Fordham Law Review

Volume 88 | Issue 5 Article 15

2020

State Courts, the Right to Vote, and the Democracy Canon

Rebecca Guthrie
Fordham University School of Law

STATE COURTS, THE RIGHT TO VOTE, AND THE DEMOCRACY CANON

*Rebecca Guthrie**

Entire elections can be determined by the way a state judge chooses to interpret an election statute. And yet, there has been little scholarly attention on how judges construe statutes regulating elections at the state level. This Note begins to redress that lack of attention by undertaking an in-depth analysis of one interpretive tool historically invoked by state courts. The "Democracy Canon" is a substantive canon urging courts to liberally construe election statutes in favor of voter enfranchisement. By conducting a review of both historical and modern references to the Democracy Canon by state courts, this Note argues that courts have become less willing to rely on the Democracy Canon in recent decades. At the same time, codification of the Democracy Canon, and perhaps other substantive canons, by state legislatures may alleviate most concerns of courts about using substantive canons and may be the solution to revitalize the Democracy Canon.

* J.D. Candidate, 2021, Fordham University School of Law; B.A., 2016, Barnard College of Columbia University. Thank you to Professor James Brudney for the constant support; your words of encouragement were just as inspiring as your scholarly advice. To my family and friends, thank you for the unending love and support.

INTRODUCTION

Most of us would assume that we have fulfilled the ideals of democracy as soon as we exit the voting polls. By submitting our ballots, we have expressed our will and the democratic process is complete. However, in the words of playwright Tom Stoppard, "[i]t's not the voting that's democracy, it's the counting."[1] With a spike in the number of election disputes over the last twenty years,[2] state courts are playing an increasingly important role in the outcome of elections.[3] Courts determine who can vote, for whom we can vote, and which votes will count. For example, courts have determined the outcomes of entire elections by interpreting words and phrases like "obvious

1. TOM STOPPARD, JUMPERS 35 (1972).
2. As of 2008, the number of election cases in state courts had tripled since the late 1990s. *See* Richard L. Hasen, *The Democracy Canon*, 62 STAN. L. REV. 69, 89 (2009).
3. For an analysis of how state court election decisions shape the constitutional right to vote, see generally Joshua A. Douglas, *State Judges and the Right to Vote*, 77 OHIO ST. L.J. 1 (2016).

error,"[4] "overvote,"[5] and "must."[6] With courts having so much power in determining elections, how can citizens make sure that the democratic process remains in their hands and not the judiciary's? One answer lies with understanding how these courts interpret and apply relevant election statutes.

Most states have constitutions that ensure the right to vote (either implicitly or explicitly),[7] a legislature that enacts laws outlining election procedures,[8] election officials who carry out those procedures, and judges who interpret and apply the procedures whenever there is a dispute. Thus, election disputes will very often be resolved by courts interpreting election statutes.[9] How courts interpret these can, in some instances, completely nullify a vote, replacing the citizens' choice with the court's own opinion of the correct result. This Note seeks to understand whether judicial statutory interpretation has actually ensured that the democratic process remains with the people.

Part I of this Note explores the legal background of both statutory interpretation by courts and election laws enacted by legislatures. These two worlds converge when a state legislature codifies canons of construction specific to the interpretation of its election laws. The most prominent of these canons is the "Democracy Canon," which is examined more thoroughly in Part I.B. Part I.C explains the methodology used in this Note to analyze state courts' and legislatures' employment of the Democracy Canon.

This Note provides both a longitudinal and latitudinal review of the Democracy Canon. Part II undertakes the longitudinal review, looking at every case from the highest courts of four states that applied the Canon since the nineteenth century. By providing an in-depth historical analysis, this Part highlights that references to the Democracy Canon in modern times are more likely to lead to disenfranchisement[10] of voters than was the case before 1960.[11]

Part III seeks to understand this shift by exploring state court decisions invoking the Democracy Canon from all fifty states after 2000 (the latitudinal review). This dataset confirms that courts are almost as likely to disenfranchise voters as to enfranchise them when courts discuss the Canon.[12] There are several justifications in the state courts' reasons for rejecting the Democracy Canon, including the rise of textualism, the impact of other state legislative interests, and judicial concerns about infringing on the legislature.[13] Lastly, Part IV suggests that state legislatures can revitalize

4. *See* Coleman v. Ritchie, 762 N.W.2d 218, 225 (Minn. 2009).
5. *See* Edgmon v. State, 152 P.3d 1154, 1157 (Alaska 2007).
6. *See* Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1239 (Fla. 2000).
7. *See infra* note 15.
8. *See infra* note 16.
9. In 2008, almost 71 percent of election cases in state courts were purely questions of statutory interpretation. *See* Hasen, *supra* note 2, at 91.
10. For an overview of techniques historically used to disenfranchise certain voters, see generally MICHAEL DIMINO ET AL., VOTING RIGHTS AND ELECTION LAW 1–8 (2d ed. 2015).
11. *See infra* Part II.C.
12. *See infra* Part III.A.2.
13. *See infra* Part III.B.

the Democracy Canon by codifying it as a statutory rule of construction.[14] This Note concludes by offering some reasons for why codification of substantive canons in general would mitigate judges' concerns about employing such tools when undertaking a statutory analysis.

I. THE INTERSECTION OF STATUTORY INTERPRETATION AND ELECTIONS

The right to vote is almost entirely state-based, either guaranteed in state constitutions[15] or protected in state legislation.[16] Thus, state judges "are often the main actors in defining the constitutional right to vote" by interpreting the state's constitution, statutes, and regulations.[17] For this reason, state election laws offer an ideal playing field for analyzing state statutory interpretation methods. This field is even more bountiful in that it allows us to consider the impact of codified rules of construction. One of these codified canons is the Democracy Canon, first discussed by Richard Hasen.[18] The Democracy Canon is a substantive canon that calls for courts to interpret election statutes "with a thumb on the scale in favor of voter enfranchisement."[19] The Democracy Canon, which several state legislatures have codified as a legislatively mandated rule of construction,[20] provides ample opportunity to study the intersection of statutory interpretation and election law. To fully understand the impact of the Democracy Canon, it is necessary to first highlight some important aspects about substantive canons and codified rules of construction.

A. Statutory Interpretation at the State Level

For more than a century, scholars have debated the best way to interpret statutes at the federal level.[21] Statutory interpretation in practice, however, is very different at the state level than at the federal level.[22] This is due in

14. *See infra* Part IV.

15. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 101–04 (2014) (noting the constitutional provisions in all fifty states that provide voting protection).

16. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."); *see also* Jocelyn Friedrichs Benson, *Democracy and the Secretary: The Crucial Role of State Election Administrators in Promoting Accuracy and Access to Democracy*, 27 ST. LOUIS U. PUB. L. REV. 343, 354–57 (2008) (providing various ways in which state legislatures impact election administration).

17. Douglas, *supra* note 3, at 3.

18. Hasen, *supra* note 2, at 71.

19. *Id.* (emphasis omitted).

20. *See infra* Appendix A.

21. *See* WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 478 (5th ed. 2014) (providing a brief timeline of statutory interpretation theories).

22. *See* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1755 (2010) ("[S]tate court developments may be changing the terms of the statutory interpretation debate in ways that may be far more productive than anything currently happening in the federal arena.").

part to the codification by state legislatures of rules of statutory construction, a phenomenon that has not occurred to the same degree at the federal level.[23]

1. Codified Rules of Construction

While canons of statutory interpretation exist only as a part of the common law at the federal level,[24] all fifty states have enacted statutory canons, informing the courts on how their statutes should be interpreted.[25] The codification of interpretative canons began in the nineteenth century with legislatures enacting provisions instructing courts to liberally construe certain statutes.[26] Over time, state legislatures have enacted all types of interpretative canons, including textual canons, extrinsic source canons, and substantive canons.[27] These codified rules of construction have raised constitutional concerns, namely, whether legislatures are infringing on the judicial sphere in telling courts how to interpret the law.[28]

State legislatures enact these rules of construction to instruct courts on how to interpret their work product. In practice, these codified canons might not be successful, as state courts have either ignored the rules or have navigated their way around them.[29] For example, Abbe Gluck analyzes how the Connecticut Supreme Court has purposefully avoided the state's codified plain meaning rule by simply finding ambiguity in the statutes before the court.[30] Theoretically, such skirmishes could be understood as a type of interbranch dialogue,[31] but the practical consequences may make this theory less persuasive.[32] Further, the adoption of a particular theory of statutory

23. While the United States Congress has enacted some statutory directives, it has not attempted to codify a comprehensive set of interpretive canons. *See, e.g.*, Linda D. Jellum, *"Which Is to Be the Master," the Judiciary or the Legislature?: When Statutory Directives Violate Separation of Powers*, 56 UCLA L. REV. 837, 846–54 (2009) (providing various examples of statutory directives but noting that "Congress has not enacted a general theoretical directive").

24. *See* Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2093 (2002) (describing federal courts' canons as "pure common law").

25. *See generally* Jacob Scott, *Codified Canons and the Common Law of Interpretation*, 98 GEO. L.J. 341 (2010) (providing an in-depth analysis of codified canons in every state).

26. *See* Alan R. Romero, Note, *Interpretive Directions in Statutes*, 31 HARV. J. ON LEGIS. 211, 215–17 (1994) (outlining the history of codified rules of construction).

27. *See* Scott, *supra* note 25, at 352.

28. *See* Gluck, *supra* note 22, at 1826–27 (Codified rules of construction "raise[] new questions about which branch—judicial or legislative—primarily controls methodological choice" of interpretation techniques.); *see also* Jellum, *supra* note 23, at 842 (arguing that codified rules of construction are unconstitutional "when enacted to apply generally to many statutes"); Rosenkranz, *supra* note 24, at 2102–03 (arguing in support of federal codified rules of construction).

29. *See* Gluck, *supra* note 22, at 1824–25 (providing examples of courts avoiding or ignoring legislated rules); *see also* Romero, *supra* note 26, at 241–42 (noting several practical limitations on how codified canons impact judicial decision-making).

30. *See* Gluck, *supra* note 22, at 1795–96; *see also infra* Part II.A.1.

31. *See* James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 390–98 (2019) (exploring the benefits of conceptualizing statutory interpretation as dialogue).

32. *See id.* at 378–79 (noting that judicial concerns over the constitutional implications of codified rules may limit the interbranch dialogue concept). It is possible that these statutes

interpretation by individual judges can make the impact of codified canons more nuanced.[33]

2. Substantive Canons

The codification of rules of construction is further complicated when one considers substantive canons. Substantive canons are the judge-made presumptions used "to protect important background norms derived from the Constitution, common-law practices, or policies related to particular subject areas."[34] Courts use these presumptions to favor "polic[ies] that courts have identified as worthy of special protection," meaning that courts apply these presumptions in a nonneutral way with respect to those policies.[35] These canons have generated plenty of debate. Scholars and judges bemoan substantive canons as allowing courts to decide cases based on their personal policy preferences,[36] with Justice Antonin Scalia famously referring to them as "dice-loading rules."[37] Not only do these substantive canons permit judges (unelected at the federal level) to consider policy issues but they act as a tool for the judiciary to displace the legislature's policy preferences.[38] In this regard, substantive canons may raise constitutional concerns about the proper role of the judiciary.[39] Additionally, some scholars see substantive

still curb judicial discretion to a degree by forcing the judge to "approach their task with an appropriate comportment to the job [instead of] imagin[ing] that they are in conversation with no one but themselves." *Id.* at 391. A close analysis of developments in five states, however, finds that these rules do little to dissuade courts from relying on their own interpretative methods. *See* Gluck, *supra* note 22, at 1824–25.

33. *See* Gluck, *supra* note 22, at 1826–27 (finding that "state judges who reject the legislated rules . . . are self-proclaimed textualists").

34. Anita S. Krishnakumar, *Reconsidering Substantive Canons*, 84 U. CHI. L. REV. 825, 833 (2017).

35. JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 266 (2010).

36. *See, e.g.*, Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 119 (2010) ("It is difficult to isolate a single policy objective behind any substantive canon, for a canon's purpose often lies in the eyes of the beholder."); James J. Brudney & Corey Ditslear, *Canons of Construction and the Elusive Quest for Neutral Reasoning*, 58 VAND. L. REV. 1, 109 (2005) (Empirical data of the U.S. Supreme Court's canon usage suggests that substantive canons "are functioning more as a façade to promote judicial policy preferences than as a principled methodological tool."). *But see* Jonathan R. Macey & Geoffrey P. Miller, *The Canons of Statutory Construction and Judicial Preferences*, 45 VAND. L. REV. 647, 656 (1992) (arguing that judges only rely on canons when they do not have personal policy preferences).

37. Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 3, 28 (Amy Gutmann ed., 1997).

38. *See* Stephen F. Ross, *Where Have You Gone, Karl Llewellyn?: Should Congress Turn Its Lonely Eyes to You?*, 45 VAND. L. REV. 561, 563 (1992) (arguing that substantive canons "clearly reflect *judicial,* not congressional, policy concerns").

39. *See* Scalia, *supra* note 37, at 29 (noting that substantive canons raise "the question of where the courts get the authority to impose" such rules).

canons as resulting in unpredictable decisions, eroding the ideals of uniform law and predictable decision-making.[40]

However, substantive canons are not entirely nefarious. These canons can act as a shield, allowing courts to watch over certain rights or classes of individuals that have historically required more protection—the rule of lenity being a classic example.[41] Unpredictable decision-making may not be such a bad result if it means that courts are protecting individual rights. Additionally, substantive canons allow courts to notify legislatures about the courts' expectations for statutes by communicating to the legislatures how the courts will fill in statutory gaps.[42]

Codifying substantive canons adds yet another complication to this inquiry. One such codified canon is the rule of liberal construction.[43] Thirty-six states have adopted some form of the liberal construction rule, with seventeen of those states having provisions instructing courts to liberally construe all statutes.[44] The rule to liberally construe statutes has been the topic of much debate and confusion[45] and is often depicted as a tool for judges "to impose their own values on society."[46] Critics see the rule of liberal construction as providing for far too much judicial discretion at the expense of the integrity of the legislative process.[47] Thus, any statute asking

40. *See* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 123 (2018) (finding that the Roberts Court's use of canons "raise[s] significant questions about whether canons improve interpretive predictability, constrain judicial discretion, or supply a stable interpretive background for Congress"); Scalia, *supra* note 37, at 28 ("[I]t is virtually impossible to expect uniformity and objectivity when there is added, on one or the other side of the balance, a thumb of indeterminate weight.").

41. Other examples include the principle that courts should construe statutes about veterans' benefits liberally in favor of the veterans, *see* King v. St. Vincent's Hosp., 502 U.S. 215, 220–21 (1991), and the presumption to construe "ambiguities in deportation statutes in favor of aliens." ESKRIDGE ET AL., *supra* note 21, at 1214 & n.229 (discussing the inconsistent application of this presumption).

42. *See* Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2284 (2002) (noting that canons can be used to "maximize the satisfaction of legislative preferences by procuring more explicit legislative action"). Concerns about the effectiveness of interbranch dialogue may complicate Elhauge's theory. *See supra* notes 31–32.

43. *See* Scott, *supra* note 25, at 399–401.

44. *See id.* at 402 tbl.11.

45. *See* Morell E. Mullins, Sr., *Coming to Terms with Strict and Liberal Construction*, 64 ALB. L. REV. 9, 12–23 (2000) (undertaking an extensive review of the Canon); Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 581 (1989–90) (referring to the liberal construction rule as "the prime example of lego-babble").

46. Mullins, *supra* note 45, at 37 (rejecting this characterization).

47. A common critique of the rule of liberal construction stems from the idea that legislation is the result of legislators compromising to find a middle ground that satisfies a majority on both sides of the aisle. If they lead to a deviation from a given compromise, instructions to liberally construe a statute are in direct conflict with the importance of that compromise in creating legislation. *See* FRANK B. CROSS, THE THEORY AND PRACTICE OF STATUTORY INTERPRETATION 95 (2009) ("[T]he liberal interpretation of remedial statutes may go well beyond the legislature's compromise solution."); ROBERT A. KATZMANN, JUDGING STATUTES 53 (2014) ("[T]he courts can use [canons] in ways that fundamentally shape outcomes differently than how Congress intended . . . ."). Another critique is that congressional awareness of such canons would paralyze the legislative process entirely. *See*

the courts to liberally construe a provision is approached with skepticism by some.

The fact that citizens elect most state judges[48] may mollify fears about substantive canons at the state level. When a judge is elected, rather than appointed, some argue that she can (or should) have greater leeway in considering policy reasons when interpreting statutes.[49] Using substantive canons may allow an elected judge to consider how her constituents would want her to decide the case while staying within the bounds of the rule of law.[50] At the very least, elected judges' reliance on substantive canons is limited by the will of their constituents, who can vote the judge out if a canon elicits undesirable results.[51] Either way, critiques of substantive canons might hold less weight when citizens elect both the legislator and judge.

B. The Democracy Canon: A Tool for Interpreting State Election Laws

Richard Hasen was the first to identify and explore the Democracy Canon, beginning by taking a deep dive into its historical references.[52] Hasen traces the Democracy Canon back to as early as 1885 when the Texas Supreme Court held that "[a]ll statutes tending to limit the citizen in his exercise of this right [to vote] should be liberally construed in his favor."[53] Such language has appeared throughout the following two centuries in state court decisions resulting in the enfranchisement of voters.[54] Hasen urges that the "Democracy Canon forces legislators to make their intent more visible to all"[55] and so courts should use it as a tool to enforce the underenforced constitutional norm of voting equality.[56]

Yet Hasen is aware of the havoc the Democracy Canon may wreak. He acknowledges that the Democracy Canon is susceptible to one of the major

---

ABNER J. MIKVA & ERIC LANE, AN INTRODUCTION TO STATUTORY INTERPRETATION AND THE LEGISLATIVE PROCESS 26–27 (1997) ("[A] bill drafter's awareness of this rule of interpretation would . . . guarantee the defeat of the bill if he or she were to take the position that no compromise is possible because the courts will ignore it."). *But see* Krishnakumar, *supra* note 34, at 841 (finding some instances where "the [Roberts] Court seeks to use substantive canons to *honor* congressional intent").

48. For an overview of the judicial selection systems in all fifty states, see Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1084–86 (2007). For a review of the 2018 judicial elections, see *State Supreme Court Elections, 2018*, BALLOTPEDIA, https://ballotpedia.org/State_supreme_court_elections,_2018 [https://perma.cc/N2DP-UV6Q] (last visited Mar. 17, 2020).

49. *See, e.g.*, Aaron-Andrew P. Bruhl & Ethan J. Leib, *Elected Judges and Statutory Interpretation*, 79 U. CHI. L. REV. 1215, 1238 (2012) (exploring the idea of "interpretive divergence" in which elected judges have a greater degree of freedom in interpreting statutes).

50. *Id.* at 1246–48.

51. This argument is more nuanced than it appears at first blush since voters tend to pay less attention to judicial reelections than elections for other offices. *See id.* at 1231–35.

52. *See* Hasen, *supra* note 2, at 75–83.

53. Owens v. State *ex rel.* Jennett, 64 Tex. 500, 509 (1885); *see also* Hasen, *supra* note 2, at 71–72 (discussing *Owens*).

54. Hasen, *supra* note 2, at 75–81 (providing numerous examples of the Democracy Canon throughout history).

55. *Id.* at 103.

56. *Id.* at 97.

criticisms of substantive canons: "it can play a role in the actual and perceived politicization of the judiciary."[57] Scholars have been quick to highlight other problems with the Democracy Canon. Chad Flanders decries the Democracy Canon as favoring one legitimate democratic hallmark (the right to vote) over another (the legislative process).[58] Justin Levitt raises concerns about the inconsistent application of the Democracy Canon since "the search for statutory ambiguity seems to depend largely on the will of the judge in question."[59] Christopher Elmendorf opines that the Democracy Canon's detriments outweigh its benefits.[60] One such detriment comes from placing the burden on the legislature to either state, ex ante, that a provision should be strictly construed or correct a court's overly liberal interpretation of a statute.[61] Such requirements, Elmendorf argues, waste lawmaker energy and displace other issues on the legislative agenda.[62]

Hasen suggests ways to address some of these concerns. He argues that the Democracy Canon will not be seen as delegitimizing the courts if the public is educated on the Canon's consistent usage[63] and if the state legislatures "act ex ante to prevent state court overreaching."[64] In other words, "a state legislature concerned about state court application of the Democracy Canon . . . can use clear statements to negate its application."[65] Colorado, Hasen points out, provides an example of effective dialogue between the legislature and the courts: the Colorado legislature enacted a Democracy Canon provision but clearly stated throughout its election code when a provision should be strictly construed.[66]

Yet as previously discussed, it is unclear how effective the codification of interpretation canons is in restraining judicial discretion.[67] Is Hasen's suggestion of ex ante legislative action enough to ease concerns about the

57. *Id.* at 106; *see also supra* note 36 and accompanying text.

58. *See* Chad Flanders, *Election Law Behind a Veil of Ignorance*, 64 FLA. L. REV. 1369, 1373–74 (2012). Flanders suggests that courts should not apply the Democracy Canon to election laws that are facially neutral when enacted (or are "behind a veil of ignorance") because legislators cannot manipulate these statutes to favor a certain candidate or party. *See id.* at 1373.

59. Justin Levitt, *Resolving Election Error: The Dynamic Assessment of Materiality*, 54 WM. & MARY L. REV. 83, 155 (2012).

60. *See* Christopher S. Elmendorf, *Refining the Democracy Canon*, 95 CORNELL L. REV. 1051, 1054 (2010).

61. *See id.* at 1062–63.

62. *See id.* at 1066. For Richard Hasen's response to Elmendorf's critiques, see generally Richard L. Hasen, *The Benefits of the Democracy Canon and the Virtues of Simplicity: A Reply to Professor Elmendorf*, 95 CORNELL L. REV. 1173 (2010).

63. *See* Hasen, *supra* note 2, at 112. *But see* Elmendorf, *supra* note 60, at 1055.

64. Hasen, *supra* note 2, at 106.

65. *Id.* at 74; *see also* Eric H. Kearney et al., *Perfect Is the Enemy of Fair: An Analysis of Election Day Error in Ohio's 2012 General Election Through a Discussion of the Materiality Principle, Compliance Standards, and the Democracy Canon*, 62 CLEV. ST. L. REV. 279, 312–13 (2014) (arguing in favor of ex ante codification).

66. *See* Hasen, *supra* note 62, at 1180. For further discussion on Colorado's codified Democracy Canon provision, see *infra* Part II.B.1.

67. *See supra* notes 36–38.

Democracy Canon? Or is Colorado an outlier? This Note seeks to clarify this issue.

C. Methodology: Organization of the States

To assess the impact of the codified Democracy Canon on state courts, I began by reviewing the election codes and general rules of construction for all fifty states. From this survey, I divided the fifty states into three categories: (1) Democracy Canon codified; (2) rejection or disregard of the Democracy Canon; and (3) semi–Democracy Canon codified.[68] The Democracy Canon codified category includes states with provisions advising that either (a) the entire election code should be construed broadly in favor of the right to vote or (b) particular sections within the election code should be liberally construed in favor of the right to vote. This category includes fourteen states.[69]

The second category, rejection or disregard of the Democracy Canon, includes states that either have no codified liberal construction rule or have codified rules of construction that advise courts against considering the purpose or spirit of the statute, both of which are inherently incompatible with the Democracy Canon.[70] There are fourteen states in this category.[71]

The third category, semi–Democracy Canons codified, includes states where the relevant statutes could either favor the Democracy Canon or another state interest would limit enfranchisement, like the state's interest in preventing election fraud. This category includes states that have (a) a general provision to construe statutes liberally that is not specifically about election provisions or (b) a provision stating that the election code's purpose is to uphold both the right to vote and the integrity of the election process by preventing fraud.[72] There are twenty-two states in this category.[73] This Note analyzes how the codification of the Democracy Canon (or the lack thereof) affects decisions regarding election disputes at the highest courts of certain states.

For the longitudinal review in Part II, I chose specific states to analyze in greater depth by considering three factors. I selected states that (1) offer a range of geographically diverse locations; (2) are varied in terms of the categorization of codified Democracy Canons and have varied histories of codifying the Democracy Canon; and (3) have at least ten cases in which the

68. *See infra* Appendix A.

69. *See infra* Appendix A.

70. Such a claim of incompatibility is, of course, a generalization. However, because liberal construction is often aligned with legislative purpose, *see* Mullins, *supra* note 45, at 45–46, and the Democracy Canon specifically relies on the purpose of election laws, these provisions rejecting the spirit of the law should, in theory, make it more difficult for courts to invoke the Democracy Canon.

71. *See infra* Appendix A.

72. An example of a provision falling into this second group is Wyoming. *See* WYO. STAT. ANN. § 22-2-101(b) (2020) ("This Election Code shall be construed so that all legally qualified electors may register and vote, that those who are not qualified shall not vote, and that fraud and corruption in elections shall be prevented.").

73. *See infra* Appendix A.

state's highest court explicitly accepted or rejected the Democracy Canon.[74] Based on these three factors, Part II analyzes the Democracy Canon decisions from Nevada (Democracy Canon codified), Colorado (semi–Democracy Canon codified), Connecticut (rejection or disregard of the Democracy Canon), and Arkansas (semi–Democracy Canon codified). I have collected all the election decisions at the four states' highest courts that in some way reference the Democracy Canon,[75] with the earliest case decided in 1883.[76]

I categorized these decisions further based on the type of election dispute, using the same three types of disenfranchisement as Hasen. The first group is vote counting cases, in which enfranchisement is determined based on the court's decision to either count or void the challenged ballots.[77] The second group, voter eligibility or registration cases, involves disputes where citizens argue that they have been denied the right to vote prior to election day.[78] Lastly, candidate or party competitiveness cases are disputes in which a candidate claims to have been wrongly denied the ability to seek election.[79] The methodology for the dataset in Part III, which considers a broader range of more recent Democracy Canon decisions, is detailed in Part III.A.

II. LONGITUDINAL REVIEW OF THE DEMOCRACY CANON

Initially, it appears that states have seen a decline in references to the Democracy Canon; searches for the case law yielded results mostly from before 1960.[80] Originally, undertaking a longitudinal review was meant to provide support for this observation. However, an analysis of the Connecticut, Arkansas, Nevada, and Colorado case law suggested the opposite: some of these courts were invoking the Democracy Canon after 1960 almost as often as they had before 1960. Of the utmost importance, however, is that in these states, the courts in recent decades are much more likely to invoke the Democracy Canon and still decide the case in a way that disenfranchises voters. Thus, even in states where the courts have consistently relied upon the Democracy Canon, the Canon's appearance is more likely today to lead to disenfranchisement, a sort of decline in and of itself.

---

74. It should be noted that no court refers to the presumption to liberally construe election statutes as the "Democracy Canon." Richard Hasen coined this phrase to describe the presumption referred to by courts.

75. I used a variety of methods to locate these decisions, including West Key Number 53 under the topic Election Law (142T). I also searched each jurisdiction with various Boolean searches (for example, "'liberally construe' AND election OR vote" and "statute AND election OR vote"). I found additional cases by using LexisNexis's "Shepardizing" feature and Westlaw's "Citing References" feature.

76. *See* Stinson v. Sweeney, 30 P. 997 (Nev. 1883).

77. *See* Hasen, *supra* note 2, at 83. For an example of a case in this group, see *infra* notes 190–95 and accompanying text (discussing *Moran v. Carlstrom*).

78. *See* Hasen, *supra* note 2, at 83.

79. *See id.* at 84. For example, a court can disenfranchise a voter by not permitting a candidate from the voter's political party to appear on the ballot. *See, e.g.*, Butts v. Bysiewicz, 5 A.3d 932 (Conn. 2010); *see also infra* notes 103–11.

80. This was clear in both my use of the relevant Key Number and in my Boolean searches. *See supra* note 75.

Before turning to each state's analysis, this dataset (collected in Appendices B–E) warrants a few caveats. First, this analysis only looks at decisions that in some way invoke the Democracy Canon and so does not itself reflect whether the Democracy Canon is often or rarely invoked by courts in election disputes. Similarly, this analysis does not suggest that these four states are more likely to disenfranchise voters today than they were in the first half of the twentieth century, as that is beyond the scope of this Note.

A. No Historically Codified Democracy Canon

Part II.A explores how state courts have historically engaged with the Democracy Canon when the state legislature has either hinted that the court should not use the Canon (Connecticut) or remained silent on the issue (Arkansas).

1. Connecticut

Though Connecticut has codified rules of construction, there is no liberal construction provision.[81] Instead, section 1-2z of the General Statutes of Connecticut endorses the plain meaning rule.[82] Limiting the courts to a plain meaning interpretation implies that the Connecticut legislature does not wish the courts to implement canons like the Democracy Canon if the statutory language is unambiguous.[83]

Connecticut's use of the Democracy Canon before 1960 is more varied than some of the other states in this analysis.[84] Of the nine cases invoking the Canon before 1960, three led to the disenfranchisement of voters, five enfranchised voters, and one case was split.[85] The first instance of the Democracy Canon comes in Chief Justice Charles Bartlett Andrews's dissent in *Talcott v. Philbrick*.[86] Citing a concern for fraudulent voting, the majority voided 286 votes cast on ballots issued by the Republican Party that contained the word "citizens" and thus purported to be issued by the citizens,

81. In addition, my research yielded no instances of a codified Democracy Canon in the historical Connecticut statutes available for review.

82. CONN. GEN. STAT. § 1-2z (2020) ("The meaning of a statute shall, in the first instance, be ascertained from the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered.").

83. Section 1-2z was enacted in 2003, in reaction to the Connecticut Supreme Court's decision in *State v. Courchesne*, 816 A.2d 562 (Conn. 2003) to no longer use the plain meaning rule. *See* Gluck, *supra* note 22, at 1791–92 (analyzing this conflict between the Connecticut Supreme Court and legislature).

84. *See infra* Appendix B.

85. For Part II, I use "split" to refer to decisions in which the court both enfranchised and disenfranchised voters. For example, the Connecticut Supreme Court in *State v. Walsh* would not apply a liberal construction when the circumstances of the disputed ballots "preclude[d] the idea that they were the result of ignorance, accident, or mistake." 25 A. 1, 5 (Conn. 1892); *see also infra* notes 97–98 and accompanying text. Because the court assumed that there was intentional misconduct, the court only counted some, but not all, of the challenged ballots. *See Walsh*, 25 A. at 6.

86. 20 A. 436, 439 (Conn. 1890) (Andrews, C.J., dissenting).

not a specific party.[87] The majority held that this violated the statute requiring "the ballots [to] contain only the names of the candidates, the office voted for, and the name of the political party issuing the same."[88] Chief Justice Andrews, the former governor of Connecticut,[89] argued that the majority's construction of the statute would actually encourage fraud because political parties could purposefully void certain votes by handing out ballots listing the incorrect party name.[90] Given this absurd result, Andrews believed the court should count the votes since "no voter is to be disfranchised, and no ballot is to be declared void, on doubtful construction."[91] Andrews cited to other states' decisions, including *Kellogg v. Hickman*[92] from Colorado[93] and *Owens v. State ex rel. Jennett*[94] from Texas,[95] to bolster his Democracy Canon argument.[96] Yet, the court did not adopt Andrews's view until two years later in *State v. Walsh*.[97] Though the court rejected some votes (making the case a split decision), the court adopted a "presumption in favor of the voter."[98] This presumption led almost entirely to decisions resulting in voter enfranchisement for the next sixty years.[99]

Though the Connecticut Supreme Court often relied on the Democracy Canon to enfranchise voters in the first half of the century, the court consistently used it to disenfranchise voters after 1960; of the eight cases decided after 1960 that invoked the Democracy Canon, seven disenfranchised voters and one was a split decision.[100] These eight decisions include some election disputes in which the court refused to even entertain a

87. *Id.* at 437 (majority opinion).
88. *Id.*
89. *See Gov. Charles Bartlett Andrews*, NAT'L GOVERNORS ASS'N, https://www.nga.org/governor/charles-bartlett-andrews/ [https://perma.cc/6KWM-DYJS] (last visited Mar. 17, 2020).
90. *Talcott*, 20 A. at 439–40 (Andrews, C.J., dissenting).
91. *Id.* at 439.
92. 21 P. 325 (Colo. 1889).
93. *See infra* Part II.B.1.
94. 64 Tex. 500 (1885).
95. *See supra* note 53.
96. *See Talcott*, 20 A. at 439 (Andrews, C.J., dissenting).
97. 25 A. 1 (Conn. 1892).
98. *Id.* at 4.
99. *See, e.g.*, Scully v. Town of Westport, 145 A.2d 742, 745 (Conn. 1958) (validating absentee ballots when noncompliance with statutes did not affect voters); Flanagan v. Hynes, 54 A. 737, 738 (Conn. 1903) (counting ballots for a candidate that was not the official party candidate because of the presumption of liberal construction); Merrill v. Reed, 52 A. 409, 410 (Conn. 1902) (Violations of the statute "were not sufficient to make the ballot void, under the principles of construction applicable to those provisions of our election laws which tend toward limiting the privileges of the elector."); Coughlin v. McElroy, 43 A. 854, 856 (Conn. 1899) (counting ballots with illegal marks on them because of a liberal construction); Fessenden v. Bossa, 37 A. 977, 979 (Conn. 1897) ("Where the legislature in express terms says that a ballot shall be void for some cause, the courts must undoubtedly hold it to be void; but no voter is to be disfranchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor."). *But see* Denny v. Pratt, 135 A. 40, 41 (Conn. 1926) (finding that the Democracy Canon "cannot prevail as against a statutory requirement expressed in unmistakable language").
100. *See infra* Appendix B.

Democracy Canon argument, such as when interpreting absentee voting statutes.[101] In other types of disputes, like candidate eligibility cases, the court acknowledged that the statute in question should be construed liberally in favor of candidate eligibility, but this presumption "does not authorize [the court] to ignore the clear intent of the legislature."[102] The court even refused to rely on the Democracy Canon to grant candidates access in situations where the result of ineligibility was severe, stripping a major political party of having any candidate in the election. In *Butts v. Bysiewicz*,[103] the Connecticut secretary of state refused to place an incumbent judge on the ballot because the secretary did not receive the judge's certificate of endorsement from his political party before the statutory deadline.[104] The record revealed that the candidate mailed the endorsement, as permitted by the statute, but the secretary never received it nor was it returned to the candidate.[105] The candidate argued that he should appear on the ballot, giving the voters more candidates to choose from, and that the court should not honor a strict construction of the statutory deadline.[106] The court refused to extend the deadline for the candidate's unintentional noncompliance because "filing deadlines for ballot access 'are designed to ensure the integrity of the election process in general.'"[107] In a footnote, the court rejected the candidate's Democracy Canon argument because he failed to show that the court's strict construction "involved the *actual* disfranchisement of voters."[108] The disenfranchisement of voters, the court noted, was not the result of the court's statutory interpretation but of the candidate's untimely inquiry into the status of his endorsement, which meant he missed the deadline to run as an independent or write-in candidate.[109] The court acknowledged the harsh results of this interpretation—the Republican candidate would be running unopposed.[110] Still, the court felt that it could not "intervene when the legislature clearly has expressed its intent to require

101. *See, e.g.*, Keeley v. Ayala, 179 A.3d 1249, 1261 (Conn. 2018) (rejecting absentee ballots for noncompliance because the legislature "enacted a regulatory scheme designed to prevent fraud as far as practicable by mandating the way in which absentee ballots are to be handled"). *But see In re* Election of the U.S. Representative for the Second Cong. Dist., 653 A.2d 79, 105–06 (Conn. 1994) (partially relying on the Democracy Canon to count some absentee ballots).

102. Bysiewicz v. Dinardo, 6 A.3d 726, 730 (Conn. 2010) (interpreting "attorney at law of at least ten years" to mean that attorney general candidates must have ten years of litigation experience); *see also id.* at 802 (Bishop, J., concurring) (concurring because the majority "disregards the canon it claims to embrace, namely, that election statutes should be construed liberally in favor of eligibility" and instead "imports into the statute a restriction on eligibility that is neither implied nor expressed by the statute's language").

103. 5 A.3d 932 (Conn. 2010).

104. *Id.* at 947.

105. *Id.* at 935.

106. *Id.* at 936–37.

107. *Id.* at 939 (quoting Forcade-Osborne v. Madison Cty. Electoral Bd., 778 N.E.2d 768, 772 (Ill. 2002)).

108. *Id.* at 937 n.5.

109. *Id.*

110. *Id.* at 947.

strict compliance with the filing deadline . . . . Any relief must come from the legislature."[111]

Similarly, in *Gonzalez v. Surgeon*,[112] the court interpreted a statute to reject a candidate's petition to appear on the ballot. In doing so, the court explicitly rejected the candidate's Democracy Canon argument, stating that, while the Democracy Canon has merit, it

> does not authorize the court to substitute its views for those of the legislature or to read into an election statute a limitation on its application that the legislature easily could have imposed but did not. . . . Accordingly, the principle that election laws must be liberally construed does not affect [the court's] conclusion.[113]

The four most recent cases from the Connecticut Supreme Court invoking the Democracy Canon acknowledged the plain meaning provision, section 1-2z,[114] but circumvented the provision by finding the statute ambiguous.[115] In these cases, the Connecticut Supreme Court repeatedly found ways not to restrict its interpretation to the plain meaning.[116] For example, in *Bysiewicz v. Dinardo*,[117] the Connecticut Supreme Court interpreted a statute requiring a candidate for attorney general to be "an attorney at law of at least ten years' active practice at the bar of this state."[118] The Court found that the statutory language was ambiguous[119] but still refused to allow the plaintiff to run as a candidate: "the presumption [in favor of eligibility] does not authorize us to ignore the clear intent of the legislature that the attorney general must have some measure of experience in trying cases."[120] Because the plaintiff had no litigation experience, his candidacy was rejected by the court, despite the court's acknowledgment that the statute was ambiguous and the presumption in favor of greater eligibility would normally require the court to rule in the candidate's favor.

This, however, creates an irreconcilable tension: the court finds the election provision ambiguous to avoid relying on section 1-2z. Yet, when an election statute is ambiguous, the court's Democracy Canon precedent urges the court to liberally construe the provisions in favor of enfranchisement. Then, despite the ambiguity in the statute, the Democracy Canon is rejected.

---

111. *Id.*
112. 937 A.2d 13 (Conn. 2007).
113. *Id.* at 22.
114. *See* Keeley v. Ayala, 179 A.3d 1249, 1257 (Conn. 2018); *Butts*, 5 A.3d at 937; Bysiewicz v. Dinardo, 6 A.3d 726, 737 (Conn. 2010); *Gonzalez*, 937 A.2d at 20.
115. *See, e.g.*, *Keeley*, 179 A.3d at 1262–63 ("To the extent that any ambiguity remains, we agree with the trial court that the legislative history . . . makes it abundantly clear that the legislature intended for partisan individuals . . . to be excluded from the process."); *Butts*, 5 A.3d at 946 (reviewing the statute's legislative history to find ambiguity); *Gonzalez*, 937 A.2d at 20 ("We conclude that the statute's reference to 'any petition page *circulated in violation of this provision*' is ambiguous.").
116. This pattern is consistent with Abbe Gluck's observations of the Connecticut Supreme Court's reaction to section 1-2z. *See* Gluck, *supra* note 22, at 1791–92.
117. 6 A.3d 726 (Conn. 2010).
118. *Id.* at 730.
119. *Id.* at 737–38.
120. *Id.* at 741.

It is strange for a court that generally embraces a purposivist outlook by rejecting a codified plain meaning rule to conclude that it cannot "substitute its views for those of the legislature,"[121] despite the inherently purposivist goals of the Democracy Canon.

Is there any way to reconcile these two positions? The divergence may be explained by considering that the Connecticut Supreme Court is less apt than other courts to employ substantive canons, believing that they "should be employed as a last resort, after all other attempts to garner meaning have been exhausted."[122] In other words, if the court cannot derive the statute's purpose from its plain meaning or legislative history, the court may be unwilling to solely rely on a substantive canon, like the Democracy Canon, to support such a broad reading of the statute.

Another simple, yet disconcerting, explanation for this tension is that the justices' individual policy concerns were better embodied by disenfranchisement in these cases. The justices that decided *Gonzalez*, *Dinardo*, and *Butts* were all appointed by relatively conservative governors,[123] and each of those decisions led to the disenfranchisement of Democratic candidates.[124] However, when the court revisited the issue in 2018 in *Keeley v. Ayala*,[125] the justices, who by this time were mostly appointed by a Democratic governor,[126] still decided to disenfranchise a Democratic candidate. The court refused to count absentee ballots that were not returned in one of the methods authorized by the statute.[127] Noting that "vot[ing] by absentee ballot is a special privilege,"[128] the court harshly refused to count the votes out of a concern for fraud.[129] Any belief that the almost entirely Democrat-appointed court would revitalize the Democracy Canon to protect enfranchisement may have been quashed with the *Keeley* decision.

---

121. Gonzalez v. Surgeon, 937 A.2d 13, 22 (Conn. 2007); *see also* Butts v. Bysiewicz, 5 A.3d 932, 939 (Conn. 2010).

122. State v. Courchesne, 816 A.2d 562, 618 (Conn. 2003) (Zarella, J., dissenting); *see also* Gluck, *supra* note 22, at 1829 (finding that state judges who consider themselves textualists "demote the substantive canons favored by the federal textualists").

123. These three cases were decided by ten justices: Chase Rogers, Joette Katz, Christine Vertefeuille, Barry Schaller, William Sullivan, Richard Palmer, Ian McLachlan, Dennis Eveleigh, Flemming Norcott, Jr., and Peter Zarella. Additionally, Judge Thomas Bishop of the Connecticut Appellate Court sat with the court to hear *Dinardo*. Fairly conservative governors appointed all ten of these justices, as well as Judge Bishop.

124. *See Butts*, 5 A.3d at 935 (The candidate judge was running as a Democrat.); *Dinardo*, 6 A.3d at 729 (The plaintiff sought Democratic candidacy for secretary of state.); *Gonzalez*, 937 A.2d at 16 (The candidate petitioned to appear on the ballot as a Democrat.).

125. 179 A.3d 1249 (Conn. 2018).

126. Seven justices decided *Keeley*: Richard Palmer, Andrew McDonald, Richard Robinson, Gregory D'Auria, Raheem Mullins, Maria Araujo Kahns, and Christine Vertefeuille. A Democratic governor appointed the five newest justices: McDonald, Robinson, D'Auria, Mullins, and Kahns.

127. *Keeley*, 179 A.3d at 1261, 1265.

128. *Id.* at. 1258.

129. *Id.* at 1258–59.

2. Arkansas

The Arkansas legislature has never enacted a codified Democracy Canon and there is no codified Democracy Canon today. Though there is a general liberal construction provision,[130] the Arkansas Supreme Court has not cited to this provision in adjudicating any election disputes. The court has invoked the Democracy Canon ten times since 1925 and only three of these cases were decided after 1960.[131] In the early twentieth century, the Arkansas Supreme Court repeatedly construed certain election statutes liberally but only enfranchised voters when discussing either election contests[132] or candidate access disputes.[133] For example, in *Fisher v. Taylor*,[134] the appellant, hoping to run for the Arkansas General Assembly but serving in the navy, gave his mother power of attorney to complete the requirements to get his name on the ballot.[135] This included signing a loyalty pledge and sending it to the county central committee.[136] However, the committee's chairman rejected the application, claiming that it did not comply with party rules since the loyalty pledge was not personally signed by the candidate.[137] The trial court denied the candidate a writ of mandamus to compel the printing of his name on the ballot.[138] The Arkansas Supreme Court reversed because "[t]he right to become a candidate for public office is, under our form of government, a fundamental right which should not be in any manner curtailed without good cause."[139] The court seemed to reach this decision, however, in large part because of the candidate's naval service: "soldiers and sailors absent from home in defense of their country have been the objects of special consideration at the hands of lawmakers and courts."[140]

---

130. *See* ARK. CODE ANN. § 1-2-202 (2020) ("All general provisions, terms, phrases, and expressions used in any statute shall be liberally construed in order that the true intent and meaning of the General Assembly may be fully carried out.").

131. *See infra* Appendix C. With only ten decisions, Arkansas has the fewest cases invoking the Democracy Canon of the four states in Part II. Despite having fewer cases, I chose to include Arkansas so that a state from the Southeast was included, and Arkansas had the most applicable decisions from the Southern states. Additionally, the Arkansas cases include election contest disputes, not one of the three categories of disenfranchisement I have outlined.

132. *See, e.g.*, Gunter v. Fletcher, 233 S.W.2d 242, 243 (Ark. 1950) (relying on the liberal construction of election statutes as akin to a pleading standard); La Fargue v. Waggoner, 75 S.W.2d 235, 239 (Ark. 1934) ("[T]he statute providing for contesting elections should be liberally construed, the purpose of the contest being to determine what candidate received the greatest number of votes."); Robinson v. Knowlton, 40 S.W.2d 450, 452 (Ark. 1931) (requiring a new election because "the statute providing for contesting elections should be liberally construed"). *But see* Logan v. Russell, 206 S.W. 131, 132 (Ark. 1918) (prohibiting an election contest because the statute's language was clear).

133. *See, e.g.*, Fisher v. Taylor, 196 S.W.2d 217, 217 (Ark. 1946).

134. 196 S.W.2d 217 (Ark. 1946).

135. *Id.* at 217–18.

136. *Id.*

137. *Id.*

138. *Id.* at 217.

139. *Id.* at 220.

140. *Id.*

After 1960, there are only three cases from the Arkansas Supreme Court that invoke the Democracy Canon; two of these decisions resulted in enfranchisement, while one resulted in disenfranchisement.[141] In *Republican Party of Garland County v. Johnson*,[142] the Arkansas Supreme Court narrowly interpreted a statutory deadline to file the candidate's party certificate, prohibiting the candidate from appearing on the ballot, even though the candidate missed the deadline by only a few minutes.[143] The court explicitly rejected the candidate's Democracy Canon argument, stating that *Fisher* "was specifically limited to its facts."[144] Yet, just one month later, the court in *Populist Party of Arkansas v. Chesterfield*[145] liberally interpreted a statute dictating procedures about petitions for candidate access. This broad interpretation permitted Ralph Nader to appear on the 2004 presidential ballot.[146] The court, citing to *Fisher*, stated that "[a]ny law or party rule, by which this inherent right of the citizen [to become a candidate for public office] is diminished or impaired ought always to receive a liberal construction in favor of the citizen desiring to exercise the right."[147]

Is there any way to reconcile this inconsistent application? Perhaps the court is less willing to enfranchise voters via the Democracy Canon when the violation of the election statute is based on the candidate's wrongdoing. The court may expect candidates to have a better understanding of the law or judges may have less sympathy for candidates. However, this explanation fails to take into account that the election violation in *Fisher* was the result of a candidate's error. The more likely reason for this inconsistent application is that the court will employ the Democracy Canon whenever it feels that a candidate deserves to appear on the ballot, though this inference is hard to confirm given the small sample of cases available. The justices sympathized with the candidate in *Fisher* because he was a member of the navy during World War II[148] and felt Nader deserved to be on the ballot because he had collected the required number of signatures.[149] The court did not have the same sympathy for the candidate in *Republican Party of Garland County* because she failed to meet the deadline for no reason other than tardiness (despite the candidate testifying that she waited until the last minute out of fear that she would lose her job since she would be running against her employer).[150] Whether or not the Arkansas Supreme Court's inconsistent application of the Democracy Canon is the result of judicial cherry-picking will only become clearer as the court hears more candidate access disputes.

141. *See infra* Appendix C.
142. 193 S.W.3d 248 (Ark. 2004).
143. *Id.* at 250.
144. *Id.* at 252 n.2.
145. 195 S.W.3d 354 (Ark. 2004).
146. *Id.* at 355.
147. *Id.* at 359 (citing Fisher v. Taylor, 196 S.W.2d 217 (Ark. 1946)).
148. *See* Fisher v. Taylor, 196 S.W.2d 217, 219–20 (Ark. 1946).
149. *See Populist Party of Ark.*, 195 S.W.3d at 360 (Brown, J., concurring).
150. Republican Party of Garland Cty. v. Johnson, 193 S.W.3d 248, 250 (Ark. 2004).

B. Historically Codified Democracy Canon

The Connecticut and Arkansas analyses show that the Democracy Canon is more prone to inconsistent results today than it was prior to 1960. The next inquiry is whether the codification of the Democracy Canon by the state legislatures impacts this trend.

1. Nevada

Nevada's legislature enacted the Democracy Canon as early as 1925.[151] Today, Nevada's codified Democracy Canon is found in section 293.127 of the Nevada Revised Statutes.[152] The Nevada Supreme Court relies on the codified Democracy Canon provision more than any other state in the Democracy Canon codified category.[153] Further, all of the decisions citing to section 293.127 actually result in the enfranchisement of voters, another anomaly in this analysis.[154] In one case, the Democracy Canon is the only tool of statutory interpretation relied on to interpret the statute in question.[155]

Even though the Democracy Canon has consistently been codified in Nevada, the Nevada Supreme Court's reliance on the Democracy Canon to enfranchise voters has still decreased. The court has mentioned the Democracy Canon twenty-three times since 1883.[156] Though the Democracy Canon has been mentioned relatively consistently,[157] it has been rejected more frequently since the turn of the twenty-first century, which has led to more decisions to disenfranchise voters.[158]

---

151. *See* 1925 Nev. Stat. 19 ("This statute shall be liberally construed to the end that minority groups and parties shall have an opportunity to participate in the elections and that the real will of the electors shall not be defeated . . . .").

152. NEV. REV. STAT. § 293.127(1) (2020) ("This title must be liberally construed to the end that: (a) All electors, including, without limitation, electors who are elderly or disabled, have an opportunity to participate in elections and to cast their votes privately; (b) An eligible voter with a physical or mental disability is not denied the right to vote solely because of the physical or mental disability; and (c) The real will of the electors is not defeated by any informality or by failure substantially to comply with the provisions of this title with respect to the giving of any notice or the conducting of an election or certifying the results thereof.").

153. *See infra* Appendix D. The Nevada Supreme Court has cited to the codified Democracy Canon provision five times between 1975 and 2009. *See generally* Lueck v. Teuton, 219 P.3d 895 (Nev. 2009); Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 100 P.3d 179 (Nev. 2004); Eller Media Co. v. City of Reno, 59 P.3d 437 (Nev. 2002); Long v. Swackhamer, 538 P.2d 587 (Nev. 1975); LaPorta v. Broadbent, 530 P.2d 1404 (Nev. 1975). Two of these cases, *Lueck* and *Eller Media Co.*, have not been included in this analysis because they do not fall within the three categories of disenfranchisement. The other six cases since 1960 in Appendix D are instances where the court refers to the common-law Canon, without reference to the codified provision.

154. *See infra* Appendix H; *see also infra* Part III.A.2.

155. *See Long*, 538 P.2d at 589 (finding that the Independent American Party should appear on the ballot because a "qualified political party that has met standards for qualification should be afforded an opportunity to express its views at election time through its candidates").

156. *See infra* Appendix D.

157. The Canon was invoked twelve times between 1880 and 1960 and eleven times between 1960 and 2019. *See infra* Appendix D.

158. While only two of the twelve decisions before 1960 disenfranchised voters, five of the eleven decisions after 1960 disenfranchised voters. *See infra* Appendix D.

These decisions indicate that the court was much more open to the idea of the Democracy Canon before 1960. For instance, in *Buckner v. Lynip*,[159] the court validated ballots that had distinguishing marks written on them, despite a statute that read "[a]ny ballot upon which appears names, words or marks written or printed . . . shall not be counted."[160] The court opined that invalidating the ballot for "[s]uch a word or mark would not be within the spirit of the law, although within its letter" and so applied a liberal construction to count the ballots.[161] The court did not hesitate to rely on the Democracy Canon despite such clear statutory language.

More recently, the court, though still willing to invoke the Democracy Canon, tends to do so more as a tiebreaker between two possible interpretations, as was the case in *Cirac v. Lander County*.[162] In that case, the court interpreted the statute in question[163] to permit a wife with a community property interest to be considered a "taxpayer" and thus able to validly sign an initiative petition.[164] The court reached this conclusion because "the right to vote should not be taken away due to a doubtful statutory construction."[165] Justice Gordon Thompson, in dissent, argued that "[t]his court is not empowered to annul or alter the legislative direction" of the statute because the "legislative intent is clearly expressed and there is no occasion for [statutory] construction."[166] Distressed by the majority's disregard for what he considered to be the plain text of the statute, Justice Thompson concluded with a reminder that wives who own community property could have listed their names, along with their husbands' names, on the assessment roll; for this reason, the wives' "ineligibility must be attributed to them rather than to the statutory wording selected by the legislature."[167] Despite Justice Thompson's concerns, the majority relied on the Democracy Canon to decide between two equally plausible interpretations of the statute: the plain meaning or an interpretation within the "spirit and meaning" of the statute.[168]

In the most recent invocation of the Democracy Canon, a unanimous Nevada Supreme Court refused to rely on the Canon.[169] In interpreting the

159. 41 P. 762 (Nev. 1895).

160. *Id.* at 764.

161. *Id.* at 766. *But see id.* at 767 (Belknap, J., dissenting) ("I admit that if my views are to be adopted the voters of the precinct at that election will be disfranchised, but I am confronted with what I think are clear and imperative provisions of law, incapable of judicial construction.").

162. 602 P.2d 1012 (Nev. 1979).

163. NEV. REV. STAT. § 243.465 (2020) ("Whenever the residents of any county in this State shall file a petition with the clerk of the board of county commissioners, signed by qualified electors of the county, who are also taxpayers of the county as appears by the last real or personal property assessment roll . . . the board of county commissioners shall fix a time for a public hearing upon the petition . . . .").

164. *See Cirac*, 602 P.2d at 1015.

165. *Id.* at 1016–17.

166. *Id.* at 1019 (Thompson, J., dissenting).

167. *Id.* at 1020.

168. *Id.* at 1016 (majority opinion).

169. *See* Strickland v. Waymire, 235 P.3d 605 (Nev. 2010).

language of the Nevada Constitution permitting recall petitions, the court had to determine whether all registered voters could sign a petition to recall or just those who had voted in the election of the officer facing the potential recall.[170] Respondents, seeking the former result, argued that the Democracy Canon required the court to count all the signatures and uphold the registered voters' right to petition for a recall.[171] The court disagreed, finding that the respondents "conflate[d] the right to submit a petition calling for recall with the right to vote at the special election that follows, which are two different things."[172] Although the court had considered invoking the Democracy Canon in the nineteenth century with regard to recall petitions,[173] the court in *Strickland v. Waymire*[174] affirmatively limited the Democracy Canon's relevance in recall disputes.

2. Colorado

Like Nevada, Colorado has a long history of codifying the Democracy Canon.[175] Today, Colorado's relevant statute is section 1-1-103(1) of the Colorado Revised Statutes.[176] Though Hasen cites this provision as an example of the codified Democracy Canon,[177] I argue that that section 1-1-103(1) is only a semi–Democracy Canon provision because the same section permits courts to disenfranchise voters by including the language regarding fraud prevention.[178] In other words, it is left to the court's discretion as to which purpose (fraud prevention or voter accessibility) to prioritize in its interpretation. The Colorado Supreme Court case law supports this conclusion: the court, despite citing to section 1-1-103(1), still disenfranchises voters.[179]

In analyzing the Colorado cases invoking the Democracy Canon, there are more references to the Canon after 1960 than before 1960.[180] Yet, the Canon's effectiveness has still been in decline: the number of decisions

170. *Id.* at 613.
171. *Id.*
172. *Id.*
173. *See generally* State v. Scott, 285 P. 511 (Nev. 1930).
174. 235 P.3d 605 (Nev. 2010).
175. The legislature enacted a Democracy Canon provision as early as 1905. *See* 1905 Colo. Sess. Laws 190 ("This act shall be liberally construed, so that all legally qualified electors may be registered, and that those who are not legal electors may be kept from such registration lists, and that fraud and corruption in elections may be prevented . . . .").
176. COLO. REV. STAT. § 1-1-103(1) (2020) ("This code shall be liberally construed so that all eligible electors may be permitted to vote and those who are not eligible electors may be kept from voting in order to prevent fraud and corruption in elections.").
177. *See* Hasen, *supra* note 2, at 79 n.49.
178. COLO. REV. STAT. § 1-1-103(1).
179. *See, e.g.*, Kuhn v. Williams, 418 P.3d 478, 486 (Colo. 2018) (refusing to liberally construe the statute because section 1-1-103(1) does not apply to the statute in question); Moran v. Carlstrom, 775 P.2d 1176, 1182–83 (Colo. 1989) (undertaking an extensive statutory analysis in voiding four write-in ballots).
180. The Colorado Supreme Court has invoked the Democracy Canon twenty-four times since 1889. The Canon was invoked ten times before 1960 and fourteen times after 1960. *See infra* Appendix E.

disenfranchising voters has increased since 1960. While all but one of the cases before 1960 relying on the Democracy Canon resulted in enfranchisement, over 40 percent of the decisions after 1960 (six of the fourteen cases) resulted in disenfranchisement. Of the six cases after 1990, four resulted in disenfranchisement.[181]

As was the case in Nevada, the Colorado Supreme Court was much more willing to rely on the Democracy Canon to overcome the plain meaning of statutes at the turn of the twentieth century. In the court's first invocation of the Canon in *Kellogg v. Hickman*,[182] the court validated ballots that had been printed on paper not in compliance with the statute. The court counted the ballots because "the spirit and intention of the law [was] not violated, although a literal construction would vitiate it."[183] The dissent rejected this interpretation, arguing that "[a] ballot proscribed as illegal before it is voted, is not, when voted, converted into a legal ballot."[184] Other cases from the court at this time followed the approach of the majority.[185]

Since 1960, however, the Colorado Supreme Court has been less consistent in its application of the Democracy Canon.[186] The court relied on the Canon in *Meyer v. Lamm*[187] to validate some write-in ballots but void others.[188] The court found that a liberal construction of the write-in statute is acceptable so that ballots are not rejected when "the intent of the voter to vote for a particular write-in candidate is clear."[189] In *Moran v. Carlstrom*,[190] the court cited to the Democracy Canon provision, section 1-1-103(1), to support the claim that "a ballot cast by a qualified elector should be rejected only if the elector's intent cannot be ascertained with reasonable certainty."[191] When intent cannot be discerned, "the elector's right to have the ballot count must give way to the right of the electorate to a fair and accurate count."[192] Here, four votes were not counted because the voters placed an "x" next to Moran's name as well as an "x" next to another candidate's name, which had been written in by the voters.[193] The court

181. *See infra* Appendix E.
182. 21 P. 325 (Colo. 1889).
183. *Id.* at 327.
184. *Id.* at 331 (Helm, C.J., dissenting).
185. *See, e.g.*, Littlejohn v. People *ex rel.* Desch, 121 P. 159, 162 (Colo. 1912) (invalidating legislation that "extend[s] to the denial of the franchise itself"); People *ex rel.* Johnson v. Earl, 94 P. 294, 298–99 (Colo. 1908) (expanding eligibility of voters by relying on the codified Democracy Canon provision); Dickinson v. Freed, 55 P. 812, 814 (Colo. 1898) ("[C]ourts will not undertake to disfranchise any voter, by rejecting his ballot, where his choice can be gathered from the ballot . . . ."); Allen v. Glynn, 29 P. 670, 674 (Colo. 1892) (Helm, J., dissenting) (Election laws are "peculiarly entitled to such judicial construction as will effectuate its purpose, unless sound legal principles imperatively forbid.").
186. Of the fourteen cases decided after 1960, seven led to enfranchisement, six led to disenfranchisement, and one decision was split. *See infra* Appendix E.
187. 846 P.2d 862 (Colo. 1993) (en banc).
188. *Id.* at 877–78.
189. *Id.* at 876.
190. 775 P.2d 1176 (Colo. 1989).
191. *Id.* at 1180.
192. *Id.* at 1183.
193. *Id.* at 1178.

found it impossible to determine the voters' intent and so rejected all four ballots.[194] However, as Justice William H. Erickson noted in dissent, the intent of the four votes in question was easily ascertained given that the other candidate was ineligible for the position in question.[195] Thus, the court avoided relying on the Democracy Canon simply by determining that the voters' intent was unclear, despite there being room for reasonable minds to disagree about the voters' intent.

In the one other case citing to section 1-1-103(1), *Kuhn v. Williams*,[196] the court again avoided liberally interpreting the statute. The court found that a petition circulator was statutorily ineligible to collect signatures on behalf of the candidate, so all the signatures he collected could not be counted.[197] The court acknowledged the harsh results:

> [The court's decision] causes the [candidate's] number of signatures to fall short of the 1000 required to be on the Republican primary ballot. Therefore, the Secretary may not certify [the candidate] to the 2018 primary ballot for [the election]. We recognize the gravity of this conclusion, but Colorado law does not permit us to conclude otherwise.[198]

The secretary of state argued that the court was required to liberally construe the statute that permits judicial review.[199] The court rejected this argument, stating that the liberal construction requirement "is independent from the issue of whether a protester may challenge the validity of a petition."[200] In addition, the court noted, a liberal construction of this statute would lead to an absurd result that the Colorado General Assembly could not have intended.[201]

Despite having a codified Democracy Canon, the Colorado Supreme Court has still managed to disenfranchise voters by refusing to apply a liberal construction to the election statutes. This may be the result of enacting a Democracy Canon provision that asks the courts to both protect the right to vote and prevent fraud.[202] However, the court seems less concerned with fraud (though it is mentioned as a legitimate state interest) and more concerned with staying within the confines of the statutes' plain language.[203]

194. *Id.* at 1183 (rejecting the ballots "because in each case the voter's intent cannot be ascertained with reasonable certainty").

195. *Id.* at 1183–84 (Erickson, J., dissenting).

196. 418 P.3d 478 (Colo. 2018).

197. *Id.* at 480–81.

198. *Id.* at 489.

199. *Id.* at 485.

200. *Id.* at 486.

201. *Id.* ("[P]ermit[ting] every facially valid petition to proceed, regardless of any underlying flaws" is an absurd result.).

202. *See* COLO. REV. STAT. § 1-1-103(1) (2020).

203. *See, e.g.*, *Kuhn*, 418 P.3d at 489 ("Colorado law does not permit us to conclude otherwise."); Moran v. Carlstrom, 775 P.2d 1176, 1183 (Colo. 1989) ("A commonsense reading of the statute shows these four ballots are defective within the meaning of [the disputed statute].").

C. Understanding the Longitudinal Analysis

Given this Note's analysis of these four states, one can make several assumptions about the Democracy Canon's use over time. First, even when these courts have consistently applied the Democracy Canon over time, its use is more likely to be associated with voter disenfranchisement after 1960 than before. Second, it appears that having a codified Democracy Canon either currently (Nevada) or historically (Colorado) does not impact this trend. However, these states do have both more references to the Democracy Canon[204] and more cases resulting in enfranchisement[205] than Connecticut and Arkansas. Thus, it is possible that the codification of the Democracy Canon had some impact on greater enfranchisement, though other factors could have played a role in this development.

There are several hypotheses that may account for this shift toward disenfranchisement, none of which are mutually exclusive nor account for this trend entirely. First, this decline may be the result of growing distrust in substantive canons more generally.[206] Second, this shift may derive from a change in the composition of the electorate itself after 1960; with the passage of the Voting Rights Act of 1965,[207] voting was made more accessible to nonwhite voters.[208] Perhaps some courts were less willing to invoke the Democracy Canon if it meant enfranchising African-American voters. A less accusatory conclusion may be that more election disputes were resolved by interpreting more recent federal statutes (or the state's analogue statute), so justices were less inclined to rely on old precedent interpreting state laws that invoked the Democracy Canon. Such an explanation might account for the courts' (especially Connecticut's) hesitation to rely on century-old precedent.[209] Lastly, this shift may be a practical result as the number of election disputes in state courts skyrocketed toward the end of the twentieth century,[210] encouraging courts to seek more precise justifications for their decisions. With more eyes on election disputes now, courts may be less willing to rely on the Democracy Canon out of concern for jeopardizing the judiciary's legitimacy. To further understand why the Democracy Canon has become less effective, Part III of this Note explores the reasons underlying courts' rejection of the Democracy Canon.

---

204. The total Democracy Canon references for each state were: Connecticut (17); Arkansas (11); Nevada (23); and Colorado (24).

205. The total cases resulting in enfranchisement for each state were: Connecticut (5); Arkansas (6); Nevada (16); and Colorado (16).

206. *See supra* notes 36–40 and accompanying text.

207. Voting Rights Act of 1965, Pub. L. No. 89–110, 79 Stat. 437 (codified as amended in scattered sections of 42 and 52 U.S.C.).

208. For an example of how the Voting Rights Act of 1965 has impacted voter enfranchisement in one state, see Paul Finkelman, *The Necessity of the Voting Rights Act of 1965 and the Difficulty of Overcoming Almost a Century of Voting Discrimination*, 76 LA. L. REV. 181, 220–22 (2015).

209. *See supra* Part II.A.1.

210. *See supra* note 2.

III. LATITUDINAL REVIEW OF THE DEMOCRACY CANON

Part III analyzes decisions from the courts of last resort in all fifty states that have invoked the Democracy Canon since 2000.[211]

A. Preliminary Results from the Dataset

1. Assembling the Dataset

For Part III, I collected one hundred cases decided since 2000 from thirty-eight states.[212] I then categorized these cases in several ways. First, I determined the type of election dispute involved in the case. Here, I was more expansive than in Part II[213] and included disputes about election contests themselves and the constitutionality of initiative and recall petitions.[214] The expanded categories of disputes reflect the wider variety of cases in which judges have decided the Democracy Canon is relevant.

Second, I categorized the cases into three different results: (1) voter enfranchised; (2) voter disenfranchised; and (3) other.[215] Decisions falling within the "other" category do not clearly result in either the enfranchisement or disenfranchisement of voters. This includes what I have been referring to as "split" decisions,[216] as well as cases in which the court's decision could be seen as enfranchising one general group of voters at the expense of disenfranchising another group. An example of this is when a candidate has already been elected but the court orders a new election.[217] In these cases, the court must decide whether to disenfranchise those who already voted or those who were unable to vote due to the error raised by the plaintiffs.

---

211. I selected the year 2000 because the presidential election debacle of 2000 fundamentally changed how parties litigate election disputes. *See* Richard L. Hasen, *The Supreme Court's Shrinking Election Law Docket, 2001–2010: A Legacy of* Bush v. Gore *or Fear of the Roberts Court?*, 10 ELECTION L.J. 325, 325–26 (2011) (noting the "explosion" of election law litigation after *Bush v. Gore*). On a practical note, limiting the dataset to cases decided after 2000 provided a manageable, yet informative, set of cases.

212. These cases were collected by searching Westlaw and LexisNexis using the same Boolean searches and Key Number in note 75 and limiting the results to decisions after January 1, 2000. Thirteen states had no high court decisions citing to the Democracy Canon in this time frame. *See infra* Appendix F.

213. *See supra* notes 77–79 and accompanying text.

214. Cases about the constitutionality of initiative and recall petitions involve a more specific Democracy Canon: courts should liberally construe constitutional provisions in favor of the people's right to petition their government. *See, e.g.*, Ross v. Bennett, 265 P.3d 356, 358 (Ariz. 2011) ("[T]his Court has interpreted constitutional and statutory provisions governing recall liberally to protect the public's right to recall its officials."). However, because this is a subset of the Democracy Canon and often involves counting or not counting petition signatures, I have included them in this analysis.

215. *See infra* Appendix F.

216. *See supra* note 85.

217. *See, e.g.*, *In re* Contest of Nov. 8, 2011 Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684, 722 (N.J. 2012) (Rabner, C.J., dissenting) ("To annul the election is to disenfranchise 19,907 voters and raise questions about whether their constitutional right to vote has been denied.").

Another example is when an election has been erroneously conducted and may have resulted in voter confusion or misconduct at the polls.[218]

There are some caveats about this dataset. To begin, this may not be a full survey of all instances in which the Democracy Canon has been invoked since 2000 in the highest court of every state, though I included every decision I found that falls within the relevant categories of disenfranchisement.[219] Additionally, because this set of cases is limited to election disputes that explicitly mention a liberal construction in favor of enfranchisement, this analysis does not purport to reflect a greater trend in state election dispute results. Instead, the data is meant only to highlight how courts are now employing the Democracy Canon. Lastly, this dataset does not show that the Democracy Canon is less useful in protecting the right to vote than it has been historically (as was the analysis in Part II). Building on the observations made in Part II, this Part provides a universe of cases that is helpful in considering why courts in the twenty-first century are disenfranchising voters despite referencing the Democracy Canon, which is meant to protect enfranchisement.

2. Initial Results

Of the one hundred cases in this dataset, forty-nine of the cases resulted in the enfranchisement of voters, forty-one resulted in disenfranchisement, and ten resulted in other results.[220] In broad strokes, reference to the Democracy Canon is almost as likely to result in voter disenfranchisement as it is to enfranchise voters. This suggests that the Democracy Canon is not a powerful instrument for protecting the right to vote, and it is a mistake to assume that courts will enfranchise voters if the judges mention the Canon.

Another intriguing result is that the enfranchisement/disenfranchisement split is just as pronounced in states where the Democracy Canon has been codified by the state legislature: the twenty-six decisions in this category were equally split between enfranchisement and disenfranchisement (twelve each), with the remaining two cases falling into the other category.[221] This category had the highest rate of disenfranchisement (46 percent) of all three categories.[222] In addition, most of the decisions in this category do not have any citations to their codified Democracy Canon provision.[223] However, the state court decisions that do cite to these provisions often enfranchise

218. *E.g.*, Wesley v. Wash. Cty. Democratic Exec. Comm., 235 So. 3d 1379, 1386–87 (Miss. 2017) (refusing to order a new election when the security of ballot boxes allegedly called all votes into question).

219. This dataset only includes cases in which some variation of the terms "liberal," "strict," "construe," or "construction" appear in the opinion; if courts refer to the Democracy Canon using other language, it will not appear in this dataset.

220. *See infra* Appendix G.

221. *See infra* Appendix G.

222. *See infra* Appendix G.

223. Though there are twenty-six cases from this category of states that were decided after 2000, there are only seven cases that cite to the codified Democracy Canon provision after 2000. *Compare infra* Appendix G, *with infra* Appendix H.

voters.[224] Though the presented dataset cannot provide a reason for this trend, one hypothesis is that state courts are hesitant to confine themselves to codified rules of construction.[225] It could also be that these states generally have more codified canons of statutory interpretation, so justices have greater leeway in choosing which canons to rely on. Regardless, the analysis of these decisions suggests that the mere existence of a codified Democracy Canon provision does not generally impact a court's decision. But when a court relies on the codified Democracy Canon provision by explicitly citing to it, the chances of enfranchisement increase dramatically.

B. Trends from the Dataset

Because the invocation of the Democracy Canon, generally, is almost as likely to be associated with disenfranchisement as it is with enfranchisement, it is important to understand what might explain these results. If a court purports to construe statutes in favor of the right to vote, how does it still disenfranchise voters? To answer this question, this Part examines decisions in the dataset that either disenfranchise voters despite reference to the Democracy Canon or enfranchise voters with a dissenting opinion that critiques the court's use of the Democracy Canon.[226] These discussions provide a fruitful ground for understanding how the Democracy Canon is subject to judicial discretion and what other interpretive canons might sway a court to disenfranchise voters. Understanding state courts' reactions to the Democracy Canon can shine light on how attorneys and state legislatures should approach using the Canon.

1. The Rise of Textualism

Some courts arguing against the legitimacy of the Democracy Canon do so by adopting a method of statutory interpretation akin to Gluck's "modified textualism."[227] In short, Gluck identifies a new trend in state courts that differs from traditional textualism in that it offers a tiered approach to interpretation that "emphasizes textual analysis (step one); limits the use of legislative history (only in step two, and only if textual analysis alone does not suffice); and dramatically reduces reliance on the oft-used policy presumptions, the 'substantive canons' of interpretation (only in step three, and only if all else fails)."[228]

Indeed, most of the cases rejecting the Democracy Canon do so because the plain language of the statute is clear and thus no further interpretation is

224. Of the seven cases that cite to a codified Democracy Canon provision after 2000, six of them led to enfranchisement. *See infra* Appendix H.

225. *See* Gluck, *supra* note 22, at 1824–25.

226. There are forty-eight cases that fall within this subset. *See infra* Appendix F.

227. *See* Gluck, *supra* note 22, at 1834–42 (noting the differences between modified textualism and traditional textualism).

228. *Id.* at 1758.

necessary.[229] Often, this involves determining whether the statutory language is mandatory or directory. Typical in this regard is the Pennsylvania Supreme Court's 2004 decision *In re Canvass of Absentee Ballots of Nov. 4, 2003 General Election*.[230] The court had to decide whether absentee ballots delivered by third parties on behalf of nondisabled voters are valid votes that should be counted.[231] The relevant statute, section 3146.6 of the Pennsylvania Election Code, states that "the elector shall send [the absentee ballot] by mail, postage prepaid, except where franked, or deliver it in person to said county board of election."[232] The appellate court counted the seventy-four absentee ballots because the voters had submitted their ballots via third parties in reliance on instructions from the board of elections, even though "those instructions violated the plain language of the Election Code."[233] On appeal, the Pennsylvania Supreme Court reversed and voided the ballots after finding that "shall" in the statute "carries an imperative or mandatory meaning."[234] Appellees referenced the court's precedent, urging that the election code be liberally construed, so that "shall" should be understood as directory rather than mandatory.[235] The court rejected this argument, noting that the cases relied on by appellees were decided before the Pennsylvania legislature enacted the Statutory Construction Act of 1972, "which dictates that legislative intent is to be considered only when a statute is ambiguous."[236] Though acknowledging that "some contexts may leave the precise meaning of the word 'shall' in doubt," the court nevertheless found the term "shall" to be unambiguous and refused to liberally construe the statute.[237] By finding the plain language to be unambiguous, the Pennsylvania Supreme Court disenfranchised voters who simply relied on instructions from election officials.

---

229. *See, e.g.*, State *ex rel.* Schmidt v. City of Wichita, 367 P.3d 282, 293–94 (Kan. 2016) (rejecting the Democracy Canon because the statute was not ambiguous); Becker v. Dean, 854 So. 2d 864, 873 (La. 2003) (Weimer, J., dissenting) (noting that "promoting candidacy is unquestionably a laudable goal" but "[u]nderlying policy cannot supercede the clear language of the law"); Doe v. Montgomery Cty. Bd. of Elections, 962 A.2d 342, 362–63 (Md. 2008) (same); Abrams v. Lamone, 919 A.2d 1223, 1243 (Md. 2007) (finding the Democracy Canon inappropriate because the court has "construed eligibility requirements strictly, where the language of the constitutional provision is clear"); Pony Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists., 710 N.W.2d 609, 621 (Neb. 2006) ("[R]ule[s] of construction cannot authorize this court to expand the right of referendum beyond what has been reserved or to ignore its plain limitations."); Ohio Renal Ass'n v. Kidney Dialysis Patient Prot. Amendment Comm., 111 N.E.3d 1139, 1145 (Ohio 2018) (The rule that an unambiguous statute is to be applied, not interpreted, "applies with particular force in this election case."); Cathcart v. Meyer, 88 P.3d 1050, 1068 (Wyo. 2004) (rejecting the Democracy Canon because "construction, liberal or otherwise, of unambiguous provisions is not only unnecessary, but is unwarranted").

230. 843 A.2d 1223 (Pa. 2004).

231. *Id.* at 1225.

232. *Id.* at 1226.

233. *Id.* at 1229.

234. *Id.* at 1231.

235. *Id.*

236. *Id.*

237. *Id.* at 1231–32.

Even if a court finds ambiguity in the statute's language, justices employing a method of interpretation similar to Gluck's modified textualism hierarchy will only rely on substantive canons, like the Democracy Canon, as a last resort.[238] Courts rejecting a liberal construction of the election statute in question do just this, relying on everything from dictionaries[239] to legislative history[240] to avoid employing the Democracy Canon. The rising popularity of modified textualism in state courts may explain in part the hesitancy to rely on the Democracy Canon to enfranchise voters. Additionally, Part II of this Note showed that the supreme courts of Connecticut, Nevada, and Colorado are less willing now to rely on the Democracy Canon to overcome the plain language of a statute than before 1960.[241] A court, regardless of statutory interpretation method, can easily avoid employing the Democracy Canon if the court finds the language to be unambiguous.

2. Balancing Other State Interests

Courts have acknowledged a number of state interests that may outweigh the interest of protecting enfranchisement. For instance, in recall petition disputes, courts have found that the state's interest in having rare recalls (to ensure stability and save costs) can outweigh the citizen's right to recall.[242] Another idea courts emphasize is the interest in maintaining a uniform election code.[243]

The most important state interest that courts are willing to uphold is the prevention of fraud.[244] Hasen acknowledges that courts may not rely on the

238. *See* Gluck, *supra* note 22, at 1824–25.

239. *See, e.g.*, Keeley v. Ayala, 179 A.3d 1249, 1262 (Conn. 2018) (defining "designate"); Butts v. Bysiewicz, 5 A.3d 932, 941 (Conn. 2010) (defining "invalid"); Becker v. Dean, 854 So. 2d 864, 874 (La. 2003) (Weimer, J., dissenting) (defining "actually"); Kucera v. Bradbury, 97 P.3d 1191, 1201 (Or. 2004) (defining "certify"); *In re* Contest of 2003 Gen. Election for the Office of Prothonotary, 849 A.2d 230, 238 (Pa. 2004) (defining "oath").

240. *See, e.g.*, Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 100 P.3d 179, 194 (Nev. 2004) (A review of the legislative history removes ambiguity of the term "occupied" in the election statute.); Panio v. Sunderland, 824 N.E.2d 488, 493 (N.Y. 2005) (Read, J., dissenting) (noting that the statute's legislative history does not support the majority's Democracy Canon argument).

241. *See supra* Parts II.A.1, II.B.1–2.

242. *See* Strickland v. Waymire, 235 P.3d 605, 612 (Nev. 2010); Citizens for Honest & Responsible Gov't v. Heller, 11 P.3d 121, 127 (Nev. 2000).

243. *See* Republican Party of Garland Cty. v. Johnson, 193 S.W.3d 248, 252 (Ark. 2004) ("[S]trict observance of statutory requirements is essential . . . as it is desirable that election results have a degree of stability and finality."); Erlandson v. Kiffmeyer, 659 N.W.2d 724, 730 (Minn. 2003) ("[I]t is this paramount importance of the right to vote that imbues the state with a compelling interest in preserving the orderliness and integrity of the election process."); Kucera v. Bradbury, 97 P.3d 1191, 1202 (Or. 2004) (deferring to the secretary's duty "to obtain and maintain uniformity in the application, operation and interpretation of the election laws").

244. *See, e.g.*, Peroutka v. Cronin, 179 P.3d 1050, 1057 (Haw. 2008) (rejecting the candidate's petition signatures "[i]n light of the state's interest in detecting fraudulent or questionable signatures"); Doe v. Montgomery Cty. Bd. of Elections, 962 A.2d 342, 363 (Md. 2008) (rejecting a liberal construction of statute to avoid effectively eliminating additional

Democracy Canon when there are serious allegations of fraud.[245] However, courts have refused to employ the Democracy Canon even where there is a complete absence of fraud or intentional misconduct.[246] For instance, the New York Court of Appeals voided all absentee ballots that were incorrectly submitted due to an election official's error, not the wrongdoing of the voters.[247] In responding to the dissent's invocation of the Democracy Canon, the court held that the Democracy Canon could not be invoked even when voters were innocent of wrongdoing because "an exception predicated on voter innocence would swallow the rule, effectively relieving election officials of their obligation to adhere to the law."[248] Strict compliance with the election statutes, even if noncompliance was not the fault of the voter, is necessary because "a too-liberal construction . . . has the potential for inviting mischief on the part of candidates, or their supporters or aides, or worse still, manipulations of the entire election process."[249]

Even when fraud prevention is a valid concern in an election dispute, courts differ in understanding what their role is in upholding the state's interest of fraud prevention in relation to the Democracy Canon. Some courts will invoke the Democracy Canon so long as it does not trample on the state's interest in preventing fraudulent elections.[250] Under this view, the court has some discretion as to whether strict compliance with an election statute would compromise concerns about fraudulent voting.[251]

Other courts conceptualize the enforcement of fraud prevention regulations as being quintessential to the right to vote, making the Democracy Canon unnecessary. For example, in cases regarding the constitutionality of voter identification requirements, courts accepting the identification laws see the requirement as a method of fraud prevention that

---

preventions against fraud); *In re* Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1232–33 (Pa. 2004) ("To ignore [the statute's] clear instructions regarding in-person delivery would undermine the statute's very purpose as a safeguard against fraud."). *But see Panio*, 824 N.E.2d at 490 (relying on the Democracy Canon because the risk of fraud is less present in affidavit voting as opposed to absentee voting).

245. *See* Hasen, *supra* note 2, at 84.

246. *See, e.g.*, Keeley v. Ayala, 179 A.3d 1249, 1261 (Conn. 2018) ("[T]he return of ballots in a manner not substantially in compliance with [statute] will result in their invalidation, regardless of whether there is any proof of fraud."); Gross v. Albany Cty. Bd. of Elections, 819 N.E.2d 197, 202 (N.Y. 2004).

247. *See Gross*, 819 N.E.2d at 202.

248. *Id.* at 203.

249. *Id.* at 201 (quoting Stabler v. Fidler, 482 N.E.2d 1204, 1205 (N.Y. 1985)).

250. *See, e.g.*, Adkins v. Huckabay, 755 So. 2d 206, 221 (La. 2000) (A court will liberally construe a statute "to the extent that such tolerance of the irregularities will not lead to a manipulation of an election or affect the integrity of an election or the sanctity of the ballot."); *In re* Contest of 2003 Gen. Election for the Office of Prothonotary, 849 A.2d 230, 237 (Pa. 2004) ("[T]he policy of the liberal reading of the Election Code cannot be distorted to emasculate those requirements necessary to assure the probity of the process." (quoting *In re* Cianfrani, 359 A.2d 383, 384 (Pa. 1976))).

251. *See, e.g.*, Panio v. Sunderland, 824 N.E.2d 488, 491 (N.Y. 2005) (finding that the risk of fraud was less important when election error was the result of ministerial error).

does not unreasonably interfere with the right to vote.[252] By preventing fraudulent voting, these laws "preserve the purity of elections" by "preventing lawful voters from having their votes diluted by those cast by fraudulent voters."[253] Whether or not a court takes such a strong stance on fraud prevention, it is clear that some courts simply believe that fraud prevention should be prioritized over broader enfranchisement.

3. Judicial Deference to Legislative Prerogatives

Courts have suggested that employment of the Democracy Canon exemplifies a lack of judicial restraint.[254] Many courts acknowledge that the outcomes of cases disenfranchising voters are unsavory but that such decisions fall outside the judicial scope of power.[255] The courts reach this conclusion by acknowledging that election statutes are the compromised result of balancing the promotion of enfranchisement with "ensur[ing] the integrity of the election process."[256] Thus, courts will avoid a liberal construction of an election statute out of concern that such an interpretation would upset the legislature's policymaking decision.[257]

To not upset the legislature's policymaking, courts must make certain assumptions about the legislature's intent. One of these assumptions is that the legislature intends to avoid absurd results when drafting legislation.[258]

---

252. *See, e.g.*, League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302, 306 (Wis. 2014) ("[P]hoto identification is a reasonable regulation that could improve and modernize election procedures, safeguard voter confidence in the outcome of elections and deter voter fraud.").

253. *In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444, 448 (Mich. 2007); *see also League of Women Voters of Wis.*, 851 N.W.2d at 315 (Voter identification law "promote[s] the right to vote by assuring that a constitutionally qualified elector's vote counts with full force and is not offset by illegal ballots.").

254. *See, e.g.*, Gonzalez v. Surgeon, 937 A.2d 13, 22 (Conn. 2007) (finding that the Democracy Canon "does not authorize the court to substitute its views for those of the legislature"); Taylor v. Cent. City Cmty. Sch. Dist., 733 N.W.2d 655, 661 (Iowa 2007) ("Our legislature has established certain basic voting requirements that we are obligated to enforce in the absence of a successful constitutional challenge to the statute.").

255. *See, e.g.*, Coleman v. Ritchie, 762 N.W.2d 218, 230 (Minn. 2009) (refusing to count absentee ballots even though "a more flexible process might be advisable as a matter of policy [but] that is for the legislature to decide"); State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982, 990 (Ohio 2008) (The Democracy Canon "does not allow [the court] to simply ignore facts and make unreasonable assumptions."); Shambach v. Bickhart, 845 A.2d 793, 808 (Pa. 2004) (Castille, J., dissenting) (dissenting because the court "do[es] not possess a free-ranging power to strike down legislation that [it] finds contrary to amorphous 'principles of democracy'").

256. Butts v. Bysiewicz, 5 A.3d 932, 939 (Conn. 2010); *see also Shambach*, 845 A.2d at 813 (Castille, J., dissenting) (A court's "task is to strike the proper balance between protecting the elective franchise and enforcing the salutary directives of the Code" unless the statute's language is clear.).

257. *See, e.g.*, Comm. to Recall Robert Mendez from the Office of U.S. Senator v. Wells, 7 A.3d 720, 749–50 (N.J. 2010) ("We cannot resolve the policy debate over recall" in part because that "can only be achieved through the amendment process."); *see also* League of Women Voters Minn. v. Ritchie, 819 N.W.2d 636, 651 (Minn. 2012) (Courts should not "second-guess the wisdom of policy decisions that the constitution commits to one of the political branches.").

258. *See* ESKRIDGE ET AL., *supra* note 21, at 673–74 (defining the canon of avoiding absurd results).

Courts often refuse to employ the Democracy Canon if such a construction will lead to an absurd result.[259] For example, the Missouri Supreme Court avoided a liberal construction of the residency requirement for a judicial candidate in *Lewis v. Gibbons*.[260] The statute in question required the candidate to reside in the county where he or she was seeking election for "at least one year prior to the date of his [or her] election."[261] Gibbons, the challenged candidate, argued for a liberal construction of the statute so that his residency in the county for a year after college, but not the immediately preceding year, would be sufficient to meet the residency requirement.[262] The majority believed that such an interpretation was an absurd result since it "would permit a person to live in a county between the age of birth and 18 months, to leave the county and to return 50 or 60 years later and be eligible to run."[263] Judge Michael Wolff, in dissent, did not necessarily disagree with the absurd result of this interpretation but nevertheless felt Gibbons was eligible: "Incumbent-protection laws, such as the one at issue here, often are inherently absurd. If the reading that I advocate seems absurd, it may be precisely what this statute deserves."[264]

Another canon that courts invoking the Democracy Canon will simultaneously refer to is the constitutional avoidance canon.[265] The two substantive canons are clearly related: if the state's constitution guarantees the right to vote, then interpreting a statute to avoid an unconstitutional reading would avoid an interpretation that would infringe on the right to vote.[266] However, there are some who believe that these two canons do not work in tandem. At least one judge concerned about infringing on the legislature's role has understood the constitutional avoidance canon to be just as problematic as the Democracy Canon. Justice Ronald Castille's dissent in

259. *See, e.g.*, Doe v. Montgomery Cty. Bd. of Elections, 962 A.2d 342, 363 n.28 (Md. 2008) (Interpreting "shall" as "anything other than mandatory" would lead to absurd results.); Abrams v. Lamone, 919 A.2d 1223, 1248 (Md. 2007) (The broad interpretation of eligibility requirements is "absurd or unworkable."); City of North Platte v. Tilgner, 803 N.W.2d 469, 481 (Neb. 2011) (determining that a liberal construction leads to an absurd result because it would shield all taxation measures from referendum); *In re* Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223, 1232 (Pa. 2004) ("To construe [the statute] as merely directory would render its limitation meaningless and, ultimately, absurd."). *But see* Populist Party of Ark. v. Chesterfield, 195 S.W.3d 354, 359 (Ark. 2004) (holding that not construing the statute liberally would lead to an absurd result); Weinschenk v. State, 203 S.W.3d 201, 225 (Mo. 2006) (Limbaugh, J., dissenting) (same).

260. 80 S.W.3d 461 (Mo. 2002) (en banc).

261. *Id.* at 463–64.

262. *Id.* at 464.

263. *Id.* at 466.

264. *Id.* at 471 (Wolff, J., dissenting).

265. *See* ESKRIDGE ET AL., *supra* note 21, at 725–29 (discussing the constitutional avoidance canon).

266. *See, e.g.*, Populist Party of Ark. v. Chesterfield, 195 S.W.3d 354, 359 (Ark. 2004) (rejecting the lower court's interpretation that denied the candidate access because such interpretation "infringes upon one of the fundamental civil liberties of our democracy, that of the secret ballot"); Comm. to Recall Robert Mendez from the Office of U.S. Senator v. Wells, 7 A.3d 720, 760 (N.J. 2010) (Rivera-Soto, J., dissenting) ("[T]he principle commanding that we avoid a constitutional question . . . authoritatively counsels that we . . . stay our hand and allow the recall process to go forward.").

Shambach v. Bickhart,[267] rejecting the majority's use of the Democracy Canon, invoked constitutional avoidance as an example of "salutary principles requiring judicial restraint."[268] Even if employing the Democracy Canon would mean avoiding unconstitutional interpretations, some courts may still not be willing to rely on the Canon because such a practice falls outside the scope of the judicial function and infringes on the legislature's role.

IV. THE LIMITATIONS AND BENEFITS OF CODIFYING THE DEMOCRACY CANON AND OTHER SUBSTANTIVE CANONS

The datasets in Parts II and III highlight three trends in state court references to the Democracy Canon. First, in at least four states, invocation of the Democracy Canon is less likely to be associated with the enfranchisement of citizens today than it was in the first half of the twentieth century.[269] Second, codification of the Democracy Canon does not stop this trend toward disenfranchisement, though it may mitigate the trend's effects.[270] Lastly, courts invoking the Democracy Canon in the twenty-first century have been almost as likely to disenfranchise voters as they are to enfranchise them.[271] All three trends seem to point to one conclusion: in practice, the Democracy Canon is no longer effective.

This analysis reinforces some of the fears about the Democracy Canon that scholars have raised.[272] Its use is scattered and leads to unpredictable results, with enfranchisement and disenfranchisement being almost equally as likely when a state court references the Democracy Canon.[273] Further, the reasons courts give for rejecting the Democracy Canon mirror scholarly concerns about the Canon. The courts cite to concerns about encroaching on the legislature's power either by veering from a statute's plain meaning[274] or undertaking policymaking decisions,[275] both of which derive from concerns about disrupting the legislative process.[276] Other courts take the opposite

267. 845 A.2d 793 (Pa. 2004).

268. *Id.* at 808 (Castille, J., dissenting).

269. *See supra* Part II.

270. *See supra* Part II.B. Though the overall trend in Nevada and Colorado was toward disenfranchisement, there were still more cases resulting in enfranchisement than in Connecticut and Arkansas. *See supra* notes 204–05. Perhaps the presence of a codified Democracy Canon provision at least made it harder for courts to justify disenfranchising voters.

271. *See supra* Part III.A.1.

272. *See supra* notes 57–62.

273. This supports concerns raised by Levitt, as well as more general concerns about the inconsistent results of substantive canons. *See* Levitt, *supra* note 59, at 155; *see also supra* note 40.

274. *See supra* Part III.B.1.

275. *See supra* Part III.B.3.

276. *See* Elmendorf, *supra* note 60, at 1064–65 ("If [conservative legislators] knew that there was a special 'pro voter' canon of interpretation that could be trotted out by liberal judges to construe the inevitable imperfections of legislative drafting in a manner that undermines the legislative deal, they would fight tooth and nail against bills that even modestly liberalize the terms of voter participation . . . ."); Flanders, *supra* note 58, at 1373 ("When election statutes

approach, embracing the chance to make the choice between voting integrity and voter access,[277] a policy choice that theoretically should make critics of substantive canons shiver. Thus, it seems as if these courts reject the Democracy Canon out of either fear of or total disregard for the concerns regarding substantive canons.

Richard Hasen believes that these dangers "should [not be met] with a jettisoning of the Democracy Canon."[278] Despite the unpredictable results the Democracy Canon yields, I agree with Professor Hasen. Yet there must be a way to make the Democracy Canon more effective, to ensure that judicial interpretation of statutes does not infringe on the right to vote. Codification of the Democracy Canon is still the best way to ensure that statutory interpretation of election laws does not lead to disenfranchisement of voters. To be sure, codification is not foolproof. This dataset supports Abbe Gluck's insight that state high courts will work around or simply ignore codified rules of construction.[279] Of the fourteen states with a codified Democracy Canon, only half cited to the Democracy Canon provision.[280] In addition, most citations to the codified Democracy Canon provisions are from before 2000.[281] However, of the twenty-three cases that did cite to the Democracy Canon provision, only four led to disenfranchisement (a rate of about 17 percent).[282] Though the results of the Democracy Canon are still unpredictable, the uncertainty decreases when the court invokes the Democracy Canon provision, as opposed to the Democracy Canon at common law.

Even if this limited information on states with codified Democracy Canons is not sufficiently convincing, on a theoretical level, codification of the Democracy Canon should assuage the fears outlined by courts in justifying their rejection of the Democracy Canon. For courts that fear infringing on the legislature's power, codification of the Democracy Canon makes these concerns moot. Some see the Democracy Canon (and substantive canons more generally) as undermining the legislative process itself.[283] Codification of the Democracy Canon, however, legislatively legitimizes it. When a legislature enacts a provision urging the judiciary to employ a value-driven rule (e.g., "access to voting deserves protection"), it is affirmatively prioritizing the value of the rule over the risk of inconsistent application.[284]

---

have been drafted in a nonpartisan way, the court should respect the outcome of the democratic legislative process.").

277. *See supra* Part III.B.2.

278. Hasen, *supra* note 2, at 106.

279. *See, e.g.*, *supra* Part II.A.1.

280. *See infra* Appendix H. The states that did not cite at all to their Democracy Canon provisions were California, Iowa, Kansas, Massachusetts, Nebraska, New York, and Vermont.

281. *See infra* Appendix H (Of the twenty-three cases citing to the Democracy Canon provisions, sixteen were decided before 2000.).

282. *See infra* Appendix H. The states that cited to their Democracy Canon provisions were Nevada, New Jersey, Oregon, South Carolina, South Dakota, Utah, and Wisconsin.

283. *See* Flanders, *supra* note 58, at 1373; *see also supra* note 47.

284. *See* Scott, *supra* note 25, at 405 ("[I]t is hard to say that interpreters can ignore [codified canons] where that permission has been democratically granted.").

In other words, how can Democracy Canon discretion infringe on the legislative power when the legislature instructs the courts to use such discretion? Legislatures can further bolster the codified Democracy Canon by enacting a general Democracy Canon provision but noting that certain provisions of the election code are exceptions to the general Democracy Canon provision and should be strictly construed.[285] This practice would assure the judiciary that, based on the whole election code, the legislature has been explicit about which provisions it intended to be strictly enforced and which provisions are open to a liberal construction.[286]

For courts that rejected the Democracy Canon to prioritize other state interests (like fraud prevention), codification of the Canon can inform the courts which interests the legislature considers the most important. With a codified Democracy Canon provision, courts will find it harder to justify other interests over those explicitly mentioned by the legislature. This is especially effective if a legislature enacts a statute explicitly stating that voting accessibility is a more important state interest than the prevention of fraud.[287] This solution is clearly not perfect: not only would it be difficult to enact such a provision but judges would still be capable of working around this plain language.[288] However, providing such explicit instructions would make it more difficult for courts to hide behind the veil of fraud prevention.

The solution of codification is not limited to the Democracy Canon. At the state level, there has been an expansive codification of statutory rules of construction. This provides a unique opportunity to reconsider critiques of substantive canons that are less viable once state legislatures codify the canons. If courts and scholars are willing to give weight to their criticisms of substantive canons, those criticisms must withstand the codification of the substantive canons by a legislature.[289] Enactment of a substantive canon eliminates concerns about judicial interpretations undermining the legislative process[290] because enactment of the codified substantive canon is now itself the result of compromise-based legislation. Unpredictability in the results of substantive canons[291] also is less of a concern after codification, as the legislature has expressed its belief that the need for judicial discretion is worth the risks of uncertainty in application when certain issues are involved

285. Richard Hasen makes this suggestion as well. *See* Hasen, *supra* note 2, at 122 ("A legislature worried about judicial overreaching could pass election statutes that not only clearly state their mandatory and non-waivable nature, but also indicate that such statutes should be strictly construed against expansive voter rights.").

286. An example of this would be Colorado's election code, which Hasen relies on to rebuke some of Elmendorf's claims. *See* Hasen, *supra* note 62, at 1180.

287. An example of this statute is Nevada's section 293.127. *See supra* note 151. All of the Nevada Supreme Court's cases citing to this provision resulted in the enfranchisement of the voters. However, this statute is not entirely effective, as the Nevada Supreme Court still decided four other cases since 2000 that did not cite to this provision and resulted in disenfranchisement.

288. *See supra* notes 115–16 and accompanying text.

289. There is still a question of whether legislatures even have the authority to enact rules of construction. *See supra* note 28. However, this issue is beyond the scope of this Note.

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

291. *See supra* note 40.

(like voting rights). Finally, when state legislatures codify substantive canons, statutory interpretation can be better understood as interbranch dialogue, which can lead to a cooperative and more accurate understanding of what the law is.[292] State courts (as well as scholars) should be open to reconsidering substantive canons when they are codified by the state legislature as a rule of construction. By reconceptualizing the codified rules of construction as interbranch dialogue, both branches can work in tandem to ensure that voters, not judges, determine the outcomes of our elections.

CONCLUSION

The Democracy Canon could be (and has been) a powerful tool for courts to safeguard our right to vote. However, as this Note has shown, the impact of this Canon, particularly over the past half-century, has been inadequate, if not outright detrimental. If state courts are unwilling to use the Canon, then the task of protecting the right to vote must fall on the legislatures' shoulders. Codification of the Democracy Canon, and other substantive canons, undermines the courts' concerns about invoking a common-law substantive canon. Once a substantive canon is codified, courts and scholars will have to reconsider their well-established critiques of substantive canons.

Yet this exercise is not just about recharacterizing scholarly debate. While the data on the Democracy Canon may seem inconsequential within the bigger picture of election law, it demonstrates how state courts may operate to either enhance or limit individual rights, like the right to vote. More importantly, shedding light on how courts can circumvent substantive canons like the Democracy Canon can help litigants and lawmakers alike frame their arguments to confront these challenges when fighting for our right to vote.

292. *See* Brudney & Leib, *supra* note 31, at 390 (Interbranch dialogue "supports institutions' appropriate humility, leverages their comparative institutional competence, and harnesses the benefits of deliberative engagement on matters of law and policy.").

APPENDIX A

Categorization of Democracy Canon Statutes

Category 1: Democracy Canon Codified		**Category 2: Rejection or Disregard of Democracy Canon**		**Category 3: Semi–Democracy Canon Codified**	
Applicable to All Election Provisions	*Applicable to Specific Election Provisions*	*No Rule to Liberally Construe Statute*	*Other Incompatible Rules of Construction*	*General Rule to Liberally Construe Statutes*	*States That Appear in Both Categories 1 and 2*
Nebraska	California	Alabama	Connecticut	Arizona	Colorado
Nevada	Iowa	Alaska	Louisiana	Arkansas	Delaware
Oregon	Kansas	Indiana	New Mexico	Illinois	Florida
Wisconsin	Massachusetts	Maine	Rhode Island	Kentucky	Georgia
	New Jersey	Michigan		Missouri	Hawaii
	New York	Mississippi		Montana	Idaho
	South Carolina	New Hampshire		Ohio	Maryland
	South Dakota	North Carolina		Oklahoma	Minnesota
	Utah	Virginia		Washington	North Dakota
	Vermont	West Virginia			Pennsylvania
					Tennessee
					Texas
					Wyoming

APPENDIX B

Connecticut Democracy Canon Cases

Case	Type of Dispute	Result	Reference to Democracy Canon
Talcott v. Philbrick, 20 A. 436 (Conn. 1890)	Vote counting	Disenfranchised	Dissent (followed)
Fields v. Osborne, 21 A. 1070 (Conn. 1891)	Vote counting	Disenfranchised	Majority (rejected)
State *ex rel.* Phelan v. Walsh, 25 A. 1 (Conn. 1892)	Vote counting	Split	Majority (followed)
Fessenden v. Bossa, 37 A. 977 (Conn. 1897)	Vote counting	Enfranchised	Majority (followed)
Coughlin v. McElroy, 43 A. 854 (Conn. 1899)	Vote counting	Enfranchised	Majority (followed)
Merrill v. Reed, 52 A. 409 (Conn. 1902)	Vote counting	Enfranchised	Majority (followed)
Flanagan v. Hynes, 54 A. 737 (Conn. 1903)	Candidate access	Enfranchised	Majority (followed)
Denny v. Pratt, 135 A. 40 (Conn. 1926)	Vote counting	Disenfranchised	Majority (rejected)
Scully v. Town of Westport, 145 A.2d 742 (Conn. 1958)	Vote counting	Enfranchised	Majority (followed)
Hurlbut v. Lemelin, 230 A.2d 36 (Conn. 1967)	Vote counting	Disenfranchised	Majority (rejected)
Dombkowski v. Messier, 319 A.2d 373 (Conn. 1972)	Vote counting	Disenfranchised	Majority (rejected)
Wrinn v. Dunleavy, 440 A.2d 261 (Conn. 1982)	Vote counting	Disenfranchised	Majority (rejected)
In re Election of U.S. Representative for Second Cong. Dist., 653 A.2d 79 (Conn. 1994)	Vote counting	Split	Majority (followed and rejected); concurrence (followed)
Gonzalez v. Surgeon, 937 A.2d 13 (Conn. 2007)	Candidate access	Disenfranchised	Majority (rejected)
Bysiewicz v. Dinardo, 6 A.3d 726 (Conn. 2010)	Candidate access	Disenfranchised	Majority (rejected)
Butts v. Bysiewicz, 5 A.3d 932 (Conn. 2010)	Candidate access	Disenfranchised	Majority (rejected)
Keeley v. Ayala, 179 A.3d 1249 (Conn. 2018)	Vote counting	Disenfranchised	Majority (rejected)

APPENDIX C

Arkansas Democracy Canon Cases

Case	Type of Dispute	Result	Reference to Democracy Canon
Logan v. Russell, 206 S.W. 131 (Ark. 1918)	Election contest	Disenfranchised	Majority (rejected)
Cain v. Carl-Lee, 269 S.W. 57 (Ark. 1925)	Vote counting	Disenfranchised	Dissent (followed)
Robinson v. Knowlton, 40 S.W.2d 450 (Ark. 1931)	Election contest	Enfranchised	Majority (followed)
La Fargue v. Waggoner, 75 S.W.2d 235 (Ark. 1934)	Election contest	Enfranchised	Majority (followed)
Phillips v. Rothrock, 110 S.W.2d 26 (Ark. 1937)	Initiative	Disenfranchised	Dissent (followed)
Horne v. Fish, 127 S.W.2d 623 (Ark. 1939)	Vote counting	Disenfranchised	Majority (rejected)
Fisher v. Taylor, 196 S.W.2d 217 (Ark. 1946)	Candidate access	Enfranchised	Majority (followed)
Gunter v. Fletcher, 233 S.W.2d 242 (Ark. 1950)	Election contest	Enfranchised	Majority (followed)
Reed v. Baker, 495 S.W.2d 849 (Ark. 1973)	Election contest	Enfranchised	Majority (followed)
Republican Party of Garland Cty. v. Johnson, 193 S.W.3d 248 (Ark. 2004)	Candidate access	Disenfranchised	Majority (rejected)
Populist Party of Ark. v. Chesterfield, 195 S.W.3d 354 (Ark. 2004)	Candidate access	Enfranchised	Majority (followed)

APPENDIX D

Nevada Democracy Canon Cases

Case	Type of Dispute	Result	Reference to Democracy Canon
Stinson v. Sweeney, 30 P. 997 (Nev. 1883)	Vote counting	Enfranchised	Majority (followed)
State *ex rel.* Galusha v. Davis, 19 P. 894 (Nev. 1888)	Initiative petition	Disenfranchised	Dissent (followed)
Buckner v. Lynip, 41 P. 762 (Nev. 1895)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
Dennis v. Caughlin, 41 P. 768 (Nev. 1895)	Vote counting	Enfranchised	Majority (followed)
State *ex rel.* McMillan v. Sadler, 58 P. 284 (Nev. 1899)	Vote counting	Enfranchised	Majority (followed)
State *ex rel.* Kaufman v. Martin, 106 P. 318 (Nev. 1910)	Vote counting	Enfranchised	Majority (followed)
In re Primary Ballots, 126 P. 643 (Nev. 1910)	Candidate access	Enfranchised	Majority (followed)
Nicholson v. Commins, 111 P. 289 (Nev. 1910)	Vote counting	Enfranchised	Majority (followed)
Turner v. Fogg, 159 P. 56 (Nev. 1916)	Registration	Enfranchised	Majority (followed)
State *ex rel.* Morton v. Howard, 248 P. 44 (Nev. 1926)	Initiative petition	Disenfranchised	Majority (rejected)
State *ex rel.* Matzdorf v. Scott, 285 P. 511 (Nev. 1930)	Recall petition	Enfranchised	Majority (followed)
Gilbert v. Breithaupt, 104 P.2d 183 (Nev. 1940)	Candidate access	Enfranchised	Majority (followed)
Lundberg v. Koontz, 418 P.2d 808 (Nev. 1966)	Initiative petition	Disenfranchised	Dissent (followed)
Long v. Swackhamer, 538 P.2d 587 (Nev. 1975)	Candidate access	Enfranchised	Majority (followed)
LaPorta v. Broadbent, 530 P.2d 1404 (Nev. 1975)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
Cleland v. Eighth Judicial Dist. Court, 552 P.2d 488 (Nev. 1976)	Initiative petition	Enfranchised	Majority (followed)
Cirac v. Lander County, 602 P.2d 1012 (Nev. 1979)	Initiative petition	Enfranchised	Majority (followed); dissent (rejected)
State Emps. Ass'n v. Lau, 877 P.2d 531 (Nev. 1994)	Candidate access	Enfranchised	Majority (followed)

Citizens for Honest & Responsible Gov't v. Heller, 11 P.3d 121 (Nev. 2000)	Recall petition	Disenfranchised	Majority (mentioned)
Rogers v. Heller, 18 P.3d 1034 (Nev. 2001)	Initiative petition	Disenfranchised	Dissent (followed)
Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 100 P.3d 179 (Nev. 2004)	Initiative petition	Enfranchised	Majority (followed)
Miller v. Burk, 188 P.3d 1112 (Nev. 2008)	Candidate access	Disenfranchised	Majority (rejected)
Strickland v. Waymire, 235 P.3d 605 (Nev. 2010)	Initiative petition	Disenfranchised	Majority (rejected)

APPENDIX E

Colorado Democracy Canon Cases

Case	Type of Dispute	Result	Reference to Democracy Canon
Kellogg v. Hickman, 21 P. 325 (Colo. 1889)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
Allen v. Glynn, 29 P. 670 (Colo. 1892)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
Young v. Simpson, 42 P. 666 (Colo. 1895)	Vote counting	Enfranchised	Majority (followed)
Dickinson v. Freed, 55 P. 812 (Colo. 1898)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
Nicholls v. Barrick, 62 P. 202 (Colo. 1900)	Vote counting	Enfranchised	Majority (followed)
People *ex rel.* Johnson v. Earl, 94 P. 294 (Colo. 1908)	Registration	Enfranchised	Majority (followed)
Littlejohn v. People *ex rel.* Desch, 121 P. 159 (Colo. 1912)	Candidate access	Enfranchised	Majority (followed)
Pease v. Wilkin, 127 P. 230 (Colo. 1912)	Candidate access	Enfranchised	Majority (followed)
Benson v. Gillespie, 161 P. 295 (Colo. 1916)	Candidate access	Enfranchised	Majority (followed)
Stephen v. Lail, 248 P. 1012 (Colo. 1926)	Candidate access	Disenfranchised	Dissent (followed)
City of Aspen v. Howell, 459 P.2d 764 (Colo. 1969)	Registration	Enfranchised	Majority (followed)
Colo. Project–Common Cause v. Anderson, 495 P.2d 220 (Colo. 1972)	Initiative petition	Enfranchised	Majority (followed)
Meyer v. Putnam, 526 P.2d 139 (Colo. 1974)	Registration	Enfranchised	Majority (followed)
Chesser v. Buchanan, 568 P.2d 39 (Colo. 1977)	Registration	Disenfranchised	Dissent (followed)
Moore v. MacFarlane (*In re* Interrogatories of the U.S. Dist. Court Pursuant to Rule 21.1), 642 P.2d 496 (Colo. 1982)	Registration	Enfranchised	Majority (followed)
Erickson v. Blair, 670 P.2d 749 (Colo. 1983)	Vote counting	Enfranchised	Majority (followed)
Romero v. Sandoval, 685 P.2d 772 (Colo. 1984)	Candidate access	Enfranchised	Majority (followed)

Moran v. Carlstrom, 775 P.2d 1176 (Colo. 1989)	Vote counting	Disenfranchised	Majority (rejected)
Comm. for Better Health Care for All Colo. Citizens v. Meyer, 830 P.2d 884 (Colo. 1992)	Initiative petition	Disenfranchised	Majority (mentioned); dissent (followed)
Meyer v. Lamm, 846 P.2d 862 (Colo. 1993)	Vote counting	Split	Majority (followed); dissent (rejected)
McClellan v. Meyer, 900 P.2d 24 (Colo. 1995)	Initiative petition	Disenfranchised	Concurrence (followed)
Fabec v. Beck, 922 P.2d 330 (Colo. 1996)	Initiative petition	Enfranchised	Majority (followed)
Buckley v. Chilcutt, 968 P.2d 112 (Colo. 1998)	Initiative petition	Disenfranchised	Majority (rejected); dissent (followed)
Kuhn v. Williams, 418 P.3d 478 (Colo. 2018)	Initiative petition	Disenfranchised	Majority (rejected)

APPENDIX F

Post-2000 Democracy Canon Decisions

State	Case Name	Type of Dispute	Result	Reference to Democracy Canon
Category 1: Democracy Canon Codified				
CA	Howard Jarvis Taxpayers Ass'n v. Padilla, 363 P.3d 628 (Cal. 2016)	Initiative	Enfranchised	Majority (followed)
	Cal. Cannabis Coal. v. City of Upland, 401 P.3d 49 (Cal. 2017)	Initiative	Enfranchised	Majority (followed)
IA	Taylor v. Cent. City Cmty. Sch. Dist., 733 N.W.2d 655 (Iowa 2007)	Vote counting	Disenfranchised	Majority (rejected)
KS	Richards v. Schmidt, 56 P.3d 274 (Kan. 2002)	Petitions	Enfranchised	Majority (followed)
	State *ex rel.* Schmidt v. City of Wichita, 367 P.3d 282 (Kan. 2016)	Initiative	Disenfranchised	Majority (rejected)
MA	—	—	—	—
NE	Pony Lake Sch. Dist. 30 v. State Comm. for the Reorganization of Sch. Dists., 710 N.W.2d 609 (Neb. 2006)	Petitions	Disenfranchised	Majority (rejected)
	City of North Platte v. Tilgner, 803 N.W.2d 469 (Neb. 2011)	Initiative	Disenfranchised	Majority (followed)
NV	Citizens for Honest & Responsible Gov't v. Heller, 11 P.3d 121 (Nev. 2000)	Recall petition	Disenfranchised	Majority (mentioned)
	Rogers v. Heller, 18 P.3d 1034 (Nev. 2001)	Initiative petition	Disenfranchised	Dissent (followed)
	Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 100 P.3d 179 (Nev. 2004)	Initiative petition	Enfranchised	Majority (followed)
	Miller v. Burk, 188 P.3d 1112 (Nev. 2008)	Candidate access	Disenfranchised	Majority (rejected)

	Strickland v. Waymire, 235 P.3d 605 (Nev. 2010)	Initiative petition	Disenfranchised	Majority (rejected)
NJ	*In re* Gray-Sadler, 753 A.2d 1101 (N.J. 2000)	Vote counting	Enfranchised	Majority (followed)
	N.J. Democratic Party, Inc. v. Samson, 814 A.2d 1028 (N.J. 2002)	Candidate access	Enfranchised	Majority (followed)
	In re Contest of Nov. 8, 2005 Gen. Election for the Office of Mayor of Parsippany-Troy Hills, 934 A.2d 607 (N.J. 2007)	Election contest	Enfranchised	Majority (followed); concurrence (followed)
	Comm. to Recall Robert Mendez from the Office of U.S. Senator v. Wells, 7 A.3d 720 (N.J. 2010)	Recall petition	Disenfranchised	Dissent (followed)
	In re Contest of Nov. 8, 2011, Gen. Election of Office of N.J. Gen. Assembly, 40 A.3d 684 (N.J. 2012)	Election contest	Unclear	Dissent (followed)
	Tumpson v. Farina, 95 A.3d 210 (N.J. 2014)	Initiative	Enfranchised	Majority (followed)
NY	Gross v. Albany Cty. Bd. of Elections, 819 N.E.2d 197 (N.Y. 2004)	Vote counting	Disenfranchised	Majority (rejected); dissent (followed)
	Panio v. Sunderland, 824 N.E.2d 488 (N.Y. 2005)	Vote counting	Both	Majority (followed); dissent (rejected)
OR	Kucera v. Bradbury, 97 P.3d 1191 (Or. 2004)	Candidate access	Disenfranchised	Majority (rejected)
SC	Broadhurst v. City of Myrtle Beach Election Comm'n, 537 S.E.2d 543 (S.C. 2000)	Vote counting	Enfranchised	Majority (followed)
	Odom v. Town of McBee Election Comm'n, 831 S.E.2d 429 (S.C. 2019)	Vote counting	Enfranchised	Majority (followed)
SD	—	—	—	—
UT	Adams v. Swensen, 108 P.3d 725 (Utah 2005)	Candidate access	Enfranchised	Majority (followed)
VT	—	—	—	—
WI	Roth v. LaFarge Sch. Dist. Bd. of Canvassers, 677 N.W.2d 599 (Wis. 2004)	Vote counting	Enfranchised	Majority (followed)

	League of Women Voters of Wis. Educ. Network, Inc. v. Walker, 851 N.W.2d 302 (Wis. 2014)	Voter eligibility	Disenfranchised	Dissent (followed)
Category 2: Rejection or Disregard of Democracy Canon				
AL	Fluker v. Wolff, 46 So. 3d 942 (Ala. 2010)	Vote counting	Disenfranchised	Majority (rejected)
AK	N.W. Cruiseship Ass'n of Alaska, Inc. v. State, 145 P.3d 573 (Alaska 2006)	Initiative	Enfranchised	Majority (followed)
	Edgmon v. State, 152 P.3d 1154 (Alaska 2007)	Vote counting	Enfranchised	Majority (followed)
	Municipality of Anchorage v. Mjos, 179 P.3d 941 (Alaska 2008)	Candidate access	Enfranchised	Majority (followed)
	Miller v. Treadwell, 245 P.3d 867 (Alaska 2010)	Vote counting	Enfranchised	Majority (followed)
	Nageak v. Mallott, 426 P.3d 930 (Alaska 2018)	Vote counting	Both	Majority (followed)
	Dodge v. Meyer, 444 P.3d 159 (Alaska 2019)	Registration	Both	Majority (followed)
CT	Gonzalez v. Surgeon, 937 A.2d 13 (Conn. 2007)	Candidate access	Disenfranchised	Majority (rejected)
	Bysiewicz v. Dinardo, 6 A.3d 726 (Conn. 2010)	Candidate access	Disenfranchised	Majority (rejected)
	Butts v. Bysiewicz, 5 A.3d 932 (Conn. 2010)	Candidate access	Disenfranchised	Majority (rejected)
	Arras v. Reg'l Sch. Dist. No. 14, 125 A.3d 172 (Conn. 2015)	Vote counting	Unclear	Majority (followed)
	Keeley v. Ayala, 179 A.3d 1249 (Conn. 2018)	Vote counting	Disenfranchised	Majority (rejected)
IN	Pabey v. Pastrick, 816 N.E.2d 1138 (Ind. 2004)	Election contest	Both	Majority (followed)
	Burke v. Bennett, 907 N.E.2d 529 (Ind. 2009)	Candidate access	Enfranchised	Majority (followed)
	White v. Ind. Democratic Party, 963 N.E.2d 481 (Ind. 2012)	Candidate access	Enfranchised	Majority (followed)
LA	Adkins v. Huckabay, 755 So. 2d 206 (La. 2000)	Vote counting	Disenfranchise	Majority (followed)
	Russell v. Goldsby, 780 So. 2d 1048 (La. 2000)	Candidate access	Enfranchised	Majority (followed)

	Becker v. Dean, 854 So. 2d 864 (La. 2003)	Candidate access	Enfranchised	Majority (followed); dissent (rejected)
ME	—	—	—	—
MI	*In re* Request for Advisory Op. Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007)	Registration	Disenfranchised	Dissent (followed)
MS	Wesley v. Wash. Cty. Democratic Exec. Comm., 235 So. 3d 1379 (Miss. 2017)	Election contest	Unclear	Majority (followed)
NH	*In re* McDonough, 816 A.2d 1022 (N.H. 2003)	Vote counting	Enfranchised	Concurrence (followed)
NM	State *ex rel.* League of Women Voters v. Herrera, 203 P.3d 94 (N.M. 2009)	Vote counting	Enfranchised	Majority (followed)
NC	—	—	—	—
RI	—	—	—	—
VA	—	—	—	—
WV	State *ex rel.* Bowling v. Greenbrier Cty. Comm'n, 575 S.E.2d 257 (W. Va. 2002)	Vote counting	Both	Majority (followed)
	Tillis v. Wright, 619 S.E.2d 235 (W. Va. 2005)	Candidate access	Enfranchised	Majority (followed)
Category 3: Semi–Democracy Canon Codified				
AZ	Ross v. Bennett, 265 P.3d 356 (Ariz. 2011)	Recall	Enfranchised	Majority (followed)
AR	Republican Party of Garland Cty. v. Johnson, 193 S.W.3d 248 (Ark. 2004)	Candidate access	Disenfranchised	Majority (rejected)
	Populist Party of Ark. v. Chesterfield, 195 S.W.3d 354 (Ark. 2004)	Candidate access	Enfranchised	Majority (followed)
CO	Herpin v. Head (*In re* Title, Ballot Title & Submission Clause, Summary for 1999–2000 No. 255), 4 P.3d 485 (Colo. 2000)	Initiative	Unclear	Majority (followed)
	Kuhn v. Williams, 418 P.3d 478 (Colo. 2018)	Initiative petition	Disenfranchised	Majority (rejected)

DE	—	—	—	—
FL	Palm Beach Cty. Canvassing Bd. v. Harris, 772 So. 2d 1220 (Fla. 2000)	Vote counting	Enfranchised	Majority (followed)
	Gore v. Harris, 772 So. 2d 1243 (Fla. 2000)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
	Wright v. City of Miami Gardens, 200 So. 3d 765 (Fla. 2016)	Candidate access	Enfranchised	Majority (followed)
GA	—	—	—	—
HI	Peroutka v. Cronin, 179 P.3d 1050 (Haw. 2008)	Candidate access	Disenfranchised	Majority (rejected)
ID	—	—	—	—
IL	Goodman v. Ward, 948 N.E.2d 580 (Ill. 2011)	Candidate access	Disenfranchised	Majority (rejected)
KY	Heleringer v. Brown, 104 S.W.3d 397 (Ky. 2003)	Candidate access	Enfranchised	Majority (followed); concurrences (followed)
	Hardin v. Montgomery, 495 S.W.3d 686 (Ky. 2016)	Election contest	Both	Majority (followed)
MD	Abrams v. Lamone, 919 A.2d 1223 (Md. 2007)	Candidate access	Disenfranchised	Majority (rejected)
	Doe v. Montgomery Cty. Bd. of Elections, 962 A.2d 342 (Md. 2008)	Initiative	Disenfranchised	Majority (rejected)
	Fraternal Order of Police Lodge 35 v. Montgomery County, 80 A.3d 686 (Md. 2013)	Initiative	Enfranchised	Majority (followed)
MN	Erlandson v. Kiffmeyer, 659 N.W.2d 724 (Minn. 2003)	Vote counting	Enfranchised	Majority (followed); concurrence (followed)
	Coleman v. Ritchie, 758 N.W.2d 306 (Minn. 2008)	Vote counting	Disenfranchised	Concurrence (followed)
	Coleman v. Ritchie, 762 N.W.2d 218 (Minn. 2009)	Vote counting	Disenfranchised	Dissent (followed)
	League of Women Voters Minn. v. Ritchie, 819 N.W.2d 636 (Minn. 2012)	Registration	Disenfranchised	Dissent (followed)

MO	Lewis v. Gibbons, 80 S.W.3d 461 (Mo. 2002)	Candidate access	Disenfranchised	Majority (rejected); dissent (followed)
	Comm. for a Healthy Future, Inc. v. Carnahan, 201 S.W.3d 503 (Mo. 2006)	Initiative	Enfranchised	Majority (followed)
	Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Registration	Enfranchised	Dissent (followed)
MT	Montanans Opposed to I-166 v. Bullock, 285 P.3d 435 (Mont. 2012)	Initiative	Enfranchised	Concurrence (followed)
ND	Thompson v. Jaeger, 788 N.W.2d 586 (N.D. 2010)	Initiative	Disenfranchised	Majority (rejected)
	Zaiser v. Jaeger, 822 N.W.2d 472 (N.D. 2012)	Initiative	Disenfranchised	Majority (rejected)
OH	*In re* Election Contest of Dec. 14, 1999, 744 N.E.2d 745 (Ohio 2001)	Election contest	Enfranchised	Majority (followed)
	State *ex rel.* Oster v. Lorain Cty. Bd. of Elections, 756 N.E.2d 649 (Ohio 2001)	Petition	Enfranchised	Majority (followed)
	State *ex rel.* Brady v. Blackwell, 857 N.E.2d 1181 (Ohio 2006)	Candidate access	Disenfranchised	Majority (rejected); concurrence (rejected)
	State *ex rel.* Colvin v. Brunner, 896 N.E.2d 979 (Ohio 2008)	Registration	Enfranchised	Majority (followed)
	State *ex rel.* Myles v. Brunner, 899 N.E.2d 120 (Ohio 2008)	Vote counting	Enfranchised	Majority (followed)
	State *ex rel.* Skaggs v. Brunner, 900 N.E.2d 982 (Ohio 2008)	Vote counting	Disenfranchise	Majority (followed); concurrence (followed)
	State *ex rel.* LetOhioVote.org v. Brunner, 916 N.E.2d 462 (Ohio 2009)	Initiative	Enfranchises	Majority (followed)
	State *ex rel.* Linnabary v. Husted, 8 N.E.3d 940 (Ohio 2014)	Candidate access	Disenfranchised	Majority (rejected)
	State *ex rel.* Espen v. Wood Cty. Bd. of	Initiative	Enfranchised	Majority (followed)

	Elections, 110 N.E.3d 1222 (Ohio 2017)			
	Ohio Renal Ass'n v. Kidney Dialysis Patient Prot. Amendment Comm., 111 N.E.3d 1139 (Ohio 2018)	Initiative	Disenfranchise	Majority (rejected)
OK	—	—	—	—
PA	*In re* Nomination of Flaherty, 770 A.2d 327 (Pa. 2001)	Candidate access	Disenfranchised	Majority (followed)
	In re 2003 Gen. Election for the Office of Prothonotary, 849 A.2d 230 (Pa. 2004)	Election contest	Disenfranchised	Majority (rejected)
	In re Canvass of Absentee Ballots of Nov. 4, 2003 Gen. Election, 843 A.2d 1223 (Pa. 2004)	Vote counting	Disenfranchised	Majority (rejected)
	Shambach v. Bickhart, 845 A.2d 793 (Pa. 2004)	Vote counting	Enfranchised	Majority (followed); dissent (rejected)
	In re Nader, 858 A.2d 1167 (Pa. 2004)	Candidate access	Enfranchised	Majority (followed); concurrence (followed)
	In re Paulmier, 937 A.2d 364 (Pa. 2007)	Candidate access	Enfranchised	Majority (followed)
	In re James, 944 A.2d 69 (Pa. 2008)	Candidate access	Enfranchised	Majority (followed)
	In re Nomination of Gales, 54 A.3d 855 (Pa. 2012)	Candidate access	Enfranchised	Majority (followed)
	In re Beyer, 115 A.3d 835 (Pa. 2015)	Candidate access	Disenfranchised	Majority (rejected)
	In re Vodvarka, 140 A.3d 639 (Pa. 2016)	Candidate access	Enfranchised	Majority (followed)
	Reuther v. Del. Cty. Bureau of Elections, 205 A.3d 302 (Pa. 2019)	Candidate access	Enfranchised	Majority (followed)
TN	Halbert v. Shelby Cty. Election Comm'n, 31 S.W.3d 246 (Tenn. 2000)	Candidate access	Enfranchised	Majority (followed)
TX	—	—	—	—
WA	—	—	—	—

WY	Geringer v. Bebout, 10 P.3d 514 (Wyo. 2000)	Initiative	Disenfranchised	Dissent (followed)
	Murphy v. State Canvassing Bd., 12 P.3d 677 (Wyo. 2000)	Candidate access	Enfranchised	Majority (followed)
	Cathcart v. Meyer, 88 P.3d 1050 (Wyo. 2004)	Initiative	Disenfranchised	Majority (rejected)

APPENDIX G

Latitudinal Review Summary

	All States	**Category 1: Codified**	**Category 2: Rejected**	**Category 3: Ambiguous**
Enfranchised	49 (49%)	12 (46%)	11 (46%)	26 (52%)
Disenfranchised	41 (41%)	12 (46%)	7 (29%)	22 (44%)
Other	10 (10%)	2 (8%)	6 (25%)	2 (4%)
Total	100	26	24	50

APPENDIX H

Cases Citing Codified Democracy Canon After 1960

State	Case Name	Result
Applicable to All Election Provisions		
Nebraska	—	—
Nevada	LaPorta v. Broadbent, 530 P.2d 1404 (Nev. 1975)	Enfranchised
	Long v. Swackhamer, 538 P.2d 587 (Nev. 1975)	Enfranchised
	Eller Media Co. v. City of Reno, 59 P.3d 437 (Nev. 2002)	Enfranchised
	Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't, 100 P.3d 179 (Nev. 2004)	Enfranchised
	Lueck v. Teuton, 219 P.3d 895 (Nev. 2009)	Enfranchised
Oregon	Kucera v. Bradbury, 97 P.3d 1191 (Or. 2004)	Disenfranchised
Wisconsin	Clapp v. Joint Sch. Dist. No. 1, 124 N.W.2d 678 (Wis. 1963)	Enfranchised
	Gradinjan v. Boho (*In re* Chairman in Town of Worcester), 139 N.W.2d 557 (Wis. 1966)	Disenfranchised
	Lanser v. Koconis, 214 N.W.2d 425 (Wis. 1974)	Enfranchised
	Beckstrom v. Kornsi, 217 N.W.2d 283 (Wis. 1974)	Other
	State *ex rel.* Ahlgrimm v. State Elections Bd., 263 N.W.2d 152 (Wis. 1978)	Disenfranchised
	McNally v. Tollander, 302 N.W.2d 440 (Wis. 1981)	Other
	Roth v. LaFarge Sch. Dist. Bd. of Canvassers, 677 N.W.2d 599 (Wis. 2004)	Enfranchised
Applicable to Specific Election Provision		
California	—	—
Iowa	—	—
Kansas	—	—
Massachusetts	—	—
New Jersey	Lesniak v. Budzash, 626 A.2d 1073 (N.J. 1993)	Other
	Holloway v. Byrne, 874 A.2d 504 (N.J. 2005)	Enfranchised
New York	—	—

South Carolina	Knight v. State Bd. of Canvassers, 374 S.E.2d 685 (S.C. 1988)	Enfranchised
South Dakota	Thoms v. Andersen, 235 N.W.2d 898 (S.D. 1975)	Other
	Larson v. Locken, 262 N.W.2d 752 (S.D. 1978)	Disenfranchised
	Pankhurst v. New Effington Indep. Sch. Dist. No. 54-3 (*In re* Election Contest as to Reorganization of New Effington Indep. Sch. Dist. No. 54-3), 462 N.W.2d 185 (S.D. 1990)	Enfranchised
	Duffy v. Mortenson, 497 N.W.2d 437 (S.D. 1993)	Enfranchised
	McIntyre v. Wick, 558 N.W.2d 347 (S.D. 1996)	Other
	Becker v. Pfeifer, 588 N.W.2d 913 (S.D. 1999)	Enfranchised
Utah	Adams v. Swensen, 108 P.3d 725 (S.D. 2005)	Enfranchised
Vermont	—	—