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## Political Participation, Expressive Association, and Judicial Review

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## Political Participation, Expressive Association, and Judicial Review

# POLITICAL PARTICIPATION, EXPRESSIVE ASSOCIATION, AND JUDICIAL REVIEW

JOSHUA S. SELLERS\*

*Increasingly novel legal conflicts over electoral participation and voting rights are on the rise. For instance, multiple aspects of Georgia’s election system have been challenged, including the state’s “exact match” policy. An Arizona law imposing harsh penalties on initiative petition circulators who fail to respond to subpoenas is the subject of an ongoing lawsuit. And a Tennessee law that strictly regulated voter registration drives was recently enjoined and ultimately repealed. As states implement unprecedented methods of election administration, courts, in turn, are tasked with determining just what the “right to vote” entails and to what extent it encompasses efforts by organizations to engage voters in the political process. This Essay explores this dynamic and considers how more intensive methods of election administration may, paradoxically, result in a broader conception of the right to vote that the First Amendment expressly protects.*

*Part I of this Essay summarizes the unresolved—and potentially dispositive—doctrinal debate over the appropriate level of judicial scrutiny to be applied to state laws implicating both voting and expressive association. Part II examines the doctrinal irresolution in the context of two recent cases, *Miracle v. Hobbs* in Arizona and *League of Women Voters v. Hargett* in Tennessee. Viewed together, these cases illustrate the contingent nature of organizations’ ability to engage voters; an ambiguity of great consequence as we approach Election 2020. Part III outlines the short and long-term political significance of whether a capacious or circumscribed conception of the right to vote in this context prevails.*

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## INTRODUCTION

A voter who believes her right to vote has been unjustifiably denied or abridged can invoke several viable legal claims.<sup>1</sup> Likewise, organizations that facilitate others' right to vote may raise similar claims when their efforts are impeded.<sup>2</sup> Such legal disputes are typically unremarkable. However, increasingly novel legal conflicts over electoral participation and voting rights are on the rise. As states implement unprecedented methods of election administration, courts, in turn, are tasked with determining just what the "right to vote" entails,<sup>3</sup> and to what extent it encompasses efforts by organizations to engage voters in the political process. This Essay explores this dynamic and considers how more intensive methods of election administration may, paradoxically, result in a broader conception of the right to vote that the First Amendment expressly protects.

Traditionally conceived, the right to vote is the right of any U.S. citizen to show up at a polling place on a legislatively determined Election Day and cast a ballot.<sup>4</sup> That basic conception, of course, vastly oversimplifies matters. For one, simply showing up is not always easy, particularly in jurisdictions where polling sites are few and far between.<sup>5</sup> Even assuming access, one's experience at a polling site will depend on the type of ballot and voting machine used.<sup>6</sup> Furthermore, even the idea of a single election day is oversimplified: many voters can cast their ballot in person prior to Election Day or participate by mail.<sup>7</sup> In some

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1. See, e.g., U.S. CONST. amends. I, XIV; Voting Rights Act of 1965, 52 U.S.C. § 10301 (2012).

2. See, e.g., U.S. CONST. amends. I, XIV.

3. See Derek T. Muller, *The Democracy Ratchet*, 94 IND. L.J. 451, 460 (2019) ("Aggressive litigant skepticism of new election laws has, in turn, put courts in a skeptical posture of new election laws.").

4. Federal statutes establish Election Day for the House of Representatives and the Senate as the first Tuesday after the first Monday in November of even calendar years and for the President and Vice President as the first Tuesday after the First Monday in November every fourth year. 2 U.S.C. §§ 1, 7; 3 U.S.C. §§ 1, 7. States and local governments, for the most part, remain free to hold their elections when they desire.

5. See LEADERSHIP CONF. ED. FUND, DEMOCRACY DIVERTED: POLLING PLACE CLOSURES AND THE RIGHT TO VOTE 8 (Sept. 2019), <http://civilrightsdocs.info/pdf/reports/Democracy-Diverted.pdf> [<https://perma.cc/9SS5-D2HY>] ("Closing polling places has a cascading effect, leading to long lines at other polling places, transportation hurdles, denial of language assistance and other forms of in-person help, and mass confusion about where eligible voters may cast their ballot."). Also, it is often difficult to travel to government agencies that register voters and issue qualifying forms of voter identification. See, e.g., First Amended Complaint for Declaratory & Injunctive Relief at 47, *Spirit Lake Tribe v. Jaeger*, No. 1:18-cv-00222 (D.N.D. Feb. 28, 2019) ("Travel to a driver's license site to obtain a qualifying North Dakota ID imposes a severe burden on Native American voters. Only 19 [driver's license (DL)] sites exist across the state, and there is not a single DL site on an Indian reservation in the state. The DL sites closest to North Dakota Indian reservations have limited hours and require eligible voters to drive . . . substantial distances in order to obtain qualifying ID.").

6. Ballots and voting machines vary greatly both in their design and in their ease of use, a point driven home by, among other notable examples, *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("This case has shown that punchcard balloting machines can produce an unfortunate number of ballots which are not punched in a clean, complete way by the voter."), and Maine's recent adoption of ranked-choice voting for both congressional and presidential elections. See Maggie Astor, *Maine Voters Will Rank Their Top Presidential Candidates in 2020*, N.Y. TIMES, (Sept. 6, 2019), <https://www.nytimes.com/2019/09/06/us/politics/maine-elections.html>.

7. See U.S. ELECTION ASSISTANCE COMM'N, 4 TIPS FOR MANAGING ALTERNATIVE VOTING METHODS 1 (Oct. 2014), [https://www.eac.gov/sites/default/files/eac\\_assets/1/28/EAC\\_4TipsForVotingMethods\\_508\\_HiRes.pdf](https://www.eac.gov/sites/default/files/eac_assets/1/28/EAC_4TipsForVotingMethods_508_HiRes.pdf) [<https://perma.cc/7YP5-KPGW>] ("Nationwide voting has slowly moved from one Election Day toward an election period of several days or weeks that can involve a variety of methods for voting.").

locations, even smartphone voting is underway.<sup>8</sup> In short, the right to vote encompasses a range of activities far exceeding the mere completion of a paper ballot in a private booth.

In addition to encompassing the activities of individuals, the right to vote also encompasses organizational activities. For instance, laws that impede the ability of political parties to encourage voter participation implicate both the First Amendment right of association afforded to parties and individuals' right to vote.<sup>9</sup> Nonpolitical party organizations that facilitate others' right to vote—e.g., The League of Women Voters and Rock the Vote—enjoy similar legal standing when their efforts are hampered. Viewed from a distance, then, a “voting ecosystem”<sup>10</sup> begins to take shape: the law entitles individuals to vote on generally equal terms with others, subject to reasonable methods of state election administration, and protects the endeavors of organizations that aid in that process.<sup>11</sup>

These basic tenets are uncontroversial as far as they go, yet on their own, fail to resolve actual legal challenges. In recent years, states have enacted, with both legitimate and pretextual justifications, laws that make it harder to vote.<sup>12</sup> Some of these laws target voters, others target organizations.<sup>13</sup> Many involve the imposition of onerous bureaucratic processes that individuals or organizations must navigate in order to comply with the law and, in some instances, avoid the prospect of criminal charges.<sup>14</sup> In response, litigants have advanced creative legal theories with the hope of expanding the definitional parameters of the right to vote.<sup>15</sup> This Essay explores whether existing voting rights doctrine can facilitate such an expansion, such that organizational rights are robustly protected.

Resolution of the organizational question requires resolution of a normative framing question: do we wish to adopt a broad conception of our voting system, one that apprehends the interrelationship between

8. See, e.g., John Dahlia, *History-Making, Mobile Voting App for Overseas Military Now in 24 Counties*, WVNEWS.COM (Sept. 25, 2018), [https://www.wvnews.com/ews/wvnews/history-making-mobile-voting-app-for-overseas-military-now-in/article\\_0402b7dd-af11-56ed-a42d-5981a214f9c0.html](https://www.wvnews.com/ews/wvnews/history-making-mobile-voting-app-for-overseas-military-now-in/article_0402b7dd-af11-56ed-a42d-5981a214f9c0.html) [<https://perma.cc/37G9-JBZQ>]; Miles Parks, *Exclusive: Seattle-Area Voters To Vote By Smartphone In 1st For U.S. Elections*, NPR (Jan. 22, 2020), <https://www.npr.org/2020/01/22/798126153/exclusive-seattle-area-voters-to-vote-by-smartphone-in-1st-for-u-s-elections> [<https://perma.cc/8VN3-CSZE>].

9. See, e.g., *Williams v. Rhodes*, 393 U.S. 23, 30 (1968) (“In the present situation the state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.”).

10. The idea of a voting or election “ecosystem” is taken from STEVEN F. HUEFNER ET AL., FROM REGISTRATION TO RECOUNTS REVISITED: DEVELOPMENTS IN THE ELECTION ECOSYSTEMS OF FIVE MIDWESTERN STATES 2 (2011) (“[W]e view the elections systems of all five states as ecosystems in which it is dangerous to tinker with one element without considering how it might affect the others.”).

11. See, e.g., *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1159 (N.D. Fla. 2012) (“Together speech and voting are constitutional rights of special significance; they are the rights most protective of all others, joined in this respect by the ability to vindicate one’s rights in a federal court.”); see also Daniel P. Tokaji, *Voting Is Association*, 43 FLA. ST. U. L. REV. 763, 763 (2016) (“What is the relationship between the First Amendment right to expressive association and the Fourteenth Amendment right to vote? It’s closer than you probably think.”).

12. See *infra* Part II.

13. See *infra* Part II.

14. See *infra* Part II.

15. See Lisa Marshall Manheim & Elizabeth G. Porter, *The Elephant in the Room: Intentional Voter Suppression* 2018 SUP. CT. REV. 213, 217 (2018) (“[N]ow that litigants no longer need to frame their arguments with one eye on Justice Kennedy, there may be more space for the maturation of legal theories to prevent voter suppression, even if those theories do not bear immediate fruit.”).

various elements of the electoral system? Consider, for example, the 2018 election cycle in Georgia, a high-profile election in which nearly four-million votes were cast, a state record.<sup>16</sup> Much of the enthusiasm was driven by a closely watched gubernatorial election between Secretary of State Brian Kemp and his Democratic opponent, former minority leader of the Georgia House of Representatives, Stacey Abrams.<sup>17</sup> Abrams was seeking to make history as the nation's first African-American female governor.<sup>18</sup>

While Secretary Kemp eventually triumphed, Abrams initially refused to concede, openly incriminating an election system riddled with flaws, many of which she accused Secretary Kemp of exacerbating.<sup>19</sup> She carried that message forward, forming an organization—Fair Fight Action—that is leading the legal fight against multiple aspects of Georgia's election system on behalf of voters.<sup>20</sup> The organization's principal lawsuit charged Georgia election officials with unconstitutionally purging eligible voters; implementing an "exact match" policy, which requires a showing of identical personal information on various government records;<sup>21</sup> unlawfully closing polling places; unlawfully denying voters access to provisional ballots; unlawfully distributing and managing absentee ballots; and maintaining an election system vulnerable to hacking.<sup>22</sup> The lawsuit claimed that these "problems in Georgia's voting system are pervasive, severe, chronic, and persistent."<sup>23</sup>

At its core, the lawsuit seeks judicial acknowledgment of a comprehensive conception of the right to vote. Its claims presume that the law entitles voters to an electoral system that is relatively easy

16. Maya T. Prabhu, *Midterm Voter Turnout Surges in Georgia*, ATLANTA J.-CONST. (Nov. 7, 2018), <https://www.ajc.com/news/state-regional-govt-politics/midterm-voter-turnout-surges-georgia/P51TgGVyRjXwcKufdXKncM> [<https://perma.cc/6ARZ-VTAR>].

17. See Richard Fausset, *How Voting Became a Central Issue in the Georgia Governor's Race*, N.Y. TIMES (Nov. 3, 2018), <https://www.nytimes.com/2018/11/03/us/politics/georgia-governor-voting-irregularities.html>.

18. *Id.*

19. Alan Blinder & Richard Fausset, *Stacey Abrams Ends Fight for Georgia Governor with Harsh Words for Her Rival*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/elections/georgia-governor-race-kemp-abrams.html> ("Although she pledged to pray for Mr. Kemp, she also uncorked a bracing indictment of his tenure as secretary of state, including the election last week. She excoriated a system, overseen by Mr. Kemp and legions of local officials, that left voters lawfully purged from the rolls, waiting in the rain and facing rejections of their ballots for arbitrary reasons.").

20. See Jelani Cobb, *Stacey Abrams's Fight for a Fair Vote*, NEW YORKER (Aug. 12, 2019), <https://www.newyorker.com/magazine/2019/08/19/stacey-abrams-fight-for-a-fair-vote> [<https://perma.cc/H8QL-FNUV>]. The litigation is entitled *Ebenezer Baptist Church of Atlanta v. Raffensperger*. Fair Fight Action, Inc. was the lead plaintiff but has since dropped out of the litigation.

21. Many of the policy's most controversial provisions have since been eliminated. See Press Release, Stanley Augustin, Georgia Largely Abandons Its Broken "Exact Match" Voter Registration Process (Apr. 5, 2019), <https://lawyerscommittee.org/georgia-largely-abandons-its-broken-exact-match-voter-registration-process> [<https://perma.cc/64GG-CNA9>].

22. Amended Complaint for Declaratory & Injunctive Relief at 19–22, Fair Fight Action, Inc. v. Raffensperger, No. 1:18-cv-05391 (N.D. Ga. Feb. 19, 2019).

23. *Id.* at 22. Some changes to the state's election system have been made. See Cobb, *supra* note 20 (reporting that, in addition to installing new voting machines, Governor Kemp signed bills which extended the "use it or lose it" period to five calendar years and ensured protections for voters who use absentee or provisional ballots, and Georgia Secretary of State Brad Raffensperger has opened up an investigation into the 4700 absentee ballot applications that went missing in 2018). On December 27, 2019, the district court judge hearing the case denied plaintiffs' request for a preliminary injunction, which sought the reinstatement of approximately 100,000 voters who had been removed from the voter rolls. Elisha Brown, *Federal Judge Backs Georgia's Purge of Nearly 100,000 Voters*, N.Y. TIMES (Dec. 27, 2019), <https://www.nytimes.com/2019/12/27/us/elections/georgia-voters-purge.html>.

to navigate insofar as it does not require voters to travel long distances or wait in long lines, does not intentionally or unintentionally disadvantage minority voters, does not raise administrative burdens that are likely to discourage participation, does not discount or discard provisional and absentee ballots, and which is safe from outside interference or tampering. Anything less, it is argued, presents constitutional and/or statutory concerns.<sup>24</sup> Such a comprehensive conception is a prerequisite to the robust protection of organizations' political rights. Put differently, the voting process is multifaceted and implicates myriad actors and institutions, not simply individual voters. Organizations, whether through voter registration or civic education initiatives, play an essential role in our electoral system.

In sum, the enormous stakes of Election 2020 have heightened the election-related concerns of voters, voting-rights advocates, and elected officials. Georgia is only one of many battlegrounds. The misgivings articulated by Fair Fight Action's suit are shared by individuals and organizations across the nation, resulting in a proliferation of lawsuits.<sup>25</sup> This Essay evaluates two such lawsuits involving organizations that facilitate political participation and the question of whether litigation of this type may, in fact, result in a more capacious understanding of the boundaries of the right to vote.

Part I of this Essay summarizes the unresolved—and potentially dispositive—doctrinal debate over the appropriate level of judicial scrutiny to be applied to state laws implicating both voting and expressive association. Part II examines the doctrinal irresolution in the context of two recent cases, *Miracle v. Hobbs* in Arizona and *League of Women Voters v. Hargett* in Tennessee. Viewed together, these cases illustrate the contingent nature of organizations' ability to engage voters; an ambiguity of great consequence as we approach Election 2020. Part III outlines the short and long-term political significance of whether a capacious or circumscribed conception of the right to vote in this context prevails.

## I. JUDICIAL REVIEW OF ELECTORAL REGULATIONS

Election laws (along with federal and state constitutional provisions) implicating the right to vote come in seemingly countless forms. Such laws dictate everything from who is eligible to participate to the order in which candidates are placed on a ballot. Election Day is of course also highly regulated, with, for instance, the precise method of voting varying from county to county and limits placed on polling place activity.<sup>26</sup> Additional laws inform how votes are tallied and how post-election disputes are resolved.<sup>27</sup> On one level, this makes sense. The

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24. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 22, at 1, 85–86.

25. See, e.g., Robert Yablon, *Voting, Spending, and the Right to Participate*, 111 Nw. U. L. REV. 655, 657 (2017) (“On the voting front, frenetic legislative and regulatory activity, primarily at the state level, has generated substantial litigation but little doctrinal clarity.”); Press Release, Democratic Senatorial Campaign Committee, Memo: Democratic Campaign Committees Investing Millions to Protect Voting Rights Across Battleground States (Jan. 8, 2020), <https://www.dscc.org/press-release/memo-democratic-campaign-committees-investing-millions-to-protect-voting-rights-across-battleground-states> [https://perma.cc/US46-L6GM].

26. *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (“[W]e hold that requiring solicitors to stand 100 feet from the entrances to polling places does not constitute an unconstitutional compromise.”).

27. See, e.g., Jonathan Lai, *Pennsylvania's Presidential Election Could Be Too Close to Call for Days Because of a New Law*, PHILA. INQUIRER (Jan. 18, 2020), <https://www.inquirer.com/politics/election/pennsylvania-2020-presidential-election-results-absentee-ballots-20200117.html> [https://perma.cc/VZJ3-YQCS] (“[A] new law

right to vote is fundamental—in both the colloquial and constitutional senses<sup>28</sup>—and is the cornerstone of our democracy; the voting process should therefore be highly regulated. That said, its designation as a fundamental right ostensibly elevates the burden on government to sustain such regulations.

Complicating matters further is the First Amendment right of association and its appositeness in the voting context. As Daniel Tokaji has detailed, the Supreme Court has long perceived the rights to vote and to expressive association as closely tethered, complementary rights.<sup>29</sup> The connection was drawn in *Williams v. Rhodes*,<sup>30</sup> a case involving a challenge to several Ohio election laws brought by two third parties: the Ohio American Independent Party, a vehicle for the 1968 presidential candidacy of George Wallace, and the Socialist Labor Party.<sup>31</sup>

Before *Williams*, Ohio law required new political parties seeking placement on the state's presidential ballot to present signed petitions by qualified electors totaling at least fifteen percent of the ballots cast in the preceding gubernatorial election.<sup>32</sup> In addition, new parties were required to file their nominating petitions in February, well before the two major parties.<sup>33</sup> The Supreme Court concluded that Ohio “has made it virtually impossible for a new political party, even though it has hundreds of thousands of members, or an old party, which has a very small number of members, to be placed on the state ballot.”<sup>34</sup> The Court expressly invoked the connection between the right to vote and the First Amendment right of expressive association, stating, “[n]o extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate.”<sup>35</sup> Applying strict scrutiny, the Court invalidated the laws.<sup>36</sup>

The Court's application of strict scrutiny to voting-related restrictions comported with prior caselaw<sup>37</sup> and, for a short time,

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means a significant share of ballots might not be tallied until after Election Day, according to county elections officials.”).

28. The Supreme Court has designated the right to vote as a “fundamental right.” *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666–67 (1966). *But see* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 157 (2008) (noting that “the Court sometimes considers the right to vote as fundamental and sometimes conspicuously omits any fundamental rights language”).

29. Tokaji, *supra* note 11, at 771 (“The Supreme Court has long flirted with the idea that voting is a form of speech protected by the First Amendment but has never adopted this position. It has, however, held that voting is a form of *expressive association* protected by the First Amendment.”); *see also* Yablon, *supra* note 25, at 679 (making the related point that “[t]hese open-ended constitutional guarantees of equality and of expressive and associational liberty are not so rigidly deterministic”).

30. 393 U.S. 23 (1968).

31. *Id.* at 26. On the presidential candidacies and legacy of George Wallace, see Frank Rich, *After Trump*, N.Y. MAG. (Nov. 13, 2017), <https://nymag.com/intelligencer/2017/11/frank-rich-trumpism-after-trump.html> [<https://perma.cc/46UA-2WCN>].

32. *Id.* at 24–25.

33. *Id.* at 36 (Douglas, J., concurring).

34. *Id.* at 24.

35. *Id.* at 31.

36. *Id.* (“The State has here failed to show any ‘compelling interest’ which justifies imposing such heavy burdens on the right to vote and to associate.”).

37. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (“[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.”).

seemed to be the settled approach.<sup>38</sup> Gradually, however, the Court began to intimate that heightened review was not always appropriate. In *Storer v. Brown*,<sup>39</sup> the Court heard a challenge to California’s “sore loser” law<sup>40</sup> that prohibited candidates who had lost a primary election from running as an independent in the general election. The Court upheld the law, noting “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”<sup>41</sup> Accordingly, the initial task is now to assess whether the law at issue is, in fact, invidious—an inquiry that, by extension, determines the appropriate standard of review.<sup>42</sup>

*Storer* presaged the Court’s introduction of an election-law-specific form of judicial review now commonly referred to as “*Anderson-Burdick*,” a shorthand for the two cases from which it derives: *Anderson v. Celebrezze*<sup>43</sup> and *Burdick v. Takushi*.<sup>44</sup> The challenge in *Anderson* was to an Ohio law requiring independent presidential candidates—the plaintiff was independent presidential candidate John Anderson<sup>45</sup>—to submit petition signatures no later than March of the election year, despite the fact that the two major parties would not select their nominees for several more months.<sup>46</sup>

Justice Stevens’s opinion for the majority cited *Williams v. Rhodes* to establish the link between the right to vote and the right of expressive association.<sup>47</sup> He then, though, asserted “[a]lthough these rights of voters are fundamental, not all restrictions imposed by the States on candidates’ eligibility for the ballot impose constitutionally suspect burdens on voters’ rights to associate or to choose among candidates.”<sup>48</sup> Thus, as foreshadowed in *Storer*, Justice Stevens instructed courts to first determine the severity of the alleged injury.

The central passage details the process:

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.<sup>49</sup>

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38. See, e.g., *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) (“[I]n this case, we must give the statute a close and exacting examination.”); see also Douglas, *supra* note 28, at 151 (“At one time, the Court always construed the right to vote in the context of voter eligibility as a fundamental right, but now the jurisprudence is not as clear.”).

39. 415 U.S. 724 (1974).

40. On sore loser laws, see generally Michael S. Kang, *Sore Loser Laws and Democratic Contestation*, 99 GEO. L.J. 1013 (2011).

41. *Storer*, 415 U.S. at 730.

42. *Id.*

43. 460 U.S. 780 (1983).

44. 504 U.S. 428 (1992).

45. Scott Neuman, *John Anderson, Independent for President in 1980, Dies at 95*, NPR (Dec. 5, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/05/568489924/john-anderson-independent-for-president-in-1980-dies-at-95>

[<https://perma.cc/WHQ2-GXFP>].

46. *Anderson*, 460 U.S. at 790–91.

47. *Id.* at 786–87.

48. *Id.* at 788.

49. *Id.* at 789.

The majority found the Ohio law failed this test, notably, in part because of the prospect of dampened enthusiasm and participation among independent candidates and their supporters (voters, volunteers, and donors).<sup>50</sup> Outcome aside, *Anderson* introduced a less rigorous form of judicial review in the election regulations context.<sup>51</sup>

*Burdick*, which upheld a Hawaii ban on write-in votes, offered a slight modification to this approach, clarifying that laws that impose a “severe” burden on the right to vote remain subject to strict scrutiny.<sup>52</sup> By contrast, when laws impose only “reasonable, nondiscriminatory restrictions,”<sup>53</sup> then “the State’s important regulatory interests are generally sufficient to justify” the law.<sup>54</sup> As the *Anderson-Burdick* doctrine evolved, election law claims grounded in the First Amendment became far less common.<sup>55</sup> However, adjacent doctrines directly pertaining to political speech reinforced the substantial constitutional protection afforded expressive association in the political context.

The Court has long held that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>56</sup> In addition, “the freedom to join together in furtherance of common political beliefs ‘necessarily presupposes the freedom to identify the people who constitute the association.’”<sup>57</sup> Such freedom extends not only to individuals but to organizations as well.<sup>58</sup> The

50. *Id.* at 792 (highlighting that in addition to barring potential candidates who decided to run after March from running at all, and overly restraining candidates that did decide to run by the deadline, the Ohio law would hinder an independent campaign’s efforts to recruit volunteers, raise funds, and secure publicity).

51. Josh Douglas notes that “*Anderson* confirmed that the Court no longer approached an election law case from a fundamental rights framework.” Douglas, *supra* note 28, at 159. Armand Derfner and J. Gerald Hebert lament the decision’s introduction of what they call a “lenient balancing test.” Armand Derfner & J. Gerald Hebert, *Voting Is Speech*, 34 YALE L. & POL’Y REV. 471, 481 (2016). *But cf.* Samuel Issacharoff, *Voter Welfare: An Emerging Rule of Reason in Voting Rights Law*, 92 IND. L.J. 299, 307 (2016) (critiquing the decision for “craft[ing] a test that brought election regulation perilously close to the generally crushing least-restrictive-means analysis from First Amendment law”).

52. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

53. *Id.* at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

54. *Id.*; *see Tokaji, supra* note 11, at 777 (“*Burdick*’s main doctrinal contribution is to clarify that only a restriction that is ‘severe’ should receive strict scrutiny, requiring government to show it is narrowly tailored to a compelling interest.”); Derfner & Hebert, *supra* note 51, at 483 (“While the *Anderson* ‘balancing test’ was vague and left significant room for restrictions on voting, depending on its interpretation, *Burdick* further increased the task of those challenging voting restrictions and lowered the practical level of review to something akin to rational basis review.”); *see also* Yablon, *supra* note 25, at 661 (“On the voting side, the Court has downplayed the burdens that regulations impose, cast the government’s regulatory interests in broad terms, and placed the onus squarely on plaintiffs to establish that a regulation’s burdens outweigh its benefits.”). After applying its new test to Hawaii’s law, the Court determined that the state’s interests in preventing contentious elections and in discouraging “party raiding” during primaries sufficiently outweighed the burden that the ban on write-in voting has on voters. *Burdick*, 504 U.S. at 439–40.

55. Tokaji, *supra* note 11, at 784.

56. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958).

57. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 214–15 (1986) (quoting *Democratic Party of United States v. Wisconsin ex rel. LaFollette*, 450 U.S. 107, 122 (1981)).

58. Political parties receive considerable protection under the First Amendment. *See e.g.*, *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (“If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows that it advances a compelling state interest . . .”). Nonpartisan organizations engaged in political activity are similarly protected. *See, e.g.*, *Hernandez v. Woodard*, 714 F. Supp. 963, 973 (N.D. Ill. 1989) (“Where groups, formal or informal, seek to advance their goals through the

precise relationship, however, between these core First Amendment doctrines and states' essential need to regulate the electoral process remains a source of confusion.

In select contexts, the Court has distinguished laws that regulate “the mechanics of the electoral process”<sup>59</sup> from those that regulate “pure speech,”<sup>60</sup> subjecting the latter to “exacting scrutiny”<sup>61</sup> rather than the *Anderson-Burdick* balancing test. Yet to date, this distinction has been inadequately developed in the lower courts. In sum, the appropriate form of judicial review of organizations' involvement in the political process is distinctly unsettled.<sup>62</sup>

## II. COMPETING CONCEPTIONS OF THE RIGHT TO VOTE: EXAMPLES FROM ARIZONA AND TENNESSEE

As Part I made clear, uncertainty remains over the appropriate degree of judicial scrutiny to be applied to state laws implicating both voting and expressive association. This Part examines the doctrinal irresolution in the context of two recent cases: *Miracle v. Hobbs*<sup>63</sup> (Arizona) and *League of Women Voters of Tennessee v. Hargett*<sup>64</sup> (Tennessee).

### A. *Miracle v. Hobbs*

In 2014, the Arizona legislature enacted a law commonly referred to as the “Strikeout Law.”<sup>65</sup> The law requires the Arizona Secretary of State to strike all signatures gathered by a “registered” initiative petition circulator<sup>66</sup> if the circulator fails to appear in response to a subpoena.<sup>67</sup> A subpoena may be sought by any person “in the superior court of the county in which the circulator is registered.”<sup>68</sup> Supporters of the law, including state officials, defend the law as a method of preventing fraud and preserving the integrity of the ballot initiative process.<sup>69</sup> The law threatens to have a significant impact on the initiative process in Arizona, a state in which direct democracy is commonplace.<sup>70</sup>

In July 2019, a group of both petition circulators (who are also registered voters) and, importantly here, organizations involved in

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electoral process, regulations preventing their members from becoming [election] registrars impair their ability effectively to organize and make their voices heard.”).

59. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995).

60. *Id.*

61. *Id.* at 346 (citation omitted).

62. See Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 316–17 (2007).

63. Complaint at 1, *Miracle v. Hobbs*, No. 2:19-cv-04694-SRB (D. Ariz. July 11, 2019).

64. Complaint at 1, *League of Women Voters of Tenn. v. Hargett*, No. 3:19-cv-00385 (M.D. Tenn. May 9, 2019).

65. ARIZ. REV. STAT. ANN. § 19-118(E) (2019); see Howard Fischer, *Judge Lets Arizona Law on Initiative Petitions to Stand*, ARIZ. CAP. TIMES (Dec. 16, 2019), <https://azcapitoltimes.com/news/2019/12/16/judge-lets-arizona-law-on-initiative-petitions-to-stand> [<https://perma.cc/Z8JH-EYUB>] (noting that the law has “been dubbed the Strikeout Law”).

66. Only paid and nonresident petition circulators are required to register. § 19-118(A).

67. § 19-118(E) (“If a registered circulator is properly served with a subpoena to provide evidence in an action regarding circulation of petitions and fails to appear or produce documents as provided for in the subpoena, all signatures collected by that circulator are deemed invalid.”).

68. § 19-118(F).

69. Howard Fischer, *State Wants Challenge to Petition Law Thrown out of Court*, [https://tucson.com/news/local/state-wants-challenge-to-petition-law-thrown-out-of-court/article\\_047e2c88-6508-52b7-ab96-cf9256b77a05.html](https://tucson.com/news/local/state-wants-challenge-to-petition-law-thrown-out-of-court/article_047e2c88-6508-52b7-ab96-cf9256b77a05.html) [<https://perma.cc/FV8A-DLK4>].

70. The law was previously upheld by the Arizona Supreme Court when challenged under state law. *Stanwitz v. Reagan*, 429 P.3d 1138, 1145 (Ariz. 2018). On direct democracy in Arizona, see Daniel A. Smith & Caroline Tolbert, *The Instrumental and Educative Effects of Ballot Measures: Research on Direct Democracy in the American States*, 7 ST. POL. & POL'Y Q. 416, 420 (2007) (providing data on statewide initiatives in Arizona).

the initiative process, challenged the law under the First and Fourteenth Amendments, arguing that it “denies core constitutional rights of political speech and association, along with the right to vote or participate meaningfully in the initiative process.”<sup>71</sup> More specifically, they claimed that “the “indiscriminate rejection of voter signatures”<sup>72</sup> based solely on a petition circulator’s failure to respond to a potentially dubious subpoena request “effectively silences hundreds of thousands of Arizona citizens who sponsor, circulate, or sign petitions, as well as those who associate with them to promote or fund initiatives in Arizona.”<sup>73</sup> The law, plaintiffs attested, thus chills speech by making it harder for initiative proponents to hire and retain petition circulators, thereby impermissibly decreasing the likelihood that initiative proponents will find success.<sup>74</sup> The law also, plaintiffs argued, imposes an undue burden on the fundamental right to vote.<sup>75</sup>

The Arizona Secretary of State defended the law by arguing that, because it does not directly regulate circulation or advocacy, it “does not implicate the First Amendment at all.”<sup>76</sup> As framed, “[t]he crucial question for courts considering challenges to initiative-related regulations is thus whether the regulation *directly bans* anyone from circulating, or whether it merely *regulates* the circulation process.”<sup>77</sup> Defendant further argued, with regard to plaintiffs’ claim that the law would diminish the pool of circulators, that “all regulations of petition circulation potentially reduce the pool of available circulators”<sup>78</sup> and that the law imposes only a “lesser,” fully justified burden.<sup>79</sup> Moreover, “[t]he fact that a regulation makes it less likely that initiatives will be enacted is . . . not constitutionally determinative.”<sup>80</sup> Finally, regarding the claim that the law imposes an undue burden on the fundamental right to vote, defendant argued that signature invalidations “have nothing to do with the petition signers and everything to do with whether those who circulate the petitions comply with the applicable rules.”<sup>81</sup>

The parties are equally at odds over the appropriate level of judicial review in cases of this type, betraying a fundamental disagreement that, as noted above, persists among reviewing courts. Plaintiffs argued, first, that because the Strikeout Law restricts “core political speech” by chilling speech and reducing plaintiffs’ likelihood of success, strict scrutiny should be applied.<sup>82</sup> Alternatively, because initiatives implicate the fundamental right to vote, they should be evaluated under *Anderson-Burdick*, under which, recall, a severe burden on voters also triggers strict scrutiny.<sup>83</sup> By contrast, as

71. Complaint for Declaratory and Injunctive Relief at 2, *Miracle v. Hobbs*, No. 2:19-cv-04694-SRB (D. Ariz. July 11, 2019), ECF No. 1.

72. *Id.* at 4.

73. *Id.*

74. Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support at 9–10, *Miracle*, No. 2:19-cv-04694-SRB (July 18, 2019), ECF No. 9.

75. Complaint for Declaratory and Injunctive Relief, *supra* note 71, at 33.

76. Defendant Arizona Secretary of State’s Motion to Dismiss at 8, *Miracle*, No. 2:19-cv-04694-SRB (D. Ariz. Aug. 23, 2019), ECF No. 16.

77. Defendant Arizona Secretary of State’s Reply in Support of Motion to Dismiss at 1, *Miracle*, No. 2:19-cv-04694-SRB (Sept. 13, 2019), ECF No. 25.

78. Defendant Arizona Secretary of State’s Motion to Dismiss, *supra* note 76, at 11.

79. *Id.*

80. *Id.* at 14.

81. Defendant Arizona Secretary of State’s Reply in Support of Motion to Dismiss, *supra* note 77, at 8.

82. Plaintiffs’ Motion for Preliminary Injunction and Memorandum in Support, *supra* note 74, at 7–10.

83. *Id.* at 15 (“Because their right to meaningfully participate in the initiative process hinges solely on a factor outside their knowledge or control that is

noted above, defendant argued that neither the First Amendment nor the fundamental right to vote is implicated at all, and, consequently, the defendant could easily satisfy the applicable *Anderson-Burdick* balancing test.<sup>84</sup>

In ruling on plaintiffs' motion to dismiss, the district court judge agreed with the defendant that the relevant precedents draw a distinction between "laws that regulate the communicative conduct of persons advocating a particular message and laws that regulate the procedures by which legislation is enacted."<sup>85</sup> The judge therefore determined, based on that distinction, that because the Strikeout Law does not implicate "the communicative message associated with the physical act of circulation *at the time of circulation*," any resulting injuries are only incidental to plaintiffs' expressive association rights.<sup>86</sup> The law is focused not on speech or association, but on "subpoena-related compliance that comes into play only *after* all initiative-related speech has occurred."<sup>87</sup> Accordingly, the judge concluded, judicial review asks only whether the burden on political speech is reasonably related to an important state interest, a question the judge answered in the affirmative.<sup>88</sup>

#### B. League of Women Voters of Tennessee v. Hargett

The ruling in *Miracle* stands in stark contrast with a recent order from a district court in Tennessee granting a request for a preliminary injunction in a similar context. The order provides a clear illustration of how judicial doctrine could evolve to provide stronger First Amendment protection to organizations engaged in political activity. In April 2019, the Tennessee General Assembly passed a law regulating voter registration drives.<sup>89</sup> The law, which has since been repealed,<sup>90</sup> required organizations and individuals planning such drives to register with the state's Coordinator of Elections and complete government-provided training.<sup>91</sup> The law further mandated that voter registration forms be delivered within ten days of completion and, most controversially, contained civil penalties for those who submitted "incomplete" voter registration applications," even if unknowingly.<sup>92</sup> Finally, the law required organizations to adhere to a disclaimer provision for any "public communication regarding voter registration

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completely unconnected to any indication that their signature was not valid, these burdens are severe and the restriction must be evaluated under strict scrutiny.").

84. Defendant Arizona Secretary of State's Motion to Dismiss, *supra* note 76, at 7–8, 16.

85. Order at 3, *Miracle*, No. 2:19-cv-04694-SRB (Dec. 16, 2019), ECF No. 36 (citing *Meyer v. Grant*, 486 U.S. 414, 414 (1988); *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 182–83 (1999)).

86. *Id.* at 6.

87. *Id.*

88. *Id.* at 5–6, 12 (concluding that the Strikeout Law does not warrant strict scrutiny because the law impacts activity only after protected speech has occurred and dismissing Plaintiff's Fourteenth Amendment right to vote claims because the Arizona Supreme Court had already determined that the law did not impede the initiative process).

89. TENN. CODE ANN. §§ 2-2-142 to -143, 2-19-132 (2019).

90. Press Release, Campaign Legal Center, Tennessee Removes Anti-Voter Registration Provisions Following Federal Legal Challenge (Apr. 2, 2020), <https://campaignlegal.org/press-releases/tennessee-removes-anti-voter-registration-provisions-following-federal-legal> [<https://perma.cc/ABZ3-JHSX>].

91. § 2-2-142(a)(1)(C); Memorandum at 3, *League of Women Voters of Tenn. v. Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60.

92. Memorandum at 4-5, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60.

status.”<sup>93</sup> The plaintiffs in the case—a group of organizations that engage in voter registration drives—claimed that the law unconstitutionally burdened their First Amendment rights of speech and association.<sup>94</sup> They further argued that the law directly interfered with the fundamental right to vote.<sup>95</sup>

As in *Miracle*, the parties disputed what the applicable standard of review is in a case involving efforts by organizations to engage voters in the political process.<sup>96</sup> Notably, the district court judge agreed with plaintiffs that “exacting scrutiny” was appropriate, given that the case involved more than just a contest between individuals’ right to vote and the state’s power to regulate the electoral process; the case “implicate[s] more than those two sets of concerns.”<sup>97</sup> In enjoining the law in September 2019, the judge articulated a conception of voting rights and political participation vastly different than what was presented in *Miracle*. As stated, “[e]ncouraging others to register to vote is ‘pure speech,’ and because that speech is political in nature, it is a ‘core First Amendment activity.’”<sup>98</sup>

By contrast with the *Miracle* court’s recognition of a line between “laws that regulate the communicative conduct of persons advocating a particular message and laws that regulate the procedures by which legislation is enacted,”<sup>99</sup> the judge in *Hargett* voiced

skeptical[ism] that the First Amendment would countenance “slic[ing] and dic[ing] the activities involved in the plaintiffs’ voter registration drives” for constitutional purposes, both because doing so would allow the government to burden the protected aspects of the drive indirectly and because the “entire voter registration activity” implicates the “freedom of the plaintiffs to associate with others for the advancement of common beliefs [that] is protected by the First and Fourteenth Amendments.”<sup>100</sup>

Likewise, whereas the *Miracle* court viewed subpoena-compliance as a mere bureaucratic concern, divorced from the associational aspects of the initiative process, the judge in *Hargett* concluded that “while the civil penalties for incomplete applications are directed only at the paperwork aspect of a drive, the threat of penalties is likely to have a chilling effect on the entirety of the drive, including its communicative aspects.”<sup>101</sup> With regard to the registration and training requirements, the court found the former unnecessary, particularly prior to conducting a voter registration drive,<sup>102</sup> and the latter an unwarranted imposition of government speech.<sup>103</sup> The court also enjoined the

93. *Id.* at 6–7 (describing how the disclaimer provision required voter registration organizations to “display a disclaimer that such [public] communication is not made in conjunction with or authorized by the secretary of state”).

94. Complaint at 40–43, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. May 9, 2019), ECF No. 1.

95. *Id.* at 50.

96. Memorandum at 18–19, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60 (“Specifically, the plaintiffs argue that the requirements should be subject to ‘exacting scrutiny,’ whereas the defendants argue that they should be subject only to some lesser standard of review.”). After reviewing the variable standards of review that courts have used in similar cases, the court later referred to “this sometimes bewildering array of standards to choose from.” *Id.* at 22–23.

97. *Id.* at 23.

98. *Id.* at 19 (quoting *League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012)).

99. *Supra* note 85 and accompanying text.

100. Memorandum at 20, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60 (citing *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 401, 404 (5th Cir. 2013) (Davis, J., dissenting)).

101. *Id.*

102. *Id.* at 29.

103. *Id.* at 31 (“The state’s interest in avoiding errors might, therefore, justify a simpler application form or a public education program, but there is substantial

penalties for the submission of incomplete applications, noting that “the collection and submission of applications is inextricably intertwined with’ the expressive and advocatory aspects of the drive, and it is impossible to burden one without, in effect, burdening the other.”<sup>104</sup> Finally, the court found the disclaimer requirement to constitute unconstitutionally compelled speech.<sup>105</sup>

The conception of the “right to vote” expressed in *Hargett* is substantially more capacious than that expressed in *Miracle*. The voting ecosystem portrayed in *Hargett* is multi-dimensional and functions at its best when state oversight, though necessary, is judiciously calibrated. The judge’s sensitivity to this point is perhaps best captured through her closing critique of the “cumulative burden” that the Tennessee law’s provisions, when taken together, imposed on organizations.<sup>106</sup> Writing of the organizations’ “vulnerability,”<sup>107</sup> she noted:

The Act would attack their limited resources from all sides. The disclaimer and registration requirements produce compliance costs for what might be an already cash-strapped organization. The training and penalty provisions hamper the organization’s ability to recruit qualified volunteers and registration workers. Then, when the voter registration drive is done, the organization’s already-depleted resources may be drained by fines.<sup>108</sup>

Viewed in its entirety, the judge concluded that the law would likely fail whether evaluated under strict scrutiny or the *Anderson-Burdick* balancing test.<sup>109</sup>

In conclusion, both *Miracle* and *Hargett* share factual and legal similarities insofar as they both involved organizations seeking to increase political participation in ways that implicate the fundamental right to vote,<sup>110</sup> yet reached decidedly divergent outcomes regarding the appropriate level of judicial scrutiny to be applied, and the bearing the First Amendment has on the resolution of such disputes.

### III. THE SHORT- AND LONG-TERM POLITICAL STAKES

This Part outlines the short- and long-term political significance of whether a capacious or circumscribed conception of the right to vote in this context prevails. A capacious view is one in which many organizational efforts to increase political participation are deemed protected activities

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reason to doubt that it can justify the unusually aggressive insertion of government speech into private political association that the Act contemplates.”).

104. *Id.* at 34 (quoting *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314, 1332 (S.D. Fla. 2006)).

105. *Id.* at 35–37.

106. *Id.* at 41.

107. *Id.*

108. *Id.* Recall the similar reasoning expressed by Justice Stevens in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), *supra* note 50, and accompanying text.

109. Memorandum at 42, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60.

110. One could argue that petitions for ballot initiatives are distinct from voter registration drives, thereby justifying distinct judicial treatment. In *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), the Supreme Court issued rulings on the constitutionality of state laws regulating the initiative process. In both cases the Court invalidated Colorado restrictions on petition circulators. However, the Court has not addressed the constitutionality of laws regulating voter registration that are similar to what was enacted in Tennessee. Notably, the judge in *Hargett* expressly rejected the suggested distinction, finding both petition drives for ballot initiatives and voter registration drives to be “central to shared political life.” *Id.* at 25–26; *see also* Derfner & Hebert, *supra* note 51, at 488 (“The expressive nature of the vote is present whether the vote is for a candidate in a primary or general election or for a ballot proposition, recall, referendum or anything else called a vote.”).

that warrant heightened judicial review. Such a view was evident in *Hargett*.<sup>111</sup> A circumscribed view affords deference, under a lesser form of judicial review, to state regulations that increase administrative burdens and impose compliance costs on organizations attempting to engage the citizenry.<sup>112</sup> Such a view was evident in *Miracle*.<sup>113</sup>

In the short term, obviously, the organizations operating in Arizona and Tennessee face very different environments. In Arizona, subpoena challenges could prove fatal to the signature-gathering efforts of initiative petition circulators. At the time of this writing, the district court judge hearing *Miracle* has recently denied a motion for reconsideration.<sup>114</sup> An appeal to the Ninth Circuit may follow. Meanwhile, petition circulators are gathering signatures to place an initiative on the 2020 ballot that would ban “dark money” in Arizona elections.<sup>115</sup> A separate initiative effort would, among other things, require automatic voter registration and limit political spending.<sup>116</sup> The resolution of *Miracle* will directly impact the likelihood of whether these initiatives are put to the voters. In Tennessee, given the legislature’s repeal of the voter registration law, voter registration organizations are now free to collect and submit voter registration forms without the fear of civil penalties being levied on them for unwittingly submitting incomplete forms.

More broadly, courts’ decisions about whether to adopt a capacious or circumscribed conception of the right to vote in this context will likely determine the legality of dozens of similar laws being challenged around the country. For example, the Eastern District of Michigan is hearing challenges to two Michigan laws: one that makes it a misdemeanor to “hire a motor vehicle”<sup>117</sup> to take voters to polling stations unless they are “physically unable to walk,” and another that makes it a crime to help voters submit absentee ballots.<sup>118</sup> Though the facts differ from those of *Miracle* and *Hargett*, the essential legal question is the same: are organizations that seek to engage the citizenry for the purpose of increasing political participation able to operate free of only the most necessary impediments?

Greater political participation is normatively desirable independent of any electoral consequences. However, the levels of voter turnout and citizen participation—i.e., the individuals both inspired to and permitted to participate—in Election 2020 may be the dispositive

111. Memorandum at 24, 26–27, *Hargett*, No. 3:19-cv-00385 (M.D. Tenn. Sept. 12, 2019), ECF No. 60.

112. The economist Richard Thaler has aptly described such administrative burdens as “sludge.” Richard H. Thaler, *Nudge, Not Sludge*, SCI. (Aug. 3, 2018), <https://science.sciencemag.org/content/361/6401/431.full> [<https://perma.cc/D3X2-LP6T>].

113. Order at 14, *Miracle v. Hobbs*, No. 2:19-cv-04694-SRB (D. Ariz. Dec. 16, 2019), ECF No. 36.

114. Order at 12, *Miracle*, No. 2:19-cv-04694-SRB (D. Ariz. Mar. 27, 2020), ECF No. 58.

115. Jeremy Duda, *Effort to End ‘Dark Money’ in AZ Campaigns Hires Paid Circulators*, ARIZ. MIRROR (Oct. 17, 2019), <https://www.azmirror.com/blog/effort-to-end-dark-money-in-az-campaigns-hires-paid-circulators> [<https://perma.cc/7WVX-WKAK>]. On “dark money,” see Joshua S. Sellers, *Contributions, Bribes, and the Convergence of Political and Criminal Corruption*, 45 FLA. ST. U. L. REV. 657, 676–83 (2018).

116. Steven Hsieh, *Ballot Initiative Would Limit Big Campaign Donors, Transform Elections in Arizona*, PHX. NEW TIMES (Oct. 31, 2019, 2:24 PM), <https://www.phoenixnewtimes.com/news/ballot-initiative-would-make-it-easier-to-vote-in-arizona-11379200> [<https://perma.cc/557X-56GE>]. In full disclosure, I am on the Board of the Arizona Advocacy Network and Foundation, the sponsoring organization of this initiative.

117. MICH. COMP. LAWS § 168.931(1)(f) (2020).

118. § 168.759(4), (5), (8); Complaint at 2–3, *Priorities USA v. Nessel*, No. 2:19-cv-13341 (E.D. Mich. Nov. 12, 2019).

factors in many electoral outcomes.<sup>119</sup> Particularly with regard to voter registration, the ability of nonpolitical party organizations to mount effective voter registration drives is of great consequence. In an insightful recent article, Bertrall Ross and Douglas Spencer detail how political parties and campaign organizations, largely for strategic reasons, systematically fail to engage with certain members of the citizenry.<sup>120</sup> The authors argue that because voter mobilization efforts come at a cost, campaigns must be strategic about whom they contact. Given resource limitations, the most sensible strategy is to contact those most likely to participate in an election and support the campaign.<sup>121</sup> As a result, nonvoters, many of whom have lower socioeconomic statuses, are rarely mobilized.<sup>122</sup> Consequently, the work done by voter registration organizations over the coming months in communicating with and registering nonvoters is essential to increase voter participation rates this fall and beyond. As explicated above, the viability of these organizations' operations depends on how much constitutional protection their activities receive.

In the long term, a larger, philosophical question must be addressed: how much do we value equality of political participation?<sup>123</sup> As repeated above, a capacious conception of the right to vote is inherently dubious of government efforts to curb political participation and apprehends the links between organizational outreach and engagement. Under this conception, courts would closely scrutinize laws that allegedly undermine participatory efforts.<sup>124</sup> Adoption of such a conception abets a more grandiose, inclusive notion of civic participation that should be encouraged.

A long-term outlook also reveals that a capacious conception of the right to vote holds the promise of reducing partisan abuse. Though not emphasized in this Essay, many of the recent laws impacting organizations are partisan power plays, designed to dampen the political participation of groups believed to hold sympathies for political opponents. A circumscribed conception of the right to vote makes it more difficult to respond to this fact. If courts, however, comprehensively probe the relationship between electoral

119. See Nate Cohn, *Huge Turnout Is Expected in 2020. So Which Party Would Benefit?*, N.Y. TIMES (Jul. 15, 2019), <https://www.nytimes.com/2019/07/15/upshot/2020-election-turnout-analysis.html>; William A. Galston, *What Does High Voter Turnout Tell Us About the 2020 Elections?*, BROOKINGS (Nov. 20, 2019), <https://www.brookings.edu/blog/fixgov/2019/11/20/what-does-high-voter-turnout-tell-us-about-the-2020-elections> [<https://perma.cc/UB3P-2JWS>].

120. Bertrall L. Ross II & Douglas M. Spencer, *Passive Voter Suppression: Campaign Mobilization and the Effective Disfranchisement of the Poor*, 114 NW. U. L. REV. 633, 680 (2019) (“There is one consistent feature that cuts across virtually all contemporary campaign mobilization strategies: the avoidance of unregistered, infrequent, and nonvoters.”).

121. *Id.* at 678–80.

122. *Id.* at 680–87.

123. See Daniel P. Tokaji, *First Amendment Equal Protection: On Discretion, Inequality, and Participation*, 101 MICH. L. REV. 2409, 2412 (2003) (arguing “that the decision whether to cabin official discretion, or, alternatively, to adopt a more deferential test in a given context reflects a judgment, usually a silent one, about the relative value of discretion and equality”).

124. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 644 (2008) (“Scrutiny levels should be tied to the aggregate consequences of voting requirements for the rate and demographics of voter participation.”); Tokaji, *supra* note 123, at 2523 (“Where official discretion threatens to deny equality of political participation, courts should apply heightened front-end scrutiny comparable to that which has traditionally been applied in First Amendment equality cases.”); see also Manheim & Porter, *supra* note 15, at 243 (“There is something particularly constitutionally offensive, in our view, about a government intending to undermine a right whose very existence depends on that government’s good graces.”).

regulations, expressive association, and political participation, doctrinal space exists to consider the central role of partisanship in many of these contests.<sup>125</sup>

A final long-term concern, one focused more on law than on politics per se, is the achievement of doctrinal harmonization. Scholars have long argued that voting is a type of speech and should be recognized as such under the First Amendment.<sup>126</sup> Federal courts' difficulties reconciling *Anderson-Burdick's* balancing test with First Amendment jurisprudence is intellectually intriguing, yet leaves voters, organizations, and litigants in an untenable state of uncertainty. A unifying theory of political participation—one that includes organizations—would therefore be of enormous benefit.<sup>127</sup>

#### CONCLUSION

Looking ahead, the judiciary's immensely important role in defining the nature of democratic engagement is apparent. Though this is by now a familiar role, political circumstances are always changing such that even basic legal disputes, even the most pedestrian, emerge in new forms. In some states, there seems to be an endless supply of creativity put towards shrinking the electorate.<sup>128</sup> The recurrent nature of these disputes, especially as we approach Election 2020, creates the possibility of constructing a conception of the right to vote that encompasses clearly established First Amendment protections for organizations. In one sense this development would seem paradoxical, with more intensive methods of election administration ultimately expanding voting and expressive association rights. Yet, perhaps this possibility is not paradoxical at all. Perhaps the better understanding of such a development, one the history of voting rights reveals, is that the greatest opportunities for broadening the electorate and increasing political engagement—both of which are goals to which we should aspire—arise when opposition is greatest.

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125. Tokaji, *supra* note 11, at 787 (“Litigants and courts have not focused directly on partisan disparate impact. Recognition of the associational rights implicated by voting cases would allow courts to focus on the real harm, the dominant political party disadvantaging supporters of its main rival.”); *id.* at 791 (“The cost of losing the voting-association connection is to obscure the central question whether the challenged voting practice advantages the dominant party by impeding participation by those likely to support its main rival.”); see Michael S. Kang, *Gerrymandering and the Constitutional Norm against Government Partisanship*, 116 MICH L. REV. 351, 390 (2017) (“[T]he nondiscrimination norm gradually has emerged as a *sub silentio* influence in judicial decisions curbing partisan voting restrictions, in particular voter identification requirements and early voting cutbacks.”).

126. See, e.g., Derfner & Hebert, *supra* note 51, at 490, 490 n.123.

127. For one recent attempt to harmonize the right to vote with First Amendment campaign finance jurisprudence, see Yablon, *supra* note 25, at 714 (“Though voting and spending differ in important ways, this Article concludes that it is nevertheless valuable to conceptualize them as aspects of a broader constitutionally grounded right to participate in the electoral process.”). See also Elmendorf, *supra* note 124, at 675–77 (outlining a novel judicial review methodology focused on the aggregate effects of election regulations).

128. See Ashley Lopez et al., *After Democrats Surged In 2018, Republican-Run States Eye New Curbs On Voting*, NPR (Apr. 22, 2019), <https://www.npr.org/2019/04/22/714950127/after-democrats-surged-in-2018-republican-run-states-eye-new-curbs-on-voting> [<https://perma.cc/786T-NAHX>]. See generally Justin Levitt, *Election Deform: The Pursuit of Unwarranted Election Regulation*, 11 ELECTION L.J. 97 (2012) (discussing burdensome election regulations in several states).