Voter Viewpoint Discrimination: 
A First Amendment Challenge 
to Voter Participation Restrictions

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ABSTRACT

The Supreme Court’s recent decision in *Shelby County v. Holder* has generated a flurry of scholarly thinking about alternative ways to approach legislatively enacted restrictions on voting rights. One alternative that deserves additional attention is the possibility of challenging voter participation restrictions (such as voter ID laws) as viewpoint discriminatory under existing First Amendment doctrine. Many of these laws, after all, are perceived as embodying a legislative choice to burden some voters but not others based on legislative expectations about how the most burdened voters are likely to vote. A viewpoint discrimination approach therefore seems ripe for further exploration. Part 1 of this paper explains why a First Amendment, viewpoint based challenge to at least some such laws is indeed appropriate. Part 2 uses existing First Amendment doctrine to ground the approach in existing case law, and to specify what it would look like in the election law context.

INTRODUCTION

The Supreme Court’s decision in *Shelby County v. Holder* generated a flurry of scholarly thinking about alternative ways to approach legislatively enacted restrictions on voting rights. One approach that has thus far gotten little attention is using the First Amendment as a vehicle to challenge at least some voter participation restrictions.

The First Amendment has long been a part of the conversation about the constitutionality of election regulations. Most obviously (and most successfully) it has been used to challenge campaign finance regulations. The First Amendment’s inferred right of association also has been used to challenge things like ballot access rules and state regulation of political party primaries. Less common have been First Amendment challenges to rules restricting voter participation. These rules, such as voter ID requirements, student residency restrictions, and rules limiting early voting, not only impose burdens on voting, but are perceived by those they affect as doing so in intentionally partisan ways. They are seen by some, in other words, as viewpoint discriminatory: as imposing burdens and barriers to voting based on legislative expectations about how the most burdened voters are likely to vote. Described this way—as purposefully designed to impose a burden on voters based on legislative expectations about how the most burdened voters will vote—such laws seem ripe for review as viewpoint discriminatory under the First Amendment. While...
this approach has gotten some attention in the lower courts (Judges Diane Wood and Terence Evans have each nodded to it in separate dissents in lower court opinions addressing Indiana’s voter ID law, later taken up by the Supreme Court in Crawford v. Marion County1) the argument was not seriously engaged by the Seventh Circuit in that case,2 and the Supreme Court likewise has said little about the matter.3

The goal of this article is to remedy this omission by setting out a clear doctrinal path, built from existing case law, showing how courts can use viewpoint discrimination doctrine to evaluate restrictive voter participation laws. After providing a brief history of the dispute regarding voter participation restrictions and the Court’s current approach to such restrictions, Part I of the article addresses the two perceived barriers to a First Amendment, voter viewpoint discrimination approach: whether voting is an activity protected by the First Amendment at all; and whether the facial neutrality of most laws restricting voter participation immunizes them from judicial scrutiny into the legislative purposes underlying them. Part II then draws on existing case law to illustrate what a viewpoint discrimination challenge to voter participation restrictions would look like in the election law context.

Ultimately, the argument presented in both Parts is quite simple: if it is paradigmatically correct that a law that on its face imposes barriers to voting on members of one party but not the other would be treated as viewpoint based and subjected to heightened review under the First Amendment,4 then a facially neutral law that intentionally does the same thing also must be subjected to such review if there is a reasonably manageable way of ferreting out the underlying viewpoint discriminatory purpose. Because existing doctrines supply ample tools designed to do exactly that, the Court should consider using this approach to evaluate restrictive voter participation laws.

Various election law scholars have engaged the ideas presented here. Janai Nelson pioneered the approach in her 2013 article examining whether felon disenfranchisement laws (a type of voter participation restriction) should be analyzed as a form of viewpoint discrimination under the First and Fourteenth Amendments.5 Guy-Uriel Charles has written about the resurgent relevance of exclusionary reasons in election law cases.6 Richard Hasen has argued that laws that discriminate on the basis of partisan affiliation and are enacted with admittedly partisan motivations should be subjected to heightened review under the Equal Protection Clause,7 and Christopher Elmendorf, also working within the Equal Protection Clause, has advocated for a burden shifting mechanism similar to that developed here that would allow courts to take into account the partisan motivations of legislators when evaluating voter participation restrictions.8 This paper builds on these efforts by explicitly placing the discrimination inquiry within First Amendment doctrine and mining existing case law to specify how the Court can operationalize these ideas within the election law context.

PART I

A. Background

The razor thin vote margin separating Vice President Al Gore and Governor George W. Bush in the 2000 presidential election showed a fresh generation of political activists the importance that even a

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1See Crawford v. Marion County Election Bd., 484 F.3d 436, 439 (7th Cir. Ind. 2007).
2Judge Posner, who wrote the majority opinion in the Crawford case upholding the Indiana law, noted the partisan effects of the law, but discussed those effects only in the context of describing (and dismissing) the associational burdens imposed by the law on the Democratic Party. Crawford, 472 F.3d at 952. He has since indicated that this may have been a mistake. John Schwartz, Judge in Landmark Case Disavows Support for Voter ID, N.Y. Times, October 16, 2013, at A16.
3See infra notes 24–27.
4And it is. See Part 5, infra; see, e.g., Carrington v. Rash, 380 U.S. 89 (1965) (treatig as voter viewpoint based and invalidating a Texas constitutional provision prohibiting members of the military stationed in Texas from voting in Texas elections that Texas justified by arguing that military members were likely to have different political preferences than long-term residents and noting that no person can be excluded from the franchise “because of the way [he] may vote”). See also Christopher S. Elmendorf, Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?, 25 Hastings Const. L.Q 642, 654 (2008) (“It is by now well established that the right to vote on equal terms with others is fundamental, and that no state may exclude any class of adult, non-felon, citizen residents from what I shall term the normative electorate—the class of persons to whom elected officials are supposed to be accountable”).
relatively small number of votes can have when cast in key states. One consequence of this has been what election law expert Richard Hasen has dubbed the “voting wars.” Election law litigation, as Hasen reports, more than doubled in the decade following the 2000 election. State legislatures also got into the game, particularly in the run-up to the 2008 presidential election, and began passing voter participation laws (election-related laws that directly regulate the circumstances under which people are allowed to vote). The most common of these laws require voters to show particular forms of photo ID before being allowed to vote. Others impose enhanced registration requirements, eliminate or reduce early voting, or make it more difficult for college students to vote where they attend school.

These laws were overwhelmingly supported by Republicans and opposed by Democrats. This reflects in part the competing narratives growing out of the attention Bush v. Gore brought to the nuts and bolts of election administration. Republicans claim that the integrity of our voting system is threatened by fraud and that the new rules are essential to preventing such fraud. Democrats worry that accusations of fraud are veiled efforts to make voting more burdensome for some voters, based on expectations about how those voters will vote.

In evaluating voter participation restrictions like voter ID laws, the Court has opted against subjecting such laws to the heightened review routinely given under the First Amendment to viewpoint-based laws. Instead, the Court has evaluated such laws under the Anderson-Burdick balancing test. This test was developed by the Court in two cases: Anderson v. Celebrezze and Burdick v. Takushi. Anderson involved a ballot access case—exactly the type of nuts and bolts regulation the Court hesitates to automatically subject to rigorous review. The key doctrinal move in Anderson is that the severity of the burden on the right to vote was linked to the degree of judicial scrutiny the law receives. Under Anderson, laws imposing more severe burdens on voting are subject to more rigorous review than laws imposing lesser burdens.

In Burdick the Court refined its Anderson test. Upholding a challenge to Hawaii’s ban on write-in votes, the Court noted that since all election regulations impose some burdens on some voters, it would be inappropriate to use strict scrutiny in all challenges to such regulations. As in Anderson, the Court tied the level of review to the severity of the burden. In Burdick, however, the Court appeared to use an either/or test rather than the sliding scale seen in Anderson. Under this view of Burdick, only those laws imposing a severe burden will be subject to strict scrutiny, while laws imposing reasonable, nondiscriminatory burdens are subjected to lesser review and usually will be justified by a state’s important regulatory interests.

Crawford v. Marion County applied this test to a law directly restricting voter participation: Indiana’s voter ID law. At the time of its enactment, Indiana’s law was one of the most restrictive voter participation laws in the country. It was enacted on partisan lines, and was widely seen by its opponents as a legislative effort to disenfranchise voters on the basis of how they were expected to vote. As such, Crawford presented an ideal opportunity for the Court to directly engage the question of whether the Anderson-Burdick test was the appropriate way to evaluate a modestly burdensome (according to the Court), facially neutral, voter participation restriction allegedly enacted for a viewpoint discriminatory purpose.

The Anderson-Burdick test itself shows the relevance of this inquiry. The test, as repeatedly set forth by the Court, applies only when the law being challenged is neutral and nondiscriminatory.
to ascertain whether a law meets this threshold criterion should, therefore, have been a key question in the Anderson-Burdick analysis. Despite this, the Court in Crawford declined to grapple with the issue. Justice Stevens, who authored the lead opinion, noted only “[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact [the voter ID law]. If such considerations had provided the only justification [for the law] we may also assume that [the law] would suffer the same fate as the poll tax at issue in Harper.”25 This is of limited help. It tells us that (as was the case in Harper itself) a law supported solely by constitutionally improper reasons will fail; it does not, however, directly engage the question of how to evaluate a law purportedly supported by neutral justifications but raising concerns that a constitutionally suspect purpose nonetheless is lurking in the background.

Given the intensely partisan dispute surrounding Indiana’s voter ID law, Crawford appeared to be an ideal vehicle to examine this fundamental question. Why, then, did the Court decline to use the case to develop doctrine that would fulfill the promise of the non-discrimination component of the Anderson-Burdick test? There undoubtedly are many reasons; this article addresses one: the doctrinal uncertainty about whether (and how) a court should use First Amendment doctrine to look behind a facially neutral law supported by neutral justifications to determine whether the law is nonetheless constitutionally suspect because enacted for a viewpoint discriminatory purpose.

Unpacking this concern requires addressing two separate questions: whether the First Amendment is an appropriate vehicle through which to challenge voting restrictions of this sort; and if so, whether the facial neutrality of most voter participation restrictions nonetheless immunizes such laws from judicial scrutiny into the viewpoint discriminatory purposes allegedly underlying them. The remainder of this Part addresses these questions.

B. Voting and the First Amendment

The Court repeatedly has held that both the expressive and the political association elements of voting are protected by the First Amendment from viewpoint based discrimination. In one sense, this is not surprising: it is unexceptional to say that a law that on its face imposes burdens on Democratic voters but not on Republican voters would raise grave First Amendment concerns.26 After all, as Justice Stevens noted in League of United Latin American Citizens v. Perry,27 the First Amendment protects citizens from “official retaliation based on their political affiliation,” and the freedom of “belief and association” embodied in that Amendment, at the very least, prevents states from penalizing citizens because of their participation in the electoral process, or their association with a political party.28

In so saying, Justice Stevens was drawing on a long line of cases treating viewpoint discrimination in voting as constitutionally suspect under the First Amendment. In Williams v. Rhodes,29 the Court held that the ballot restrictions challenged in that case infringed upon voters’ rights of political association, as well as their right “regardless of their political persuasion,” to cast effective ballots.30 In American Party of Texas v. White,31 the Court struck down as “obviously discriminatory” a law prohibiting absentee votes to be cast for otherwise qualified members of a disfavored party (the Socialist Workers Party) while permitting them to be cast for major party candidates. In Carrington v. Rash,32

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25 Id. at 203.
26 See Justice Kennedy’s uncontested statement in Vieth v. Jubelirer, 542 U.S. 267, 312 (2994), that a law stating that all legislative districts shall henceforth be drawn to advantage one party at the expense of the other would be plainly unconstitutional; and Hasen, Race or Party?, 126 Harv. L. Rev. F. at 16 (“No case, however, has said that states can stack the rules about the casting and counting of votes—the most basic election laws—to promote one major party over that of the other.” See also Caleb Nelson, Judicial Review of Legislative Purpose, 83 N.Y.U. L. Rev. 1784 (2008) (documenting that concerns about judicial review of improper legislative purposes have since very early in our history been driven by (1) reservations about finding judicially manageable methods of ascertaining improper purposes; and (2) substantive disagreement about what constitutes an improper purpose, rather than disagreement about the impropriety of basing legislation on such purpose); and Bd. of Ed. Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 583, 870–71 (1982), discussing Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) (“If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books.”).
28 Id. at 461.
29 393 U.S. at 30.
30 Id.
32 38 U.S. 89, 93–4 (1965). Texas argued that it had an important interest in preventing a “takeover” of the local civilian community by military personal presumed to have different political preferences and interests.
the Court invalidated a Texas law (prohibiting military personnel living on bases from voting in Texas elections) that the state itself defended in content based terms.\(^{33}\)

The Court has, of course, resisted protecting voting rights by imposing strict scrutiny review on all voting restrictions and regulations: avoiding such ubiquitous and stringent review is the entire point of the *Anderson-Burdick* balancing test. It is a mistake, however, to construe this pragmatic reluctance to subject neutral, non-discriminatory restrictions on voting as equivalent to a holding that the expressive and associational elements of voting are not protected by the First Amendment from non-neutral, viewpoint-based discrimination. As discussed below, First Amendment law frequently is bifurcated this way: laws that infringe protected rights only incidentally often are subjected to less rigorous review than those that intentionally target those rights.\(^{34}\)

*Burdirck* itself illustrates this. As noted above, *Burdirck* involved a challenge to Hawaii’s ban on write in votes.\(^{35}\) The ban was challenged as a violation of the First and Fourteenth Amendments. The Court, refusing to find any free standing right to use the ballot for expressive purpose, declined to apply heightened review.\(^{36}\)

It is plain from the Court’s analysis, however, that the outcome would have been different had the majority believed that the underlying purpose of the ban was to discriminate against voters on the basis of how they were expected to vote. The challenger in *Burdirck* in fact urged the Court to adopt precisely that view of the case. The law should be subjected to heightened review, he argued, because it was content based in that it deprived him of his ability to cast a “protest vote.”\(^{37}\) The Court was not convinced that this made the law content-based. “There is nothing content based,” Justice White wrote for the majority, “about a flat ban on all forms of write-in bans.” Consequently, he continued, the ban was a “reasonable, politically neutral” regulation, and therefore (under the reasoning of *Anderson*) a reduced level of scrutiny was appropriate.\(^{38}\)

Whether or not the Court was correct in deeming the ban on writing in votes content neutral, it is clear from the opinion that a restriction seen by the Court as non-neutral or viewpoint based would have been subjected to more rigorous review, notwithstanding the Court’s refusal to find a First Amendment right to cast a “protest” vote.\(^{39}\) This is consistent with the Court’s treatment of viewpoint discrimination in other contexts. The Court consistently has held that viewpoint discrimination raises distinct First Amendment concerns, even when occurring in areas which would not necessarily otherwise be protected with robust review.\(^{40}\) In the political patronage cases (discussed further below) the Court held that discrimination on the basis of partisan affiliation triggers the strictest review under the First Amendment, even when there is no underlying right to public employment.\(^{41}\) Likewise, in *R.A.V. v. St. Paul*\(^{42}\) and *Board of Regents v. Southworth*,\(^{43}\) the Court held that the First Amendment prohibits viewpoint discrimination even when the underlying activities

\(^{33}\)See also *Clingen v. Beaver*, 544 U.S. 581 (recognizing the First Amendment interest in voting but refusing under the *Anderson-Burdirck* test to apply strict scrutiny to a semi-closed primary system on the grounds that the burden imposed by the challenged rule was not severe); *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Rosario v Rockefeller*, 410 U.S. 752 (1973); *Kasper v. Pontikes*, 414 U.S. 51 (1973); and *Jenness v. Fortsom*, 403 U.S. 431 (1971). Christopher Elmendorf has pointed out that political party cases like *California Democratic Party v. Jones* may also turn on this content based, non-discrimination principle. Elmendorf, *Structuring Judicial Review*, 156U. PA. L. REV. at 365. The few cases in which the Court even arguably has cast doubt on this foundational principle have been those in which it recognizes an important state interest in preserving a two-party system—an interest decidedly not served by imposing burdens on voters for the purpose of advantaging one of those parties over the other. See, for example, *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997) (accepting the state’s purported interest in preserving a stable, two party system in upholding a ban on “fusion” candidates).


\(^{35}\)Id, at 438.

\(^{36}\)Id.

\(^{37}\)Id. (emphasis added).

\(^{38}\)The Court’s analysis on this point is similar to that seen later in *Hill v. Colorado* and *Turner Broadcasting v. FCC*, discussed below.

\(^{39}\)Daniel Tokaji has developed this idea at length. See Tokaji, *First Amendment Equal Protection*, at 2490–95. See also Michael Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1181, 1240 (1996) (“Because some rights embody equality norms, the very act of singling out persons who exercise such a right may constitute purposeful frustration of the right to equal treatment...laws that violate such equality norms ought to trigger heightened scrutiny even if they only impose minimal burdens” and including at p. 1240 that the speech right is such a right.).


\(^{41}\)R.A.V., 505 U.S. 377.

\(^{42}\)Southworth, 529 U.S. 217.
themselves (engaging in “fighting words” and the expectation of state funding) are not independently protected. In such cases, as in voting rights cases, it is the viewpoint discriminatory nature of the challenged regulation that triggers heightened First Amendment protection of the underlying associational or expressive interest. 44

The First Amendment approach to voter participation restrictions is, therefore, a viable one. It also is a desirable one. The Anderson-Burdick test links judicial scrutiny to the burdensomeness of the voting requirement being challenged, but on its own terms applies only to non-discriminatory laws. Viewpoint discrimination analysis, well-developed in the First Amendment case law, provides a way to operationalize this non-discrimination requirement, regardless of how burdensome a voting restriction is: under the First Amendment, heightened review is appropriate for even a modestly burdensome law if the law is (or is suspected of being) viewpoint discriminatory. As explained in Part II, heightened review in this context most often will lead to a shift in the relevant burdens of proof rather than a flat invalidation of the requirement, but the point is that the First Amendment path provides a doctrinally tested and theoretically sound mechanism through which to disentangle the Anderson-Burdick focus on burdensomeness from the separate constitutional harm imposed by intentional voter viewpoint discrimination.

Fully developing a First Amendment approach also is desirable because at least some members of the current Court appear to view it as the appropriate way to evaluate laws restricting voter participation. This is most apparent in Justice Kennedy’s concurring opinion in Vieth v. Jubelierer. 45 Citing the political patronage cases, Kennedy wrote that the First Amendment—not the Equal Protection Clause—“may be the more relevant constitutional provision” in partisan gerrymandering cases (the election law issue present in that case). 46 This is so, he wrote, because allegations of partisan manipulation “involve the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views.” 47

Kennedy concludes by noting, quite explicitly, that “if a court were to find that a State did impose burdens and restrictions on groups or persons by reason of their views, there would likely be a First Amendment violation, unless the State shows some compelling interest.” 48 If Justice Kennedy finds First Amendment viewpoint discrimination doctrine relevant to legislative districting decisions—an area bearing little resemblance to traditional expressive or associational activity—then surely it is even more relevant in the voting context, where the expressive and associational elements of the underlying activity are more solidly grounded.

The difficult question in voter viewpoint discrimination cases, then, is not whether the First Amendment’s prohibition on viewpoint discrimination applies to laws restricting voter participation, but how courts should go about ascertaining whether such discrimination has occurred. It is that question that the following section will address.

C. Viewpoint discrimination and facial neutrality

The vexing problem with a First Amendment-based, voter viewpoint discrimination challenge to voter participation restrictions is not one of law but of proof. As shown above, voter viewpoint discrimination, when established, is constitutionally suspect under the First Amendment. But laws restricting voter participation are rarely written or defended in viewpoint-based terms. Instead, they are facially neutral laws supported by at least superficially neutral justifications. Are such laws thereby immunized from meaningful judicial inquiry into

44 Nev. Comm’n on Ethics v. Carrigan, 131 S.Ct. 2343 (2011), did hold that the legislative votes of elected representatives acting in their official capacity are not protected speech, and therefore that a legislative body’s recusal rules not implicate the official’s speech rights. In doing so, however, the Court noted that the right of an elected official to vote in legislative assembly is a “public” right belonging to the people, not a personal right held by the representative. The case, consequently, is hardly persuasive precedent for arguing that ordinary citizen voting is not protected First Amendment activity. Moreover, the Court in Carrigan specifically noted that the representatives had not argued that the recusal rules were viewpoint discriminatory, and that the law applied to all legislators regardless of party or position. If anything, then, Carrigan supports by implication the conclusion that a law that was viewpoint based would be subjected to more searching scrutiny, at the very least. See also Tokaji, First Amendment Equal Protection, at 2499 (“The greater power to deny political participation entirely does not include the lesser power to do so on an unequal basis”).

45 541 U.S. 267 (2004). 46 Id. at 311. 47 Id. at 314. 48 Id. at 315.
whether their underlying purposes are nonetheless in fact viewpoint discriminatory?\textsuperscript{49} Despite the Court’s occasional assertions to the contrary, the answer to this question is plainly “no.”

Concern about inappropriate legislative purposes drive much of existing First Amendment doctrine, regardless of the facial neutrality of the challenged law. Laws routinely interfere with our ability to say exactly what we what, how we want, when we want. Courts understandably are reluctant to subject all such laws to the searching review required by strict scrutiny. Instead, they have developed doctrinal mechanisms to separate constitutionally suspect laws from those that are not suspect, and apply stricter scrutiny only to the former group. The most common such mechanism, ubiquitous in First Amendment cases, is the distinction between speech restrictive laws that are content or viewpoint based, and those that are not.\textsuperscript{50} Content neutral restrictions are subjected to minimal or intermediate review, while content or viewpoint based laws are subject to the strictest scrutiny.

The Court has been unequivocal in its commitment to this core idea. It also has been relatively clear about why content and viewpoint based laws trigger heightened review while content neutral laws do not. The Court repeatedly has explained the distinction in purpose-based terms.\textsuperscript{51} In case after case, the Court explains that the importance of content and viewpoint neutrality is grounded in the idea that the one thing government cannot do is regulate speech because of agreement or disagreement with the ideas being expressed.\textsuperscript{52}

The difficulty in this area of law, then, is not really whether legislative purposes matter, but how they are to be ascertained. There are some easy cases. A law that draws a viewpoint distinction on its face will be subject to the strictest review,\textsuperscript{53} as will a law admittedly supported by viewpoint based justifications (such as the poll tax in Harper).\textsuperscript{54} The Court also

\textsuperscript{49}Richard Hasen and Richard Pildes have debated a similar point in the context of a discussion about whether restrictive election regulations are better analyzed under the rubric of structural or individual rights. See Richard L. Hasen, Bad Legislative Intent, 2006 Wis. L. Rev. 843 (2006); and Richard H. Pildes, The Constitutionalization of Democratic Politics, 118 Harv. L. Rev. 28 (2004).

\textsuperscript{50}As discussed below, determining whether or not a law is in fact “content based” is complicated. The distinction between a genuinely content based law and a viewpoint based law, however, appears to be doctrinally important in only two situations. First, when a viewpoint distinction is drawn in a content area, such as fighting words, that is not itself otherwise protected by heightened review. Second, when a law draws a content based distinction but there is no underlying suspicion that the distinction was drawn because of official disapproval or disagreement with the speech being restricted. In the first scenario, the Court has held that viewpoint based distinction are constitutionally suspicious even when drawn in otherwise unprotected, content-specific areas. In the second, the Court has generated a tangled web of doctrines, sometimes applying heightened review simply because of the presence of a facial distinction regardless of the lack of evidence of improper legislative purpose; sometimes refusing to do so on the grounds that even a facially content based law was targeting the “secondary effects” of the speech rather the speech itself; and sometimes expending its energies arguing about whether the face of the law did in fact draw a legally relevant, content based distinction. See Leslie Kendrick, Content Discrimination Revisited, 98 Va. L. Rev. 231 (2012), discussing Young, 427 U.S. 50; Turner Broadcasting v. FCC, 512 U.S. 622 (1994), and Boos v. Barry, 485 U.S. 312 (1988). The second of these scenarios is not relevant to the question addressed in this article; today’s voter participation restrictions do not involve facial restrictions on the content of speech or political association: the relevant question is solely one of legislative purpose. The first scenario—the application of heightened review to viewpoint distinctions drawn in areas otherwise unprotected by the First Amendment—may be of relevance, and was discussed above.

\textsuperscript{51}Geoffrey Stone has argued that one reason the content-neutral/content-based distinction has such power in First Amendment doctrine is because it functions as a way of ferreting out improper governmental motives. Geoffrey R. Stone, Content Regulation and the First Amendment, 25 WM. & MARY L. Rev. 189 (1983).

\textsuperscript{52}See, e.g., W. Va. Bd. of Ed. v. Barnette, 319 U.S. 624, 642–43 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion”); and Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (holding that “the principle inquiry in determining content neutrality...is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”). See also Chicago v. Mosley, 408 U.S. 92 (1972). Daniel Tokaji (among others) likewise has argued that the “general principle” that governmental regulation of expressive activity must be “evenhanded” is a “staple” of First Amendment jurisprudence. Daniel P. Tokaji, First Amendment Equal Protection: On Discretion, Inequality, and Participation, 101 Mich. L. Rev. 2409 (2003). See also R.A.V., 505 U.S. 377. For a discussion that the Court should develop more finely tuned distinctions in this area, see Susan H. Williams, Content Discrimination and the First Amendment, 139 U. Pa. L. Rev. 615 (1991) (suggesting that the Court should be more serious about distinguishing between laws that only incidentally effect speech and those that restrict speech essential to the speaker’s message).


\textsuperscript{54}Id.
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claims that facially content based but viewpoint neutral laws will be subject to heightened review, although it is unclear in practice if this is true when there is no reason to suspect that the actual target of the law is disfavored speech. The more difficult question, and the one relevant to a voter viewpoint discrimination approach to restrictive voting laws, is whether facial discrimination and avowedly content based justifications are the only types of evidence of improper legislative purposes that trigger heightened review, or whether other types of evidence of those same purposes will do so as well.

What the Court has said on this point, in United States v. O’Brien, is that it will not look behind a facially neutral law professedly supported by neutral justifications to determine whether the legislature enacting the law acted with an improper motive. This would appear to stop a voter viewpoint discrimination claim dead in its tracks, since legislatures simply do not write restrictive voting laws that are on their face viewpoint or content based. But what the Court says in this area and what it does are quite different.

Jeb Rubenfeld’s careful examination of O’Brien reveals that the rule announced in the case denies judicial inquiry into improper legislative purposes while simultaneously deeming a test the entire point of which is to tease out improper legislative purposes. By asking whether the “governmental interest” served by the law is “justified without reference to the content of the regulated speech” or “unrelated to the suppression of free expression,” the O’Brien test, Rubenfeld argues, effectively requires courts to determine whether the purpose of the law is to burden the affected speech, or whether the burden imposed is merely incidental to that speech.

The analysis done in O’Brien itself illustrates this point quite clearly. In analyzing the question presented, the Court (rightly or wrongly) first determined that the governmental interest in prohibiting the burning of draft cards was not in fact aimed at the expression conveyed by such actions. Only after determining it did not, did the Court go on to apply a lower standard of review. Future Justice Elena Kagan, writing in the University of Chicago Law Review in 1996, agreed. Notwithstanding the Court’s pronouncements to the contrary in O’Brien, she wrote, First Amendment law “has as its primary, though unstated, objective the discovery of improper governmental motives.” The Court’s First Amendment doctrines, she continued, “comprise[] a series

55Jed Rubenfeld, The First Amendment’s Purpose, 53 Stan. L. Rev. 767, 787 (2001) (“In actuality, O’Brien has by and large played its proper, purposive function in First Amendment law. Courts do not, under O’Brien, get themselves entangled in super legislative review of speed limits or other generally applicable conduct laws. O’Brien is applied with bite only when there exists a significant, plausible suspicion of an improper speech-suppressing purpose.”). See also Kendrick, Content Discrimination, 98 Va. L. Rev. at 273–74, who notes that the Court will treat as content neutral facial classifications, such as “solicitation,” that plainly rest in some sense on the content (or category) of the speech being regulated. Kendrick argues that these cases represent situations where facial discrimination is “not a good proxy for illicit purpose”—thus reasserting her core point that it is concern about improper purposes that drive the content-based/content-neutral distinction and its accordant application of heightened review. Id. at 274.

56It is not relevant for current purposes whether viewpoint discrimination is all that matters for First Amendment purposes; it is enough that viewpoint discrimination be one thing that triggers heightened review. We therefore can set aside the broader question of whether such review should be reserved only for laws evidencing such purposes, or whether it also is appropriate in cases evaluating laws having a discriminatory effect unaccompanied by any evidence of a discriminatory purpose.


58“It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.” O’Brien, 391 U.S. at 383–84.

59But see Hasen, Race or Party, 127 Harv. L. Rev. at 58 (noting that one exception to this may be when states defend their decisions against race-based Voting Rights Act challenges by affirmatively asserting that their decisions were based on partisan, not racial, considerations).

60Rubenfeld, The First Amendment’s Purpose, 53 Stan. L. Rev. at 787. See also Burson v. Freeman, 504 U.S. 191, 213 (1992) (“The compelling-interest test may be one analytical device to detect, in an objective way, whether the asserted justification is in fact an accurate description of the purpose and effect of the law. This explanation of the compelling-interest analysis is not explicit in our decisions; yet it does appear that in time, place and manner cases, the regulation’s justification is a central inquiry”).

61Id.


63Rubenfeld, The First Amendment’s Purpose, 53 Stan. L. Rev. at 804. Rubenfeld’s larger point is that laws whose purpose (or “aim”) in the language of O’Brien are categorically unconstitutional, without regard to any “balancing” of speech interests and governmental needs.

of tools to flush out illicit motives and to invalidate actions infected with them.”

Leslie Kendrick’s recent survey of the Court’s content and viewpoint discrimination cases supports Kagan’s point. After an exhaustive survey of the Court’s work in this area, Kendrick concludes that the “principal inquiry” in determining whether a law challenged under the First Amendment’s speech clause will be subject to heightened review is not facial neutrality or the assertion of neutral justifications, but whether the Court suspects that the government adopted the restrictive law because of agreement or disagreement with the speaker’s message. Facially neutral statutes, she shows, are evaluated as such only when they are justified without reference to either the content of the regulated speech or the suppression of free expression, and neither facial neutrality nor the mere assertion of a neutral justification protect a law from heightened review when the Court suspects the law was enacted for a viewpoint discriminatory purpose.

Kendrick’s review of the case law is persuasive: when the Court is determining with what degree of scrutiny to review a given law, legislative purposes matter. Unfortunately, the Court has often buried this reality under a heap of doctrinal confusion. Two of the Court’s most perplexing First Amendment cases, Hill v. Colorado and Turner Broadcasting Systems v. FCC, illustrate this. A careful review of these cases, however, reveals a surprising amount of consensus amid the muddle. As it turns out, four of the currently sitting justices (Justices Kagan, discussed above, and Justices Kennedy, Ginsburg, and Breyer, discussed below) have explicitly endorsed the proposition that facial neutrality and proffered neutral justifications do not immunize a law from close judicial inquiry into whether it is in fact supported by constitutionally suspect purposes. Two others justices, Scalia and Thomas, deny the propriety of such an inquiry, but nonetheless appear to rely on non-facial evidence of improper purposes in at least some ways in some First Amendment cases. They also, as discussed in Part 3, do so unapologetically in Equal Protection cases.

1. Hill v. Colorado. Hill v. Colorado involved a First Amendment challenge to a state law prohibiting people from approaching, for the purpose of “engaging in oral protest, education, or counseling,” individuals entering medical clinics. The law was enacted in response to the tactics adopted by anti-abortion protestors, and was challenged under the First Amendment. The primary point of disagreement between the justices in the case was whether the statute should be treated as neutral, or as content or viewpoint based.

The distinctions drawn on the face of the law limited its application to public spaces near medical clinics. It also prohibited within those locations only certain types of communication: “oral protests,” “education,” or “counseling.” Justice Stevens’ majority opinion nonetheless deemed the law facially neutral. To Justice Stevens, the facial classifications drawn in the statute were not the type of content...
classification First Amendment doctrine is concerned about. Instead, he wrote, the statute’s facial restrictions were akin to time, place, and manner restrictions, unrelated to the content of the speech being regulated. Since the law also was supported by what the majority saw as speech-neutral justifications (namely, to protect vulnerable clinic clients from harassment and potential violence) the majority declined to subject the law to the strictest review.

Justice Stevens’ opinion did not say much about why the facial categorizations of the statute, which limited application of the law to particular types of speech in particular locations, did not render the law content based. But Justice Souter’s concurring opinion, joined by Justices O’Connor, Ginsburg, and Breyer, did. “The key to determining whether [a law] makes a content based distinction,” Souter wrote, “lies in understanding that content based discriminations are subject to strict scrutiny because they place the weight of government behind the disparagement or suppression of some messages, whether or not with the effect of approving or promoting others.” Consequently, the question for the Court, Souter continued, was “simply whether the ostensible reason for regulating the circumstances is really something about the ideas.”

Justice Souter went on to conclude that, in this case, the ostensible reason offered was in fact the real reason. The idea that the substance of abortion protestors’ speech—as opposed to their conduct—was the real target of the legislation was, to Justice Souter, “implausible.” Notably, he did not reach this conclusion by simply accepting at face value the state’s offered content and viewpoint neutral justifications. Instead, he fully examined the evidence presented, including the context in which the law was enacted, before determining that the evidence did not show that the state was intentionally targeting the expression of the anti-abortion protestors.

The dissenting justices saw the law as both content and viewpoint based. Justices Kennedy and Scalia authored separate dissents. Like Justice Souter, Justice Kennedy explicitly identified the question presented as whether the legislature acted with an improper purpose in adopting the law. He concluded that it had. In doing so, he argued that the statute was content based not because of the classifications present on its face, but because of its “predictable and intended operation.” The law, he said, was content based because it was intended to be used against anti-abortion protestors but not abortion rights supporters, and was enacted because of legislative disagreement with the content of the anti-abortion protestors’ message.

In reaching this conclusion, Kennedy, like Souter, Breyer, and Ginsburg, looked beyond the face of the statute to ascertain its underlying purpose. “Clever” content-based restrictions, he wrote, are just as offensive to the First Amendment as are overt ones. In the case presented, he went on, the underlying legislative purpose to restrict unpopular speech “should be beyond all dispute.”

Justice Kennedy at this point in his discussion uses an illuminating example: “If just a few decades ago,” he wrote, “a state with a history of enforcing racial discrimination had enacted a statute like this one, regulating ‘oral protest, education or counseling’ within 100 feet of the entrance to any lunch counter, our predecessors would not have hesitated to hold it was content based or viewpoint based.” The persuasive power of this example relies entirely on a judicial inquiry that reaches beyond the face of the law and acknowledges both its effects in the real world and the contextual situation in which it was enacted.

77Id. at 725–26.
78Id.
79Id. at 704.
80Id. at 721.
81Id. at 735 (emphasis added).
82Id. at 738.
83Id.
84Id.
85Id. at 768–69.
86Id. at 766.
87Id. at 769.
88Id. at 768.
89Id. at 769.
90Id. at 767.
Justice Scalia, joined by Justice Thomas, dissented separately. Scalia argued that the statute should have been subjected to strict scrutiny because it was facially content based. The content distinctions Scalia focuses on are the same facial restrictions Justice Stevens deemed not the type of classification triggering stricter review, namely, the limitation of the law to areas near medical clinics, and to only certain types of communications (oral protest, education, and counseling).

Justice Scalia writes as if it is apparent that these types of facial limitations trigger strict scrutiny review. But this is not self-evident. Spatial restrictions, such as laws restricting sound trucks in city limits but not outside city limits, are routinely treated as content neutral time, place, and manner restrictions, as are laws limiting only certain types of speech, such as picketing.

The fact that such laws reference a type of speech, or a particular location being regulated, has not rendered them content based.

Justice Scalia, perhaps tacitly recognizing this, did in fact broaden his argument beyond the face of the statute.

The textual limitations on the face of the statute, he reasoned, should be considered content (and viewpoint) based not just because they exist but because they had both the purpose and effect of covering only one subject matter (abortion) and disadvantaging only one viewpoint within that subject (the pro-life view). That result is not literally visible on the face of the law. Instead, the statutory text can be given a viewpoint discriminatory meaning only when read in light of the full context in which it was enacted, and its actual effect in operation. Thus, while Justice Scalia’s rationale superficially depends on a purely facial distinction (the limitation of the statute to specific locations and types of speech) that facial distinction becomes legally meaningful only when coupled with concerns about the law’s underlying discriminatory purpose.

To be clear, there is nothing extraordinary about what Justice Scalia is doing here, nor does it necessarily represent a departure from his usual insistence that subjective legislative intentions are unknowable and unhelpful in questions of statutory interpretation. Instead, his approach can be understood as conceding the wholly unexceptional fact that words only have meaning in context. To argue that the application of heightened review is automatically triggered by a facial restriction of any sort is true only in the most aridly formal way. Facial classifications are not suspect for their own sake, but because they serve as evidence of the real target of judicial concern, which is viewpoint or content discrimination. Perhaps, as Justice Scalia argues (and the Court has sometimes implied) facial classifications should be considered conclusive evidence that the risk of such discrimination is high and that strict scrutiny therefore always is warranted when such classifications are present. Justice O’Connor makes just this argument in Turner Broadcasting, discussed below. But whether facial classifications alone should always trigger strict scrutiny, or whether strict scrutiny should be used only when other evidence also indicates the presence of a suspect purpose, the target of judicial concern remains what the classification represents, not merely that it exists.

2. Turner Broadcasting Systems v. FCC. The Court’s willingness to look behind facially neutral laws for an underlying viewpoint discriminatory purpose was on even more open display in Turner Broadcasting System, Inc. v. FCC. The Court involved a challenge to the federal “must carry” rules requiring cable companies to provide access to local broadcast television stations. As in Hill, the justices looked behind the face of the law to ascertain whether it was content and viewpoint neutral.

91Id. at 742.
92Id.
93See Kendrick, Content Discrimination, 98 Va. L. Rev. at 258–59; and City of Chicago v. Mosley, 408 U.S. 92, 97 (1972) (accepting that an anti-picketing ordinance could be a content neutral time, place and manner regulation, but striking down the ordinance at issue because of content-based exceptions for pro-labor union views).
94Justice Scalia has recognized this in other cases. For example, in Burson v. Freeman, 504 U.S. 191, 216 (1992) (a law prohibiting campaign related speech in or near a polling place), Justice Scalia, writing separately, argued that although the law challenged was facially content based (it only applied to political speech) the majority erred in applying strict scrutiny to it because it was viewpoint neutral and consistent with historical practices. Id.
95Id. at 214–16.
96Hill, 530 U.S. at 766. From Justice Scalia: “I have explained already how the statute is a failed attempt to make the enactment appear content neutral, a disguise for the real concern of the legislation….by confining the law’s application to the specific locations where the prohibited discourse occurs, the state has made a content-based determination.” Id.
98See also Part II, infra, discussing Justice Scalia’s approach to the Free Exercise Clause and the question of whether a law “targets” a religious practice.
Justice Kennedy, again, did this the most unambiguously. “Even a regulation neutral on its face,” he wrote, “may be content based if its manifest purpose is to regulate speech because of the message it conveys.”101 Because he saw the must carry provision as facially neutral, Kennedy framed the issue as whether the provision nonetheless was constitutionally suspect because of an underlying content based purpose—in this case, to promote the favored speech of local broadcast stations over the disfavored speech of cable providers.102 After examining the evidence presented, he found no such purpose. Congress’s “overriding objective,” he determined, was not to favor any viewpoint but rather to preserve access to free television programming.103 Consequently, he applied only a weak form of intermediate review.104

Justice O’Connor’s dissent, joined by Justices Scalia, Thomas, and Ginsburg, argued (as had Justices Scalia and Thomas in Hill) that the must carry provision was facially content based.105 The facial classification they saw took the form of findings enacted by Congress as part of the legislation. These findings touted the values of “diversity” and “localism” in cable programing.106 The dissenting justices read these terms as embodying a preference for particular types of speakers, and therefore as legally meaningful content based distinctions.107 As in Hill, the dissenters argued that the presence of any such distinction on the face of the statute automatically warranted strict review.108

Because they saw the law as facially content based, the dissenters did not need to directly address the question of whether evidence of an inappropriate legislative purpose also would warrant heightened review, even in the absence of a facial classification. Justice O’Connor’s analysis, however, invites this conclusion. In explaining why the types of facial distinctions found in the law should automatically trigger heightened review, she focused on the evidentiary value of improper purposes such distinctions embody, even when they appear benign.109

Generally applicable laws (those that do not draw any speech or speaker related classifications on their face), she wrote, are “poor tools” for controlling public debate.110 In contrast, laws that do single out particular speakers are “substantially more dangerous” precisely because they are good evidence of viewpoint discrimination, even when they do not draw explicitly content-based distinctions.111 In other words, even innocent appearing facial classifications should trigger stricter review because they are reliable warning signs of improper legislative purposes. Under this reasoning, facial classifications are always sufficient to trigger such review, but this does not mean they are always necessary, particularly if other reliable evidence of improper purposes is available.112

PART II

Part I illustrates that viewpoint discrimination doctrine is an appropriate vehicle through which to challenge laws restricting voter participation, and that facial neutrality does not immunize such a law from heightened review when a Court has reason to suspect that the law in fact has a viewpoint discriminatory purpose. The cases discussed in Part I illustrate this latter point, showing how concerns about underlying legislative purposes animate the way the Court applies its content-based/content-neutral distinction. These cases do not, however, explore in detail the type of evidence of improper purposes courts consider relevant to triggering heightened review, or how a court should proceed when such evidence is present.

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101 Id. at 645.
102 Id. at 659–60. Kennedy also was very explicit on this point in an earlier case, Burson v. Freeman, 504 U.S. 191. In Burson, Justice Kennedy wrote that “discerning the justification for a restriction of expression” is not always straightforward. In some cases, he wrote, “a censorial justification will not be apparent from the face of a regulation which draws distinctions based on content, and the government will tender a plausible justification unrelated to the suppression of speech or ideas.” In such cases, Kennedy argues that strict scrutiny functions as an mechanism through which to detect improper justifications in an objective way, by testing whether the claimed justification is in fact an accurate description of the purpose and effect of the law.” Id. at 213. 103 Turner Broadcasting Sys. Inc., 512 U.S. at 646. 104 Id. at 636. 105 Id. at 676. 106 Id. at 676–77. 107 Id. at 679. 108 Id. at 680. 109 Id. at 677 (“These provisions may all be technically severable from the statute, but they are still strong evidence of the statute’s justifications.”). 110 Id. at 676. 111 Id. 112 Id. This conclusion is confirmed by Justice O’Connor’s acknowledgement in her dissent that not all laws that draw speaker-based classifications need be subject to heightened review, but only those that are “genuinely justified without reference to content.” Id. See also Clingman v. Beaver, 544 U.S. 581 (2005).
Building off of existing case law, this Part takes that next step, arguing that when sufficient, objectively ascertainable evidence of an underlying improper legislative purpose is present, the Court should respond by imposing a burden shifting mechanism that requires the state to show a more precise fit between the challenged law and its offered neutral justifications. The rationale for this approach is that the presence of improper purposes nullifies the presumption of constitutionality a state law otherwise would enjoy. Its effect is to increase the applicable standard of review by putting the state to its proof.

It is worth returning at this point to then-professor Kagan’s exploration of the ways in which existing First Amendment doctrine already works to ferret out improper governmental purposes.113 Kagan notes that the most pressing concern in any doctrine turning on a determination of governmental motives is the now well-documented difficulty associated with judicial efforts to ascertain and give legal meaning to the collective intentions of a legislative body (or even the “true” intentions of individual legislators).114 Given this, Kagan argues, the better approach in such cases is not to rely on such assessments at all, but rather to use indirect, objective signals (objectively ascertainable indicia) to flag situations in which there is a high likelihood that improper legislative purposes are present, and then adjust presumptions and rebuttable burdens of proof accordingly.115 Christopher Elmendorf has advocated for a similar approach,116 as did several of the current justices, in the campaign financing context, in Randall v. Sorrell.117

Existing law offers ample models that can be used for fleshing out this type of scheme.118 This Part explores those approaches in several different issue areas, then brings the discussion back into the realm of election law by illustrating how existing election law cases provide a variety of objectively ascertainable indicia the Court can use as evidence of voter viewpoint discrimination in the context of evaluating laws restricting voter participation.

None of the cases discussed below are directly on point. The first cases, Employment Division v. Smith and Church of the Lukumi Babalu Aye, Inc. v. Hialeah, involve judicial review of legislation, but arise under the First Amendment’s Free Exercise Clause, not its speech or association provisions. The next set, Washington v. Davis, Arlington Heights v. Metro Housing Corp., and the more recent “racial gerrymandering” cases, also involves direct review of legislation, but contains race cases arising under the Equal Protection Clause, not the First Amendment. The final group, the patronage hiring cases and Board of Education v. Pico, arise under the speech provisions of the First Amendment and involve viewpoint discrimination, but involve judicial review of executive rather than legislative decisions.

While the particular doctrines in these cases vary in detail, all have two important things in common: 1) they avoid the quagmire of attempting to ascertain subjective legislative intentions by relying instead on indirect, objectively ascertainable indicia as evidence of improper legislative purposes; and 2) the presence of such evidence does not render the law per se unconstitutional, but rather triggers either stricter scrutiny or a burden shifting mechanism, both of which have the effect of requiring the state to show a tighter fit between its law and the neutral justifications purportedly supporting it. These cases thus provide a roadmap showing how the Court can, if it chooses, create a judicially manageable standard by which to evaluate claims of voter viewpoint discrimination in election law cases.

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113Kagan, at 414 (suggesting this type of mechanism be used to spot improper legislative purposes not evident on the face of the law being challenged).
115See id. at 442. See also Tokaji, First Amendment Equal Protection, 101 Mich. L. Rev. at 2456–58 (making the same point in regard to the use of procedural requirements to prevent viewpoint based restrictions from being imposed behind the “veil of official discretion” and “post hoc rationalizations.” Justice O’Connor, writing in Clingman v. Beaver, 544 U.S. 581 (2005), made the same point: the point of Burdick’s burden shifting regime, she wrote, was to determine whether the challenged law was enacted for exclusionary or anticompetitive purposes. Such laws, she implied, would not warrant a presumption of constitutionality and thus should be subject to more rigorous review. Id. at 602. See also Burson, 504 U.S. at 213 (Kennedy concurring, and noting that the compelling interest test is an objective way of ascertaining whether the state’s claimed reasons for a law are in fact the real reasons.”).
118It is when the Court foregoes these model and responds to concerns about improper legislative purposes with more absolutist tests that its doctrine becomes the most untenable. See Edwards v. Aguillard, 482 U.S. 578 (1987) (Justice Scalia, dissenting).
A. Objective indicia and improper purposes in existing doctrines

1. The Free Exercise Clause. In Employment Division v. Smith, the Court held that neutral, generally applicable laws that did not target religious practices would not be subjected to heightened review under the Free Exercise Clause. Justice Scalia, writing for the majority, noted that the Free Exercise Clause, like the Free Speech Clause, requires the Court to distinguish between laws having as their “object” the restriction of religious practice from those which merely have the “incidental effect” of imposing such restrictions. After Smith, only the former would be subject to rigorous judicial review.

In Church of the Lukumi Babalu Aye, Inc. v. Hialeah, the Court, applying the rule announced in Smith, had to decide what it meant to say that a generally applicable law targeted a religious practice. Lukumi involved an animal sacrifice ordinance enacted by the City of Hialeah. The ordinance was passed amidst public outrage over the ritualistic animal sacrifices engaged in by followers of the Santeria religion, which included a growing number of Afro-Caribbean immigrants. The ordinance itself did not mention the Santeria religion, but was riddled with exemptions and limitations having the effect of protecting almost all existing slaughterhouses, as well as the ritualistic practices used by kosher butchers.

The question presented to the Court in Lukumi was whether the object of the ordinance was the Santeria’s religious practice. If so, the ordinance would be subject to heightened review under Smith. As in Hill and Turner, the analysis turned on whether an admittedly facial restriction was the type of content based classification raising constitutional concerns. In this case, the challengers argued that the law was not facially neutral because it was textually limited to sacrificial or ritualistic animal killings. The Lukumi Court acknowledged that the words “sacrifice” and “ritual” can have religious connotations, but did not consider that fact alone sufficient to trigger heightened review. Instead, the Court went on to determine whether the facial categorization was the type of content based classification that warranted heightened review. Because contemporary uses of the words “sacrifice” and “ritual” have secular meanings as well as religious origins, the Court declined to find the law facially content based. That did not end the Court’s inquiry, however. The Court went on to note that facial neutrality was not determinative, and that the Free Exercise Clause “forbids subtle departures from neutrality” as well as “covert suppression” of religious beliefs. The Court was explicit on this point, noting that there are “many ways” of demonstrating that the “object or purpose” of a law is to target religion, and that “official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality.”

To determine if the ordinance, despite its facial neutrality, in fact targeted the Santeria religious practice, the Court explored the circumstances in which the ordinance was enacted. In doing so, the Court again looked at objectively ascertainable evidence to determine the actual purpose of the law. Here, the adverse impact on a particular group, the openly expressed hostility of the city council members to the Santeria religion, the exemptions for the religious practices of other groups, and the use of

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120. Id.
121. Id. at 878.
122. Id. at 524, 526–27.
123. Id. at 536.
124. Id. at 546–47.
125. Interestingly, Justice Scalia and Thomas joined this part of Justice Kennedy’s majority opinion, although they declined to join a later part of the opinion making a similar point. The part of the opinion not joined drew on the Court’s Equal Protection jurisprudence. In that part, Justice Kennedy, citing Arlington Heights v. Metro. Hous. Dev. Corp, 429 U.S. 252 (1977), and Pers. Adm’r of Mass. v. Feeney, 442 U.S. 256, 279, n. 24 (1979) (discussed below) stated “[h]ere, as in equal protection cases, we may determine the city council’s object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision-making body. These objective factors bear on the question of discriminatory object.”
126. Lukumi, 508 U.S. at 533.
127. Id.
128. Id. at 534.
129. Id. at 521. In First Amendment cases, the Court frequently uses statutory exceptions as evidence that a law should be treated as content based and subjected to heightened review. See City of Ladue v. Gilleo, 512 U.S. 43 (1994), Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), and Carey v. Brown, 447 U.S. 455 (1980).
words such as “sacrifice” and “ritual” all rendered the law suspect.\textsuperscript{131}

Given this evidence of a suspect purpose, the Court, explicitly drawing on its free speech jurisprudence,\textsuperscript{132} determined that the ordinance was not neutral, but instead targeted religion because it was enacted “because of” not merely “in spite of” its effect on the Santeria religious practices.\textsuperscript{133} Consequently, the Court applied strict scrutiny, and went on to hold that the ordinance was both over and under inclusive relative to the City’s non-suspect purposes.\textsuperscript{134} As such, it was not narrowly tailored and was invalid.\textsuperscript{135}

2. The Equal Protection Clause. The Court has for some time not only permitted but required proof of improper legislative purpose as a necessary component of discrimination claims brought under the Equal Protection Clause.\textsuperscript{136} It has been the norm in constitutional race discrimination cases since 1976, when the Court held that challengers bringing claims of racial discrimination under the Equal Protection Clause must demonstrate both that the challenged law had a discriminatory effect and was enacted for a discriminatory purpose.\textsuperscript{137} A discriminatory effect can in some situations be evidence of a discriminatory purpose, but the improper purpose is a distinct, constitutionally required component of the claim.\textsuperscript{138}

If an improper purpose is present, it renders a law constitutionally suspect even if it is not the legislature’s sole, or even primary, purpose. Like Professor Kagan’s explanation of why the Court’s search for improper legislative purposes should rely on objectively ascertainable evidence rather than subjective legislative intentions, the Court in Arlington Heights v. Metro. Housing Development,\textsuperscript{139} noted the problems with attributing a single subjective purpose to a multi-member legislative body. “Rarely,” the Court said, “can it be said that a legislature or administrative body…made a decision motivated solely by a single concern, or even that a particular purpose was the “dominant” or “primary” one.\textsuperscript{140} Proof that the legislature acted with a discriminatory purpose does not therefore nullify the law—other, legitimate, purposes may also have been relevant. Instead, the Court said, evidence of a discriminatory purpose removes the presumption of constitutionality ordinarily enjoyed by legislative acts and thereby puts the state to its proof through the application of heightened review.\textsuperscript{141} In race discrimination cases, this heightened review is operationalized through a “but/for” burden-shifting test. Once the challenger has raised sufficient evidence that an improper purpose was in play, the burden shifts to the state to show that it would have taken the same action even without the constitutionally suspect reason.\textsuperscript{142}

Cases like Arlington Heights also make clear that evidence of a racially discriminatory purpose is not

\textsuperscript{131}Lukumi, 508 U.S. at 534–35, 541. The Court’s comments about the adverse effect on a particular group are notable. “Apart from the text,” Justice Kennedy wrote, “the effect of a law in its real operation is strong evidence of its object. To be sure, adverse impact will not always lead to a finding of impermissible targeting. For example, a social harm may have been a legitimate concern of government for reasons quite apart from discrimination. [citations omitted]. The subject at hand does implicate, of course, multiple concerns unrelated to religious animosity, for example, the suffering or mistreatment visited upon the sacrificed animals and health hazards from improper disposal. But the ordinances when considered together disclose an object remote from these legitimate concerns.” Id. at 535.

\textsuperscript{132}Id. at 543.

\textsuperscript{133}Id. at 540–41.

\textsuperscript{134}Id. at 546–47.

\textsuperscript{135}Id.

\textsuperscript{136}Mobile v. Bolden, 446 U.S. 55, 66 (1980) (“This burden of proof is simply one aspect of the basic principle that only if there is purposeful discrimination can there be a violation of the Equal Protection clause of the Fourteenth Amendment.”).

\textsuperscript{137}Washington v. Davis, 426 U.S. 229 (1976). See also Arlington Heights, 429 U.S. 252. For a discussion of why intents tests and effects tests are more similar than they may initially appear, see Daniel Ortiz, The Myth of Intent in Equal Protection, 41 STAN. L. REV. 1105 (1989). Ortiz also describes the ways in which intent is used in constitutional doctrine to allocate burdens of proof, which resonates with the approach suggested here.

\textsuperscript{138}See also Miller v. Johnson, 515 U.S. 900, 913 (1995) (“We recognized in Shaw that, outside the districting context, statutes are subject to strict scrutiny under the Equal Protection clause not just when they contain express racial classifications, but also when, though race neutral on their face, they are motivated by a racial purpose or object”). The Court extended this reasoning to claims of gender discrimination in Pers. Admin. of Massachusetts v. Feeney, 442 U.S. 256 (1979).

\textsuperscript{139}429 U.S. 252 (1977).

\textsuperscript{140}Arlington Heights, 429 U.S. at 265.

\textsuperscript{141}Id. at 266. Heightened review often is used in this way to “smoke out” illegitimate purposes by demonstrating that the classification drawn does not actually serve the state’s asserted legitimate purpose. See Peter J. Rubin Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny after Adarand and Shaw, 149 U. PA. L. REV. 1, 10 (2000) (discussing Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), and Shaw v. Reno, 509 U.S. 630 (1993)).

\textsuperscript{142}Feeney, 442 U.S. at 279 (“[D]iscriminatory purpose... implies more than intent as volition or intent as awareness of consequences. It implies that the decision maker...selected or reaffirmed a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects”).
required to be present on the face of the challenged law, but can be demonstrated in other ways. A disproportionate impact unexplainable on grounds other than race is one fact that will render a facially neutral law suspect, but the Arlington Heights Court was clear that other, more indirect and circumstantial evidence, also must be considered. In Arlington Heights, the Court itemized the types of evidence that would be considered relevant. While not purporting to be exhaustive, the Court noted that this would include the historical background of the dispute, the specific sequence of events leading up to it, the legislature’s departure from its normal procedures, the legislative history of the law, and statements made during debate about its enactment.

The Court indicated in Washington v. Davis that the reasoning used in race discrimination cases generally also would apply to cases asserting racial discrimination in election related contexts. The Court has followed through on this, requiring proof of a discriminatory purpose in legislative districting cases decided under the Fourteenth Amendment (Mobile v. Bolden) and the Fifteenth Amendment (Gomillion v. Lightfoot). In these areas, then, non-facial evidence of an underlying improper legislative purpose is not just permitted but is positively required to support the asserted constitutional claim.

More recently, a version of this reasoning has been used in the so-called “racial gerrymandering” cases. The claim in these cases is that the legislature improperly relied on racial considerations when drawing majority-minority legislative districts. Recognizing that legislators drawing district lines inevitably are aware of and take into consideration the racial composition of the districts being drawn, Justice O’Connor, writing for the majority, was hesitant to apply strict review simply because race had played some role in the districting decision. Instead, she searched for objective indicators showing that the use of race had gone “too far.”

This required looking behind a facially neutral districting scheme to determine what role racial considerations in fact played in how the district lines were drawn. Justice O’Connor’s way of managing the problems this presented was to keep the trigger for strict scrutiny tightly focused on the shape of the challenged district. Under her test, only districting decisions resulting in “bizarrely” shaped districts would be judicially presumed to rely too much on racial considerations. Only those decisions, therefore, were subject to strict scrutiny, with the burden of defending bizarrely shaped districts falling to the state to show that its use of race was narrowly tailored to meet a compelling purpose.

Later cases went further. Miller v. Johnson made clear that the shape of the district was merely one way to trigger strict scrutiny. The key question, Justice Kennedy wrote in Miller, was the underlying question of legislative purpose: was race the “predominate factor” in how the lines were drawn? If so, then the law would be treated as a racial classification and strict scrutiny would be appropriate, regardless of the shape of the district. Justice Kennedy’s opinion thus made clear that the shape of the district (the focus of Justice O’Connor’s test) was merely evidence of the real constitutional concern, which was the legislative purpose behind the law. Among the additional things the Miller Court said could evidence an improper legislative purpose were the effects of the law in operation, the identity and agendas of groups supporting or opposing the law, the drafting history of the law, and the extent to which the legislature enacting the law had deviated from standard
districting principles. Justices Scalia and Thomas, who have objected to the use of such evidence in other areas, expressed no such concerns here.

The point is not that these cases were correctly decided; they are controversial for many reasons. Rather, the point is that in these cases the Court, including its most conservative justices, agreed without hesitation that facial neutrality does not immunize a statute from heightened review when there is sufficient non-facial evidence of an underlying improper legislative purpose. The Miller Court was quite explicit on precisely this point: “The plaintiff’s burden is to show, either through circumstantial evidence of a district’s shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”

When such a purpose is adequately demonstrated, shifting the burden of proof to the state to justify its law under more rigorous judicial review is appropriate and, indeed, constitutionally required.

3. Political patronage cases. The Court has long held that conditioning public employment on political preferences or affiliations violates the First Amendment, and political patronage schemes are reviewed under the strictest scrutiny. As with voter participation restrictions, governmental employers rarely (today) announce that they are hiring, firing, or otherwise disadvantaging an employee because of the employee’s constitutionally protected political speech or affiliations. This does not immunize such decisions from rigorous judicial review. Instead, the Court has developed a burden shifting mechanism designed to ferret out illicit viewpoint discrimination in government employment decisions.

Under the prevailing standard, a governmental employee or failed job applicant must show that he or she was engaged in a constitutionally protected activity and that the activity was a motivating factor in the adverse employment action. The burden then shifts to the state to demonstrate (under a preponderance of the evidence standard) that the action would have been taken even if the employee had not engaged in the disfavored First Amendment activity. So, for example, in Mt. Healthy School District v. Doyle, a teacher challenging his dismissal needed to first show that the conduct he had engaged in (in that case, speech critical of a variety of school policies) was constitutionally protected and that it had been a factor in the school board’s decision not to renew his contract. At that point, the burden shifted to the board to show that it would have made the same decision even in the absence of the employee’s constitutionally protected speech.

As in Arlington Heights, Shaw, and Miller, the Court in Mt. Healthy considered what effect partial reliance on a constitutionally prohibited purpose should have on the constitutionality of the board’s decision. The lower court had held that “substantial” reliance on an improper purpose rendered the board’s decision per se invalid. Justice Rehnquist, writing for the majority, disagreed. The difficulty with the lower court’s test, he wrote, is that it would deem an employment decision unconstitutional even if the same decision would have been made in the absence of the prohibited reason. The appropriate test, he wrote, would instead shift the burden of proof back to the state once reliance on a prohibited reason was shown, thereby allowing the state to show that it would have taken the action anyway, but requiring it to make that showing without the presumption of constitutionality it would have enjoyed absent reliance on the constitutionally suspect reason.

The patronage hiring cases, like the racial gerrymandering cases, are controversial. Like those cases (indeed, like all the cases discussed in this Part) they also generate a fair amount of doctrinal disagreement. There is disagreement about

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154 Id. at 921.
155 In fact, as Reva Siegel has noted, they appear in this context, in direct contrast to equal protection claims brought by members of minority groups in cases like Arlington Heights, to treat what they see as the racially segregating effect of the law as virtually irrefutable evidence of the improper legislative purpose. Reva B. Siegel, Forward: Equality Divided, 127 Harv. L. Rev. 1 (2013).
156 The dissenters in Miller did not argue that looking beyond the face of the statute was inappropriate. Rather, the disagreement between the majority and the dissenters was the extent to which the use of race to enhance minority group representation was constitutionally suspect, regardless of how such use was shown. Miller, 515 U.S. at 929.
157 Id. at 916.
158 Mt. Healthy, 429 U.S. 274.
159 Id. at 276.
160 Id. at 287.
161 Id.
162 Id.
163 Id.
the precise test that should be applied,165 the type of individuals who should be protected by it,166 and the adverse actions those individuals should be protected against.167 But these disputes all are about whether a particular purpose is or is not improper in a particular realm.168 They are not about whether a burden-shifting test is appropriate once the challenger has shown that the government did indeed act at least in part for an improper purpose, regardless of how such purposes are defined.

4. Board of Education v. Pico. Another example of using a burden shifting mechanism to cope with constitutionally suspect purposes lurking behind facially neutral actions is found in Board of Education v. Pico.169 Pico involved a local school board’s decision to remove numerous books from the school library after parental complaints.170 The board claimed it had absolute discretion to remove from the library any materials it deemed educationally unsuitable, for any reason.171

The Court disagreed, holding that the constitutionality of the board’s actions depended on why it removed the books.172 School boards have a great deal of discretion in making decisions about the educational appropriateness of course materials and library books, but that discretion, the Court held, “cannot be exercised in a narrowly partisan or political manner.”173 Consequently, if the purpose of the removal decision was to deny access to the books because of disagreement with the ideas expressed in them, then the removal was constitutionally suspect.174

Citing Mt. Healthy, the Court adopted the same type of burden shifting test used in that case: if the challenger could show that the constitutionally suspect purpose was a decisive factor in the board’s decisions, then the burden of proof would shift to the board to show, again by a preponderance of the evidence, that it would have made the same decision even absent the constitutionally prohibited reason.175

The Pico Court then went further, and explored the type of evidence that would meet the challenger’s initial burden. The Court considered the circumstances surrounding the board’s action, including the fact that the board’s initial justifications for the decisions (announced in a press release) included assertions that the removed books were “anti-American” and “offensive” to Americans in general.176 The Court also noted that the Board appointed a committee to evaluate the books, but then disregarded the committee’s recommendations. Finally, the Court was concerned that the board ignored its own established procedures for handling parental complaints of the type that triggered the removals.177

5. Summary. As noted above, none of the doctrines discussed in this Part are perfect templates for a voter viewpoint discrimination challenge to restrictive election laws. They arise in different issue areas, they use different burden shifting mechanisms or standards of review, and they are searching for different types of suspect purposes. Nonetheless, there are three lessons to be culled from the cases reviewed in this section.

First, the Court routinely looks behind facially neutral laws supported by proffered neutral justifications to determine whether the law has a constitutionally improper purpose. Four of the Court’s currently sitting Justices have explicitly endorsed this approach in First Amendment speech cases, while others have used similar approaches (with more or less transparency) in other areas.

Second, the finding that an improper legislative purpose was present is rarely outcome determinative. Instead, it functions to remove the general presumption

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168 See, e.g., Chief Justice Burger, dissenting in Elrod v. Burns, 427 U.S. 347 (1976), on the basis that employees in the Cook County Sheriff’s department have no right to not be fired because of their political affiliations because political patronage is a traditionally accepted way of maintaining the strength of political parties.
170 Id. at 857.
171 Id. at 858.
172 The majority opinion combined this idea of improper purposes with what it framed as a students’ right to receive information. Justice Blackmun’s concurring opinion, in contrast, limited the potential scope of the majority opinion by focusing solely on the question of unconstitutional purposes. School officials, he argued, could remove books for any number of reasons, but they could not do so because of disagreement with the ideas expressed in them. By keeping the scope of the claimed right firmly on the “purposeful suppression of ideas,” Justice Blackmun argued, he made the test more judicially manageable than the “right to access information” flirted with by the majority and attacked by the dissenters. Pico, 457 U.S. at 880–81.
173 Id. at 870.
174 Id. at 871.
175 Id. at 870.
176 Pico, 457 U.S. at 873.
177 Id. at 874–75.
of constitutionality enjoyed by legislative acts by triggering more rigorous judicial review. This heightened review sometimes takes the form of a burden-shifting test, requiring the state to provide additional evidence (often using a preponderance of the evidence standard) that the law actually fixes the problem the state claims it was enacted to address. At other times the evidence of improper purpose triggers more traditional strict scrutiny review. Even in these cases, however, the trigger does not function in an outcome determinative way. Instead, the strict scrutiny used by the Court in such cases appears in practice to give the state somewhat more leeway than traditional strict scrutiny, thereby allowing the state a genuine chance to defend its law as truly necessary to serve its legitimate (as opposed to its illegitimate) purposes. This is important, in that this burden shifting mechanism avoids the complex questions that arise in cases like Vieth v. Jublierer (discussed below) when the Court tries to determine how much reliance on an improper purpose is “too much”; and Edwards v. Aguillard when the Court ignores the reality of mixed legislative motives and declares instead that certain types of legislative purposes are outcome determinative if present.

Finally, in determining whether an improper purpose is or is not present, the Court has paid little attention to the subjective motivations of individual legislators. Instead, the justices avoid the difficulties associated with that approach by focusing instead on objectively ascertainable indicia showing that improper legislative purposes may be in play. The evidence the Court considers relevant in determining if such purposes are present depends on the specific claim asserted, but there are some commonalities among the things the Court has considered, such as deviations from existing procedures, the expected effects of the law in operation, the contextual history of the dispute giving rise to the law, and public statements made by lawmakers about the law being challenged.

B. Objective indicia and legislative purposes in election law cases

A test by which to evaluate a voter viewpoint discrimination challenge to a facially neutral law supported by proffered neutral justifications can build on these commonalities. Such a test would not look for the individual or subjective intentions of the enacting legislators, but rather for objectively ascertainable indicia of an underlying improper purpose. If such indicia indicate a real risk that the legislation being challenged rests on a viewpoint discriminatory (and therefore constitutionally suspect) purpose, the Court can, again building on the above cases, justify removing the usual presumption of constitutionality enjoyed by non-suspect legislation and impose a more rigorous standard of review—one that puts the state to its proof while still allowing the state to demonstrate a genuine need for the challenged legislation.

This section identifies the type of objectively ascertainable indicators of suspect legislative purposes, drawn from existing election law cases, that courts could rely on in voter viewpoint discrimination challenges to laws restricting voter participation.

1. Self-dealing. The Court in deciding election law cases often has expressed a concern about legislative self-dealing. This is particularly so in campaign finance cases, although the Court also has

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178 See supra discussion at 33. See also Burson, 504 U.S. 191, (applying strict scrutiny to a “campaign free zone” prohibiting campaign related speech in or near polling places but upholding the restriction as supported by a compelling state interest of protecting voters from “intimidation”).

179 541 U.S. at 297–98.


181 The approach developed here is similar to that developed by other scholars working in the Equal Protection context. Richard Hasen argues that courts should read the Equal Protection Clause as requiring a burden flipping test similar to the one developed here. Under his approach, a legislature adopting a law burdening one party’s voters would be required to produce “substantial evidence” that the law is supported by non-partisan goals and is “closely connected” to advancing those goals. Hasen, Race or Party? 126 Harv. L. Rev. F. at 72. Hasen takes this approach in part to avoid what he sees as the unworkability of a test based on teasing out legislative intentions, which he equates with a judicial inquiry into what lies within the “legislators’ hearts.” Id. at 71. Although working in the Equal Protection context, Christopher Elmendorf, also working under the Equal Protection Clause, uses “red flags” as indicators of improper legislative purposes, noting that the Anderson-Burdick test functions at least in part as a judicially manageable way to tease out improper legislative purposes, and that judicial suspicion of underlying improper legislative motives are one thing that in fact triggers stricter judicial scrutiny. Christopher S. Elmendorf, Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities, 156 U. Pa. L. Rev. 313, 347 (2007).

expressed concerns about self-dealing in the ballot access cases, and political primary cases.

Imposing burdens on voters because of legislative expectations about how the most burdened voters are likely to vote raises similar concerns that legislators may be engaged in electoral self-protection. The Court explicitly recognized this as a concern in Clingman v. Beaver. In Clingman, Justice O’Connor, in an opinion joined by Justice Breyer, wrote that the courts have an important role in reviewing electoral regulations because the legislators who enact such laws are not “independent or neutral” arbiters. Legislators, she wrote, “presumably have an incentive to shape the rules of the electoral game to their own benefit.” Likewise, in Tashjian v. Republican Party of Connecticut, the Court expressed suspicion of voter participation restrictions that appeared to have the effect of entrenching the power of a political party enjoying transient power. It would be consistent with these cases to treat as raising a red flag voter participation restrictions that are generally expected to benefit one party at the expense of the other.

2. Context. The Court frequently has used the context in which a law was enacted as evidence of the law’s underlying purpose. Contextual details the Court has deemed relevant include deviation from standard practices, the background of the dispute giving rise to the challenged law, and public comments made by supporters and opponents of a law during debate about it.

Storer v. Brown brought this attention to context into the election law realm. In Storer, the Court noted that determining when an election regulation violates the Constitution requires considerations of all the “facts and circumstances” lying behind the law. Deviation from a decision-maker’s normal practices, discussed by the Court in cases like Shaw and Miller, is one type of contextual factor courts may deem relevant in evaluating voter participation restrictions. Other relevant contextual facts could include the adoption of restrictions with presumed partisan effects in the lead up to a closely contested election, and the adoption or development of laws in ways that short-circuit established legislative methods, or disregard expert advice.

3. Outliers. In Randall v. Sorrell, a case challenging Vermont’s exceptionally low individual contribution limits, Justice Breyer indicated that a law’s status as an “outlier” among other states should be treated as a red flag (or “danger sign”) that the law was not really necessary to advance the state’s asserted interest. The constitutional relevance of the unusual shape of a district, discussed at length by the Court in Shaw and Miller, depends on a similar concern: when a state chooses to solve a common problem in an uncommon way, there may be reason to suspect its purpose in doing so is something other than meets the eye. In such cases, a closer judicial look may be warranted.

4. Discriminatory effects. Discriminatory effects are commonly treated as evidence of improper legislative purposes, particularly when those effects are knowable or expected in advance. As noted above, using discriminatory effects as evidence of a discriminatory purpose has become the constitutional...
norm in Equal Protection cases, and the Court has expressed similar concerns about the discriminatory effects of election regulations.\textsuperscript{200}

In \textit{Anderson}, the Court noted that it is “especially difficult” for the state to justify a voting restriction that “limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status.”\textsuperscript{201} In \textit{Storer}, the Court instructed the lower court on remand to determine whether the challenged regulation in effect imposed an insurmountable burden on independent candidates seeking ballot access.\textsuperscript{202} More recently, in \textit{Clingman}, Justice O’Connor listed a law’s discriminatory effect on opposing parties as a reason for more serious judicial review.\textsuperscript{203} Justice Kennedy likewise has observed that serious First Amendment concerns arise where a state enacts a law that has the purpose and effect of “subjecting a group of voters or their party to disfavored treatment by reason of their views.”\textsuperscript{204}

5. Exceptions for favored viewpoints. Cases like \textit{Lukumi Babalu Aye}\textsuperscript{205} show deep judicial suspicion of purportedly neutral laws that nonetheless exempt presumptively favored viewpoints. Much of the Court’s First Amendment based over- and under-breadth doctrine rests on similar concerns: when favored speech is exempted from the challenged prohibition, even when done for allegedly neutral reasons, the Court expresses concern that the law may in fact have a viewpoint discriminatory purpose.\textsuperscript{206}

In the election law realm, this red flag could be triggered by laws exempting certain types of voters or voting methods, particularly when those voters or mechanisms are strongly associated with one party or the other (for example, the exemption from most voter ID laws of absentee voting despite the fact that fraud is more prevalent in that type of voting than it is in-person voting practices covered by the ID laws).\textsuperscript{207}

These four, objectively ascertainable indicia of an underlying, constitutionally suspect, viewpoint discriminatory legislative purpose—contextual facts about the law’s enactment; the law’s status as an “outlier” among those adopted by similarly situated states; the law’s known or expected viewpoint discriminatory effect; and the inclusion within the law of exceptions for presumptively favored viewpoints—can provide the backbone of a judicially manageable inquiry into whether a facially neutral law was nonetheless enacted for a viewpoint discriminatory purpose. None of them require judicial inquiry into the subjective motives of individual legislatures, nor are they susceptible to the usual concerns about projecting collective intent onto multi-member legislative bodies.

Using these objective indicia in the way suggested here, to tease out improper legislative purposes and flip the otherwise applicable burdens of proof, has the additional advantage of going some way toward alleviating the concern expressed by the Court (most notably in \textit{Vieth v. Jubelier}\textsuperscript{208}) about its ability in the election law realm to distinguish routine legislative pursuit of partisan goals from those that go “too far” and thereby render the law unconstitutional. Unlike in the districting cases, no one (yet) has put forth an argument that it is constitutionally permissible to enact voting restrictions for the purpose of skewing the electorate to favor one political party over the other.\textsuperscript{209} Voter viewpoint discrimination cases, therefore, are more correctly analogous to the equal protection, free exercise, and political patronage cases.

\textsuperscript{200}For the most obvious example, see \textit{Gomillion}, 364 U.S. 339, discussed supra at note 146.

\textsuperscript{201}\textit{Anderson}, 460 U.S. at 793. See also \textit{Gordon v. Lance}, 401 U.S. 1 (1971) (rejecting a challenge to a supermajority requirement in a law governing referendums because no particular group of voters benefited from it), and \textit{Lubin v. Panish}, 415 U.S. 709 (1974) (striking down filing fees that would disproportionately affect candidates expected to appeal to low income voters).

\textsuperscript{202}\textit{Storer}, 415 U.S. at 740. See also \textit{Williams v. Rhodes}, 393 U.S. 32 (1968) (applying heightened review to a law challenging a ballot access rule that made it almost impossible for non-major party candidates to be ballot qualified).

\textsuperscript{203}\textit{Clingman}, 544 U.S. at 2045.


\textsuperscript{205}364 U.S. 339, 342 (1960).

\textsuperscript{206}\textit{Turner}, 512 U.S. 622.


\textsuperscript{208}\textit{Vieth}, 541 U.S. at 311.

\textsuperscript{209}Janai Nelson makes this point in relation to felon disenfranchisement laws. Nelson, \textit{Felon Disenfranchisement}, 65 Fla. L. Rev. at 112.
discussed above, in that intentional viewpoint discrimination is presumptively improper.210

As such, the relevant doctrinal inquiry when such indicia are present, then, is not the difficult question of whether a constitutionally acceptable consideration was given too much weight (Vieth) but rather what the consequences should be of legislative reliance on a constitutionally unacceptable consideration.211 The cases discussed above provide a clear answer: in such situations, the legislature forfeits the presumption of constitutionally its laws usually enjoy and must demonstrate under a more skeptical judicial eye that the content neutral, non-discriminatory, constitutionally proper justifications offered in defense of the challenged law are in fact necessary to advance the law’s non-suspect purpose.

CONCLUSION

The First Amendment’s prohibition on viewpoint discrimination provides a promising and analytically robust way for courts to approach future challenges to voter participation restrictions. The First Amendment prohibits voter viewpoint discrimination in laws restricting voter participation, and facially neutrality does not protect such laws from judicial inquiry into whether they in fact rest on constitutionally suspect purposes. Doctrine mechanisms to ferret out improper purposes, moreover, abound in current doctrine, as do guidelines about what courts should do when evidence of such purposes is found. A well structured, First Amendment based, voter viewpoint challenge can readily be built from these doctrines.

A voter viewpoint based approach to restrictive voting laws has several advantages. It provides a doctrinally credentialed and judicially manageable way of realizing the non-discrimination requirement already embedded in the Anderson-Burdick test. Moreover, four of the sitting justices, including Justice Kennedy, have accepted the idea—that an improper legislative purpose renders a facially neutral law supported by neutral justifications constitutionally suspect. The current Supreme Court also is notably more receptive to First Amendment claims than to traditional race discrimination claims. Those concerned with preserving or enhancing voting rights, particularly after Shelby County, may therefore as a practical matter be well served by a pivot away from Equal Protection and toward the First Amendment.

There also is an additional, more subtle advantage to this approach. It focuses judicial attention on what is more readily perceived as the genuinely important issue raised by the latest generation of restrictive voting laws: the opportunity they present to manipulate voter participation for partisan purposes. A constitutional test that directly describes and evaluates the harm caused by these laws in those terms will generate a more relevant legal doctrine, more readily understandable to those obliged to follow it.

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210See also Elmendorf, Structuring Judicial Review, 156 U. Pa. L. REV. at 372 (“Far from being the paradigm case, then, partisan vote dilution through redistricting may be distinguished as an exception to the rule, on the theory that courts had to demand more than a ‘purpose to dilute’ in this context—either because of a Frankfurterian worry about excessive judicial involvement in a domain of incessant partisan conflict, or because of judicial anxiety about proportional representing as a remedy.”).

211Justice Scalia’s opinion in Vieth is illustrative on this point. Scalia argued that a First Amendment based approach to partisan gerrymandering claims was not viable because it would require courts to determine when a legislative decision was so “substantially affected by the excess of an ordinary and lawful motive” (partisan considerations) as render it invalid. That question is very different, he wrote, than the question presented in cases such as those involving clear constitutional prohibitions (his example was race discrimination) in which courts must decide whether a legislative decision has been affected by a “rare and constitutional suspect motive.” In the latter case, unlike in the former, Scalia concedes that “courts might be justified in accepting a modest degree of unmanageability” to enforce the more clear constitutional command. Vieth, 541 U.S. at 289–90.