A CONSTITUTIONAL OUTLIER: LEGITIMACY AS A STATE INTEREST AND ITS IMPLICATIONS IN ELECTION LAW

INTRODUCTION

A common theme throughout election law jurisprudence is the idea of *legitimacy*. As one scholar put it, "election law jurisprudence is preoccupied with appearances."[1] Whether one refers to it as legitimacy or appearances, the idea is the same: because elections undergird a functioning democracy,[2] people must have trust and confidence in those elections and their results.[3] Electoral legitimacy, while always important, is at the center of many important debates unfolding right now. James Clapper, the former director of national intelligence, has reported that intelligence agencies' assessment of Russian interference in the 2016 election "cast doubt on the legitimacy" of President Donald Trump's victory.[4] President Trump added an asterisk of his own to the 2016 election results when he claimed that he lost the popular vote because millions of undocumented immigrants voted against him.[5] In addition to the concerns about the 2016 election, the Supreme Court's campaign finance

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1. John Copeland Nagle, *The Appearance of Election Law*, 31 J. LEGIS. 37, 39 (2004).

2. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) ("Since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." (quoting Reynolds v. Sims, 377 U.S. 533, 562 (1964))).

3. *Cf.* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 565 (1973) (noting that the government has an interest in reducing the perception of political influence "if confidence in the system of representative Government is not to be eroded to a disastrous extent.").

4. Bryan Logan, *JAMES CLAPPER: US intelligence assessment of Russia's election interference 'cast doubt on the legitimacy' of Trump's Victory*, BUS. INSIDER (Sep. 23, 2017), http://www.businessinsider.com/trump-legitimacy-russia-election-interference-james-clapper-us-intelligence-assessment-2017-9 [https://perma.cc/C44E-74MA].

5. Abby Phillip & Mike DeBonis, *Without evidence, Trump tells lawmakers 3 million to 5 million illegal ballots cost him the popular vote*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/23/at-white-house-trump-tells-congressional-leaders-3-5-million-illegal-ballots-cost-him-the-popular-vote/ [https://perma.cc/Y2FY-8DXH].

decision in *Citizens United v. FEC*[6] has resulted in worries about political corruption; one *New York Times* headline read "American Democracy Is Drowning in Money."[7] As with any important political debate, legitimacy and its appearance also matter in the Supreme Court. For example, in the oral argument in *Gill v. Whitford*[8] this Term, Chief Justice Roberts explicitly questioned whether hearing political gerrymandering claims would hurt the legitimacy of the Supreme Court.[9] In the Court's oral argument for *Minnesota Voters Alliance v. Mansky*,[10] also this Term, one of the advocates explicitly argued that speech restrictions in polling places could be justified in order to avoid a "perception problem."[11] Although there are many contexts in which legitimacy rears its head in election law,[12] this Note focuses on two: voter ID laws and campaign finance.

Using *Crawford v. Marion County Election Board*[13] and *Buckley v. Valeo*[14] as case studies, this Note will explore the Supreme

6. 558 U.S. 310 (2010).

7. Celestine Bohlen, *American Democracy Is Drowning in Money*, N.Y. TIMES (Sep. 20, 2017), https://www.nytimes.com/2017/09/20/opinion/democracy-drowning-cash.html [https://perma.cc/H6Y5-LQGH] (describing the United States' system of money in politics as "legalized corruption").

8. 137 S. Ct. 2268 (2017) (mem.).

9. Transcript of Oral Argument at 36–38, Gill v. Whitford, No. 16–1161 (U.S. argued Oct. 3, 2017), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_mjn0.pdf [https://perma.cc/5KBS-XKF3].

10. 138 S. Ct. 446 (2018) (mem.).

11. Transcript of Oral Argument at 51–53, Minnesota Voters Alliance v. Mansky, No. 16–1435 (U.S. argued Feb. 25, 2018), https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1435_2co3.pdf [https://perma.cc/KW6Z-3PN2] (After a question from Justice Kagan asking why a polling place should have a sense of decorum, the advocate responded, inter alia, "[F]or that process to have integrity, the beginning of the process, the act of voting itself has to have integrity. And the integrity is not just actual integrity that somebody—that everybody who is entitled to vote was able to vote. It has to be perceived as having integrity. And one of the problems with allowing campaign or political material into the polling place is it creates a perception problem.").

12. *See* Nagle, *supra* note 1 at 39–42 (citing Buckley v. Valeo, 424 U.S. 1 (1976); McConnell v. FEC, 540 U.S. 93 (2003); Shaw v. Reno, 509 U.S. 630 (1993); Bush v. Gore, 531 U.S. 98 (2000)) (finding that appearance of legitimacy is a common theme in campaign finance regulation, reapportionment, and vote counting); *see also* U.S. Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548 at 565, 567 (holding that "plainly identifiable acts of political management and political campaigning on the part of federal employees may constitutionally be prohibited" based, in part, on a rationale of avoiding erosion of public trust).

13. 553 U.S. 181 (2008).

Court's willingness to accept legitimacy as a government interest in voter ID and campaign finance regimes, respectively. Part I compares legitimacy justifications with public perception justifications in other constitutional contexts, concluding that the Supreme Court's embrace of these justifications in election law is in tension with its rejection of them in other First and Fourteenth Amendment contexts. Part II suggests that treating election law differently from other areas of constitutional law is not easily justified and warrants further discussion. Part III shows that the Court's consideration of legitimacy interests can lead to a lower standard of review, often resembling rational basis. Part IV argues that legitimacy justifications counterintuitively give partisan actors ex ante incentives to *damage* electoral legitimacy. Part V contends that legitimacy justifications create a dangerous slippery slope for future election law cases. Part VI concludes that the Supreme Court should take a harder look at allowing public perceptions as a state interest in election law jurisprudence.

I. PUBLIC PERCEPTIONS IN FIRST AND FOURTEENTH AMENDMENT JURISPRUDENCE

The Supreme Court has generally declined to consider public perceptions as a state interest in its constitutional jurisprudence, leaving election law as an outlier in the doctrine. When evaluating Fourteenth Amendment claims, the Supreme Court generally uses three standards of review: strict scrutiny, intermediate scrutiny, and rational basis review.[15] The most exacting review is strict scrutiny, which is generally reserved for classifications based on race or national origin and laws affecting fundamental rights.[16] In order to withstand strict scrutiny, the government actor in question must prove that its actions serve a "compelling interest" and are "narrowly tailored" to that end.[17] At the other end of the spectrum is rational basis review, which applies to non-fundamental social and economic legislation and allows nearly any law to stand so long as there

14. 424 U.S. 1 (1976).
15. *See* Clark v. Jeter, 486 U.S. 456, 461 (1988).
16. *See id.*
17. Cooper v. Harris, 137 S. Ct. 1455, 1464 (2017).

is a rational justification for the law, even if the justification is questionable or post-hoc.[18] In between those two extremes lies intermediate scrutiny, which has traditionally been applied to classifications based on sex or illegitimacy and requires that the classification "must be substantially related to an important governmental objective."[19]

This three-tiered standard of review framework is often relevant in election law. Because First Amendment rights are fundamental, classifications affecting political speech or campaign finance trigger a heightened form of scrutiny, sometimes on par with strict scrutiny.[20] Although there is some debate over whether voting is a fundamental right,[21] the Court nevertheless applies a heightened balancing test that weighs the "character and magnitude" of the voting burden against the state's interests and justifications, while also considering tailoring.[22] Thus far, the Court has declined to label this voting rights balancing test with one of the traditional levels of scrutiny.[23] First and Fourteenth Amendment jurisprudence analyzes constitutional

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18. *See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955) ("The Oklahoma law may exact a needless, wasteful requirement in many cases. But it is for the legislature, not the courts, to balance the advantages and disadvantages of the new requirement."); *see also* U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) ("It is, of course, 'constitutionally irrelevant whether [the reasoning proffered by the government in rational basis review] in fact underlay the legislative decision . . . '" (quoting Flemming v. Nestor, 363 U.S. 603, 612 (1900))).

19. *Clark*, 486 U.S. at 461.

20. *See* Austin v. Mich. Chamber of Commerce, 494 U.S. 652, 657 (1990) (citing Buckley v. Valeo, 424 U.S. 1, 44–45 (1976)) (finding that if a law "burdens the exercise of political speech," it must be "narrowly tailored to serve a compelling state interest."); *see generally* Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL'Y 349 (2011).

21. *Compare Clark*, 486 U.S. at 461 (citing Harper v. Va. State Bd. of Elections, 383 U.S. 663, 672 (1966), to suggest that voting is a fundamental right worthy of "the most exacting scrutiny") *and* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969), a voting rights case, as an example of "personal rights protected by the Constitution."), *with* Bush v. Gore, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college.").

22. *See* Burdick v. Takushi, 504 U.S. 428, 433–34 (1992) (quoting Anderson v. Celebreeze, 460 U.S. 780, 789 (1983)).

23. *See, e.g.*, Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189–91 (2008); Burdick, 504 U.S. at 433–34.

rights under this framework in both the election law and non-election law context.[24]

A. Fourteenth Amendment

1. Strict Scrutiny Review

Under the strict scrutiny triggered by racial classifications, the Court has refused to consider public perception as a state justification. In *Palmore v. Sidoti*,[25] the Supreme Court reviewed a child custody case in which a Florida state court awarded custody to the father instead of the mother, in part because the mother was in an interracial relationship.[26] The Florida court believed that having an African American stepfather would cause the child to be "more vulnerable to peer pressures, [and to] suffer from the social stigmatization that is sure to come."[27] The Court did not disagree with the lower court's premise, noting that one would have to "ignore reality" to suggest that there was no longer racial stigma with which the child might have to contend.[28] Nonetheless, the racial classification triggered strict scrutiny, and the Supreme Court concluded that the Florida court's consideration of race in the custody context was impermissible under the Fourteenth Amendment's Equal Protection Clause.[29] The *Palmore* Court's reasoning is worth quoting at length, given its relevance:

> The question, however, is whether the reality of private biases and the possible injury they might inflict are permissible considerations for removal of an infant child from the custody of its natural mother. We have little difficulty concluding that they are not. *The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.* Public officials sworn to uphold the

24. *See infra* Section II.A and Part III.

25. 466 U.S. 429 (1984).

26. *See id.* at 430–31.

27. *Id.* at 431.

28. *Id.* at 433.

29. *See id.* at 432–34 ("Such classifications are subject to the most exacting scrutiny; to pass constitutional muster, they must be justified by a compelling governmental interest and must be 'necessary . . . to the accomplishment' of their legitimate purpose."(citations omitted)).

> Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.[30]

Thus, the *Palmore* Court refused to consider private biases and their effects as a justification for limiting an individual's Fourteenth Amendment rights.[31]

2. Heightened Review

Under the heightened review triggered by a fundamental rights deprivation, the Court has refused to consider public perception as a valid state justification. In *O'Connor v. Donaldson*,[32] a patient was confined against his will in a mental institution for fifteen years, even though he was not dangerous to himself or others.[33] The patient sued under 42 U.S.C. § 1983, alleging that the mental institution staff had deprived him of his due process right to liberty.[34] Finding that the patient's physical liberty had been infringed, the Court considered a possible justification: keeping the patient away from the public, which may harbor stigma against the mentally ill.[35] The Court roundly rejected this justification, instead holding: "*Mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty*."[36] Although the Court did not explicitly state a standard of review, it spoke in terms of "every man's constitutional right to liberty," and rejected multiple rational bases for confinement, suggesting that it was either employing strict scrutiny or some other form of heightened review.[37] Thus, *Donaldson* rejects the idea that public distaste for an individual or his practices may constitute an interest sufficient to deprive that individual of a fundamental right.

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30. *Id.* at 433 (emphasis added) (footnote omitted) (internal quotation marks omitted).

31. *See id.* at 433–34.

32. 422 U.S. 563 (1975).

33. *See id.* at 564, 573.

34. *See id.* at 565.

35. *See id.* at 575–76.

36. *Id.* (emphasis added) (citing U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973); Cohen v. California, 403 U.S. 15, 24–26 (1971); Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971); Street v. New York, 394 U.S. 576, 592 (1969)).

37. *Id.* at 573, 575–76 (rejecting rational bases such as providing the mentally ill with a "living standard superior to that they enjoy in the private community").

The Court's rejection of private biases as a justification for infringing on constitutional rights also applies to property rights. In *Buchanan v. Warley*,[38] a white man tried to sell a black man his home, but the transaction was nullified by a city ordinance that forbade African Americans from buying homes in white neighborhoods.[39] The white seller sued, arguing that his right to dispose of his property as he saw fit had been abridged.[40] The city argued that the ordinance "promote[d] the public peace by preventing race conflicts."[41] Working under the premise that the right to use property was a fundamental right under the Fourteenth Amendment, the Court wholly rejected the city's justification.[42] In doing so, the Court implicitly rejected the use of widely held prejudice as a permissible justification for infringement of constitutional rights.[43]

3. Rational Basis Review

Under rational basis review, the Court has also refused to consider public perception as a state justification. In *City of Cleburne v. Cleburne Living Center*,[44] a Texas city denied a permit for the construction of a group home for the intellectually disabled.[45] The basis for the denial was, among other reasons, negative attitudes and fears about the intellectually disabled held by nearby property owners.[46] The Supreme Court refused to apply any heightened scrutiny, explicitly conducting mere rational basis review.[47] Despite this low hurdle, the Court found that the permit denial violated Equal Protection, and, in doing so, rejected the city's justification relating to public perceptions of

38. 245 U.S. 60 (1917).

39. *See id.* at 72–73.

40. *See id.* at 81.

41. *Id.*

42. *See id.*

43. *See id.* ("Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the federal Constitution."); *see also* Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984) (citing *Buchanan* for the proposition that the Court will not entertain racial prejudice to justify racial classifications).

44. 473 U.S. 432 (1985).

45. *See id.* at 435.

46. *See id.* at 437, 448.

47. *See id.* at 442–47.

the intellectually disabled.[48] Citing *Palmore*, the Court held that "mere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently," and "the [c]ity may not avoid the strictures of [the Equal Protection] Clause by deferring to the wishes or objections of some fraction of the body politic."[49] Thus, even under the Court's most deferential standard of review, it has refused to entertain state justifications based on mere public perceptions.

B. First Amendment

In *Forsyth County v. Nationalist Movement*,[50] the Supreme Court considered a First Amendment challenge that arose when the Nationalist Movement, an openly racist organization, planned a protest of Martin Luther King Jr. Day in a county fraught with recent racially-motivated violence.[51] The county attempted to impose a $100 fee on the Nationalist Movement pursuant to a local ordinance that allowed local officials to charge event organizers for the security of their public demonstrations.[52] In order to determine how much security an event needed, and consequently, how much to charge its organizers, the county needed to consider how much controversy the event would spark.[53] The county argued that this fee structure was content-neutral "because it [was] aimed only at a secondary

48. *See id.* at 448–50.

49. *Id.* at 448.

50. 505 U.S. 123 (1992).

51. *Id.* at 124–27. The Court recounted that only two years earlier, a civil rights demonstration was disrupted by 400 counterdemonstrators who hurled racial slurs and beer bottles at civil rights activists. In response, civil rights activists and politicians returned with 20,000 marchers and held "the largest civil rights demonstration in the South since the 1960's." *Id.* at 125. That subsequent rally was heavily protested and required more than 3,000 police and National Guardsmen to protect the marchers.

52. *See id.* at 126–27.

53. *See id.* at 134 ("In order to assess accurately the cost of security for parade participants, the administrator must necessarily examine the content of the message that is conveyed, estimate the response of others to that content, and judge the number of police necessary to meet that response . . . . Those wishing to express views unpopular with bottle throwers, for example, may have to pay more for their permit." (citations omitted) (internal quotation marks omitted)).

effect—the cost of maintaining public order."[54] The Court rejected the argument, finding that the ordinance was unconstitutional under the First Amendment.[55] The Court reasoned that the fees were "associated with the public's reaction to the speech," essentially making it a content-based restriction.[56] In doing so, the Court squarely rejected a public perception-based state interest, finding it impermissible to restrict speech "simply because it might offend a hostile mob."[57] Thus, the Court's First Amendment jurisprudence also rejects public hostility as a valid state interest.[58]

C. Election Law Stands Alone

By relying on legitimacy arguments grounded in public perception, the Supreme Court's election law jurisprudence is highly unusual. Election law seems to be the only place where the Supreme Court is willing to rely on "mere negative attitudes[] or fear"[59] to substantiate government interests.[60] As

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54. *Id.*

55. *See id.* at 134–37.

56. *Id.* at 134.

57. *Id.* at 134–35 (footnote omitted) (citations omitted).

58. *See* Cheryl A. Leanza, *Heckler's Veto Case Law As A Resource for Democratic Discourse*, 35 HOFSTRA L. REV. 1305, 1311 (2007) ("In case after case, Courts of Appeals and the Supreme Court emphasize that the role of the state is to promote speech despite hostile circumstances."). The author does note that the state will be allowed to protect speech if the situation becomes "truly dangerous," so this principle is not an unlimited one. *See id.* However, at the point that a speaker creates a truly dangerous situation, the state interest would seem to no longer be appearances, but preventing violence.

59. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

60. There are two minor caveats to this point. First, the Court entertains appearance-based arguments in the Tenth Amendment context. In New York v. United States, 505 U.S. 144 (1992), for example, the Court refused to allow the federal government to commandeer state actors because doing so would diminish "the accountability of both state and federal officials." *Id.* at 168–69. In other words, if state actors were being used for federal purposes, *the public* would not know who was responsible for the policy being enacted: the state government or the federal government. This caveat is minor because (1) although masked as a federalism argument, this justification is really just an extension of election law, as it is concerned with the electorate knowing who is responsible for enacting policies, *see id.* at 169 ("But where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision."); and (2) the accountability justification is used to justify limitations on *federal* authority, not *individual* rights, *see id.*

noted earlier, election law relies on the public appearance of legitimacy to justify limitations on fundamental rights. This departure from constitutional jurisprudence is most marked in the voter ID and campaign finance contexts.

In the voter ID context, the Supreme Court, in *Crawford*, held that the government had an interest in "public confidence in the integrity of the electoral process," *independent* of the actual integrity of the electoral process.[61] In the campaign finance context, the *Buckley* Court held that the government had an interest in preventing the "appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."[62] Put in the larger context of constitutional law, these arguments are strange. Whereas *Palmore*, *Donaldson*, *Buchanan*, *City of Cleburne*, and *Forsyth County* all firmly rejected the idea that aggregated negative private opinions could serve as a permissible state in-

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Second, the Court also uses public perception-based arguments in the Eighth Amendment context in determining what is cruel and unusual. In particular, the Eighth Amendment is informed by "the evolving standards of decency that mark the progress of a maturing society." Furman v. Georgia, 408 U.S. 238, 242 (1972) (citations omitted). Thus, public opinion may affect an individual's Eighth Amendment rights. This caveat, however, is limited because public opinion generally *expands* Eighth Amendment rights, as opposed to acting as a justification to limit them. *See generally* Brian W. Varland, *Marking the Progress of A Maturing Society: Reconsidering the Constitutionality of Death Penalty Application in Light of Evolving Standards of Decency*, 28 HAMLINE L. REV. 311 (2005) (collecting cases). After all, given the Court's statements like "mark[ing] the progress of a *maturing* society," *Furman*, 408 U.S. at 242 (emphasis added), and "public opinion becomes *enlightened by a humane justice*," Weems v. United States, 217 U.S. 349, 378 (1910) (emphasis added), it seems unlikely that the Court would entertain arguments that a more enlightened public now finds a more barbaric form of punishment acceptable. *Cf.* Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (illustrating that once an arguably constitutional right is explicitly granted, it is extremely difficult to take it back).

61. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008).

62. Buckley v. Valeo, 424 U.S. 1, 27 (1976); *see also* McCutcheon v. FEC., 134 S. Ct. 1434, 1450 (2014) ("This Court has identified only one legitimate governmental interest for restricting campaign finances: preventing corruption or the appearance of corruption.").

terest,[63] *Crawford* and *Buckley* allow those private opinions to stand as a legitimate interest.[64]

II. NO JUSTIFICATION FOR DIFFERENTIAL TREATMENT

There is no inherent distinction between the Court's consideration of public perceptions in the election law context and its refusal to do so in other Fourteenth Amendment and First Amendment contexts. One could argue that it makes sense to consider public perceptions in the election law context, but *not* in other Fourteenth and First Amendment cases because (1) the public's perception of legitimacy in its elections matters because trust in electoral outcomes is fundamentally important for a democratic society and, as a result, may be used as a basis for limiting constitutional rights,[65] but (2) the public's hateful perceptions of others, as in *Palmore*, have no value and, as a result, should not be used as a basis for limiting constitutional rights. However, the problem with this distinction is that the *Palmore*-type cases identified significant interests stemming directly from the hostile opinions. In *Palmore*, the Court articulated a child welfare concern, believing that "[t]here [was] a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."[66] In *Forsyth County*, the Court identified an interest in covering "the cost of necessary and reasonable protection of persons participating in or observing" a controversial public demonstration.[67] That hardly seems like a frivolous, hate-based interest, considering that the county had hosted a 20,000-marcher-strong demonstration requiring more than 3,000 police and National Guardsmen only a few years earlier.[68] Thus,

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63. Forsyth Cty. v. Nationalist Movement, 505 U.S. 123, 134–35 (1992); *City of Cleburne*, 473 U.S. at 448; Palmore v. Sidoti, 466 U.S. 429, 433–34 (1984); O'Connor v. Donaldson, 422 U.S. 563, 575–76 (1975); Buchanan v. Warley, 245 U.S. 60, 81 (1917).

64. *See Crawford*, 553 U.S. at 197; *Buckley*, 424 U.S. at 29. *Crawford* and *Buckley* will be more fully discussed in Part III, *infra.*

65. *Crawford*, 553 U.S. at 197 (determining that voter confidence is an important interest because it "encourages citizen participation in the democratic process").

66. *Palmore*, 466 U.S. at 433.

67. *Forsyth Cty.*, 505 U.S. at 134.

68. *See id.* at 125–26.

the *Palmore* and *Forsyth* courts both determined that negative perceptions created serious risks, yet declined to recognize preventing those negative perceptions as a government interest. Therefore, the presence of perceptions-related harms cannot be the distinction between election law and the contexts identified in Part I.

One could make a more limited version of the above argument: perceptions matter *more* in election law than they do in other constitutional contexts. However, the election law cases are not different from the rest of the doctrine because they give *more* weight to public perceptions; they are different because they give *any* weight to those perceptions. In the cases identified in Part I, the Court categorically ruled out even *considering* public perceptions as a state interest.[69] Thus, this distinction does not work because it turns on how much weight the Court gives to public perceptions in different contexts, yet the underlying difference is giving public perceptions weight in the first place.

Finally, one could blend the first two distinctions and argue that the greater importance of public perception-based interests in election law justifies not conforming with the general categorical exclusion of those interests. Perhaps that is the right answer. Perhaps it is not; the public perception-related interests in *Palmore* and *Forsyth*—child welfare and public safety—both seem quite important. Either way, the distinction is not obvious and, thus, warrants justification.[70]

III. PERMITTING LEGITIMACY ARGUMENTS MAY LEAD TO A LOWER STANDARD OF REVIEW

A. Crawford's Legitimacy Interest and Speculative Balancing

In *Crawford*, the Supreme Court's adoption of a legitimacy interest made its heightened balancing test much more speculative. Although voting rights are not reviewed under strict scrutiny, they are generally subject to a balancing test that functions as a form of heightened scrutiny.[71] As the *Crawford* Court put it:

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69. *See, e.g.*, *Palmore*, 466 U.S. at 433 (finding that private biases and their effects are not "permissible considerations").

70. *See supra* Parts III–V.

71. *See supra* Part I.

"even rational restrictions on the right to vote are invidious if they are unrelated to voter qualifications."[72] Although this standard has been somewhat pared back over time, the test still purports to apply a higher standard than rational basis, with the current formulation being: "However slight that burden may appear, . . . it must be justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'"[73]

The *Crawford* Court found that the appearance of legitimacy could be just such an interest in upholding a burden on the right to vote. In *Crawford*, the Court reviewed the constitutionality of a state statute requiring in-person voters to present a photographic ID to have their votes counted.[74] Plaintiffs challenged the law, arguing that it burdened individuals' right to vote by making voting more difficult.[75] In analyzing the claim, the Court weighed the voter burden against the state interests.[76] The Court listed three state interests that it felt merited some weight in the analysis: (1) election modernization; (2) preventing voter fraud; and (3) "safeguarding voter confidence."[77] Yet, neither election modernization nor preventing voter fraud seemed to carry much weight on their own.

First, election modernization is merely a vehicle to implement the other two interests. The Court noted that federal election procedure statues did not require voter ID laws, but merely indicated "that Congress believes that photo identification is one effective method of establishing a voter's qualification to vote and that the integrity of elections is enhanced through improved technology."[78] As the dissent put it, although election modernization and combating voter fraud "are given separate headings, any line drawn between them is unconvincing."[79]

Second, the Court seriously undercut the *actual* fraud prevention interest when it conceded that "[t]he record contains

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72. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 189 (2008) (citing Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966)).

73. *Id.* at 191 (quoting Norman v. Reed, 502 U.S. 279, 288–89 (1992)).

74. *Id.* at 185.

75. *See id.* at 186–87.

76. *See id.* at 191–204.

77. *Id.* at 192–97.

78. *Id.* at 193.

79. *Id.* at 224 (Souter, J., dissenting).

no evidence of any such fraud actually occurring in Indiana at any time in its history."[80] Although the Court did note that in-person voter fraud *had* occurred and *could* occur in the future, it relied on a threadbare record to do so, including (1) a historical account of voter fraud in New York City over one hundred years before the case at hand; (2) a gubernatorial election in which it was confirmed that *one person* had committed in-person voter fraud; (3) a mayoral election in which a candidate encouraged voters to commit voter fraud, but not *in-person* fraud that voter-ID laws would prevent; and (4) inflated state voter rolls.[81] It makes sense that the record was lacking; the social science literature is in near-unanimous agreement that in-person voter fraud almost never occurs.[82] Although the Court may have been concerned about the risk of future in-person voter fraud, it simply did not have facts on the record to justify this concern.

Given the weak justifications for both election modernization and preventing voter fraud, most of the work seems to have been done by the legitimacy interest: safeguarding voter confi-

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80. *Id.* at 194.

81. *See id.* at 194–97, nn.11–12. The Court concluded that inflated voter rolls, themselves, were a "nondiscriminatory reason supporting the State's decision to require photo identification." *Id.* at 197. However, inflated voter rolls are simply not voter fraud. *See* German Lopez, *Trump's voter fraud commission, explained*, VOX (Jan. 3, 2018), https://www.vox.com/policy-and-politics/2017/6/30/15900478/trump-voter-fraud-suppression-commission [https://perma.cc/596N-TR73] ("As part of that, the Pew report found that more than 1.8 million registered voters were actually dead, while 2.75 million had registrations in more than one state. . . . But that doesn't mean that even one of these registrations was used for illegal votes. America has a multi-step system for voting: You register, then vote. The report only shows that people registered and were never taken off the rolls. They didn't even have to register for the latest election — some of them registered for the 2008 election, then died or moved, and states just didn't take them off their rolls. So someone could have registered in Ohio in 2008, moved to Pennsylvania by 2012, and simply forgotten to notify Ohio's elections system that he had moved — even though he never had any intention of voting in Ohio again.").

82. *Debunking the Voter Fraud Myth*, BRENNAN CTR. FOR JUSTICE (Jan. 31, 2017), https://www.brennancenter.org/analysis/debunking-voter-fraud-myth [https://perma.cc/WXJ6-AFGN] (compiling dozens of studies, all of which conclude that voter fraud almost never occurs); *see also* Peter Nicholas, Carol E. Lee, & Aruna Viswanatha, *Sticking to Unsubstantiated Claim, Donald Trump Seeks Voter-Fraud Inquiry*, WALL ST. J. (Jan. 25, 2017), https://www.wsj.com/articles/trump-says-he-is-launching-major-investigation-into-voter-fraud-1485347677 [https://perma.cc/J75G-75RQ] (noting that "state election officials and independent reviews have undercut the notion that widespread illegal voting has tainted election results.").

dence. The Court found that the voter confidence interest was "closely related to the State's interest in preventing voter fraud," but also carried "independent significance, because it encourages citizen participation in the democratic process."[83] The Court ultimately concluded that this interest, combined with an unproven fear about voter fraud, was sufficiently weighty to justify the burdens of the voter ID law.[84]

The *Crawford* Court's balancing reveals that reliance on legitimacy justifications can lead to a much more speculative analysis, something more akin to rational basis review. Under rational basis review, courts tend to accept plausible government interests without inquiring into whether those interests are grounded in fact.[85] For example, in *United States v. Carolene Products Co.*,[86] the Supreme Court applied rational basis to uphold a regulation on the shipment of skimmed milk,[87] relying on facts that were demonstrably wrong.[88] *Crawford* looks a lot like *Carolene Products* in this regard. The *Crawford* Court identified government interests largely based on mere speculation and fear; it ultimately concluded that those unsubstantiated public fears about voter fraud were enough to justify a burden on voter rights. This speculative analysis stands in stark contrast to the Court's usual refusal to consider public perceptions-based interests.[89]

B. Buckley*'s Watered-Down Strict Scrutiny*

In *Buckley*, the Supreme Court's consideration of a legitimacy interest significantly watered down its heightened scrutiny analysis. The *Buckley* Court reviewed the constitutionality of the Federal Election Campaign Act of 1971 (FECA), a campaign finance statute with a litany of provisions that limited election

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83. *Crawford*, 553 U.S. at 197.

84. *See id.* at 202–03.

85. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980);Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 487–88 (1955).

86. 304 U.S. 144 (1938).

87. *See id.* at 145–46, 153–54.

88. Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 SUP. CT. REV. 397, 398–99 (1987) ("The purported 'public interest' justifications so credulously reported by Justice Stone were patently bogus.").

89. *See supra* Part I.

spending.[90] The Court analyzed the statute using two broad categories: (1) *expenditures*, or money spent on campaign activities; and (2) *contributions*, or money given to political candidates.[91] Finding that both the expenditure and contribution limitations "implicate[d] fundamental First Amendment interests," the Court applied a heightened, but unspecified, form of scrutiny.[92] The Court found that the First Amendment limitations could be sustained "if the State demonstrate[d] a sufficiently important interest and employ[ed] means closely drawn to avoid unnecessary abridgment of associational freedoms."[93] The Court then identified four state interests for FECA's First Amendment limitations: (1) preventing corruption; (2) preventing the appearance of corruption; (3) equalizing the ability of citizens to influence elections; and (4) reining in the costs of elections.[94] The Court rejected the latter two interests, with its focus entirely limited to preventing corruption and its appearance.[95]

In the *Buckley* Court's balancing test, just as in *Crawford*, the government's interest in the appearance of legitimacy led to a lower standard of review. When analyzing the constitutionality of FECA's $1000 contribution limitation, the Court found that "Congress could legitimately conclude" that it had an interest in avoiding the appearance of corruption.[96] Importantly, the Court made no attempt at all to substantiate Congress' possible conclusion, instead finding, without citation, that the reality or appearance of corruption is "inherent in a system permitting unlimited financial contributions."[97] At the very least, it is debatable that this purported "inherent" problem is actually a problem because it is far from clear that money can significant-

90. Buckley v. Valeo, 424 U.S. 1, 6–7 (1976).

91. *See id.* at 7, 13–23.

92. *Id.* at 23, 25.

93. *Id.* at 25.

94. *See id.* at 25–26.

95. *See id.* at 48–49, 57 ("[T]he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . " & "In any event, the mere growth in the cost of federal election campaigns in and of itself provides no basis for governmental restrictions on the quantity of campaign spending . . . .")

96. *Id.* at 27.

97. *Id.* at 28.

ly alter the outcome of elections.[98] Each of the derivative harms of that shaky truth—undue influence by the wealthy and appearance of corruption—stem from a *belief* in that truth. That is, the wealthy would not have undue influence if politicians did not *believe* that they needed the money to win, and the public would not think there was an appearance of corruption if they did not *believe* that politicians needed money to win. The appearance of legitimacy, without regard for the underlying truth, was therefore paramount to the Court's analysis, and, ultimately, it was enough for the Court to uphold the contribution limitation.[99] That kind of reasoning strongly resembles rational basis review, where the truth holds little relevance, and plausibility is the touchstone.[100] The Court's reasoning, in invoking what "Congress could legitimately conclude," [101] also shares another hallmark of rational basis review: an exceedingly high level of deference to the legislature.[102] Thus, this analysis contrasts strongly with the rest of the First and Fourteenth Amendment doctrine because the *Buckley* Court had no qualms with giving great weight to "mere negative attitudes, or fear, unsubstantiated"[103] by any facts on the record.[104]

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98. In one of the most well-known papers to examine the effect of spending on election outcomes, economist Steven Levitt analyzed repeat elections, those elections where the exact same challengers faced off multiple times. Doing so allowed Levitt to control for the effect of candidate *quality* in addition to spending, incumbency advantage, the partisan makeup of the district, and nationwide partisan shocks. Such controls are important because causality is often tough to disentangle in campaign finance studies: in other words, it is hard to determine whether (1) a candidate wins because of the money or (2) a candidate gets more money because everyone thinks he will win. After controlling for each of these variables, Levitt found that "campaign spending has an extremely small impact on election outcomes regardless of incumbency status." Steven D. Levitt, *Using Repeat Challengers to Estimate the Effect of Campaign Spending on Election Outcomes in the U.S. House*, 102 J. POL. ECON. 777, 780 (1994). Leaving Levitt's influential paper aside, there is an active and contentious academic debate over the effect of money on election outcomes. *See* GUY-URIEL CHARLES & JAMES A. GARDNER, ELECTION LAW IN THE AMERICAN POLITICAL SYSTEM 753–58 (2d ed. 2018).

99. *See Buckley*, 424 U.S. at 29.

100. *See supra* Section III.A (discussing *Carolene Products*).

101. *Buckley*, 424 U.S. at 27.

102. *See, e.g.*, Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 487–88 (1955) ("[I]t is for the legislature, not the courts, to balance the advantages and disadvantages of the new [law].").

103. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

Although the interest in the appearance of legitimacy was enough to carry the day in the $1000 contribution limits in *Buckley*, that is not always the case. For example, the *Buckley* Court struck down other parts of FECA, despite the legitimacy interest.[105] Additionally, *Citizens United v. FEC*[106] and *McCutcheon v. FEC*[107] both struck down expenditure limits, despite the presence of legitimacy arguments.[108] These holdings prove that an interest in the appearance of legitimacy does not *necessarily* lead to rational basis review. However, a legitimacy interest that is only sufficient to justify restrictions on First Amendment rights *sometimes* is hardly more comforting than one that *always* justifies them. Indeed, such inconsistency is potentially worse in at least one way: the unpredictable weight of the legitimacy interest makes outcomes harder to predict, creating the possibility of arbitrariness.[109]

IV. PUBLIC PERCEPTION ARGUMENTS CREATE INCENTIVES FOR PARTISAN ACTORS TO UNDERMINE DEMOCRATIC LEGITIMACY

A. Partisans Influence Outcomes

By tying the outcome to public perceptions in election law cases, the Court has given partisan actors the ability and incentive to influence its outcomes. All laws create incentives for people,[110] many of them unforeseeable. Consider a law prohib-

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104. *See* D. Bruce La Pierre, *Campaign Contribution Limits: Pandering to Public Fears About "Big Money" and Protecting Incumbents*, 52 ADMIN. L. REV. 687, 688 (2000) ("Congress had only scant evidence that very large campaign contributions in the 1972 presidential election had caused either corruption or an appearance of corruption. The Court, nonetheless, upheld a $1000 limit on contributions in all federal elections largely on the premise that corruption is 'inherent in a system permitting unlimited financial contributions.'").

105. *See, e.g.*, Buckley, 424 U.S. at 31–49 (striking down independent expenditure limitations).

106. 558 U.S. 310 (2010).

107. 134 S. Ct. 1434 (2014).

108. *See McCutcheon*, 134 S. Ct. at 1450–53, 1461–62; *Citizens United*, 558 U.S. at 356, 360, 372.

109. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 278 (2004) ("Laws promulgated by the Legislative Branch can be inconsistent, illogical, and ad hoc; law pronounced by the courts must be principled, rational, and based upon reasoned distinctions.").

110. Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1054 (2000) ("The seminal insight that economics provides to the analysis of law is that people

iting drunk driving. Such a law gives a direct, powerful incentive for individuals to avoid drinking and driving. However, the drunk driving law has effects beyond its direct deterrence impact. For example, taxi drivers may see an uptick in business when the new law is adopted because more people will need rides home as a substitute for drinking and driving. Thus, the law, passed as a public safety measure, may also be a substantial subsidy for the taxi industry. Because courts are the arbiters of what the law means,[111] their interpretation of the law also creates incentives. If that same drunk driving law contains an ambiguous provision—whether the threshold blood alcohol level is .08% or .06%—a court reviewing the statutory text will be creating incentives. If the level is .06%, then individuals will be less likely to drive after consuming alcohol than they would if it were .08%, and the taxi industry will see a correspondingly larger subsidy. Election law, like any other law, is subject to these basic economic principles.

By allowing governments to justify their election regulations with legitimacy arguments, the Supreme Court has given partisan actors an ex ante incentive to undermine democratic legitimacy. For example, imagine that you are a Republican strategist at the Republican National Committee. Because you believe the research that shows voter ID laws benefit Republicans,[112] you would like to see voter ID laws enacted across the country.[113] However, you worry that your voter ID laws might

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respond to incentives—a generalized statement of price theory. From this insight, two important corollaries follow. First, the law can serve as a powerful tool to encourage socially desirable conduct and discourage undesirable conduct. In the hands of skillful policymakers, the law can be used to subsidize some behaviors and to tax others. Second, the law has efficiency consequences as well as distributive consequences. Intentionally or unintentionally, legal rules can encourage or discourage the production of social resources and the efficient allocation of those resources." (footnote omitted)).

111. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

112. *See, e.g.*, Christopher Ingraham, *New Evidence that voter ID laws 'skew democracy' in favor of white Republicans*, WASH. POST: WONKBLOG (Feb. 4, 2016), https://www.washingtonpost.com/news/wonk/wp/2016/02/04/new-evidence-that-voter-id-laws-skew-democracy-in-favor-of-white-republicans/ [https://perma.cc/GHT9-BDZX]; *but see* CHARLES & GARDNER, *supra* note 98, at 947–48 (noting that the empirics of voter ID law effects are debatable).

113. *See* Aaron Blake, *Republicans keep admitting that voter ID helps them win, for some reason*, WASH. POST: THE FIX (April 7, 2016), https://www.

get struck down as unconstitutional.[114] You then learn that in *Crawford*, the Supreme Court upheld a voter ID law because such laws "protect[] public confidence in the integrity and legitimacy of representative government."[115] So what is a partisan strategist to do when trying to preserve a policy that is dependent upon the "public confidence?" *Crawford's* reasoning suggests that one way to do so would be to undermine the public confidence: if one managed to convince the public that the government was not adequately combatting widespread voter fraud, those "negative attitudes[] or fear"[116] could be used to support a legitimacy interest to uphold voter ID laws.

These bad ex ante incentives also exist in the campaign finance context. If Democrats believe the tentative research showing that campaign finance laws may benefit their party,[117] they have an incentive to undermine democratic legitimacy by exaggerating the effects of money in politics. Furthermore, if incumbents believe that campaign finance laws benefit their reelection bids,[118] this fearmongering may become a bipartisan enterprise.[119]

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washingtonpost.com/news/the-fix/wp/2016/04/07/republicans-should-really-stop-admitting-that-voter-id-helps-them-win/ [https://perma.cc/9JKD-XVC6].

114. *See, e.g.*, Adam Liptak & Michael Wines, *Strict North Carolina Voter ID Law Thwarted After Supreme Court Rejects Case*, N.Y. TIMES (May 15, 2017), https://www.nytimes.com/2017/05/15/us/politics/voter-id-laws-supreme-court-north-carolina.html [https://perma.cc/4HWN-GWMM].

115. Crawford v. Marion Cty. Election Bd., 553 U.S. 181, 197 (2008) (internal quotation marks omitted) (citing government's brief).

116. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 448 (1985).

117. *See* CHARLES & GARDNER, *supra* note 98, *supra* note 96, at 883 (citing Tilman Klump et al., *The Business of American Democracy:* Citizens United, *Independent Spending, and Elections*, 59 J.L. & ECON. 1 (2016)) ("One study found that *Citizens United* was associated with an increase of approximately 4 percent in the probability of a Republican being elected to a state legislature, with the advantage rising to as much as 10 percent in some states.").

118. *See* Ciara Torres-Spelliscy, *The Incumbency Problem Has Everything to do with Money*, HILL (May 19, 2009), http://thehill.com/blogs/congress-blog/politics/25496-the-incumbency-problem-has-everything-to-do-with-money [https://perma.cc/6CJW-T4WR].

119. *Cf. Bipartisan Campaign Reform Act of 2002*, FED. ELECTION COMM'N, http://classic.fec.gov/pages/bcra/bcra_update.shtml [https://perma.cc/N9H4-FQNU] (noting that BCRA was signed into law by a Republican president).

B. Uncertain Causality

Although the Supreme Court has given partisan actors incentives to undermine democratic legitimacy, it is not clear if those incentives are the drivers of that behavior. Republicans encourage fears about voter fraud[120] and Democrats encourage fears about money in politics.[121] It is not clear, however, that the Supreme Court's incentives are the but-for cause of these partisan activities. Republicans and Democrats may genuinely believe that voter fraud and money in politics, respectively, are significant problems worth taking on. Additionally, Republicans may stoke fears about voter fraud as a cover for their voter ID laws in the political realm because a naked desire to disenfranchise voters is not popular.[122] Democrats may drum up fears about money in politics because it is a popular wedge issue with their base.[123] Because of these confounding factors, this paper makes no claims to empirical causality; rather, the argument is simply that the Court has created incentives that further encourage partisan attempts to undermine democratic legitimacy.

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120. *See* Charles Stewart III, *Trump's controversial election integrity commission is gone. Here's what comes next.*, WASH. POST (Jan. 4, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/01/04/trumps-controversial-election-integrity-commission-is-gone-heres-what-comes-next/ [https://perma.cc/AUV6-2SQT] (reporting on President Trump's efforts to "improve confidence in the electoral system and to investigate 'those vulnerabilities in voting systems and practices used for Federal elections that could lead to improper voter registrations and improper voting'" and noting that "Democrats are more likely to believe that access to the polls is a bigger problem than security; Republicans believe the opposite.").

121. *See* Ramsey Cox, *Senate GOP blocks constitutional amendment on campaign spending*, HILL (Sept. 11, 2014), http://thehill.com/blogs/floor-action/senate/217449-senate-republicans-block-constitutional-amendment-on-campaign [https://perma.cc/G6Z6-HAVR] ("Democrats argued the [*Citizens United*] decision has allowed billionaires to flood the campaign spending system with 'dark money' in order to buy election results.").

122. *Cf.* Roper Ctr. for Pub. Op. Research, *Public Opinion on the Voting Rights Act*, CORNELL UNIV. (2018), https://ropercenter.cornell.edu/voting-rights-act/ [https://perma.cc/8D3H-ZSZ4] (finding majority support for the Voting Rights Act).

123. *See* Cox, *supra* note 121 ("Democrats up for reelection are expected to use [their vote on campaign finance] on the campaign trail.").

V. A DANGEROUS SLIPPERY SLOPE

A. Poll Taxes

If the Court had considered legitimacy arguments in the state poll tax context, such a practice might still be constitutional today. In *Harper v. Virginia State Board of Elections*,[124] the Supreme Court declared that state poll taxes were unconstitutional under the Fourteenth Amendment.[125] The Court weighed the tax's burden on the fundamental right to vote against the purported benefit of increased voter quality, ultimately finding that "[v]oter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[126] One notable omission from the Court's balancing is any consideration of voter *perception* of how a poll tax affects the electoral system.[127] The Court's analysis might come out differently with a modern legitimacy interest on one side of the balancing test. If many individuals *thought* that a poll tax (1) prevented voter fraud by imposing a cost on repeat voting; or (2) stopped corrupt candidates from bribing poor voters and busing them to voting stations,[128] those would seem to be valid justifications under *Crawford* and *Buckley*. Under *Crawford*, those reasons, despite being almost certainly baseless, might justify a poll tax's burden on voting.

B. Freedom of the Press

Legitimacy arguments could justify far more invidious restrictions in the future, including restrictions on the press. Only 32% of Americans trust the media, the lowest level recorded since such a figure has been measured. [129] The distrust is driven almost entirely by Republicans, who argue that the media gives

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124. 383 U.S. 663 (1966).

125. *See id.* at 670.

126. *Id.* at 666.

127. *See generally id*.

128. *Cf.* Jeane MacIntosh, *Homeless 'Driven' to Vote Obama*, N.Y. POST (Oct. 7, 2008), https://nypost.com/2008/10/07/homeless-driven-to-vote-obama/ [https://perma.cc/C67X-US66]. There is no evidence of *actual* wrongdoing in this article, but that does not preclude a legitimacy argument under *Crawford* or *Buckley*.

129. Art Swift, *Americans' Trust in Mass Media Sinks to New Low*, GALLUP NEWS (Sept. 14, 2016), http://news.gallup.com/poll/195542/americans-trust-mass-media-sinks-new-low.aspx [https://perma.cc/3R4M-S5TE].

Democrats an unfair advantage.[130] In addition to the polling figures, the President of the United States has openly ruminated about having the Federal Communications Commission "examine its licensing procedures for major news networks because what they are reporting is not to his liking."[131] If the President ever attempted this kind of censorship, it is possible that the public's beliefs about the media and its effect on the electoral process could justify such a policy in the name of maintaining appearances. One might think that an openly content-based restriction on political speech would be absolutely safe from this kind of governmental action, but that is not so under existing law. Although this kind of censorship would probably trigger strict scrutiny,[132] that is not outcome-determinative for two reasons.

First, the Court in *Buckley*, which upheld speech restrictions, applied "exacting scrutiny applicable to limitations on core First Amendment rights of political expression."[133] Under this exacting standard, "the Government may regulate protected speech only if such regulation promotes a compelling interest

130. *See id.* ("With many Republican leaders and conservative pundits saying Hillary Clinton has received overly positive media attention, while Donald Trump has been receiving unfair or negative attention, this may be the prime reason their relatively low trust in the media has evaporated even more."). These criticisms are not without some merit. *See, e.g.*, Nate Silver, *There Really Was A Liberal Media Bubble*, FIVETHIRTYEIGHT (Mar. 10, 2017), https://fivethirtyeight.com/features/there-really-was-a-liberal-media-bubble/ [https://perma.cc/S4ZG-9NZ6] ("The political diversity of journalists is not very strong, either. As of 2013, only 7 percent of them identified as Republicans (although only 28 percent called themselves Democrats with the majority saying they were independents). And although it's not a perfect approximation—in most newsrooms, the people who issue endorsements are not the same as the ones who do reporting—there's reason to think that the industry was particularly out of sync with Trump. Of the major newspapers that endorsed either Clinton or Trump, only 3 percent (2 of 59) endorsed Trump."); Jack Shafer & Tucker Donerty, *The Media Bubble is Worse Than You Think*, POLITICO (May 2017), https://www.politico.com/magazine/story/2017/04/25/media-bubble-real-journalism-jobs-east-coast-215048 [https://perma.cc/5PKL-ZFUZ] ("The [*New York*] *Times* thinks of itself as a centrist national newspaper, but it's more accurate to say its politics are perfectly centered on the slices of America that look and think the most like Manhattan.").

131. Chris Cillizza, *Donald Trump just issued a direct threat to the free and independent media*, CNN (Oct. 12, 2017), http://www.cnn.com/2017/10/11/politics/donald-trump-media-tweet/index.html [https://perma.cc/WE94-9BSD].

132. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid.").

133. Buckley v. Valeo, 424 U.S. 1, 44–45 (1976).

and is the least restrictive means to further the articulated interest."[134] Given the similarity between exacting scrutiny and strict scrutiny, the Justices have avoided disentangling them,[135] and some scholars think they have significant overlap, particularly when it comes to what constitutes a compelling interest.[136] Although the similarity between exacting scrutiny and strict scrutiny is an indeterminate area of the law,[137] a court applying strict scrutiny would have ample room to find government speech limitations constitutional using a legitimacy interest, just as the Supreme Court did when applying exacting scrutiny in *Buckley*.

Second, the Supreme Court has upheld content-based restrictions on broadcasters in the past in *Red Lion Broadcasting Co. v. FCC*.[138] In that case, the FCC had a so-called "fairness doctrine," which required broadcasters to give reply time to individuals when someone attacked their character during a broadcast.[139] Broadcasters challenged the rule on First Amendment grounds, and the Supreme Court upheld it, relying on the fact that there were only so many radio frequencies to go around, and, thus, the government had an interest in rationing that scarce resource.[140] Given the rise of the internet and new media, the scarcity of communication resources seems like a more tenuous justification under the First Amendment,[141] but *Red Lion* still stands for the proposition that *some* interest may

134. McCutcheon v. FEC, 134 S. Ct. 1434, 1444 (2014).

135. *See id.* at 1445–46 (finding that the tests were similar enough that the Court could apply strict scrutiny without changing the outcome).

136. *See* R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 UMKC L. REV. 207, 210 (2016) ("[T]he strength or importance required of the government interest under exacting scrutiny actually need not be, in a given case, any less than that required under strict scrutiny. The circumstances of a given case may lead judges applying exacting scrutiny to conclude that only a genuinely compelling governmental interest can be sufficiently important. In fact, the logic of exacting scrutiny may well sometimes call for a government interest test that is even more demanding than the classic compelling government interest test under strict scrutiny.").

137. *See generally id.*

138. 395 U.S. 367 (1969).

139. *See id.* at 370, 373–75.

140. *See id.* at 386–390.

141. *Cf.* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 637–40 (1994) (refusing to apply *Red Lion* to cable because it did not suffer from the same physical limitations as broadcasting).

suffice to justify content-based regulations of broadcasters.[142] Under *Buckley*, a legitimacy interest could potentially fill that gap and justify a modern version of the fairness doctrine.

VI. CONCLUSION

There is an unresolved tension in the doctrine: public perceptions are an impermissible state interest in First and Fourteenth Amendment jurisprudence, *except* when it comes to election law. This exception has led to a more speculative analysis in election law jurisprudence, particularly in the voter ID and campaign finance contexts. Additionally, allowing consideration of public perceptions as a government interest in constitutional analysis gives partisans bad incentives to undermine democratic structures and could lead election law down a damaging slippery slope. Despite these drawbacks, neither the courts nor the scholarship have articulated a reason for treating election law cases differently, and there is not an obvious reason for doing so. Because the Court has held that consideration of public perceptions as a state interest is too dangerous in its other constitutional jurisprudence,[143] it should take a harder look at doing so in election law.

Boyd Garriott

142. *Cf. id.* at 638 ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence and see no reason to do so here."(footnote omitted) (citation omitted)).

143. *See supra* Part I.