother to hold elections—why do we bother to vote?”³⁹⁰ But one could pose the question the other way around: if there is not a commitment to voting for its own sake, why do we bother to hold elections at all when we know who will win? Unopposed candidate statutes throw this question into high relief. Yet neither voter satisfaction theory nor political competition theory has a full answer. For that, we must look to democratic theory—and another major debate.

V. UNOPPOSED CANDIDATE STATUTES AND THE PURPOSE OF VOTING

What is the *purpose* of elections? Answering this question is crucial to our ultimate understanding of unopposed candidate statutes. However, democratic theorists and election law scholars are split on the issue. In the “aggregative,” or “tabulative,” model, people hold fixed political preferences before a campaign begins, and the sole purpose of elections is to accurately record and add up those preferences.³⁹¹ In the “deliberative” model, on the other hand, preferences are malleable; the purpose of elections is for individuals to persuade others to adopt their own viewpoint, to reason our way toward a common good.³⁹² The vast majority of legal scholars appear to follow the deliberative theory of political campaigns,³⁹³ but a smaller band of political scientists and election law experts dissent from this consensus.³⁹⁴

A similar intellectual battle rages over the purpose of voting itself. “Expressive” theorists, as we might call them, view the right to vote as fundamental in itself. They have sought to locate this generalized right in the First Amendment’s Free Speech or Petition Clauses³⁹⁵ or in the

390. Issacharoff, *Why Elections*, *supra* note 316, at 694.

391. SHAPIRO, *supra* note 320, at 3, 10; James A. Gardner, *Deliberation or Tabulation? The Self-Undermining Constitutional Architecture of Election Campaigns*, 54 BUFFALO L. REV. 1413, 1419–20 (2007).

392. SHAPIRO, *supra* note 335, at 3, 10; Gardner, *supra* note 376, at 1418–19.

393. *See, e.g.*, BRUCE ACKERMAN & JAMES S. FISHKIN, *DELIBERATION DAY* 3 (2004); Gardner, *supra* note 376, at 1427–29.

394. *E.g.*, CHRISTOPHER H. ACHEN & LARRY M. BARTELS, *DEMOCRACY FOR REALISTS: WHY ELECTIONS DO NOT PRODUCE RESPONSIVE GOVERNMENT* 1–2 & n.2, 230–31 (2016); JAMES A. GARDNER, *WHAT ARE CAMPAIGNS FOR? THE ROLE OF PERSUASION IN ELECTORAL LAW AND POLITICS* 191 (2009); Jack Knight & James Johnson, *Aggregation and Deliberation: On the Possibility of Democratic Legitimacy*, 22 POL. THEORY 277, 278 (1994).

395. Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471, 472 & n.6 (2016).

fundamental rights strand of equal protection doctrine.³⁹⁶ To expressive theorists, voting provides a number of benefits that go beyond mere tabulation. For the voters themselves, the act of casting a ballot is constitutive of civic identity.³⁹⁷ By voting, people can declare to the world that they have chosen to participate in the electoral process.³⁹⁸ It also allows voters to send messages to candidates, letting the candidates know whether the voters feel favorably or unfavorably toward them.³⁹⁹ For society as a whole, elections provide the ability to inculcate its values in the voters.⁴⁰⁰

The Supreme Court, however, has rejected the expressive theory.⁴⁰¹ In *Burdick v. Takushi*, the majority embraced a tabulative view of voting. The plaintiff, fed up by Hawaii's tendency toward uncontested elections, sought the right to cast a protest vote for Donald Duck—an action that Hawaii's ban on write-in voting prohibited.⁴⁰² The majority rejected Burdick's First Amendment challenge.⁴⁰³ It declared that “the function of the election process is ‘to winnow out and finally reject all but the chosen candidates,’ . . . not to provide a means of giving vent to ‘short-range political goals, pique, or personal quarrel[s].’”⁴⁰⁴ The voting act itself, therefore, serves a limited purpose. Voting is not meant to express one's disagreements with the available candidates or policy climate; it is meant only to record one's predetermined choice from among the candidates who have already qualified under state law. “Attributing to elections a more generalized expressive function,” the Court warned, “would undermine the ability of States to operate elections fairly and efficiently.”⁴⁰⁵

The dissenters, led by Justice Kennedy, likewise rejected the full expressive theory. They agreed that “the purpose of casting, counting, and recording votes is to elect public officials, not to serve as a general

396. Adam Winkler, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 338 (1993). Other scholars have identified a right to vote in the Fourteenth Amendment's Privileges or Immunities Clause, e.g., James Blacksher & Lani Guinier, *Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: Shelby County v. Holder*, 8 HARV. L. & POL'Y REV. 39, 68 (2014), or the Guarantee Clause, see *supra* notes 306–308 and accompanying text.

397. EVANS, *supra* note 312, at 2; Winkler, *supra* note 381, at 368.

398. Derfner & Hebert, *supra* note 380, at 488.

399. Winkler, *supra* note 381, at 367.

400. *Id.* at 368–69.

401. *Burdick v. Takushi*, 504 U.S. 428, 438 (1992); *id.* at 445 (Kennedy, J., dissenting).

402. *Id.* at 430, 438.

403. *Id.* at 441–42.

404. *Id.* at 438 (citation omitted).

405. *Id.*

forum for political expression.”⁴⁰⁶ But, while the dissenting Justices rhetorically embraced the tabulative theory, they doctrinally developed something of a middle position. They did so by characterizing the right at issue as “the right to cast a *meaningful* vote for the candidate of one’s choice,” and asserting that this right survives past the ballot access deadline.⁴⁰⁷ Think of this as a “limited expressive” view. As laid out by Justice Kennedy, this theory does not characterize voting as expressive in itself. However, it does see the Constitution as safeguarding voters’ right to meaningfully participate in the voting process. Laws that “deprive[] some voters of any substantial voice in selecting candidates,” therefore, “impose[] a significant burden” under the *Burdick* balancing test.⁴⁰⁸ It also emphasizes review of a state’s overall statutory scheme, rather than viewing laws in isolation, because the interaction of different election laws can unduly restrict the voting process.

Depending on which theory of the purpose of voting one follows, unopposed candidate statutes are either unremarkable or unacceptable. If the purpose of voting is to simply winnow the number of candidates, then there is no particular reason to continue the voting process once there is only one left. The winner has already been chosen. We can see this logic play out in *Burdick* itself. The *Burdick* Court said that Hawaii’s write-in ban served a legitimate interest in protecting its unopposed candidate statute.⁴⁰⁹ The prohibition on write-in voting, the Court said, would prevent sore loser candidates from attempting to challenge otherwise unopposed primary victors, thereby allowing them to simply be declared elected.⁴¹⁰ The Court appeared to approve of Hawaii’s unopposed candidate statute, noting that it “focuses the attention of voters upon contested races in the general election.”⁴¹¹

For those who follow a tabulative view of voting, this makes sense. In the tabulative theory, voters have no cognizable right to express their views about those on the ballot.⁴¹² The voting booth exists solely to determine the winner of each race. If there is already a winner, there is no particular reason for people to vote. Therefore, just as ballot access laws are a legitimate way to winnow down the number of candidates to those with significant preexisting support, unopposed candidate statutes are a legitimate way to winnow down the number of

406. *Id.* at 445 (Kennedy, J., dissenting).

407. *Id.* at 445, 447–48 (emphasis added).

408. *Id.* at 446, 448.

409. *Id.* at 439

410. *Id.* This reasoning, of course, ignored the reality of sore loser laws.

411. *Id.*

412. *See supra* note 387 and accompanying text.

races to those for which votes still need to be tabulated. By shortening ballot length, the statutes serve “to prevent the clogging of [a state’s] election machinery” and “avoid voter confusion.”⁴¹³ In this sense, they are not only not an encumbrance; they are a positive development.

However, under either the full or limited expressive approach, unopposed candidate statutes look less like an unobjectionable convenience and more like a troublesome restriction on rights. The full expressive approach deems voting to be an act of social participation, and a means of communicating one’s policy and political views to one’s government.⁴¹⁴ Unopposed candidate statutes conflict with those goals. Eliminating elections for those running unopposed denies voters the opportunity to participate in those elections. The fact that they can show up to vote for other races does not suffice. They are deprived of the right to participate *in the uncontested races*. And, when cancellation statutes are in play, people cannot participate in the voting process at all.

Likewise, the statutes prevent voters from expressing either support for or dissatisfaction with an unopposed candidate through the ballot box. Voters may send a message to such candidates either by choosing to vote for them or by abstaining. In the Soviet Union, for instance—where only the Communist Party’s candidate appeared on the ballot, and the Party exerted tremendous pressure to encourage citizens to vote—a significant number of people refused to vote as an act of dissidence.⁴¹⁵ As Justice Kennedy noted in his *Burdick* dissent, more than a quarter of Hawaiians exercised the same option in uncontested races.⁴¹⁶ They, too, were “dissatisfied with the choices available to them.”⁴¹⁷ Unopposed candidate statutes deprive voters of the right to cast blank ballots, while simultaneously depriving others of the right to express their support for an unopposed candidate in the most meaningful way possible: through their votes. The statutes also prevent constituents from communicating their policy preferences through fusion voting, or from writing in another name.

These are the same concerns that underlie the limited expressive theory. After all, it is difficult to see how someone can meaningfully participate in the voting process if she cannot cast a vote in the first place. And voters cannot cast a ballot for the candidate of their choice if a race does not *appear* on that ballot. To be sure, abstentions and

413. *Bullock v. Carter*, 405 U.S. 134, 145 (1972).

414. *See supra* notes 397–400 and accompanying text.

415. Rasma Karklins, *Soviet Elections Revisited: Voter Abstention in Noncompetitive Voting*, 80 AM. POL. SCI. REV. 449, 450 (1986).

416. *Burdick*, 508 U.S. at 442–43 (Kennedy, J., dissenting).

417. *Id.* at 443.

write-in votes will not likely change outcomes in uncontested races. But neither the full nor the limited expressive theory considers decisiveness decisive. The act of participation itself is worthy of protection⁴¹⁸—and “the right to vote for one’s preferred candidate exists regardless of the likelihood that the candidate will be successful.”⁴¹⁹

Remember, too, that the limited expressive theory examines a particular provision in light of a state’s overall statutory scheme.⁴²⁰ Regimes that combine unopposed candidate statutes with other restrictive features, such as onerous ballot access rules or laws that require write-in candidates to file in advance, may, therefore, pose particular problems. Likewise, limited expressive theorists would abjure unopposed candidate statutes when combined with extreme bipartisan gerrymandering. Incumbent-protective gerrymanders make districts less competitive; this increases the likelihood that unopposed candidate statutes will become operational, denying individuals their right to vote.⁴²¹

Unopposed candidate statutes have expressive costs for candidates, as well. Normally, candidates are able to receive the messages that voters send them through the ballot box. In states that allow fusion candidacies, the candidates can learn a great deal about their voters’ political beliefs by examining how many votes they received under each of their party lines. The number of write-in votes or blank ballots cast can likewise provide valuable information. The messages sent by such actions may not always be clear,⁴²² but candidates will at least understand their basic thrust. If unopposed candidates are declared elected by fiat, they lose insight into what their constituents are thinking at this critical moment in the electoral process.

Moreover, “[s]imply appearing on the ballot provides candidates and parties an important opportunity to speak to the public”—one about which they care deeply.⁴²³ This exchange of information also ensures that voters know that races are uncontested, a fact about which they could take action next election. While states have ample room to

418. Derfner & Hebert, *supra* note 380, at 488.

419. *Burdick*, 504 U.S. at 447 (Kennedy, J., dissenting). Moreover, “in those instances where a late-developing issue arises or where new information is disclosed about a candidate” close to Election Day, write-in voting could prove vital. *Id.* at 445.

420. *Id.* at 447.

421. *See supra* text accompanying notes 332–35.

422. Jeanne M. Kaiser, *Constitutional Law—First Amendment—No Constitutional Right to Vote for Donald Duck: The Supreme Court Upholds the Constitutionality of Write-In Voting Bans in Burdick v. Takushi*, 15 W. NEW ENGLAND L. REV. 129, 147 (1993).

423. Derek T. Muller, *Ballot Speech*, 58 ARIZ. L. REV. 693, 743, 745 (2016).

regulate “ballot speech,”⁴²⁴ unopposed candidate statutes prevent candidates from communicating even the bare fact of their candidacy to the voters through the ballot. The winners thus enter office with no sense of whether people are willing to vote for them, and voters may be unaware that the candidates exist.

Unopposed candidate statutes also silence the most important possible message that voting can convey: legitimacy. There is a reason why authoritarian regimes from Bonaparte’s France to Stalin’s Russia have employed plebiscites and single-candidate elections, rather than simply imposing their policies and candidates on the people.⁴²⁵ There is a reason, too, why corporate governance standards require votes to approve even uncontested directors.⁴²⁶ Having the people ratify one’s election matters, regardless of how many options they have. Even if the veneer of validity is thin—even if the elections are a matter of form; even if nobody is happy about the one choice available—the act of voting *itself* legitimizes those elected.⁴²⁷ Simply put, unopposed candidate statutes make it impossible for winners to say that the voters chose them to lead.

That unopposed candidate statutes pose such a multifaceted problem under the expressive theory of voting, and yet cause so little worry within the tabulative theory, illustrates the wide practical gulf between the two. Indeed, laws seen as benefitting voters under one theory are sometimes seen as harming them under the other. Given this, judges should think deeply about which theory should inform their approach to election law cases. Yet the Supreme Court, at least, has not given much justification for its choice. The Court included only two sentences’ worth of reasoning to support its adoption of the tabulative theory in *Burdick*.⁴²⁸ It claimed, in a conclusory fashion that treating the vote as expressive “would undermine the ability of States to operate elections fairly and efficiently.”⁴²⁹ However, treating voting as an

424. *Id.* at 723–27.

425. See Martin Crook, *The Uses of Democracy. Elections and Plebiscites in Napoleonic France*, in *THE FRENCH EXPERIENCE FROM REPUBLIC TO MONARCHY, 1792–1824: NEW DAWNS IN POLITICS, KNOWLEDGE, AND CULTURE*, at 58, 58–59 (Maire F. Cross & David Williams eds., 2000); Karklins, *supra* note 415, at 450–51.

426. See Richard Bennett, *Corporate Director Elections and Majority Withhold Votes*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. n.2 (Sept. 1, 2012), <https://corpgov.law.harvard.edu/2012/09/01/corporate-director-elections-and-majority-withhold-votes> [<https://perma.cc/YV3Z-M5P7>].

427. See, e.g., Karklins, *supra* note 415, at 449.

428. These two sentences mainly consist of out-of-context or repurposed references to *Storer v. Brown*, 415 U.S. 724 (1974). See *Burdick v. Takushi*, 504 U.S. 428, 438 (1992).

429. *Burdick*, 504 U.S. at 438.

expressive act does not prevent courts from differentiating between severe and minimal burdens on that expression. Nor does it reduce the government's strong interest in electoral integrity.

The Court has also suggested that its tabulative view of *voting* is warranted because the *broader election process* is deliberative. Because one can communicate one's viewpoint during a campaign, the Court has argued, there is no corresponding need to use the ballot for expression.⁴³⁰ The Court has strongly endorsed the deliberative/expressive theory of campaigns, in contrast to its tabulative view of voting.⁴³¹ This fact is made most obvious by the Court's differing approaches to campaign finance law and voting rights. Campaign contributions and expenditures are considered part of a deliberative process that, to the Court, defines campaigns.⁴³² Accordingly, the Court closely scrutinizes restrictions on campaign finance.⁴³³ But, while voting is also considered a fundamental right, the Court recognizes a governmental right to regulate "the mechanics of the electoral process" that it did not recognize in the campaign context.⁴³⁴ In the Court's view, having a deliberative campaign process excuses a tabulative approach to voting itself.

What if the Court is mistaken in its approach? A large social science literature challenges the theoretical assumptions that underlie the deliberative theory, showing that campaigns almost never involve real persuasion.⁴³⁵ One does not have to go this far, however, to recognize that there are at least some circumstances in which the deliberative-campaign assumption does not hold up. One such circumstance is that of an unopposed candidate. With no opponent to generate a debate—and, in some cases, with no ability for the unopposed candidate to accept campaign contributions⁴³⁶—the ballot

430. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 363 (1997).

431. *See, e.g., Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989); *Buckley v. Valeo*, 424 U.S. 1, 14–15 (1976) (per curiam); *see also Williams-Yulee v. Fla. Bar*, 135 S. Ct. 1656, 1683 (2015) (Kennedy, J., dissenting) ("[T]he idea of elections is that voters can engage in, or at least consider, a principled debate. That debate can be a means to find consensus for a civic course that is prudent and wise."). For an argument that the Court's doctrine actually presupposes a tabulative campaign process, *see GARDNER, supra* note 394, at 45–81.

432. *See McCutcheon v. FEC*, 134 S. Ct. 1434, 1448 (2014) (plurality opinion).

433. *Id.* at 1444–46.

434. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995); *see* Noah B. Lindell, Comment, *Williams-Yulee and the Anomaly of Campaign Finance Law*, 126 *YALE L.J.* 1577, 1595–96 (2017).

435. ACHEN & BARTELS, *supra* note 379, at 213–31; GARDNER, *supra* note 394, at 84–113.

436. *See supra* text accompanying notes 106–12.

itself becomes all the more important as an instrument of political expression and association. In this situation, when no deliberative campaign exists, should some of the expressive power usually reserved for the campaign not flow to the normally tabulative voting process? At a minimum, shouldn't qualified voters have the right to actually cast a ballot?

CONCLUSION

Unopposed candidate statutes appear, at first, to be one of the many harmless oddities of state election law. But upon closer observation, they invoke several of the core constitutional doctrines that govern our elections. They also have something to say to the scholars and judges who must grapple with the larger theoretical questions surrounding the democratic process. Unopposed candidacies provide one of the greatest challenges to the common conception of what it means to have democratic (or republican) elections. There is no contestation of beliefs, no voter education, and rarely any interaction between the governor and the governed. It is precisely in this situation, however, that the act of voting is of greatest importance.

This may seem paradoxical. Indeed, unopposed candidate statutes are based on the idea that voting is *least* important in this situation. Yet voting has a meaning beyond the mere tallying of names. People vote for a number of reasons, some of which traditional psychology would classify as irrational: the desire to participate in the democratic process, the feelings of civic duty and American-ness that voting engenders, and the pleasure of expressing one's support for or opposition to particular partisan preferences.⁴³⁷ Voter satisfaction theory, premised on the idea of preexisting, immovable beliefs, denies this reality. Political competition theory, focused on the potential expressive benefits of hard-fought campaigns, ignores it. The Supreme Court's approach to the electoral process, which limits voting to a winnowing function, rejects it. Nevertheless, the act of voting does have meaning independent of the ultimate outcome. It is this fact for which unopposed candidate statutes fail to account—and for which they should be held to account.

437. William H. Riker & Peter C. Ordeshook, *A Theory of the Calculus of Voting*, 62 AM. POL. SCI. REV. 25, 28 (1968).