
*National Voter Registration Act — Statutory Interpretation —
Election Law — Husted v. A. Philip Randolph Institute*

Voter suppression is as American as apple pie.¹ Between the 2012 and 2016 elections, for example, fourteen states enacted laws making it harder for citizens to vote.² These laws affect minority voters with particular intensity.³ Last Term, in *Husted v. A. Philip Randolph Institute*,⁴ the Court upheld an Ohio law that could ultimately allow the state to remove from its voter rolls close to one million registered voters.⁵ While cast as a dry exercise in statutory interpretation, *Husted* is best understood through the lens of the nation’s history of race-based voter suppression.

Husted concerned four interlocking provisions of the National Voter Registration Act of 1993⁶ (NVRA). First, section 20507(a) (“subsection (a)”) requires states to take “reasonable effort[s] to remove the names of ineligible voters” who have moved, “in accordance with subsections (b), (c), and (d).”⁷ Second, section 20507(b) (“subsection (b),” or, the “Failure-to-Vote Clause”) imposes two requirements for any system meant to maintain voter lists: the program must be “uniform, nondiscriminatory, and in compliance with the Voting Rights Act,” and must not remove any voter “by reason of the person’s failure to vote.”⁸

Third, section 20507(c) (“subsection (c)”) sets forth one way a state may fulfill these obligations. The state may use change-of-address information from the Postal Service to identify voters who may have moved.⁹ Once it has this information, the state can use the final provision, section 20507(d) (“subsection (d)”), to send those voters notices requesting they return a pre-addressed, postage-prepaid card on which they can affirm or correct their change of address.¹⁰ If they do not return the card and do not vote in two consecutive general federal elections, they may be removed from the rolls.¹¹

¹ See generally TOVA ANDREA WANG, *THE POLITICS OF VOTER SUPPRESSION* 16–28, 42–59 (2012).

² *Election 2016: Restrictive Voting Laws by the Numbers*, BRENNAN CTR. FOR JUST. (Sept. 28, 2016), <https://www.brennancenter.org/analysis/election-2016-restrictive-voting-laws-numbers> [<https://perma.cc/MTR3-SZMZ>].

³ Zoltan L. Hajnal et al., *Do Voter Identification Laws Suppress Minority Voting? Yes. We Did the Research*, WASH. POST (Feb. 15, 2017), <https://wapo.st/2P5koxA> [<https://perma.cc/6HL4-J3RF>].

⁴ 138 S. Ct. 1833 (2018).

⁵ *Id.* at 1841, 1846.

⁶ 52 U.S.C. §§ 20501–20511 (2016 Supp. IV).

⁷ *Id.* § 20507(a)(4).

⁸ *Id.* § 20507(b).

⁹ *Id.* § 20507(c)(1)(A).

¹⁰ *Id.* § 20507(d)(1)(B)(i), (d)(2). Subsection (d) also allows states to remove someone if she confirms in writing that she has moved. *Id.* § 20507(d)(1)(A).

¹¹ *Id.* § 20507(d)(1)(B).

Congress amended the NVRA in 2002 with the Help America Vote Act¹² (HAVA). HAVA added the following italicized language to subsection (b), the Failure-to-Vote Clause: no person may be removed from the rolls “by reason of the person’s failure to vote, *except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d).*”¹³ HAVA also mandated that states have a system to keep registration rolls updated, and provided that the system, “consistent with the [NVRA],” could remove voters who failed to respond to a notice and did not vote in two consecutive general federal elections — “except that no registrant may be removed solely by reason of a failure to vote.”¹⁴

Since 1994, Ohio has maintained its voter registration rolls using two systems. In addition to the Postal Service method provided in subsection (c), Ohio also uses what it calls the “Supplemental Process.”¹⁵ Instead of starting with an indication from the Postal Service that a resident has moved, the Supplemental Process is triggered for anyone who fails to “engage in any voter activity” for two years.¹⁶ Ohio then sends those registered voters notices requiring them to respond with their name, address, and date of birth, as well as a driver’s license number or other document confirming identity and address.¹⁷ If recipients do not return the notices and do not vote for the next four years, they are removed from the rolls.¹⁸

Larry Harmon has lived at the same Ohio address for over fifteen years.¹⁹ He voted in 2004 and 2008 but cast no votes between 2009 and 2014.²⁰ On Election Day 2015, he returned to the polls, only to find that his registration had been canceled via the Supplemental Process.²¹ Harmon, the A. Philip Randolph Institute, and the Northeast Ohio Coalition for the Homeless sued to enjoin the Supplemental Process.²²

In the District Court, plaintiffs made four claims. First, they argued that the process violated the NVRA because it “remov[ed] voters based

¹² Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 52 U.S.C.).

¹³ 52 U.S.C. § 20507(b)(2) (emphasis added); *see* Help America Vote Act § 903.

¹⁴ Help America Vote Act § 303(a)(4)(A).

¹⁵ *Husted*, 138 S. Ct. at 1840.

¹⁶ *Id.* (alteration omitted) (quoting the record). Voting is the most obvious form of “voter activity,” but signing a petition or submitting a change-of-address notice would also count. *Id.* at 1840–41.

¹⁷ *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 703 (6th Cir. 2016). In response to the lawsuit, Ohio Secretary of State Husted simplified the confirmation mailer, though the new version still required an affirmative response from the voter. *Id.* at 703–04.

¹⁸ *Husted*, 138 S. Ct. at 1841.

¹⁹ *See* *Ohio A. Philip Randolph Inst. v. Husted*, No. 16-cv-303, 2016 WL 3542450, at *2 (S.D. Ohio June 29, 2016).

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at *1–2.

on a failure to vote.²³ The court rejected this argument, explaining that voters were removed only if they failed to vote *and* failed to respond to a notice.²⁴ There was nothing in the NVRA that prescribed what could trigger a state’s decision to send a confirmatory notice in the first place, so Ohio was not required to use “reliable second-hand information, independent of the voter’s failure to vote, indicating that a voter has moved.”²⁵ The court also rejected the plaintiffs’ other claims: that the procedures were unreasonable, that they were not conducted uniformly, and that the notice did not include all the information required by subsection (d).²⁶ Because the plaintiffs did not succeed on the merits, the court declined to grant an injunction or issue summary judgment.²⁷

The Sixth Circuit reversed.²⁸ Writing for a divided panel,²⁹ Judge Clay held that because the Supplemental Process was triggered by a failure to vote, it violated subsection (b).³⁰ He flatly rejected the State’s distinction between the system’s “trigger” — which it argued starts a process that *might* result in removal — and the actual removal of a name.³¹ He instead suggested that the “trigger constitutes perhaps the plainest possible example of a process that ‘result[s] in’ removal of a voter from the rolls by reason of his or her failure to vote.”³²

The Supreme Court reversed. Writing for the Court, Justice Alito³³ explained that nothing in the NVRA prohibited Ohio from using the failure to vote as a trigger for sending a notice under subsection (d).³⁴ The Court held that the Failure-to-Vote Clause, barring removal “by reason of” nonvoting, prohibits only using nonvoting as the *sole* criterion for removal.³⁵ Because the subsection (d) notice procedure contemplated failure to vote as a but-for and/or proximate cause of a person’s removal from the voting rolls, it would make no sense for the Failure-to-Vote Clause to prohibit a system like the Supplemental Process, in which failing to vote plays a similar role.³⁶ HAVA’s amendments to the NVRA

²³ *Id.*

²⁴ *Id.* at *8.

²⁵ *Id.* at *7 (quoting Plaintiffs’ Motion for Summary Judgment and Permanent Injunction, or, in the Alternative, Preliminary Injunction at 26, *Ohio A. Philip Randolph Inst.*, No. 16-cv-303).

²⁶ *Id.* at *7–11.

²⁷ *Id.* at *13.

²⁸ *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 715 (6th Cir. 2016).

²⁹ Judge Clay was joined by Judge Gibbons. Senior Judge Siler concurred in part and dissented in part, noting that he agreed with the district court’s decision, except he would have required Ohio to amend the confirmatory mailer to give notice to voters who have moved to other states about how to reregister to vote. *Id.* at 717 (Siler, J., concurring in part and dissenting in part).

³⁰ *Id.* at 710–12 (majority opinion).

³¹ *Id.* at 708.

³² *Id.* at 712 (alteration in original) (quoting 52 U.S.C. § 20507(b)(2) (2016 Supp. IV)).

³³ Justice Alito was joined by Chief Justice Roberts and Justices Kennedy, Thomas, and Gorsuch.

³⁴ *See Husted*, 138 S. Ct. at 1842.

³⁵ *Id.* at 1843.

³⁶ *Id.*

simply clarify that implicit sole-causation criterion³⁷: HAVA states that “no registrant may be removed *solely* by reason of a failure to vote.”³⁸ It therefore “dispelled any doubt that a state removal program may use the failure to vote as a factor (but not the sole factor) in removing names from the list of registered voters.”³⁹

Justice Alito then responded to several arguments raised by the respondents and the dissents. The respondents contended that the Failure-to-Vote Clause’s language “allows States to consider nonvoting only to the extent that subsection (d) requires — that is, only *after* a registrant has failed to mail back a notice.”⁴⁰ Justice Alito found this unconvincing for three reasons. First, he pointed to the amendment’s language, which says: “nothing in [the Failure-to-Vote Clause] *may be construed*” to forbid the procedures in subsections (c) and (d).⁴¹ The amendment thus “sets out not an exception, but a rule of interpretation. It does not narrow the language that precedes it; it clarifies what that language means.”⁴² Second, he found that respondents’ reading was both superfluous and illogical, because “if the new language were an exception, it would seem to follow that prior to HAVA, the Failure-to-Vote Clause *did* outlaw what subsections (c) and (d) specifically authorize. And that, of course, would be nonsensical.”⁴³ Finally, Justice Alito suggested that respondents’ argument did not address why Congress would have added another provision in HAVA stating that “no registrant may be removed *solely* by reason of a failure to vote.”⁴⁴ It would be “confusing and downright silly” for Congress to add a narrow prohibition that is already encompassed elsewhere by a broader prohibition.⁴⁵

Justice Alito next addressed the argument that, because subsection (d) itself bars states from removing voters based only on nonvoting, the Failure-to-Vote Clause is “superfluous” unless it prohibits consideration of nonvoting as a trigger for sending notices.⁴⁶ He responded that the Clause not only “prohibits the once-common state practice of removing registered voters simply because they failed to vote,” but also “prohibits States from using the failure to vote as the sole cause for removal on *any* ground, not just because of a change of residence.”⁴⁷

³⁷ *Id.* at 1842.

³⁸ *Id.* (quoting 52 U.S.C. § 21083(a)(4)(A) (2016 Supp. IV) (emphasis added)).

³⁹ *Id.* at 1843.

⁴⁰ *Id.*

⁴¹ *Id.* at 1844 (quoting 52 U.S.C. § 20507(b)(2) (emphasis added)).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* (emphasis added) (quoting 52 U.S.C. § 21083(a)(4)(A)).

⁴⁵ *Id.*

⁴⁶ *Id.* at 1845 (quoting *id.* at 1858 (Breyer, J., dissenting)).

⁴⁷ *Id.*

Finally, Justice Alito addressed arguments that he considered “policy disagreement[s]” with Congress and the Ohio legislature.⁴⁸ He explained that the parties might disagree whether nonvoting or failure to return a notice is actually a useful or reliable indicator that someone has moved, but noted that Congress specifically instructed states to use those indicators, and Ohio considered nonvoting probative enough to decide to make it the trigger for a notice.⁴⁹ He also dismissed Justice Sotomayor’s points about voter suppression and discrimination, because respondents did not bring a claim under the NVRA’s provision banning discriminatory programs, and there was no evidence “that Ohio instituted or has carried out its program with discriminatory intent.”⁵⁰

Justice Thomas concurred and wrote separately to address constitutional concerns.⁵¹ “As I have previously explained, constitutional text and history both ‘confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied.’”⁵² For Justice Thomas, the Court’s reading of the statute avoided any constitutional issue because it came out on the state’s side, but broader readings of the NVRA might not.⁵³

Justice Breyer dissented.⁵⁴ He and three other Justices would have held that Ohio’s Supplemental Process violated both the spirit and the letter of the law.⁵⁵ Justice Breyer argued that the Supplemental Process, in addition to violating the Failure-to-Vote Clause, failed to abide by subsection (a)’s requirement that a state’s efforts to ensure accurate voter rolls be “reasonable.”⁵⁶ He noted that only 4% of Americans move to a different county each year, but that 59% of registered voters failed to vote in Ohio’s 2014 midterm election.⁵⁷ The use of nonvoting as a proxy for moving is thus clearly unreasonable.⁵⁸ Furthermore, Justice Breyer argued that the word “solely” in HAVA would not be enough to prevent Ohio’s process from violating subsection (b). First, the word “solely” does not appear in the Failure-to-Vote Clause, and second, HAVA explicitly requires that “nothing in this [Act] may be construed to

⁴⁸ *Id.* at 1848.

⁴⁹ *Id.*

⁵⁰ *Id.* There is evidence, however, that Secretary Husted has used his office to restrict the black vote. See Zachary Roth, *Ohio Cuts Early Voting Method Favored by Blacks*, MSNBC (Feb. 25, 2014, 3:24 PM), <https://on.msnbc.com/1bJIoBw> [<https://perma.cc/5WET-MBKQ>].

⁵¹ *Husted*, 138 S. Ct. at 1848–49 (Thomas, J., concurring).

⁵² *Id.* at 1849 (quoting *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2265 (2013) (Thomas, J., dissenting)).

⁵³ *Id.* at 1850.

⁵⁴ Justice Breyer was joined by Justices Ginsburg, Sotomayor, and Kagan.

⁵⁵ *Husted*, 138 S. Ct. at 1850–51 (Breyer, J., dissenting).

⁵⁶ *Id.* at 1857 (quoting 52 U.S.C. § 21087(a)(4) (2016 Supp. IV) (emphasis added)).

⁵⁷ *Id.* at 1856.

⁵⁸ *Id.* at 1856–57.

authorize or require conduct prohibited under [the NVRA], or to supersede, restrict or limit [its] application.”⁵⁹ The majority’s effort to harmonize the two statutes by curtailing the scope of the Failure-to-Vote Clause was thus directly contradictory to HAVA’s text and purpose.

In addition to joining Justice Breyer’s dissent in full, Justice Sotomayor dissented separately to highlight the purpose of the NVRA — “to increase the registration and enhance the participation of eligible voters.”⁶⁰ She noted that the Supplemental Process is “precisely the type of purge system that the NVRA was designed to prevent,” and that its harsh effects fall disproportionately on “minority, low-income, disabled, and veteran voters.”⁶¹ Since 2012, for example, majority-black Cincinnati neighborhoods “had 10% of their voters removed due to inactivity,” while a nearby majority-white suburban neighborhood had only 4% of its voters removed.⁶²

The Court’s opinion frames the case as a dry exercise in bureaucratic mechanics and statutory interpretation. But it is impossible to tell the story of *Husted* without a broader look at the history of voter suppression in the United States. For centuries, state legislatures have erected barriers that make it harder for certain populations to vote. Though often facially neutral, these laws are intended to restrict the franchise — particularly among African Americans.⁶³ And though it is uniquely positioned to strike them down, the Supreme Court has at times turned a blind eye to the motivation behind, and effect of, these laws — allowing them to serve as models for states interested in restricting the franchise. *Husted* is the latest chapter in this shameful story.

The passage of the Reconstruction Amendments in the aftermath of the Civil War committed the federal government — and federal courts — to overseeing state voting laws to prevent restriction of the franchise based on “race, color, or previous condition of servitude.”⁶⁴ After ratification of the Fifteenth Amendment in 1870, African Americans began to accrue considerable political power, at least relative to the past. During the Reconstruction Era, over one thousand black men won elected office, including the first sixteen black congressmen.⁶⁵

But the end of Reconstruction marked the arrival of a backlash, and a new era of voter suppression. Using a combination of legal provisions

⁵⁹ *Id.* at 1858 (first alteration in original) (quoting 52 U.S.C. § 21145(a)(4)).

⁶⁰ *Id.* at 1863 (Sotomayor, J., dissenting).

⁶¹ *Id.* at 1864.

⁶² *Id.* (quoting Brief of *Amici Curiae* NAACP and the Ohio State Conference of the NAACP in Support of Respondents at 18, *Husted*, 138 S. Ct. 1833 (No. 16-980)).

⁶³ See, e.g., WANG, *supra* note 1, at 16–28, 123–26.

⁶⁴ U.S. CONST. amend. XV, § 1.

⁶⁵ Eric Foner, *Rooted in Reconstruction: The First Wave of Black Congressmen*, THE NATION, (Oct. 15, 2008), <https://www.thenation.com/article/rooted-reconstruction-first-wave-black-congressmen/> [<https://perma.cc/ND9X-K2VE>].

such as poll taxes and literacy tests — not to mention extrajudicial violence⁶⁶ — states dramatically decreased black voter registration and turnout.⁶⁷ In 1892, for example, Arkansas voters approved a poll tax amendment intended to ensure “pure elections and votes cast by the best citizens.”⁶⁸ Its proponents in the *Arkansas Gazette* emphasized that it would reduce electoral “frauds” and raise funds for the poor, but also noted that “[t]he most dangerous foe to democracy is the negro.”⁶⁹

These laws were obviously intended to restrict the black vote, but the Supreme Court upheld them by focusing on their facial neutrality.⁷⁰ Literacy tests, the Court explained in *Williams v. Mississippi*,⁷¹ “do not, on their face, discriminate between the races.”⁷² And although “evil was possible” under Mississippi’s new voting laws, “it has not been shown that their actual administration was evil.”⁷³

The Court’s initial willingness to permit voter suppression gave a green light to other states. Just months after *Williams*, North Carolina Democrats in Wilmington organized an election day coup d’état, which involved the murder of scores of black men, women, and children, and a declaration that white residents would “no longer be ruled and will never again be ruled, by men of African origin.”⁷⁴ Two months later, the state legislature made good on that promise, disenfranchising the black population through the passage of a poll tax and a literacy test.⁷⁵ By 1908, every ex-Confederate state had implemented similar restrictions.⁷⁶

Despite multiple opportunities to intervene, the Court continued to look the other way, often fishing for technical hooks to avoid addressing questions of race discrimination. In *Giles v. Harris*,⁷⁷ the Court all but acknowledged that the facially neutral Alabama Constitution was designed to “let in all whites and ke[ep] out a large part, if not all, of the

⁶⁶ Zanita E. Fenton, *Disarming State Action; Discharging State Responsibility*, 52 HARV. C.R.-C.L. L. REV. 47, 53 (2017) (“The period following the passage of the Fourteenth Amendment was marked by state legislation to disarm freedmen, incidents of mob violence, and a long history of lynching, all often orchestrated or otherwise tacitly condoned by government actors.” (footnotes omitted)).

⁶⁷ See J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS* 45–72 (1974).

⁶⁸ FON LOUISE GORDON, *CASTE AND CLASS* 28 (1995).

⁶⁹ *Id.*

⁷⁰ See, e.g., MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 141 (2004) (“The decision in *Williams v. Mississippi* (1898) rejected a facial challenge to a literacy test . . . on the ground that legislative motive was irrelevant to constitutionality.”).

⁷¹ 170 U.S. 213 (1898).

⁷² *Id.* at 225.

⁷³ *Id.* at 223.

⁷⁴ HARRY HAYDEN, *THE STORY OF THE WILMINGTON REBELLION* 10 (1936), <http://core.ecu.edu/umc/wilmington/scans/ticketTwo/hayden.pdf> [<https://perma.cc/YFW3-UEYZ>].

⁷⁵ *Id.* at 12.

⁷⁶ See KOUSSER, *supra* note 67, at 239.

⁷⁷ 189 U.S. 475 (1903).

blacks,⁷⁸ but declined to take action because relief “must be given by [Alabama] or by the legislative and political department of the government of the United States.”⁷⁹ Reviewing the same provision the next year, the Court again found a procedural dodge, holding that no relief could be granted because a violation of a federal right had not been properly raised.⁸⁰ In 1959, North Carolina successfully defended its literacy test — the one passed in the aftermath of the Wilmington Massacre — while arguing that it had the “purpose of preventing fraud.”⁸¹

In the modern era, a similar pattern has persisted: despite clear voter-protective law, the Supreme Court has upheld state efforts to restrict the black vote by ignoring the reality of voter suppression. This condonation emboldens other states to enact similar measures.

In 1965, Congress passed the Voting Rights Act⁸² (VRA), which prohibits voting laws that have a discriminatory effect, irrespective of whether the discrimination is facial or intentional.⁸³ But despite this seemingly robust protection, Republican-controlled state legislatures have continued to devise new ways to prevent minority voters from reaching the polls.⁸⁴ These new laws — like those of decades past — are cloaked with benign justifications like preventing fraud⁸⁵ or ensuring faith in the democratic process.⁸⁶ While couched in racially neutral terms, modern voter-suppression tactics similarly target African Americans⁸⁷ — a design element that for their proponents is a feature, not a bug.⁸⁸

⁷⁸ *Id.* at 483; *see also id.* at 487.

⁷⁹ *Id.* at 488.

⁸⁰ *Giles v. Teasley*, 193 U.S. 146, 165 (1904).

⁸¹ Brief of the Attorney General of North Carolina Amicus Curiae at 23, *Lassiter v. Northampton Cty. Bd. of Elections*, 360 U.S. 45 (1959) (No. 584).

⁸² Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 52 U.S.C.).

⁸³ 52 U.S.C. § 10301 (2016 Supp. IV).

⁸⁴ Editorial, *Republicans and Voter Suppression*, N.Y. TIMES (Apr. 4, 2016), <https://nyti.ms/2017XCM> [<https://perma.cc/74HS-9UUF>].

⁸⁵ Compare GORDON, *supra* note 68, at 28 (“It is impossible for any man . . . who believes in a fair, free and secret ballot and opposes frauds in elections to frame a valid objection [to the 1892 Arkansas poll tax amendment].”), with REPUBLICAN NAT’L COMM., WE BELIEVE IN AMERICA: REPUBLICAN PLATFORM 11 (2012) (“We support State laws that require proof of citizenship at the time of voter registration to protect our electoral system against a significant and growing form of voter fraud.”).

⁸⁶ See Michael Wines, *One Rationale for Voter ID Debunked, G.O.P. Has Another*, N.Y. TIMES (Mar. 23, 2017), <https://nyti.ms/2nHgHUU> [<https://perma.cc/982T-KA4K>].

⁸⁷ Compare Donald S. Strong, *American Government and Politics: The Poll Tax: The Case of Texas*, 38 AM. POL. SCI. REV. 693, 695 (1944) (“The belief that the poll tax is essential to ‘white supremacy’ constitutes the unspoken major premise of many defenders of the tax.”), with The Jackson Sun, “Daily Show” Comments Force GOP Activist to Resign, YOUTUBE (Oct. 25, 2013), <https://youtu.be/gT2q7cKB-4g> [<https://perma.cc/P32S-TQAH>] (“If [North Carolina’s Voter ID Law] hurts a bunch of lazy blacks that wants to have the government give them everything, so be it.”).

⁸⁸ Michael Wines, *Some Republicans Acknowledge Leveraging Voter ID Laws for Political Gain*, N.Y. TIMES (Sept. 16, 2016), <https://nyti.ms/2cMaIsc> [<http://perma.cc/8WRN-MCHL>] (“I was in

And just as it did during the Jim Crow era, the Supreme Court has all but given its blessing to voter suppression. In 2013, the Court struck down the provision of the Voting Rights Act that determined which localities were required to seek federal approval before making changes to their voting laws.⁸⁹ And as many of the previously affected states moved to restrict access to the polls, the Court bent over backward to uphold state efforts to restrict the influence of minority voters.

Just last Term, in *Abbott v. Perez*,⁹⁰ the Court upheld all but one of Texas’s racially gerrymandered legislative district maps.⁹¹ Though drenched in “hyper-technical [language] about jurisdiction and statutory construction,”⁹² the opinion had the effect of endorsing “maps that, in design and effect, burden the rights of minority voters.”⁹³ And in *Gill v. Whitford*⁹⁴ — the partisan gerrymandering case teed up as a blockbuster — the Court manufactured a procedural dodge despite ample evidence that state legislatures use redistricting to dilute the power of minority voters.⁹⁵

Which brings us to *Husted*. The Court held that Ohio’s Supplemental Process can be read consistently with federal law, as it does not use failure to vote as the sole reason for removing names from voter rolls. As a matter of textual interpretation, the analysis is defensible. But so too were decisions of the Court upholding poll taxes and literacy tests — which on their face do not discriminate by race.⁹⁶ To ignore the context

the closed Senate Republican Caucus when the final round of multiple Voter ID bills were being discussed. A handful of the GOP Senators were giddy about the ramifications and literally singled out the prospects of suppressing minority and college voters.”); see also William Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the “Monster” Law*, WASH. POST (Sept. 2, 2016), <https://wapo.st/2MwgT6u> [<https://perma.cc/U96V-2W57>] (“[I]n April 2013, a top aide to the Republican House speaker asked for ‘a breakdown, by race, of those registered voters in your database that do not have a driver’s license number.’ Months later, the North Carolina legislature passed a law that cut a week of early voting, eliminated out-of-precinct voting and required voters to show specific types of photo ID — restrictions that election board data demonstrated would disproportionately affect African Americans and other minorities.”).

⁸⁹ *Shelby County v. Holder*, 133 S. Ct. 2612, 2631 (2013).

⁹⁰ 138 S. Ct. 2305 (2018).

⁹¹ *Id.* at 2313–14.

⁹² Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Abbott v. Perez, Race, and the Immodesty of the Roberts Court*, HARV. L. REV. BLOG (July 31, 2018), <https://blog.harvardlawreview.org/abbott-v-perez-race-and-the-immodesty-of-the-roberts-court/> [<https://perma.cc/K8GF-YH5M>].

⁹³ *Abbott*, 138 S. Ct. at 2360 (Sotomayor, J., dissenting).

⁹⁴ 138 S. Ct. 1916 (2018).

⁹⁵ See Guy-Uriel E. Charles & Luis E. Fuentes-Rohwer, *The Supreme Court, 2017 Term — Comment: Judicial Intervention as Judicial Restraint*, 132 HARV. L. REV. 236, 250–51, 254–55 (2018).

⁹⁶ Compare *Williams v. Mississippi*, 170 U.S. 213, 220 (1898) (“It is not asserted by plaintiff in error that either the constitution of the State or its laws discriminate in terms against the negro race . . .”), with *Husted*, 138 S. Ct. at 1848 (“The NVRA prohibits state programs that are discriminatory, but respondents did not assert a claim under that provision.” (citation omitted)).

in which these laws arise⁹⁷ — the context of this nation’s history — is to betray the legacies of so many who have fought and died for the franchise. Even if one assumes Ohio’s law was a good-faith effort to ensure the accuracy of voter rolls, the Court’s decision offers a roadmap for states whose motives are more suspect. To date, at least a dozen states — all of them controlled by Republicans — have indicated that they intend to adopt a similar plan to purge voter rolls.⁹⁸ These purge laws will work in concert with other racially inequitable voter-suppression tactics like restrictions on early voting, stringent registration requirements, and felon disenfranchisement — many of which are common in states controlled by Republicans.⁹⁹ Though undoubtedly less blatant than Jim Crow laws, these tactics may be similarly effective given the winner-take-all nature of American elections.¹⁰⁰

Nearly 150 years after the Constitution was amended to ensure the right to vote would not be denied on account of race, black voters remain targets of voter suppression. Like it did throughout the Jim Crow era, the Court in *Husted* turned a blind eye to this reality, choosing instead to treat the case as an ordinary exercise in statutory interpretation. By missing the forest for the trees, Justice Alito’s opinion will lead to the de facto disenfranchisement of thousands of Americans. He might have instead heeded the advice of the President he so admired¹⁰¹: “For this Nation to remain true to its principles, we cannot allow any American’s vote to be denied, diluted, or defiled. The right to vote is the crown jewel of American liberties, and we will not see its luster diminished.”¹⁰²

⁹⁷ Justice Alito suggested that the Court could not consider the disparate impact of Ohio’s process because plaintiffs failed to raise the claim. But the Court is not prevented from considering context in its interpretive analysis — in fact, it has often applied substantive canons of statutory interpretation to ensure its decisions are cognizant of the nation’s history and values. See Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 182 (2010) (“[S]hared values ought to influence the interpretation of the law . . .”).

⁹⁸ Pete Williams, *Supreme Court Gives Ohio Right to Purge Thousands of Voters from Its Rolls*, NBC NEWS (June 11, 2018, 8:07 PM), <https://nbcnews.to/2sOufiR> [<http://perma.cc/6T2F-HAWN>]; cf. Thomas B. Edsall, “Ballot Security” Effects Calculated, WASH. POST (Oct. 25, 1986), <http://www.washingtonpost.com/archive/politics/1986/10/25/ballot-security-effects-calculated/ed2bcf92-b3ee-4b6c-96ce-cd18ea471727/> [<https://perma.cc/6L4F-WQH8>] (quoting a Republican Party political director describing the effect of a program that would remove names of voters if mailers sent to their houses were returned to the sender: “I know this race is really important to you. I would guess that this program will eliminate at least 60–80,000 folks from the rolls If it’s a close race . . . which I’m assuming it is, this could keep the black vote down considerably” (alterations in original) (emphasis added)).

⁹⁹ See CAROL ANDERSON, ONE PERSON, NO VOTE 70, 94, 118 (2018); *Election 2016: Restrictive Voting Laws by the Numbers*, *supra* note 2.

¹⁰⁰ See Hajnal et al., *supra* note 3.

¹⁰¹ Gregory W. Griggs, *Justice Alito Pays Tribute to Reagan’s Influence on His Life*, L.A. TIMES (Sept. 13, 2006), <https://lat.ms/2BPqWyC> [<https://perma.cc/E8G9-ZFTH>].

¹⁰² Ronald Reagan, Statement About Extension of the Voting Rights Act (Nov. 6, 1981), <http://www.presidency.ucsb.edu/ws/?pid=43215> [<https://perma.cc/CT8C-8CPS>].