A VOTE FOR CLARITY: ESTABLISHING A FEDERAL TEST FOR INTERVENTION IN ELECTION-RELATED DISPUTES

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Increasingly, state and federal courts are asked to resolve election-related disputes, as candidates are more likely than ever before to challenge some aspect of the administration of an election in court. Election-related litigation puts judges in the unfavorable position of kingmaker, forcing the court, not the people, to determine the winner of an election. When the court intervenes in an election dispute, the public may perceive the court's intervention as a political act that decreases the legitimacy of the winning candidate and the election system as a whole. Moreover, research reveals that judicial decision-making at both the state and federal levels can be skewed by party loyalty.

Typically, election-related lawsuits are brought in state court because election administration is a matter of state and local control. Occasionally, however, federal courts are called to review an election dispute in which a candidate or voters allege that the administration of the election resulted in an infringement of constitutionally protected rights. While nonintervention is the default in federal court, under certain rare circumstances federal courts have determined intervention to be appropriate. The federal judiciary has never, however, clearly established a test for determining when intervention is warranted.

This Note explores the federal courts' reluctance to intervene in election disputes through the lens of a recent Second Circuit decision: Pidot v. New York Board of Elections*. Ultimately, this Note concludes that federal courts should adopt an explicit two-part test to determine whether (1) the state corrective procedure adequately protected the constitutional interests of candidates and voters and (2) nonintervention would result in fundamental unfairness to the voters.*

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INTRODUCTION

In the spring of 2016, Philip Pidot was running for Congress in New York's third congressional district.[1] A primary election was scheduled for June 28, 2016 (the "June 28 primary"), to determine if Pidot or his opponent, Jack Martins, would become the Republican nominee.[2] In New York, a congressional candidate must submit a "designating petition" with a certain number of signatures before earning a spot on the primary ballot.[3]

1. Complaint para. 1, Pidot v. N.Y. State Bd. of Elections, No. 16-cv-859 (N.D.N.Y. Aug. 31, 2016).

2. *Id.*

3. A designating petition must meet certain formal requirements in accordance with New York election law. *See* Rivera-Powell v. N.Y.C. Bd. of Elections, 470 F.3d 458, 461 (2d Cir. 2006). A candidate for Congress must gather 1250 signatures. N.Y. ELEC. LAW § 6-136(2)(g)

Supporters of Pidot's opponent challenged the validity of Pidot's designating petition by alleging that he had not gathered the required number of signatures.[4] The Board of Elections determined that Pidot had only 1234 valid signatures—sixteen signatures shy of the minimum number required to be listed on the ballot.[5]

Pidot, in accordance with New York State election law,[6] initiated a proceeding in the New York State Supreme Court to challenge the Board's determination and have his designating petition validated.[7] Eventually, on June 23, 2016, five days before the scheduled primary, a New York court determined Pidot had, in fact, gathered the requisite number of signatures.[8] However, since the primary election was scheduled for a mere five days after the court's decision, the court held that it would be "impossible" to place Pidot's name on the primary ballot.[9]

The court based its finding of impossibility on two grounds. First, commissioners for county boards of election submitted affidavits to the court stating that there was not enough time to add Pidot's name to the ballot ahead of the scheduled June 28 primary.[10] Second, compliance with the Uniformed and Overseas Citizens Absentee Voting Act[11] (UOCAVA), which mandates that uniformed services and overseas voters have at least forty-five days to send in absentee ballots, would not be possible because the ballots sent to these voters were already printed and sent without Pidot's name.[12]

Conceding during oral arguments that it was too late to list Pidot's name on the June 28 primary ballot, Pidot's trial counsel requested that the court reschedule the primary.[13] The Supreme Court held that it lacked authority to provide such relief and denied Pidot's request.[14] A New York appellate court affirmed the lower court's ruling.[15] It held that Pidot's trial counsel had improperly requested that the court schedule a new primary at the conclusion of the trial.[16]

(McKinney 2017). In accordance with New York law, Pidot's petition was deemed presumptively valid. *Id.* § 6-154.

4. Complaint, *supra* note 1, para. 24.
5. *Id.* para. 25.
6. ELEC. § 16-102(1).
7. Complaint, *supra* note 1, para. 27.
8. *Id.* paras. 1, 36.
9. *See id.* para. 1.
10. *See id.* para. 37.
11. 52 U.S.C. § 20302(a)(8) (2012). Importantly, UOCAVA contains a "hardship exemption" that requires state election officials to request a waiver if the state is unable to meet the forty-five-day requirement for a variety of reasons, including "a delay in generating ballots due to a legal contest." *Id.* § 20302(g)(2)(B)(ii). Despite Pidot's ongoing legal battle, the Board never requested a UOCAVA waiver. Complaint, *supra* note 1, para. 33.
12. Complaint, *supra* note 1, para. 2.
13. Pidot v. Macedo, 36 N.Y.S.3d 188, 189 (App. Div. 2016).
14. *Id.* at 190.
15. *See id.* at 189.
16. *Id.*

Despite a finding that Pidot did have enough signatures and should be on the ballot for the Republican primary, the appellate division held that there was nothing it could do to grant meaningful relief to Pidot.[17]

Pidot's run through the New York State court system came to an end, and voters were never given the opportunity to choose between two qualified candidates in the scheduled Republican primary.[18] As a result, Jack Martins was deemed the candidate for the Republican Party in the third congressional district without a single ballot being cast.[19]

Pidot and two voters then petitioned the New York State Board of Elections in the Northern District of New York to schedule a new primary.[20] Pidot alleged four claims for relief: (1) UOCAVA was unconstitutional as applied because it constrained the court's power to schedule a new primary election, (2) the New York State Board of Elections violated Pidot's rights by failing to apply for an exemption, (3) voters' First Amendment rights were violated when the primary election was not held, and (4) voters' Fourteenth Amendment equal protection rights were violated by the cancellation of the primary.[21] The plaintiffs argued the constitutional deprivation was caused by the state's failure to apply for a UOCAVA waiver or hold a primary once the New York trial court determined that Pidot had gathered the required number of signatures to appear on the ballot.[22]

Oral arguments were held in front of Judge Frederick J. Scullin Jr. on August 17, 2016.[23] At the conclusion of the arguments, Judge Scullin ruled from the bench that the State Board of Elections was "obligated" to seek a hardship exemption under UOCAVA and that the defendants "violated the plaintiffs' rights to a political association under the First Amendment to the United States Constitution, resulting in depriving the plaintiff Pidot and plaintiffs' voters rights in the election."[24] The court ordered the Board of Elections to place Pidot on the ballot and scheduled a primary for October 6, 2016.[25]

Martins appealed the decision, and, on September 16, 2016, the Second Circuit vacated the district court's judgment and dismissed the case from the bench.[26] In a two-page summary order, the Second Circuit held that the

17. *See id.* at 190.

18. Complaint, *supra* note 1, para. 39. According to New York election law, when a primary has only one candidate, there is no actual vote and that candidate is deemed nominated. N.Y. ELEC. LAW § 6-160(2) (McKinney 2017); *see also* Ryan Brady, *Tom Suozzi Wins Democratic Primary*, QUEENS CHRON. (June 30, 2016, 10:30 AM), http://www.qchron.com/article_341fc128-3c22-580d-8493-41347d249702.html [https://perma.cc/V2YK-G6JH].

19. Complaint, *supra* note 1, para. 39.

20. *See id.* para. 1.

21. *See id.* paras. 47–69.

22. *See* Answer Brief of Appellee-Plaintiffs at 15, Martins v. Pidot, 663 F. App'x 14 (2d Cir. 2016) (No. 16-3028-cv).

23. Transcript of Motion Hearing Decision at 1, Pidot v. N.Y. State Bd. of Elections, No. 16-cv-859 (N.D.N.Y. Aug. 17, 2016).

24. *Id.* at 4.

25. *Id.*

26. *See* Martins v. Pidot, 663 F. App'x 14, 17–18 (2d Cir. 2016).

plaintiffs' federal claims were foreclosed by the *Rivera-Powell* doctrine.[27] The *Rivera-Powell* doctrine holds that when a candidate challenges his removal from the ballot "there is no independent burden on First Amendment rights when the state provides adequate procedures by which to remedy the alleged illegality."[28]

More than five months after Pidot first submitted his *valid* designating petition to the New York State Board of Elections, he lost his legal battle, and the 152,879 enrolled Republican voters in New York's third congressional district lost the right to choose among two statutorily qualified candidates to represent them in the general election.

Pidot's long legal battle is not unique, as election litigation has dramatically increased since the 2000 election in which the Supreme Court intervened in *Bush v. Gore*.[29] Judges asked to resolve election disputes often become immersed in a partisan battle that forces them to side with one candidate over another. There is a risk that the public will perceive this judicial intervention as a partisan act motivated by loyalty to one party as opposed to an impartial application of the law.[30] Moreover, there is little clarity or consistency when it comes to how federal courts resolve election disputes, partly because there is no established test that these courts apply.[31]

Through the lens of *Pidot*, this Note examines the federal courts' unsettled jurisprudence regarding when federal intervention in "candidate-litigated" election disputes is warranted.[32] Part I provides background on the administration of elections and examines the process through which a party can bring a lawsuit challenging some aspect of the election administration in state or federal court. Part II explores federal courts' reluctance to intervene in election-related litigation to avoid the risk of appearing to be partisan actors. In fact, legal scholars have demonstrated at both the state and federal level that a judge's political ideology is often a good predictor of how the court resolves a dispute. Finally, Part III examines *Pidot* to determine whether judicial nonintervention was appropriate in this instance and then

27. *See id.* at 17 ("[W]e can construe Pidot's First Amendment claim in this case as analogous to a due process claim, as was done in *Rivera-Powell* itself.").

28. Rivera-Powell v. N.Y.C. Bd. of Elections, 470 F.3d 458, 469 (2d Cir. 2006). For a more extensive discussion of the Second Circuit's application of the *Rivera-Powell* doctrine in *Pidot*, see *infra* Part I.C.

29. 531 U.S. 98 (2000). In the year 2000 there were 197 election challenges, in 2004 there were 361, in 2008 there were 297, and in 2012 there were 298. *See* Rick Hasen, *Election Litigation Rates Remain High, More Than Double the Period Before* Bush v. Gore, ELECTION L. BLOG (Jan. 7, 2013, 7:55 AM), https://electionlawblog.org/?p=45951 [https://perma.cc/55HU-297P].

30. *See* Steven F. Huefner, *Remedying Election Wrongs*, 44 HARV. J. ON LEGIS. 265, 288 (2007); s*ee also infra* Part II.B.

31. *See infra* Part I.B.

32. The term "candidate-driven election litigation" encompasses a subset of election litigation in which candidates raise legal disputes involving arcane questions of the law, including the counting of ballots, the eligibility of a candidate to run, whether a candidate is a resident in a particular jurisdiction, or whether a candidate can appear on a ballot despite technical defects in an application. *See* Michael S. Kang & Joanna M. Shepherd, *The Long Shadow of* Bush v. Gore*: Judicial Partisanship in Election Cases*, 68 STAN. L. REV. 1411, 1415–16 (2016).

proposes a clear judicial review standard that federal courts can use for similar cases. This Note rejects the view that nonintervention should be the federal courts' default position and, instead, proposes that the appearance of nonpartisanship should be a guiding force when courts determine whether to intervene in election disputes.

I. AN OVERVIEW OF ELECTION LITIGATION

The Constitution protects American citizens' right to vote, and, indeed, "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."[33] Part I.A examines the constitutional foundation of the right to vote. Part I.B explores how a candidate or voter who alleges his right to vote was infringed can bring a lawsuit in state or federal court. Part I.C explains the Second Circuit's reliance on the *Rivera-Powell* doctrine in *Pidot*.

A. The First Amendment Right to Vote

The ability to freely associate to advance shared beliefs is "a basic component of any democratic polis."[34] If citizens do not have the ability to freely associate with other like-minded citizens to advance common ideas, effective participation in a democracy is impossible.[35] Other rights secured by the First Amendment—speech, assembly, religion, petition—would be of no value if the Constitution did not protect the right to associate.[36]

The drafters of the Constitution purposefully chose not to address voting rights explicitly because universal suffrage laws would have complicated an already fraught relationship between states and the newly forming federal government.[37] Nonetheless, the Court has established that there is a constitutionally protected right to vote contained within the First Amendment's right to freely associate.[38] From the nation's earliest days, the Court recognized that the Constitution protects the right, of those qualified, to vote.[39] As early as 1886 in *Yick Wo v. Hopkins*,[40] the Court found that the

33. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

34. Guy-Uriel E. Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 CALIF. L. REV. 1209, 1239 (2003).

35. *See* Buckley v. Valeo, 424 U.S. 1, 15 (1976) ("The First Amendment protects political association as well as political expression.").

36. *See* David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203.

37. VICTORIA BASETTI, ELECTORAL DYSFUNCTION: A SURVIVAL MANUAL FOR AMERICAN VOTERS 5 (2012).

38. Williams v. Rhodes, 393 U.S. 23, 30 (1968) ("We have repeatedly held that freedom of association is protected by the First Amendment."); *see also Buckley*, 424 U.S. at 15 (noting that freedom of association protects "the right to associate with the political party of one's choice" (quoting Kusper v. Pontikes, 414 U.S. 51, 56 (1973))); Reynolds v. Sims, 377 U.S. 533, 554 (1964) ("Undeniably the Constitution of the United States protects the right of all qualified citizens to vote"); *Wesberry*, 376 U.S. at 17.

39. *Ex parte* Yarbrough, 110 U.S. 651, 656–57 (1884).

40. 118 U.S. 356 (1886).

right to vote was fundamental despite the lack of an explicit mention of such a right in the Constitution.[41]

Restrictions on one's right to vote "strike at the heart of representative government."[42] The right can neither be denied outright nor destroyed by alteration or dilution of one's vote.[43] The protection against federal encroachment of this right has been extended to infringement by the states through the Fourteenth Amendment.[44]

This right to vote encompasses two distinct but overlapping rights: "the right of individuals to associate for the advancement of [their] political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[45] While the Constitution protects the right to vote, election administration has always been a matter of state control.[46]

1. Elections Are State Run

The Constitution explicitly mandates that states regulate "[t]he Times, Places and Manner of holding Elections."[47] States control the administration of elections with little federal oversight.[48] Congress has enacted only limited legislation that regulates specific aspects of election administration.[49] Generally, however, states' election codes govern the specifics of election administration from the voter registration process, to ballot access requirements for candidates, to the voting process itself.[50] While these regulations are necessary to ensure fair elections, they inevitably impose some restrictions on an individual's First Amendment right to vote.[51] Courts

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41. *Id.* at 370.
42. *Reynolds*, 377 U.S at 555.
43. *See id.* at 554–55.
44. *See Williams*, 393 U.S at 30–31.
45. *Id.* at 30.
46. Daniel P. Tokaji, *Public Rights and Private Rights of Action: The Enforcement of Federal Election Laws*, 44 IND. L. REV. 113, 117 (2010).
47. U.S. CONST. art I, § 4 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").
48. *See* Gamza v. Aguirre, 619 F.2d 449, 453 (5th Cir. 1980) ("[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections." (citing Oregon v. Mitchell, 400 U.S. 112, 124–25 (1970))); *see also* Oden v. Brittain, 396 U.S. 1210, 1211 (1969) ("I remain firmly convinced that the Constitution forbids this unwarranted and discriminatory intervention by the Federal Government in state and local affairs.").
49. *See, e.g.*, Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 36 and 52 U.S.C.); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (codified as amended in scattered sections of 39 and 52 U.S.C.); Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. No. 99-410, 100 Stat. 924 (1986) (codified as amended in scattered sections of 18 and 52 U.S.C.); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).
50. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).
51. *See id.* at 788–89. The Court stated that restrictions on the right to vote trigger the "'fundamental rights' strand of equal protection analysis." *Id.* at 786 n.7. *But see generally*

have recognized, however, that some state-imposed burdens are necessary if elections are to be "fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process[]."[52] To accomplish the goal of fair and honest elections, states have enacted complex election laws that control all aspects of the election process.[53]

These state election statutes also dictate how a candidate or voter can initiate a lawsuit alleging an injury resulting from some aspect of the state's administration of the electoral process. There is little uniformity among states regarding how election-related disputes are reviewed by the courts.[54] Different review mechanisms include decisions by state trial courts, state supreme courts,[55] state legislatures, or neutral tribunals.[56] Often, the review procedure depends on what type of election is being contested.[57]

The electoral process encompasses many distinct stages, including ballot access, primary contests, and general elections.[58] Litigation may arise at each step in the electoral process involving both pre- and post-election disputes. *Pidot* presents an example of preelection litigation because the legal challenge concerned a candidate's right to be on the primary ballot.

2. Ballot-Access Statutes

Ballot-access statutes establish requirements that candidates must meet before they can be listed on ballots. A state has an interest in ensuring that candidates who earn a spot on a ballot have some minimum level of support among voters.[59] Restrictions on a candidate's ability to access the ballot inevitably affect a voter's right to support a candidate who shares his or her beliefs.[60] While states can impose ballot-access restrictions, "substantial

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Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143 (2008) (arguing that although the right to vote is considered fundamental, courts do not consistently apply strict scrutiny review in such cases).

52. *Anderson*, 460 U.S. at 788.

53. *See, e.g.*, N.Y. ELEC. LAW §§ 6-100 to 6-136 (McKinney 2017).

54. Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 3 (2013).

55. In New York, the Supreme Court is the trial level court. *Welcome Message*, N.Y. ST. UNIFED CT. SYS., http://www.nycourts.gov/courts/1jd/supctmanh/ [https://perma.cc/CRU5-57D6] (last visited Nov. 19, 2017).

56. *See* Douglas, *supra* note 54, at 9–24.

57. *See id.* at 5.

58. Louise Weinberg, *When Courts Decide Elections: The Constitutionality of* Bush v. Gore, 82 B.U. L. REV. 609, 620 (2002).

59. Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983); *see also* Jenness v. Fortson, 403 U.S. 431, 442 (1971) (holding that a state can require a candidate to demonstrate that he has a "significant modicum of support" before printing his name on a ballot).

60. Bullock v. Carter, 405 U.S. 134, 143 (1972) ("[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."). Courts have maintained that a voter's interest in having a candidate he or she supports on the ballot is connected to, but independent from, the candidate's interest in being on the ballot. *See* Schulz v. Williams, 44 F.3d 48, 54 (2d Cir. 1994); *see also* Tarpley v. Salerno, 803 F.2d 57, 60 (2d Cir. 1986) (holding that plaintiff-voters can sue in federal court because, although voters have some common interest with the candidate, "the relationship is not close enough to be viewed as an authorization by the former to the latter to represent the voters in the legal proceedings in the state courts").

burdens" are suspect and trigger potential First and Fourteenth Amendment violations.[61]

3. New York's Ballot-Access Statutes

New York ballot-access requirements are "infamous for stringently enforcing arcane petition requirements."[62] Indeed, in 2000, a federal district court found that New York's ballot-access scheme for primary elections posed an undue burden on the constitutionally protected First Amendment right to vote.[63] Article 6 of New York's election law provides the procedure by which candidates can obtain access to the ballot in New York.[64]

To get on the ballot, most candidates must submit a designating petition.[65] The designating petition contains specific information about the candidate and requires the candidate to gather a certain number of signatures.[66] While filed petitions are presumptively valid, any voter qualified to vote for the candidate designated can object to the validity of the petition.[67] Once an objection has been filed, the Board of Elections must determine whether the petition meets all statutory requirements.[68] After the Board makes this determination, an aggrieved candidate, the chairman of a party committee, or the person who initially filed the objection to the petition can challenge the Board's decision in state court.[69]

While article 6 establishes ballot-access requirements, article 16 provides that a party can challenge some aspect of the administration of an election in state court.[70] Section 16-100 states, "The supreme court is vested with jurisdiction to summarily determine any question of law or fact arising as to any subject set forth in this article, which shall be construed liberally."[71] This broad legislative mandate gives the New York trial courts power to ensure that voters have the opportunity to fully exercise their right to vote.[72] Other sections in article 16 provide specific causes of action that a candidate or voter can bring in court and give judges some guidance on the appropriate

61. Storer v. Brown, 415 U.S. 724, 729 (1974).

62. Robert Yablon, *Validation Procedures and the Burden of Ballot Access Regulations*, 115 YALE L.J. 1833, 1837 (2006). *See generally* JERRY H. GOLDFEDER, GOLDFEDER'S MODERN ELECTION LAW (3rd ed. 2012) (describing New York's ballot-access procedures).

63. Molinari v. Powers, 82 F. Supp. 2d 57, 71 (E.D.N.Y. 2000). The court in *Molinari* singled out two specific provisions of New York's ballot-access scheme that pose an unconstitutional burden on candidates' ability to get on ballots. *Id.*

64. N.Y. ELEC. LAW §§ 6-100 to 6-136 (McKinney 2017).

65. *Id.* §§ 6-118 to 6-122.

66. *Id.* §§ 6-130 to 6-134 (statutory requirements); *id.* § 6-136 (number of signatures).

67. *Id.* § 6-154(2).

68. *Id.*

69. *Id.* § 16-102(1). The statute does not permit the designation of a candidate to be challenged by other parties. *See id. Pidot* presents a situation in which a voter cannot initiate a proceeding to challenge the Board's determination that a designating petition was invalid under § 16-102(1).

70. *Id.* §§ 16-100 to 16-120.

71. *Id.* § 16-100(1).

72. Eve v. Mahoney, 358 N.Y.S.2d 785, 786 (App. Div. 1974) (recognizing "the broad powers granted to the Supreme Court to make such orders as fairness and justice require in election cases").

remedy.[73] Through the election laws, the state legislature establishes when a court should resolve an election dispute.[74]

Pidot initiated his proceeding under section 16-102, which allows an aggrieved candidate to challenge the Board's determination that a designating petition was deficient.[75] Under that section, if the court determines that there has been "such fraud or irregularity as to render impossible a determination as to who rightfully was nominated or elected," the court can order a new primary election to be held.[76]

Pidot argued that the state's failure to hold a primary election, despite two qualified candidates earning a spot on the ballot, was the very sort of irregularity section 16-102 was meant to address.[77] While the state court agreed that Pidot had a valid claim under section 16-102, the court held that it did not have the power to reschedule the primary election.[78] In other words, despite the broad authority granted to the court under section 16-102, the court held that it was powerless to act to remedy the Board's erroneous determination that Pidot's designating petition was defective.

B. Bringing an Election-Related Claim in Federal Court

While election disputes typically begin in state court under the relevant state statutory provisions, alleged constitutional deprivations arising from the maladministration of an election can also be brought in federal court.[79] For much of the early part of American history, however, federal courts were hesitant to intervene to protect voting rights.[80] As a general rule, federal court intervention in state-run election matters is not appropriate because such intervention raises federalism concerns.[81] Early courts maintained that only the legislature, not the courts, could act to limit discrimination in voting rights cases.[82] The Supreme Court's jurisprudence through much of the first half of the twentieth century reveals a desire to avoid resolving election cases in which judges are forced to pick sides in a partisan dispute.[83] This refusal

73. ELEC. §§ 16-100 to 16-120.

74. Ashline v. Haley, 219 N.Y.S.2d 911, 912 (Sup. Ct. 1961).

75. ELEC. § 16-102.

76. *Id.* § 16-102(3).

77. Brief of Petitioner-Appellant at 14, Pidot v. Macedo, 36 N.Y.S.3d 188 (App. Div. July 21, 2016) (No. 2016-6927).

78. *Pidot*, 36 N.Y.S.3d at 189 ("[The trial court] granted that branch of Pidot's petition which was to validate the designating petition but determined that it would be impossible to grant that branch of his petition which sought to place his name on the June 28, 2016, primary ballot.").

79. 28 U.S.C. § 1331 (2012).

80. *See* Rossito-Canty v. Cuomo, 86 F. Supp. 3d 175, 187 (E.D.N.Y. 2015).

81. *See* Weinberg, *supra* note 58, at 654.

82. *See* United States v. Reese, 92 U.S. 214, 218 (1875) (holding that Congress may enforce by "appropriate legislation" the rights conferred by the Fifteenth Amendment).

83. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 565 (1946) (finding congressional reapportionment to be nonjusticiable political question); Breedlove v. Suttles, 302 U.S. 277, 282–84 (1937) (holding a poll tax to be constitutional under the Fourteenth and Fifteenth Amendments). *But see* United States v. Classic, 313 U.S. 299, 323–24 (1941) (finding that Congress can regulate primary elections); Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (deeming unconstitutional a Texas statute that prevented an African American man from

to intervene in voting rights issues gave the states broad latitude to enforce various means of restricting access to the polls, including literacy tests, poll taxes, and "grandfather" clauses.[84]

Partly due to the ratification of constitutional amendments that specifically protected voting rights,[85] the middle of the twentieth century ushered in a new era in voting rights litigation.[86] The federal courts pulled back from the insistence that voting rights policies were reserved for the states and actively enforced the right to vote.[87]

Federal courts are now heavily involved in many aspects of election litigation.[88] However, while federal courts often intervene in disputes regarding class-based discrimination or restrictive election laws, federal intervention is still rare in cases where constitutional deprivation is alleged as a result of a state's application of a state law in a particular dispute.[89] These particular disputes are typically brought by a candidate and deal with arcane questions of law such as a candidate's ballot eligibility or the counting of ballots after an election.[90] While federal intervention in litigation in which a candidate challenges some particular aspect of the state's administration of an election is rare, it is not unprecedented.

1. Federal Court Intervention in Candidate-Litigated Election Disputes

Despite increased intervention to protect the right to vote, federal courts still rarely intervene in "candidate-litigated" election disputes.[91] The federal judiciary has consistently held that it is not its job to resolve minor election

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voting in a primary election); *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884) (holding that under the Fourteenth Amendment, Congress can pass legislation regulating the right to vote).

84. *See Rossito-Canty*, 86 F. Supp. 3d at 187; *see also Classic*, 313 U.S. at 311 ("[T]he states are given, and in fact exercise, a wide discretion in the formulation of a system for the choice by the people of representatives in Congress.").

85. The Nineteenth Amendment, ratified in 1920, provided women with the right to vote. *See* U.S. CONST. amend. XIX. The Twenty-Fourth Amendment, ratified in 1964, provided that the right to vote could not be conditioned on a poll tax. *See id.* amend. XXIV. The Twenty-Sixth Amendment, ratified in 1971, provided people over eighteen with the right to vote. *See id.* amend. XXVI.

86. *Rossito-Canty*, 86 F. Supp. 3d at 187–88.

87. *See id.* (collecting cases).

88. *See* Weinberg, *supra* note 58, at 622 ("It is clear enough . . . that courts can and do adjudicate election controversies."); *see also* Shelby County v. Holder, 133 S. Ct. 2612, 2623 (2013) ("[T]he Federal Government retains significant control over federal elections.").

89. Hutchinson v. Miller, 797 F.2d 1279, 1283 (4th Cir. 1986) ("We first acknowledge and affirm the significant duty of federal courts to preserve constitutional rights in the electoral process. Our role, however, primarily addresses the general application of laws and procedures, not the particulars of election disputes."). *Pidot* presents this type of dispute since Pidot challenged the Board's determination that he did not have enough signatures to be listed on the ballot. *See supra* note 4 and accompanying text.

90. *See* Kang & Shepherd, *supra* note 32, at 1415. Kang and Shepherd use the term "candidate-litigated election disputes" to describe these types of cases. *Id.*

91. *See* Griffin v. Burns, 570 F.2d 1065, 1076 (1st Cir. 1978) ("Federal court intervention into the state's conduct of elections for reasons other than racial discrimination has tended, for the most part, to be limited to striking down state laws or rules of general application which improperly restrict or constrict the franchise." (citations omitted)).

irregularities.[92] The federal courts do not oversee the details of election administration and minor irregularities do not rise to the level of a constitutional violation.[93] Irregularities are not uncommon in the administration of elections and, as the Second Circuit stated, "we cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error."[94]

These minor irregularities are referred to as "garden-variety" disputes.[95] Examples of garden-variety disputes include

> malfunctioning of voting machines, human error resulting in miscounting of votes and delay in arrival of voting machines, allegedly inadequate state response to illegal cross-over voting, mechanical and human error in counting votes, technical deficiencies in printing ballots, mistakenly allowing non-party members to vote in a congressional primary, and arbitrary rejection of ten ballots.[96]

These minor errors are an unfortunate reality of election administration,[97] and federal courts have declined to hear cases even when the error disputed may have determined the outcome of the election.[98]

The tendency against intervention is not absolute, however, and in rare instances the federal judiciary has stepped in to resolve disputes.[99] A court's job is "to separate wheat from chaff, and to determine whether [a particular dispute] fits into one of the isthmian exceptions to this general rule of non-intervention."[100] The facts of each dispute must be considered before a court can determine if it is a run-of-the-mill electoral dispute or something more.[101] In determining whether intervention is appropriate, two factors that federal courts consistently examine is whether (1) the state corrective procedure was adequate and (2) the dispute would result in fundamental unfairness absent intervention. These two factors will be examined in turn.

2. Adequacy of State Court Procedure

Federal courts look to the adequacy of the due process afforded by the state procedure before determining if federal intervention is appropriate.[102] If the state procedure is adequate, federal intervention is inappropriate.

For example, in *Powell v. Power*,[103] Powell, a candidate for Congress in New York's eighteenth congressional district, petitioned a federal court to set

92. Powell v. Power, 436 F.2d 84, 86 (2d Cir. 1970).
93. Pettengill v. Putnam Cty. R-1 Sch. Dist., 472 F.2d 121, 122 (8th Cir. 1973).
94. *Powell*, 436 F.2d at 88.
95. Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th Cir. 1998) (listing cases from various circuits all declining to intervene in election disputes).
96. Shannon v. Jacobowitz, 394 F.3d 90, 96 (2d Cir. 2005) (citations omitted).
97. Hutchinson v. Miller, 797 F.2d 1279, 1286 (4th Cir. 1986).
98. *Bennett*, 140 F.3d at 1226.
99. *See Powell*, 436 F.2d at 86.
100. Bonas v. Town of North Smithfield, 265 F.3d 69, 74 (1st Cir. 2001).
101. *Id.* at 75.
102. Gold v. Feinberg, 101 F.3d 796, 800 (2d Cir. 1996).
103. 436 F.2d 84 (2d Cir. 1970).

aside the results of a primary election citing irregularities in the voting process.[104] Powell argued that ineligible voters had voted in the primary, which affected the outcome of the election.[105] New York election law requires a candidate challenging the outcome of a primary election to initiate a lawsuit within ten days after the primary.[106] Because Powell failed to comply with this statutory mandate, the state court dismissed his petition.[107] In denying Powell federal relief, the Second Circuit held that relief was unavailable if "an adequate and fair state remedy exists."[108] In other words, the federal court was powerless to act if the candidate failed to follow the appropriate state corrective procedures.

In a later Second Circuit decision, the court again denied relief because the plaintiffs did not first bring a claim in New York state court despite the opportunity to do so.[109] The court held that the plaintiff's failure to pursue the appropriate state court remedy was fatal to his claim.[110] The court was clear, however, that its unwillingness to intervene in the dispute "in no way disparages the constitutional right of voters to 'cast their ballots and have them counted.'"[111] Rather, where "there exists a state law remedy to the election irregularities that is fair and adequate, human error in the conduct of elections does not rise" to a constitutional violation.[112]

Other circuit courts have similarly looked to the adequacy of the state corrective procedure to determine if federal court intervention is appropriate.[113] The First Circuit in *Griffin v. Burns*[114] determined that Rhode Island's retroactive invalidation of absentee and shut-in ballots in a primary election was a violation of voters' constitutionally protected right to vote.[115] In *Griffin*, a Democratic primary was held for a vacancy on the Providence City Council.[116] Election officials told voters that they could vote using an absentee or shut-in ballot.[117] After the primary election, one of the candidates challenged the use of absentee and shut-in ballots in primary elections, and the Rhode Island Supreme Court invalidated all votes that were

104. *Id.* at 85–86.
105. *Id.* at 86.
106. *See id.*
107. *Id.*
108. *See* Gold v. Feinberg, 101 F.3d 796, 800 (2d Cir. 1996) (citing *Powell*, 436 F.2d at 88).
109. *Id.*
110. *Id.*
111. *Id.* at 802 (quoting United States v. Classic, 313 U.S. 299, 315 (1941)).
112. *Id.*
113. *See, e.g.*, *Gold*, 101 F.3d at 802; Roe v. Alabama, 43 F.3d 574, 582 (11th Cir. 1995); Hutchinson v. Miller, 797 F.2d 1279, 1284 (4th Cir. 1986); Duncan v. Poythress, 657 F.2d 691, 705–06 (5th Cir. 1981); Griffin v. Burns, 570 F.2d. 1065, 1077 (1st Cir. 1978); Hennings v. Grafton, 523 F.2d 861, 865 (7th Cir. 1975); Pettengill v. Putnam Cty. R-1 Sch. Dist., 472 F.2d 121, 122–23 (8th Cir. 1973).
114. 570 F.2d. 1065 (1st Cir. 1978).
115. *See id.* at 1078–79.
116. *Id.* at 1066.
117. *Id.* at 1067.

not cast in person.[118] When Rhode Island voters alleged that the state court's decision resulted in a First Amendment violation of their right to vote, the First Circuit decided that intervention was appropriate.[119] It held that the voters' allegation went beyond a typical garden-variety dispute and that the voters had no way to challenge the election officials' actions other than in federal court.[120] The court based its decision to intervene on the inadequacy of existing state corrective procedures and the inadequacy of existing state procedures.[121]

The Eleventh Circuit, in *Roe v. Alabama*,[122] also looked to the available state court remedy before determining federal court intervention to be appropriate in a candidate-litigated election dispute.[123] In *Roe*, the established procedures for voting via absentee ballot were changed by an Alabama court after the election had already been held.[124] The Eleventh Circuit held that the established state procedure for resolving this dispute—a legislative contest—was not an adequate forum for the constitutional issues presented by the legislation.[125]

3. Fundamental Unfairness

The *Griffin* court and the *Roe* court both determined that the state corrective procedure in place was inadequate, and further, that nonintervention would result in fundamental unfairness to the voters. In *Griffin*, the court held that the state election officials had induced voters to vote by absentee or shut-in ballot, thus stripping them of their vote in the primary.[126] While acknowledging the preference for nonintervention, the court maintained that when the "election process itself reaches the point of patent and fundamental unfairness," a constitutional violation is afoot and judicial intervention is necessary to protect constitutionally guaranteed rights.[127]

Similarly, in *Roe*, the court found that the retroactive change in absentee ballot procedures affected the "fundamental fairness" of the election.[128] The change resulted in vote dilution for some voters and disenfranchisement for others who may have voted via absentee ballot had the requirements been less stringent.[129] In both *Griffin* and *Roe*, the courts engaged in a fact-

118. *Id.* at 1068. Absentee and shut-in ballots constituted nearly 10 percent of the total primary vote. *Id.* at 1074. Voters who lived close to their polling location but were unable to secure transportation to the polls used shut-in ballots. *Id.* at 1067.

119. *Id.* at 1077–78.

120. *Id.* at 1079 ("[T]he federal court was the only practical forum for redress: there appears to have been no standard state procedure for handling a claim such as this . . . .").

121. *Id.* at 1077.

122. 43 F.3d 574 (11th Cir. 1995).

123. *Id.* at 582.

124. *See id.* at 579.

125. *See id.* at 582.

126. *Griffin*, 570 F.2d at 1074.

127. *Id.* at 1077. The *Griffin* court provided § 1983 relief. *Id.*; *see also* 42 U.S.C. § 1983 (2012).

128. *Roe*, 43 F.3d at 581.

129. *See id.*

intensive inquiry into the conduct of the election to determine whether the state's administration of the election was simply a garden-variety dispute or resulted in fundamental unfairness to the voters.[130]

A federal court's job is to draw a distinction between a garden-variety irregularity and a "pervasive error that undermines the integrity of the vote."[131] *Griffin* and *Roe*, like *Pidot*, were candidate-driven election disputes in which a candidate challenged some aspect of the state's administration and application of state law. While no federal court has established a formal test with explicit factors to determine when intervention is appropriate, the adequacy of the state corrective procedure and whether nonintervention would result in fundamental unfairness are two important considerations for many courts.

C. The Second Circuit's Reliance on Rivera-Powell

After Judge Scullin in the Northern District of New York rescheduled the Republican primary for October 6, 2016, and ordered both Pidot and Martins to be listed on the ballot,[132] the Second Circuit reversed the district court's decision relying on the *Rivera-Powell* doctrine.[133]

The *Rivera-Powell* doctrine stems from a case in which Verena Rivera-Powell, a candidate for judge of the Civil Court of the City of New York, sued the city's Board of Elections for wrongfully removing her from the ballot.[134] After a voter challenged the number of signatures on Rivera-Powell's designating petition, the Board determined that she did not have enough signatures and removed her from the ballot.[135] Rivera-Powell challenged the timeliness of the voter's objection in a New York trial court, but the court dismissed her complaint for lack of jurisdiction.[136] Rather than appealing the dismissal, Rivera-Powell, along with plaintiff-voters, brought suit in federal court alleging First and Fourteenth Amendment violations.[137]

In an opinion by then-circuit Judge Sonia Sotomayor, the Second Circuit rejected Rivera-Powell's Fourteenth Amendment claim and held that the procedures in place both before and after Rivera-Powell's name was removed from the ballot satisfied the state's due process burden, and therefore there

130. Other circuits have also looked to the see if the state action has resulted in fundamental unfairness to the voters. *See, e.g.*, Gold v. Feinberg, 101 F.3d 796, 801 (2d Cir. 1996) (invoking *Griffin* and holding federal intervention to be unwarranted absent "broad-gauged unfairness"); Duncan v. Poythress, 657 F.2d 691, 702 (5th Cir. 1981) (stating that federal court intervention may be appropriate when "state actions have jeopardized the integrity of the electoral process").

131. Bennett v. Yoshina, 140 F.3d 1218, 1226 (9th Cir. 1998).

132. Pidot v. N.Y. State Bd. of Elections, No. 16-cv-859, slip op. at 4 (N.D.N.Y. Aug. 31, 2016).

133. *See* Martins v. Pidot, 663 F. App'x 14, 17 (2d Cir. 2016).

134. Rivera-Powell v. N.Y.C. Bd. of Elections, 470 F.3d 458, 461–62 (2d Cir. 2006).

135. *Id.* at 463.

136. *See id.* at 464. Rivera-Powell's complaint was not verified, as required by New York election law. *Id.*

137. *See id.*

was no independent First Amendment violation.[138] Before Rivera-Powell's name was removed from the ballot, she had a predeprivation hearing before the Board of Elections where she had an opportunity to voice opposition to the removal.[139] After her removal, she had the opportunity to challenge the decision in state court and to obtain full judicial review of the Board's determination in accordance with New York law.[140]

Regarding Rivera-Powell's First Amendment claim, the Second Circuit found that it was "virtually indistinguishable from her due process claim, in that she allege[d] no additional deprivation of her First Amendment interests independent from the deprivation that form[ed] the basis of her due process claim."[141] Rivera-Powell did not argue that the Board's review process was unconstitutional or statutorily invalid. Rather, she argued that in this particular instance, the Board simply erred in sustaining a challenge to the validity of her designating petition.[142] The Second Circuit held that Rivera-Powell did not follow the state's procedure for bringing a claim and, therefore, federal judicial intervention was not warranted.[143] The state corrective procedure provided adequate due process and a federal court should not review a potential constitutional violation simply because the candidate failed to follow the established state procedure.[144]

The Second Circuit summarized its holding this way: "when a candidate raises a First Amendment challenge to his or her removal from the ballot based on the allegedly unauthorized *application* of an admittedly valid restriction, the state has satisfied the First Amendment if it has provided due process."[145]

The *Rivera-Powell* doctrine has been applied by courts within the Second Circuit to election cases when a candidate (or a voter who supports a candidate) tries to raise a due process violation in federal court.[146] Cases citing the *Rivera-Powell* doctrine to dismiss a candidate's claim typically

138. *Id.* at 466–68. The trial court held, "having found no violation of state law, there are no viable federal claims to support federal jurisdiction, and therefore the complaint is dismissed." Rivera-Powell v. N.Y.C. Bd. of Elections, No. 06 CIV. 6843 (NRB), 2006 WL 2850212, at *5 (S.D.N.Y. Oct. 4), *aff'd*, 470 F.3d 458 (2d Cir. 2006).

139. *Rivera-Powell*, 470 F.3d at 466.

140. *Id.* at 467. The court found that its due process analysis was not affected by Rivera-Powell's failure to properly pursue action in state court. *Id.* at 467 n.9. Additionally, she could have appealed the dismissal of her petition but decided not to. *Id.*

141. *Id.* at 468. The Second Circuit held that Rivera-Powell's "First Amendment claim is inextricably intertwined with the question of whether the state afforded her procedurally adequate process." *Id.* at 469.

142. *Id.*

143. *Id.* at 468–69.

144. *Id.* at 469–70.

145. *Id.*

146. *See, e.g.*, Tiraco v. N.Y. State Bd. of Elections, 963 F. Supp. 2d 184, 194–95 (E.D.N.Y. 2013); Thomas v. N.Y.C. Bd. of Elections, 898 F. Supp. 2d 594, 599 (S.D.N.Y. 2012); McMillan v. N.Y. State Bd. of Elections, No. 10-CV-2502, 2010 WL 4065434, at *8, *10 (E.D.N.Y. Oct. 15, 2010), *aff'd*, 449 F. App'x 79 (2d Cir. 2011); *see also* Appellant's Emergency Opening Brief at 32 n.5, Martins v. Pidot, 663 F. App'x 14 (2d Cir. 2016) (No. 16-3028), 2016 WL 4662237, at *32 n.5 (listing fourteen ballot-access cases that have invoked the *Rivera-Powell* doctrine).

involve First Amendment and due process claims. These claims come to the federal courts after dismissal or adjudication against the candidate in state court.[147] Courts have held that voters alleging a constitutional violation in federal court have no valid claim if the candidate lost a due process challenge in state court or failed to pursue the appropriate postdeprivation remedy.[148]

In *Pidot*, the Second Circuit held that Pidot's First Amendment claim was "analogous to a due process claim" and therefore the dispute was not appropriate for federal court intervention.[149] Until *Pidot*, the *Rivera-Powell* doctrine had never been applied in a case where the candidate won in state court and the candidate alleged no due process violation. Additionally, the doctrine was never applied to bar voters from bringing a claim in federal court when those voters had no standing to bring the same claim in state court. Thus, voters who were statutorily barred from New York state election proceedings were prohibited from asserting their rights in federal court.[150] As such, the Second Circuit in *Pidot* extended the *Rivera-Powell* doctrine beyond the context and holding of the *Rivera-Powell* decision.

II. THE APPEARANCE OF PARTISANSHIP IN ELECTION LITIGATION

Every judge must take an oath to execute his or her duties faithfully and impartially.[151] When resolving election disputes, the risk of appearing impartial is particularly great since resolution inherently involves siding with one candidate over another.[152] Election cases put judges in the position of "kingmaker" and requires them to choose a winner and a loser in an election dispute.[153] Even if a judge determines the outcome of an election-related dispute fairly, the public might view the court as a partisan actor affecting the

147. *See Tiraco*, 963 F. Supp. 2d at 194 ("[T]he City Board's alleged actions here did not violate fundamental due process principles because Plaintiff was provided adequate process."); Marchant v. N.Y.C. Bd. of Elections, 815 F. Supp. 2d 568, 579 (E.D.N.Y. 2011) ("[The candidate] has been afforded the very same pre-deprivation hearing from the Board and judicial review in state court that the Second Circuit reviewed and deemed adequate in *Rivera-Powell* . . . ."); Minnus v. Bd. of Elections, No. 10-cv-3918, 2010 WL 3528544, at *4 (E.D.N.Y. Sept. 3, 2010) ("[New York election law] provides ample opportunity and notice both to be heard prior determining [sic] a petition's validity and to challenge the Board's determinations. [The candidate] was not deprived of an opportunity to be heard, rather she chose not to avail herself of the process . . . .").

148. *See Thomas*, 898 F. Supp. 2d at 599 ("Because the candidate plaintiffs here support had a full and fair opportunity to litigate this issue in state court, plaintiffs have failed to allege—much less prove—that they were deprived of any constitutional right.").

149. *See Pidot*, 663 F. App'x at 17.

150. *See supra* note 69 (stating who has standing to sue). Only aggrieved candidates or objectors have standing under section 16-102(1) of New York election law. N.Y. ELEC. LAW §§ 16-102(1) (McKinney 2017).

151. *See, e.g.*, 28 U.S.C. § 453 (2012) (federal); N.Y. CONST. art. XIII, § 1 (state).

152. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 993 (2005) ("Putting judges in the position of deciding election law questions when the winner and loser of its decision will be obvious can undermine the legitimacy of the courts.").

153. *See* Huefner, *supra* note 30, at 306; *see also* Douglas, *supra* note 54, at 3 ("State legislatures recognize that cases involving election contests are different from normal legal disputes. A decision maker must determine the winner of an election.").

declared winner's legitimacy.[154] Part II.A presents the "political thicket" as a justification for why courts are hesitant to intervene in election-related disputes. Next, Part II.B examines the courts' current role in the election-litigation arena and provides evidence that judges are influenced by party loyalty. Part II.C then discusses state laws that give judges guidance on how to determine the appropriate remedy in election disputes.

A. The "Political Thicket"

Two mid-twentieth century reapportionment cases decided just sixteen years apart—*Colegrove v. Green*[155] and *Baker v. Carr*[156]—demonstrate the federal courts' reluctance to involve themselves in political matters. When determining whether to intervene in these disputes, the U.S. Supreme Court grapples with two big questions. First, is intervention in reapportionment disputes—an area traditionally reserved for state legislatures—constitutionally permissible?[157] And second, if the Court gets entangled in the "political thicket," how could the Court ever leave that realm?[158] While the "political thicket" term is tied to reapportionment jurisprudence, this Note argues that these same concerns are relevant in all aspects of election-related litigation.

1. *Colegrove v. Green*

In *Colegrove*, Illinois voters alleged a Fourteenth Amendment equal protection violation because some Illinois congressional districts had much larger populations than others.[159] Justice Felix Frankfurter, writing for the majority, concluded that "the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States . . . . If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people."[160] The majority held that whether the Illinois districting scheme was unfair was a political question and therefore nonjusticiable.[161] Justice Frankfurter saw issues related to

154. *See* Douglas, *supra* note 54, at 51.

155. 328 U.S. 549 (1946).

156. 369 U.S. 186 (1962).

157. *See* Grant M. Hayden, *The Supreme Court and Voting Rights: A More Complete Exit Strategy*, 83 N.C. L. REV. 949, 969 (2005). As of this writing, the Supreme Court is considering whether the courts should be involved in "partisan gerrymandering." *See* Jess Bravin & Brent Kendall, *Supreme Court Appears Divided over Gerrymandering*, WALL ST. J. (Oct. 3, 2017, 5:44 PM), https://www.wsj.com/articles/supreme-court-takes-on-the-partisan-gerrymander-1507023002 [https://perma.cc/A6GE-4TCE].

158. *See* Hayden, *supra* note 157, at 969.

159. *Colegrove*, 328 U.S. at 550.

160. *Id.* at 554.

161. *See id.* at 556 ("The Constitution has many commands that are not enforceable by courts because they clearly fall outside the conditions and purposes that circumscribe judicial action."). *But see* Comment, *Challenges to Congressional Districting: After* Baker v. Carr *Does* Colegrove v. Green *Endure?*, 63 COLUM. L. REV. 98, 104 (1963) ("While *Colegrove* generally has been thought to stand for the proposition that Congressional districting is a 'political question,' four of the seven Justices agreed the issues raised were justiciable.").

reapportionment solely within the control of the legislature.[162] According to Frankfurter, "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people."[163]

The majority also found the Guarantee Clause of the Constitution[164] to be an insufficient basis for judicial intervention.[165] In a strong stand for the separation of powers doctrine, the Court concluded that its hands were tied and the "peculiarly political nature" of the dispute was not ripe for judicial intervention.[166] Stated another way, the *Colegrove* Court held that the voters' only remedy for the potential unfairness of malapportioned voting districts was to elect representatives who would repeal or amend the statute. Justice Frankfurter famously stated, "Courts ought not to enter this political thicket."[167]

2. *Baker v. Carr*

In *Baker*, the Court was asked to determine if Tennessee's reapportionment statute violated voters' Fourteenth Amendment equal protection rights.[168] The federal trial court, relying on *Colegrove*, held that there "can be no doubt that the federal rule . . . is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment."[169] The Supreme Court held otherwise: the Tennessee statute apportioning state representatives based on the 1901 census did indeed "deprive[] the [voters] of the equal protection of the laws in violation of the Fourteenth Amendment."[170] And because the claim arose under the Constitution, the district court erroneously dismissed the claim for want of subject matter jurisdiction.[171]

While the majority in *Colegrove* found that a reapportionment challenge implicated the Guarantee Clause of the Constitution (which presented a nonjusticiable political issue), in *Baker*, Justice William Brennan, writing for the majority, held that the challenge was based on a constitutional equal

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162. *Colegrove*, 328 U.S. at 556.

163. *See id.* at 553–54.

164. U.S. CONST. art. IV, § 4 ("The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.").

165. *Colegrove*, 328 U.S. at 556.

166. *See id.* at 552.

167. *Id.* at 556.

168. *See generally* Baker v. Carr, 369 U.S. 186 (1962). Despite a substantial increase in eligible voters—from 487,380 in 1901 to 2,092,891 in 1961—and a migration of Tennessee citizens from rural areas to cities, the state had not reapportioned its districts since 1901. *See id.* at 192.

169. Baker v. Carr, 179 F. Supp. 824, 826 (M.D. Tenn. 1959), *rev'd*, 369 U.S. 186 (1962).

170. *Baker*, 369 U.S. at 199. The Court found that intervention into the *Baker* dispute did not intrude upon Congress's area of exclusive authority and therefore was a justiciable issue. *See* Comment, *supra* note 161, at 108 (summarizing the holding in *Baker*).

171. *See Baker*, 369 U.S. at 199.

protection argument, not the Guarantee Clause.[172] The Court outright rejected the notion that just because a dispute presents a claim arising from the "embodiment of questions that were thought 'political,'" it must be nonjusticiable.[173]

Justice Frankfurter wrote a scathing dissent in *Baker*, calling the majority's opinion "a massive repudiation of the experience of our whole past" and accusing the majority of "asserting [a] destructively novel judicial power [that] demands a detailed analysis of the role of this Court in our constitutional scheme."[174] Echoing his opinion in *Colegrove*, Frankfurter scolded the majority for wading into the political thicket and warned that the public perception of the judicial branch as an institution would be harmed by intervention in political disputes.[175] Frankfurter argued for complete detachment from political entanglements and that "abstention from injecting itself into the clash of political forces" was necessary to preserve "the Court's position as the ultimate organ of 'the supreme Law of the Land.'"[176]

Frankfurter's majority opinion in *Colegrove* and dissenting opinion in *Baker* reveal what he perceived to be a grave threat to federal court intervention in election disputes: the unelected judiciary trumping the authority of democratically elected bodies regarding reapportionment.

B. An Active Judiciary in Election-Related Litigation

Today, sixty-five years after *Baker*, it is clear that the courts have, in fact, played a more active role not only in reapportionment litigation but also in other areas of election-related disputes.[177] Indeed, a significant portion of the Court's current docket deals with the regulation of politics.[178] In the first ten years of the twenty-first century, election litigation more than doubled from the previous decade.[179]

The Court's more aggressive oversight in the election-litigation arena, however, has not resulted in a clear vision of what exactly the federal

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172. *See id.* at 193, 209. The Court held that the Guarantee Clause did not apply because *Baker* involved a reapportionment challenge to state legislative districts while *Colegrove* challenged congressional districts. *See id.* at 226 ("We have no question decided, or to be decided, by a political branch of government coequal with this Court.").

173. *See id.* at 228.

174. *Id.* at 267 (Frankfurter, J., dissenting).

175. *See id.*

176. *Id.*

177. *See* Weinberg, *supra* note 58, at 622 ("It is clear enough after *Baker* that courts can and do adjudicate election controversies."); *see also* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644 (1998) ("[J]udicial oversight over the political process has expanded to a level unimaginable when the Supreme Court first entered the political thicket in the early 1960s.").

178. Pamela S. Karlan, *Exit Strategies in Constitutional Law: Lessons for Getting the Least Dangerous Branch out of the Political Thicket*, 82 B.U. L. REV. 667, 671–72 (2002).

179. Richard L. Hasen, *Judges as Political Regulators: Evidence and Options for Institutional Change*, *in* RACE, REFORM, AND REGULATION OF THE ELECTORAL PROCESS 101, 101 (Guy-Uriel E. Charles et al. eds., 2011). The number of election law disputes between 1996 and 1999 was, on average, ninety-six cases per year, while the number of election law disputes between 2001 and 2008 was, on average, 237 cases per year. *Id.* at 103.

judiciary's role should be in monitoring the election process.[180] Courts seemingly handle election-related disputes on an ad hoc basis as new questions about the political process arise.[181] Many legal scholars have examined how the federal judiciary can untangle itself from the political thicket.

One option is simply to exit the "thicket" and drastically reduce judicial review in electoral-process disputes.[182] Another option is for the courts to focus on the partisan nature of the election machinery and to strike down attempts by partisan actors to create a less competitive election process.[183] A third possibility is the creation of impartial tribunals to settle election disputes.[184]

When judges intervene in election disputes, they "might act in self-interest to favor their past or present political party or to keep themselves in office," and "judges come to [election] cases with their own world views and might not apply 'neutral' principles in deciding election law cases."[185] After judicial intervention in an election dispute, the public is left wondering if the decision was based on an unbiased application of the law or if the court's decision was tainted by a partisan skew.

1. Judicial Partisanship at the State Level

Election litigation decisions in state court indeed reveal the influence of party loyalty on judicial outcomes. A study by Michael Kang and Joanna Shepherd reveals that partisan loyalties "play[] a significant role in how legal election disputes are contested and decided."[186] The study focused on state court judges because nine out of ten state judges are democratically elected rather than appointed.[187] The study intended to disentangle partisanship from judicial ideology by focusing solely on candidate-driven election litigation.[188] These cases typically involve obscure questions of law with no consistent judicial ideology guiding judges in resolving these disputes.[189]

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180. *See* Issacharoff & Pildes, *supra* note 177, at 645.

181. *See id.* at 646.

182. *See generally* Karlan, *supra* note 178. Karlan lays out five exit strategies if the Court wanted to extricate itself from the political thicket.

183. *See generally* Issacharoff & Pildes, *supra* note 177. This approach emphasizes that if the background structure of politics creates robust and fair competition, judicial intervention is less defensible.

184. *See* Douglas, *supra* note 54, at 49–56. Douglas argues that "[s]tates that simply send an election contest to their judiciaries . . . have a flawed process, because there is always the risk of a partisan taint." *Id.* at 51.

185. Hasen, *supra* note 179, at 101.

186. Kang & Shepherd, *supra* note 32, at 1452. The authors found "systematic partisanship across ten years of state supreme court cases over roughly 500 judges and 400 cases." *Id.* at 1444.

187. *Id.* at 1413.

188. *Id.* at 1415–16, 1429.

189. *See id.* at 1416.

The study concluded that Democratic judges consistently favor Democrats and Republican judges consistently favor Republicans.[190] Judges that received more campaign donations demonstrated higher party loyalty.[191] Significantly, in high-profile election disputes in which there was more public attention on the court's outcome, partisan loyalty diminished.[192] Kang and Shepherd attributed this phenomenon to a greater likelihood that the public will detect judicial bias and concluded that "[e]ven if judges are prone to partisanship in election cases, they are less so when they may be exposed as such by the news media or competitive campaigning."[193] Thus, the study indicated that if judges fear being perceived as partisan, the effect of judicial bias decreases.[194] While partisan tendency is perhaps more pronounced in state court because judges are often elected, federal judges are not immune from the pull of partisan loyalty.

2. Judicial Partisanship at the Federal Level

At the federal level, judges appointed by Democratic Presidents are more likely to support liberal causes, while judges appointed by Republican Presidents are more likely to support conservative causes.[195] This effect is more pronounced in "ideologically salient cases like gay rights and affirmative action."[196] The partisan divide of federal judges based on the party identity of the President that appointed the judge is well documented.[197] While this reality is perhaps unsurprising, the results of this phenomenon in election litigation means "a seemingly biased tribunal [is] determin[ing] the winner of an election."[198] This might result in the public thinking the court's decision reflected a desired partisan outcome rather than an impartial application of the law.[199] This undesirable public perception was evident in the most well-known election dispute of the twenty-first century: *Bush v. Gore*.[200]

Much scholarly literature has been dedicated to the 2000 presidential election and ensuing *Bush v. Gore* litigation.[201] In the midst of a manual

190. *See id.* at 1418. The study concluded that Republican judges favor their party's candidates at a 38 percent higher rate than their Democratic counterparts. *Id.* at 1417.

191. *See id.* at 1418.

192. *See id.* Public awareness of a specific election lawsuit was measured by the number of attack advertisements on television. *Id.*

193. *Id.*

194. *See id.* at 1447–48.

195. *See id.*; *see also* Hasen, *supra* note 179, at 106. One study examined federal judges' decisions in cases brought under section 2 of the Voting Rights Act, which is intended to expand voting rights, and found that judges appointed by Democratic Presidents were significantly more likely to find for a plaintiff alleging a section 2 violation than judges appointed by Republican Presidents. *Id.*

196. Kang & Shepherd, *supra* note 32, at 1426.

197. Kang and Shepherd reference many studies that document this phenomenon. *See id.* at 1426–28.

198. Douglas, *supra* note 54, at 49.

199. *See id.*

200. 531 U.S. 98 (2000).

201. *See generally* Akhil Reed Amar, *Bush, Gore, Florida, and the Constitution*, 61 FLA. L. REV. 945 (2009); Howard Gillman, *Judicial Independence Through the Lens of* Bush v.

recount in four select counties in Florida, Florida's Secretary of State halted the recount because the deadline for county vote returns had passed, and she moved to certify George W. Bush as the winner in Florida.[202] The Florida Supreme Court, however, refused to accept the results of the partial recount and ordered the counties to be given more time to complete the recount.[203] After prolonged litigation in which the Florida Supreme Court and the U.S. Supreme Court battled for control over the timing of the recount, the U.S. Supreme Court eventually decided the recount must be halted, which ensured that Bush won the presidency.[204]

After the Supreme Court halted the recount, legal commentators from both sides of the aisle weighed in on the Court's handling of the dispute.[205] Despite the Court's general reluctance to intervene in election disputes, the Court intervened twice in this dispute and overruled a state supreme court on the application of state law.[206] Liberal commentators argued that the Republican-appointed Justices on the Supreme Court did not base their decisions on the proper application of state law but rather found a way to resolve the dispute so that the candidate they supported won the state of Florida.[207] Conservative commentators countered by arguing that the Supreme Court was no more political in its resolution of the dispute than the Florida Supreme Court, which was composed almost entirely of Democratic appointees.[208] After the Supreme Court's intervention, a group of 554 law professors from 120 law schools took out a full-page advertisement in the *New York Times*, which read, "The U.S. Supreme Court Used Its Power To Act as Political Partisans, Not Judges of a Court of Law . . . . [T]he five justices [in the majority] were acting as political proponents for candidate Bush, not as judges."[209] Many legal scholars have said that the decision in *Bush v. Gore* was a blow to the Court's legitimacy.[210]

By its own terms, *Bush v. Gore* has little precedential value.[211] Many election cases, in fact, result in extremely narrow decisions in which the Court sets little precedent and the holding of the case is effectively tied only to the dispute at bar.[212] These narrow rulings make it difficult to determine if the judges acted with partisan favor.[213] The short-term political

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Gore*: Four Lessons from Political Science*, 64 OHIO ST. L.J. 249 (2003); Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535 (2001); Weinberg, *supra* note 58.

202. *See* Kang & Shepherd, *supra* note 32, at 1419 (describing the *Bush v. Gore* litigation).

203. *See id.* at 1419–20.

204. *See id.* at 1420–22.

205. *See supra* note 201 and accompanying text.

206. *See* Kang & Shepherd, *supra* note 32, at 1424.

207. *See id.* at 1413.

208. *See id.* at 1413–14.

209. Advertisement, *554 Law Professors Say*, N.Y. TIMES, Jan. 13, 2001, at A7.

210. *See* Weinberg, *supra* note 58, at 618.

211. *See* Kang & Shepherd, *supra* note 32, at 1419.

212. Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. 1836, 1838 (2013).

213. *See id.* ("There is the concern that the judges announcing the exceedingly narrow ruling were trying to do their party a favor without creating a precedent.").

consequences of these narrow rulings are clear while the question of how the cases might be interpreted in the long-term is unknown.[214]

C. Determining the Appropriate Remedy in Election Litigation

When courts resolve election disputes, they face a great risk of appearing to be political actors, which makes the prescription of appropriate remedies particularly important. The ultimate goal of any election remedy mandated by a court is to give effect to the voters' will and to uncover what candidate the voters chose to represent them.[215] However, if there is an election irregularity, it is often difficult to determine whom the voters would have chosen absent that irregularity.[216] While election statutes give candidates and voters the opportunity to challenge election disputes in state court, these statutes rarely give courts guidance on appropriate remedies.[217] This has resulted in nonuniform jurisprudence for judicial intervention in election disputes.[218]

Broad legislative mandates give judges wide discretion to determine what remedy is appropriate in a particular controversy.[219] These ambiguous laws not only provide courts with little guidance, but they also allow judges to find statutory support for nearly any outcome they desire.[220]

In constructing the appropriate remedy, some values a court should be mindful of are (1) fairness and legitimacy, (2) voter anonymity, (3) accuracy and transparency, (4) promptness and finality, and (5) efficiency and cost.[221] As for fairness and legitimacy, the judicial system must create a public perception that it treats all candidates equally.[222] The vast majority of states' election-contest statutes, however, make no attempt to ensure that the state-level decision-maker is impartial.[223]

1. Some States Account for the Risk of Partisan Skew

Only a few states specifically address the risk of partisan skew through statutory election-contest provisions.[224] For example, Pennsylvania's statute for challenging the nomination for Governor and Lieutenant Governor in

214. *See* Kang & Shepherd, *supra* note 32, at 1424.
215. Huefner, *supra* note 30, at 277.
216. *See id.*
217. *See id.* Huefner offers six factors that would reduce discretionary decision-making that states should consider when enacting legislation dictating election remedies. *Id.* at 311; *see also Developments in the Law—Postelection Remedies*, 88 HARV. L. REV. 1298, 1311 (1975) (listing state election codes that provide little guidance in what particular remedy a court may provide).
218. *See* Huefner, *supra* note 30, at 270–71.
219. *Id.* at 277–78. Appropriate remedies may include vote recounts, adjustments to vote totals or the vote outcome, criminal fines and liability, or an order for a new election. *See id.* at 277–86.
220. *See* Douglas, *supra* note 54, at 50.
221. *See* Huefner, *supra* note 30, at 288.
222. *See id.* at 290.
223. *See* Douglas, *supra* note 54, at 48.
224. *See id.* at 49.

primary and general elections attempts to account for potential partisanship.[225] The Pennsylvania procedure mandates that a random group of members from the Pennsylvania House of Representatives and Senate be drawn from a black box to settle an election dispute.[226] This mechanism for resolving disputes applies only to elections of the Governor and Lieutenant Governor, however, and the random selection process ensures only a random selection of partisans will settle the dispute.[227] While the efficacy of this method to produce a nonbiased outcome is questionable, the Pennsylvania legislators that approved this method believed it would eliminate the potential of bias and corruption.[228]

New Hampshire has established a five-member ballot-law commission to resolve election-related disputes.[229] The commission comprises two members chosen by the House of Representatives (each party chooses one), two members chosen by the Senate (each party chooses one), and one member chosen by the Governor.[230] None of the commissioners can be elected officials and the Governor's appointee must have experience with election procedures.[231]

In West Virginia, a special court resolves election-contest disputes.[232] The special court consists of three members; one is selected by the contestee, one is selected by the contestant, and one is selected by the Governor.[233] While both sides of a dispute are represented, similar to New Hampshire's election-contest resolution system, the Governor's appointee may tilt the impartiality of the tribunal.[234]

The Pennsylvania, New Hampshire, and West Virginia statutes are examples of state attempts to account for the risk that the decision-maker in an election dispute will be swayed by party loyalty. In other states, absent clear guidelines and with no mechanism in place to ensure some degree of partiality, judges are free to hide their partisan bias behind ambiguous statutory commands.

2. New York Election Law

New York election law is an example of an ambiguous and open-ended statutory mandate. Section 16-100 grants the trial court broad powers to review "*any* question of law or fact arising as to *any* subject set forth in this article, which shall be construed *liberally*."[235] This broad language provides

225. 25 PA. STAT. AND CONS. STAT. ANN. §§ 3312–3315 (West 2016).
226. *Id.* §§ 3317–3319.
227. *Id.* § 3312; *see also* Douglas, *supra* note 54, at 49–50.
228. *See* Douglas, *supra* note 54, at 16. There has never been election litigation involving the contests of Governor or Lieutenant Governor in Pennsylvania, so this method has never been used. *See id.*
229. N.H. REV. STAT. ANN. §§ 665:1–665:17 (2016).
230. *See* Douglas, *supra* note 54, at 54.
231. *Id.*
232. W. VA. CODE ANN. § 3-7-3 (West 2016).
233. *See* Douglas, *supra* note 54, at 54.
234. *See id.*
235. N.Y. ELEC. LAW § 16-100 (McKinney 2017) (emphasis added).

judges with little guidance on the outer limits of appropriate judicial intervention in election disputes.

Additionally, New York election law provides no means to ensure the impartiality of election-litigation decisions because the trial court has jurisdiction to hear election-related claims.[236] New York trial court judges are elected in partisan elections and serve fourteen-year terms.[237]

III. REEXAMINING *PIDOT* AND RETHINKING REMEDIES

Despite concluding that Pidot deserved to be on the ballot as a candidate for the Republican nomination in New York's third congressional district, both the state court and federal court failed to provide Pidot—or voters—with any judicial relief.[238] The judicial system's determination that it could not provide any remedy in this dispute resulted in the court, not the voters, choosing the Republican Party's representative for the general election.[239] Part III.A scrutinizes the Second Circuit's decision in *Pidot* and argues that the court's reliance on the *Rivera-Powell* doctrine was misguided. Part III.B proposes that federal courts should expressly adopt a test to provide more clarity on when federal court intervention is appropriate in candidate-litigated election disputes.

While the current default in federal courts is nonintervention, in certain cases, such as *Pidot*, nonintervention leads to the undesirable result that the court, not the people, chooses the winner of an election. Such a result may reinforce a perception that the court is a political actor. Increased clarity regarding how federal courts resolve election disputes will help combat the perception of bias in the resolution of election-related disputes.

A. The Second Circuit's Misguided Decision in Pidot

The Second Circuit, in reversing the district court's decision to schedule a new primary, relied on the *Rivera-Powell* doctrine.[240] The court held that the voters' constitutional claims were not viable because the state corrective procedures in place were adequate.[241] Therefore, the plaintiffs (Republican voters who had been unable to cast a ballot in a primary) could not assert a First Amendment claim in federal court because the state law and procedures protected their due process rights.[242] The Second Circuit was wrong because neither the plaintiffs, nor any other voter, had standing to challenge an invalidated candidacy under New York election law—only an aggrieved

236. *Id.*
237. N.Y. CONST. art. VI, § 6.
238. *See supra* notes 9–12, 27.
239. Jack Martins would ultimately lose to Democrat Tom Suozzi in the November 8, 2016, general election. John T. Bennett, *Democrat Tom Suozzi Elected in New York's 3rd District*, ROLL CALL (Nov. 9, 2016, 12:09 AM), http://www.rollcall.com/news/politics/democrat-tom-suozzi-elected-in-new-yorks-3rd-district [https://perma.cc/RUM6-T77G].
240. *See supra* Part I.C.
241. *Id.*
242. *Id.*

candidate, like Pidot, could raise such a challenge.[243] The voter-plaintiffs in *Pidot* never had an opportunity to assert their rights before a state or federal court. The Second Circuit held that the established state procedures protected the voters' rights, even though the voters had *no* recourse under New York election law.[244]

The Second Circuit treated the disenfranchised voters as equivalent to the candidate who had the opportunity to challenge the Board of Election's invalidation of his designating petition in state court. In doing so, the court misapplied *Rivera-Powell* to the plaintiffs and improperly barred them from asserting their constitutional claim in federal court.

Moreover, the Second Circuit improperly equated the voters' First Amendment claim with a due process claim in state court. Pidot never alleged a due process deprivation in state court. Indeed, he won his case to overturn the Board's erroneous invalidation of his designating petition. In reversing the district court's order mandating a Republican primary with both Pidot and Martins on the ballot—and thus stripping Republican voters in the third congressional district of a choice—the Second Circuit obviated the democratic process and determined the Republican Party nominee for Congress.

Pidot had no reason to allege inadequate due process at the state level because the process in place led to a state court *victory*. As the district court correctly stated, "The plaintiffs are not asking the Court to review and reject the state court judgment."[245] Pidot and his coplaintiffs were asking the federal court to reschedule the primary election to ensure that their constitutionally protected right to vote was not violated.[246]

Rivera-Powell presents a wholly inapposite dispute. The plaintiffs in *Rivera-Powell* alleged a First Amendment violation *because of* the state's application of a statute.[247] The First Amendment violation was a result of the alleged misapplication of a New York law dictating how a candidate can be listed on the ballot.[248] *Pidot* contains no corollary because the candidate effectively used the established state corrective procedures to review the Board of Election's determination. Pidot did not challenge the application of a state law but rather challenged the Board's determination that his designating petition was deficient in accordance with New York state law.[249] Whereas in *Rivera-Powell* the court held that the candidate's First Amendment claim was "indistinguishable" from the due process claim, in *Pidot* the candidate alleged no due process violation and therefore the First

243. *See supra* note 69.

244. In reviewing the adequacy of the state corrective procedure in *Griffin v. Burns*, the First Circuit specifically noted that Rhode Island law did not permit voters to bring a challenge in state court. *See supra* note 120 and accompanying text.

245. Transcript of Motion Hearing Decision, *supra* note 23, at 3.

246. *See supra* notes 20–22.

247. *See supra* Part I.C.

248. *See supra* notes 141–46.

249. *See* Answer Brief of Appellee-Plaintiffs, *supra* note 22, at 9.

Amendment claim was separate and distinct from any maladies in the state process.[250]

Voters in New York's third congressional district were stripped of their right to select between two qualified Republican candidates in a primary election. But, the Second Circuit's brief opinion does not consider whether the state court's inability to provide any remedy to the voters resulted in fundamental unfairness. Furthermore, the Second Circuit failed to justify the adequacy of the state court's decision that it was powerless to provide any remedy. Simply put, the Second Circuit determined that because the candidate was afforded due process, there were no additional viable constitutional claims to be sustained in federal court.

The federal court essentially affirmed the state court's decision that it could not provide Pidot any remedy. At both the state and federal levels, judicial resolution meant a judge was forced to side with one candidate over the other.

While judicial intervention may place the court in the unfavorable position of "kingmaker," *Pidot* reveals that nonintervention can have an identical effect. Only judicial intervention could have ensured that voters in New York's third congressional district could choose between two eligible candidates for the nomination. Nonintervention resulted in the courts, not the enrolled Republican Party voters, determining who would represent the party in the general election.

B. A Need for Federal Judicial Intervention

The recent increase in election-related litigation has resulted in the federal judiciary becoming more involved in elections.[251] Candidate-driven election litigation, like *Pidot*, in which arcane questions of law are challenged, is not uncommon. This reality inevitably entangles the courts and judges in the political thicket which runs the risk of damaging judicial legitimacy. When federal courts decide election disputes, the public may perceive this intervention as undemocratic. While this risk exists at the state level, states have always been able to control their own elections, and state legislatures delegate authority to state courts to resolve election-related disputes.[252] Federalism concerns are unique to federal court intervention in which the federal judiciary invades an arena typically reserved for the states.[253]

While some scholars have suggested that the federal judiciary should completely exit the political thicket,[254] others have argued that the federal court should only intervene to examine whether features of the election-administration process are inherently unfair.[255] This Note concludes that the current features of state election codes—unclear and nonuniform guidelines for courts—require that the federal judiciary remain involved in resolving

250. *See supra* notes 149–51 and accompanying text.
251. *See supra* notes 177–83 and accompanying text.
252. *See, e.g.*, N.Y. ELEC. LAW §§ 16-100 to 16-120 (McKinney 2017).
253. *See supra* note 47.
254. *See supra* note 178 and accompanying text.
255. *See* Issacharoff & Pildes, *supra* note 177, at 644.

election disputes to ensure that voters' First Amendment right to association is protected.

1. Establishing a Clear Federal Standard

When federal courts decide whether to intervene in election disputes in which a candidate or voters allege a constitutional deprivation based on some irregularity in the voting process, they typically look to the adequacy of the state corrective procedure and whether nonintervention would result in fundamental unfairness to the voters.[256] A review of federal cases reveals that federal courts are hesitant to intervene. This result indicates that federal courts recognize the inherent federalism and separation of powers issues that arise with their intervention. While the default rule is nonintervention, in certain extraordinary circumstances courts are willing to intervene to protect voters' and candidates' constitutional rights.[257]

In examining circuit court decisions in which federal courts have determined whether intervention is appropriate, there is no clear, universal standard applied. However, federal courts do consistently look to two factors to determine if intervention is appropriate: (1) the adequacy of the state corrective procedure and (2) the fundamental unfairness that would result from nonintervention.[258] This two-factor test should be explicitly applied in candidate-litigated election disputes. Courts already typically look to these two factors when determining if intervention is appropriate, but a court need not reference these factors (or any others) in ultimately concluding whether intervention is appropriate.

Clear judicial standards that determine when intervention is necessary will provide candidates and voters with more confidence that the court's decision is based on established equitable principles rather than partisan considerations.

2. Bias and the Adequacy of the State Corrective Procedure

State election codes include complex requirements for the regulation of elections.[259] Judicial review mechanisms in these state statutes establish ways in which voters or candidates can challenge some aspect of the election administration. Generally, these judicial review statutes are broad and give courts little guidance on the appropriate remedy in a particular instance.[260] Additionally, the vast majority of states do not account for the possibility that the decision-maker in an election dispute will be skewed by potential partisan bias.[261] However, studies of judicial decisions at the state level reveal that

256. *See supra* Part I.B.

257. *See generally* Roe v. Alabama, 43 F.3d 574 (11th Cir. 1995) (finding federal court intervention in a candidate-litigated election dispute to be appropriate); Griffin v. Burns, 570 F.2d 1065 (1st Cir. 1978) (same).

258. *See supra* Part I.B.2–3.

259. *See supra* Part I.A.1.

260. *See supra* Part II.C.

261. *See supra* Part II.C.1.

Democratic judges often side with Democrats in election disputes, while Republican judges often side with Republicans.[262] Ambiguous state statutes permit judges to find statutory support for almost any conclusion they wish to reach.

Because the pull of partisan bias is so clearly documented in studies of election-dispute decisions, this reality should factor into the adequacy of the state corrective procedure. For example, in New Hampshire and West Virginia, which have created some sort of neutral tribunal to settle election disputes,[263] federal courts can be more confident that the state procedure was adequate. While these tribunals in their current form still run the risk of a partisan tilt,[264] there are, at the very least, decision-makers representing both sides of the dispute. When a federal court determines whether the state has provided adequate corrective procedures, the use of a neutral tribunal to resolve a dispute lends credibility to the process. Because so few states have an established mechanism by which some modicum of impartiality is assured, this factor should not be dispositive. Rather, use of a neutral tribunal should be one of many factors considered by courts in determining the adequacy of state corrective procedures.

Explicit consideration of the adequacy and impartiality of the state corrective procedure in federal court decreases the likelihood that the public will perceive judicial intervention as motivated by partisan bias. An established federal test will provide greater uniformity in the federal courts and greater public confidence that judicial intervention in election disputes is not politically motivated.

CONCLUSION

The risk of partisan bias in election-related litigation may lead courts to play an improper political role when resolving election disputes. While federal courts have traditionally been hesitant to intervene in election-related cases because elections are run by the states, the twenty-first century has seen a dramatic increase in the occurrence of election-related litigation. Much of this increase is attributable to candidate-driven litigation in which candidates challenge obscure provisions of state election laws. Despite the increase in litigation, federal courts have maintained a default rule of nonintervention subject to occasional exceptions.

In the rare instances in which federal courts do intervene, a pattern emerges. These courts look to the adequacy of the state corrective procedure and to whether the state action resulted in fundamental unfairness to the candidate or voters. However, this test is not explicit and—as in *Pidot*—the court need not consider these factors or any others when deciding whether to intervene. Federal courts should explicitly apply this two-factor test when determining whether intervention is appropriate. An established test will

262. *See supra* Part II.B.1.
263. *See supra* Part II.C.1.
264. *See supra* note 232 and accompanying text.

reduce the risk that the public will perceive judicial intervention as motivated by partisan bias.

Additionally, in determining the adequacy of the state corrective procedure, federal courts should look to see if any mechanisms existed to ensure the impartiality of the state decision-makers. The risk of judges deciding a case with a partisan skew is real, and federal courts should account for this possibility when determining whether the state process was adequate. A clear federal test to determine when intervention is appropriate will provide candidates and the public more confidence that the judiciary is fulfilling its obligation of impartial protection of the First Amendment right to vote.