COMMENT

CUEING DEMOCRACY: REPLACING THE TEXAS ELECTION CODE'S TITLE PROHIBITION

CHRISTOPHER M. CHILDREE*

I. Introduction 377
II. Background 384
III. Harm in the Current State 386
A. Random Selection 390
B. Partisan Control of Elections 392
IV. State Justification 394
A. Development in Texas 394
B. Justification Elsewhere 395
V. Weighing Interests 398
VI. Alternatives 400
A. Guam Model 401
B. Ballot Notation Model 402
VII. Conclusion 404

I. INTRODUCTION

In July 2013, former United States President Jimmy Carter surprisingly proclaimed, "America has no functioning democracy."[1] Though Carter

* St. Mary's Law Journal Vol. 46 Research/Articles Editor; 2015 graduate, St. Mary's University School of Law.

1. Katie McHugh, *Jimmy Carter: 'America No Longer Has a Functioning Democracy,'* DAILY CALLER (July 17, 2013), http://dailycaller.com/2013/07/17/jimmy-carter-america-no-longer-has-a-

spoke in the context of the NSA spying controversy,[2] his statement reflects recent opinion polls showing the American people's perception that elected public officials no longer govern for the benefit of society.[3] Such a striking revelation raises perplexing questions. How can voters continually elect officials, whom the people then consider adverse to the public will? Can the existing perception change? And, if democracy no longer functions, as former President Carter suggests, might *the law* hold the key to its restoration?[4] This Comment does not attempt to answer those questions. Instead, it focuses on a legal remedy to a single aspect of American society rationally tied to irresponsive officials—voter knowledge of candidates for public office.[5]

Despite technological advances, Americans remain largely uninformed about candidates,[6] relying on ballot cues to make voting decisions.[7] An expansion of relevant candidate information on the ballot provides a logical remedy to the problem.[8] However, in the state of Texas, which

functioning-democracy.

2. *See id.* (bringing to light the negative effects of NSA spying revelations on U.S. moral authority).

3. *See, e.g.*, Alan Yu, *Polls Reveal Season of Record-Breaking Voter Anger*, NPR (Nov. 15, 2013, 7:00 AM), http://www.npr.org/blogs/itsallpolitics/2013/11/15/245281069/polls-reveal-season-of-record-breaking-voter-anger (discussing a Gallup poll showing that for the first time since the poll began in the 1930s, Americans consider "dissatisfaction with government" as the nation's most pressing issue).

4. *See* McHugh, *supra* note 1 (discussing Carter's belief in a breakdown in both the American government, and in the public's perception of its elected officials).

5. Polls have demonstrated Americans' lack of political knowledge about those running for or occupying public offices. *See* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 208, 316–17 (1996). A 1974 poll showed only 16% of respondents could identify their district's candidates for the U.S. House of Representatives. *Id.* at 316. In 1989, only 29% could name their congressman in the House of Representatives. *Id.* at 317. A 1990 survey of Richmond, Virginia showed only 30% of residents could identify their mayor. *Id.* at 208.

6. Surveys show that despite greater access to pertinent information through the Internet and cable television, political ignorance has persisted on a national scale. Ilya Somin, *Democracy and Political Ignorance*, CATO UNBOUND (Oct. 11, 2013), http://www.cato-unbound.org/2013/10/11/ilya-somin/democracy-political-ignorance. *But cf.* Anderson v. Celebrezze, 460 U.S. 780, 796–97 (1983) (explaining that the Supreme Court assumes voters inform themselves about pertinent election information and that technological advances in accessing information strengthens that presumption).

7. *See, e.g.*, David Brockington, *A Low Information Theory of Ballot Position Effect*, 25 POL. BEHAV. 1, 2 (2003) (explaining that voters often lack necessary time to research elections and rely on cues contained within the ballot to make voting decisions).

8. Polling data from a study of the 1998 Cook County, Illinois municipal elections revealed that participants who received voter guides gained the most pertinent candidate information from the listings of "personal biography, prior experience, party affiliation, sources of campaign contributions, and endorsements." Cynthia Canary, *Know Before You Go: A Case for Publicly Funded Voters' Guides*, 64

lags behind other states in terms of civic participation,[9] the Election Code explicitly prohibits the listing of candidate titles[10] and designations,[11] thus disallowing the addition of relevant candidate information.[12]

In addition to Texas, other states and territories in the United States prohibit the listing of candidate titles on the ballot by way of statute,[13] case law,[14] and attorney general interpretation.[15] These may be among

OHIO ST. L.J. 81, 89 (2003).

9. According to a study conducted by the University of Texas's Annette Strauss Institute for Civic Life, Texas placed at the bottom of the fifty states and the District of Columbia on matters of civic engagement. Enrique Rangel, *Study: Texas Ranks Last for Voter Turnout, Close to Last for Registration*, AMARILLO GLOBE-NEWS (Oct. 20, 2013, 10:29 PM), http://amarillo.com/news/local-news/2013-10-20/study-texas-ranks-last-voter-turnout-close-last-registration. In 2010, voter turnout stood at 36%, which was last place in the nation. *Id.* In addition, Texas stood at forty-second in voter registration, forty-fourth in the percentage of citizens who regularly discuss politics, and forty-ninth in the percentage of citizens who reach out to public officials. *Id.*

10. Examples include: Dr., M.D., Ph.D., Gen., and Rev. *See* BLACK'S LAW DICTIONARY 1623 (10th ed. 2014) (defining "title" in this sense as "[a]n appellation of office, dignity, or distinction").

11. *See* TEX. ELEC. CODE ANN. § 52.033 (West 2010) ("[A] title or designation of office, status, or position may not be used in conjunction with a candidate's name on the ballot.").

12. *Cf.* Canary, *supra* note 8, at 89 (including candidate background and experience as information most helpful to voters).

13. *See* ALASKA STAT. § 15.15.030(4) (2012) ("The director may not include on the ballot, as a part of a candidate's name, any honorary or assumed title or prefix but may include in the candidate's name any nickname or familiar form of a proper name of the candidate."); CAL. ELEC. CODE § 13106 (West 2003) ("No title or degree shall appear on the same line on a ballot as a candidate's name, either before or after the candidate's name, in the case of any election to any office."); IOWA CODE § 49.31(c)(6) (2013) ("The name of a candidate printed on the ballot shall not include parentheses, quotation marks, or any personal or professional title."); KAN. STAT. ANN. § 25-619 (2007) ("No title, degree or other symbol of accomplishment, occupation or qualification either by way of prefix or suffix shall accompany or be added to the name of any candidate for nomination or election to any office on ballots in any primary or general election."); MINN. STAT. § 204B.35(2) (2013) ("The name of a candidate shall not appear on a ballot in any way that gives the candidate an advantage over an opponent, including words descriptive of the candidate's occupation, qualifications, principles, or opinions, except as otherwise provided by law."); NEV. REV. STAT. § 293.256 (2010) ("[T]he names of candidates as printed on the ballot shall not include any title, designation or other reference which will indicate the profession or occupation of such candidates."); N.C. GEN. STAT. § 163-165.5 (2011) ("No title, appendage, or appellation indicating rank, status, or position shall be printed on the official ballot in connection with the candidate's name."); OKLA. STAT. tit. 26, § 6-101 (2011) ("[N]o candidate shall have any prefix, suffix or title placed before or after the candidate's name."); S.C. CODE ANN. § 7-13-325 (1977 & Supp. 2012) ("The derivative name or nickname may not imply professional or social status, an office, or military rank."); WYO. STAT. ANN. § 22-6-111 (2013) ("A candidate may use the name on the ballot by which he is generally known. Professional titles and degrees shall not appear on the ballot."). *Contra* ARK. CODE ANN. § 7-7-305 (2012) (specifying that a candidate may use no more than three names, and may insert a prefix before a name abbreviating elected office currently held); 3 GUAM CODE ANN. § 7115 (2013) (allowing candidates to request placing nicknames or other identifiers on the ballot, but not to exceed twenty letters).

14. *See* People *ex rel.* Richter v. Telford, 242 N.E.2d 464, 467 (Ill. App. Ct. 1968) (upholding the Illinois legislature's 1955 removal of "description" from the ballot statute); State *ex rel.* Rainey v.

the least controversial state election laws in effect.[16] Yet, they affect issues with far-reaching public policy ramifications.[17] Democracy depends heavily on the appearance and format of the ballot itself.[18] The Supreme Court of the United States has given special attention to labels on the ballot for their effect on voters "at the most crucial stage in the electoral process."[19] Reflecting this understanding, New Jersey's highest court identified the use of candidate titles on the ballot as an issue "of substantial public importance."[20] For the purposes of identification, the Supreme Court of Minnesota went so far as to declare the use of titles

Crowe, 382 S.W.2d 38, 46 (Mo. Ct. App. 1964) (finding no existing Missouri statute that allowed candidate titles to be listed on ballots); Sooy v. Gill, 774 A.2d 635, 643 (N.J. Super. Ct. App. Div. 2001) (holding that only name and not title may be listed on New Jersey ballots); Toigo v. Columbia Cnty. Bd. of Elections, 273 N.Y.S.2d 781, 783 (Sup. Ct. 1966) (stating that "name" as defined in the applicable New York statute, does not include title or degree); State *ex rel.* Whetsel v. Murphy, 174 N.E. 252, 253 (Ohio 1930) (per curiam) (declaring it unlawful to place candidate titles on the ballot in Ohio absent identity ambiguity); *see also* Lewis v. N.Y. State Bd. of Elections, 678 N.Y.S.2d 887, 887–88 (Sup. Ct. 1998) (denying gubernatorial candidate's request to place his nickname "Grandpa" on the ballot).

15. *See* Neb. Att'y Gen. Op. No. 10001 (Jan. 5, 2010) (identifying titles as not part of the candidate's name for purposes of Nebraska elections); S.C. Att'y Gen. Op. No. 1665 (Apr. 9, 1964) (maintaining that the definition of "name" in South Carolina's Code of Laws makes no reference to candidate's titles, and so candidate's titles are to be excluded from the ballot). *But see* Ark. Att'y Gen. Opp. No. 86-04 (Jan. 27, 1986) (determining that in Arkansas, use of "judge" as prefix is allowable on the ballot if used as one of three names and is legally valid).

16. In Texas, there has not been any reported challenge to the title statute, and only one reported case has referenced it. Gray v. Curry, 603 S.W.2d 245, 245 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

17. *See* Elizabeth Garrett, *The Law and Economics of "Informed Voter" Ballot Notations*, 85 VA. L. REV. 1533, 1534 (1999) (observing that despite containing the most visible cues related to voter competence, the ballot itself receives little attention from scholars); *cf.* Meryl Chertoff & Dustin F. Robinson, *Check One and the Accountability Is Done: The Harmful Impact of Straight-Ticket Voting on Judicial Elections*, 75 ALB. L. REV. 1773, 1773 (2012) (determining that in partisan elections, despite its importance to the electoral process, the format of the ballot itself is a factor scholars often ignore); Laura Miller, Note, *Election by Lottery: Ballot Order, Equal Protection, and the Irrational Voter*, 13 N.Y.U. J. LEGIS. & PUB. POL'Y 373, 373–74 (2010) (accounting for ballot position as a factor in then-Senator Hillary Clinton's come-from-behind victory in the 2008 New Hampshire primary).

18. *See* Garrett, *supra* note 17, at 1534 (placing a large amount of importance on how the ballot itself looks and finding it surprising that this receives such little attention from political scientists); *cf.* Chertoff & Robinson, *supra* note 17, at 1773 (reviewing studies on partisan elections and discovering that experts often ignore the organization of the ballot); Miller, *supra* note 17, at 373–74 (arguing ballot format had a role in then-Senator Hillary Clinton's come-from-behind victory in the 2008 New Hampshire primary).

19. *See* Anderson v. Martin, 375 U.S. 399, 402 (1964) (striking down a Louisiana statute requiring ballots to list a candidate's race, as an incitement of racial prejudice "at the most crucial stage in the electoral process").

20. *See* Sooy v. Gill, 774 A.2d 635, 639 (N.J. Super. Ct. App. Div. 2001) (declaring a case concerning the listing of candidate titles in a past election as moot due to the "substantial public importance" of the matter).

essential to guaranteeing voters maintain "their right to express freely their choice[s]."[21]

Nevertheless, in the limited number of cases addressing the topic, courts have generally concluded that listing titles would be impractical,[22] create voter bias,[23] and provide greater opportunities for fraud.[24] However, certain states,[25] Texas included,[26] allow the listing of candidate titles on the ballot if opposing candidates for the same position have similar surnames.[27] The Supreme Court of Michigan found this use of title preferential to using a home address for identification.[28] Though courts see the power of titles in enabling "intelligent expression,"[29] it

21. *See* Petersen v. Holm, 66 N.W.2d 15, 15–16 (Minn. 1954) (finding it necessary to include titles on the ballot in order to distinguish one candidate named "Petersen" from another with the similar name "Peterson").

22. *E.g.*, State *ex rel.* Rainey v. Crowe, 382 S.W.2d 38, 46 (Mo. Ct. App. 1964) (denying the request of a candidate for coroner to list "M.D." beside his name on the ballot because doing so "would open the gates to a road that would lead to confusion in the minds of the voters and extreme delay in the conduct of elections").

23. *E.g.*, Toigo v. Columbia Cnty. Bd. of Elections, 273 N.Y.S.2d 781, 783–84 (Sup. Ct. 1966) (rejecting the request of a candidate for coroner to list his academic degrees, because doing so "would be neither fair nor practical").

24. *E.g.*, *Sooy*, 774 A.2d at 640 (determining that the addition of candidate titles could result in "[m]uch mischief" including candidates wishing to use "Dr." for a doctorate received from an unaccredited university).

25. *See* MICH. COMP. LAWS § 168.696(3) (2012) ("[T]he board shall print the occupation, date of birth, or residence of each of the candidates having the same or similar surnames on the ballot or ballot labels or slips to be placed on the voting machine, when used, under their respective names."); N.M. STAT. ANN. § 1-10-6 (2013) ("[I]f it appears that the names of two or more candidates for any office to be voted on at the election are the same or are so similar as to tend to confuse the voter as to the candidates' identities the occupation and post office address of each such candidate shall be printed immediately under the candidate's name on the ballot."); 25 PA. CONS. STAT. § 2965 (2007) ("If two or more candidates for the same office shall have the same or similar surnames, the county board of elections shall . . . print the occupation or residence of any such candidate, so filing a request, on the ballot or ballot labels opposite or under his name."); V.I. CODE ANN. tit. 18 § 511 (1998) ("If two or more candidates for the same office shall have the same or similar surnames, the Supervisor of Elections shall . . . print, opposite his name on the ballot, the occupation or residence of any such candidate so filing a request.").

26. *See* TEX. ELEC. CODE ANN. § 52.032 (West 2010) (providing that candidates with similar surnames running for the same office may provide "a brief distinguishing description or title, not to exceed four words[,] . . . [which] may only refer to the candidate's place of residence or present or former profession, occupation, or position . . . [and] may not refer to a public office").

27. *Id.*

28. *See* Sullivan v. Hare, 130 N.W.2d 392, 394 (Mich. 1964) (allowing a candidate named Sullivan to be distinguished from another named Sullivan by listing his name under title "Former Assistant Attorney General"); *cf.* Evans v. City of Detroit Election Comm'n, 162 N.W.2d 141, 141–43 (Mich. 1968) (affirming a lower court's decision to allow two candidates to affix titles of "Former Judge of Recorder's Court" to their names in order to distinguish them from two other candidates sharing each other's respective surname).

29. *See* State *ex rel.* Whetsel v. Murphy, 174 N.E. 252, 253 (Ohio 1930) (mentioning the use of

remains unclear why courts believe that power should be limited to specific instances.[30] Voter inability to differentiate between two candidates with similar surnames is akin to voter inability to differentiate between two candidates with different surnames in any election for a lower office.[31] Moreover, in contrast to the perceived harms from the inclusion of titles, courts usually refuse to overturn results in cases filed after elections in which titles were mistakenly listed on the ballot.[32] The lone Texas case related to the issue made such a holding.[33]

Despite the Texas Election Code's general prohibition on the use of candidate titles on the ballot, the code still allows practices that improperly influence voters, including straight-ticket voting[34] and non-rotating

"M.D." to distinguish candidates with same name as permitting "voter to make an intelligent expression of his choice").

30. *See, e.g.*, Petersen v. Holm, 66 N.W.2d 15, 15 (Minn. 1954) (applying a liberal reading of the Minnesota statute in holding the names "Petersen" and "Peterson" as substantially the same, while making no mention of non-similar candidate names also indistinguishable to voters lacking sufficient knowledge).

31. *Compare Sullivan*, 130 N.W.2d at 394 (upholding the use of title in a contest between two candidates with the same surname as an exercise compatible with government's interest in insuring "full and complete" ballot identification of candidates for effective voter selection), *with* Brockington, *supra* note 7, at 15 (determining that in low information elections, the effect of ballot position becomes more pronounced, granting an advantage to candidates at the top of the ballot regardless of the candidate's identity).

32. *See* People *ex rel.* Richter v. Telford, 242 N.E.2d 464, 467–68 (Ill. App. Ct. 1968) (maintaining ballot listing of title "Dr." for candidate on general election ballot due to sufficient notice of opposing candidate, while upholding Illinois legislature's 1955 removal of "description" from ballot statute); Douville v. Docking, 501 P.2d 778, 779 (Kan. 1972) (failing, due to the sufficient notice of the other candidate, to overturn state legislature primary results in which the winning candidate had "M.D." listed beside his name, while holding that a challenge before election would be sustained due to the statutory definition of name); *Whetsel*, 174 N.E. at 253 (refusing to overturn election of candidate with suffix "M.D." following name, while finding it statutorily unlawful "to place any characterization or description either before or after the name of a candidate upon a ballot" unless doing so was necessary for identification to intelligently express choice).

33. *See* Gray v. Curry, 603 S.W.2d 245, 246 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (finding the mistaken inclusion of title "Rev." as a violation of election laws, but not actionable due to lack of evidence showing effect on election).

34. The term "straight-ticket voting," also known as "straight-party voting," refers to the ability of a voter to cast, with one stroke, a vote for every candidate a party runs for every office in a given multi-office partisan election. *See* Chertoff & Robinson, *supra* note 17, at 1797 ("[T]he practice [of straight-ticket voting] is an abuse of intelligent democracy. . . . [because it] corrupts the integrity of a judicial selection system, impairs judicial independence, and makes the accountability of judges flow not to the voters, but to party bosses."); NAT'L CONFERENCE OF STATE LEGISLATURES, *Straight Ticket Voting*, NCSL, http://www.ncsl.org/research/elections-and-campaigns/straight-ticket-voting.aspx (last updated Jan. 30, 2015) (identifying Texas as one of eleven U.S. states allowing straight-ticket voting by party). *But cf.* Judicial Elections White Paper Task Force, *The Case for Partisan Judicial Elections*, 33 U. TOL. L. REV. 393, 403 (2002) (advocating the use of party labels in judicial elections to help voters select candidates matching the voter's political ideology).

candidate ballot order.[35] These inadequacies in the system,[36] as compared to candidate titles,[37] facilitate problems in the electoral process.[38] The information these practices transmit to voters fails to provide them with the proper facts to consider the merits of a candidate.[39] Alternatively, because titles often signify expertise or level of education, their use or the use of any other qualification-related identifier on the ballot logically provides a voter with more pertinent information about a candidate.[40]

For the purposes of organization, this Comment considers and weighs the competing state interests in a hypothetical challenge to election laws.[41]

35. *See* Miller, *supra* note 17, at 375, 381 (characterizing candidate ballot rotation as an "old solution" to an "old problem," and listing Texas as one of thirty-eight states that does not rotate candidate order on ballots).

36. Texas Supreme Court Chief Justice Wallace Jefferson argued:

> Even if I had never appeared in court, lost every endorsement and fared poorly in polls that assess qualifications, I [as a member of the Republican Party] would still have won in Texas. The state voted for [2008 Republican Party presidential nominee] McCain, and I was the down-ballot beneficiary. Currently, merit matters little in judicial elections. We close our eyes and vote for judges based on party affiliation even though a party label does not ensure a judiciary committed to the rule of law.

Chertoff & Robinson, *supra* note 17, at 1774–75 (quoting Wallace B. Jefferson, *Making Merit Matter by Adopting New System of Selecting Judges*, HOUS. CHRON. (Mar. 21, 2009), http://www.chron.com/opinion/outlook/article/Wallace-B-Jefferson-Make-merit-matter-by-1544078.php).

37. As previously mentioned, courts have refused to nullify elections based on the mistaken inclusion of candidate titles on the ballot. *See Richter*, 242 N.E.2d at 467–68 (affirming the lower court's ruling in denying a Democratic Party candidate's mandamus request, forcing the county's Republican Party candidate for coroner to not be ballot listed under the prefix "Dr." and suffix "O.D."); *Douville*, 501 P.2d at 779 (determining that a candidate lost his opportunity to challenge his opponent's use of the suffix "M.D." on the election ballot); *Whetsel*, 174 N.E. at 253 (upholding the result of a coroner election in which the state mistakenly allowed a candidate to use "M.D." as a suffix on the election ballot); *Gray*, 603 S.W.2d at 246 (refusing to nullify an election in which a candidate was listed as "Rev.").

38. *See* Chertoff & Robinson, *supra* note 17, at 1797 (concluding that Texas's straight-ticket voting for judicial races makes judges accountable to party bosses rather than the public); Miller, *supra* note 17, at 383 (categorizing the "primacy effect," where the first item in a list is often selected, as a voting cue for low-information voters).

39. For judicial elections, the party label does not provide an effective determinant of how a judge will perform. Chertoff & Robinson, *supra* note 17, at 1781. For municipal elections, there is little connection between the duties of the office and the philosophies of political parties. Hugh Rice Kelly, *Accepting Reality: Judicial Elections Are Here to Stay*, 53 THE ADVOC. (TEX.) 48, 49 (2010).

40. *See* Garrett, *supra* note 17, at 1539 (arguing the use of "ballot notations" listing candidate viewpoints and qualifications, similar to the information titles provide, exposes voters to more relevant information than party label, thereby allowing voters to make more competent choices); *cf.* Canary, *supra* note 8, at 89 (discussing polling data revealing that participants who received voter guides for the 1998 Cook County, Illinois municipal election gained the most pertinent information about candidates from descriptions of the candidate's biography, experience, party affiliation, endorsements, and lists of campaign contributors).

41. This Comment is based on the standard used in *Anderson v. Celebrezze*, 460 U.S. 780, 789

Further, it analyzes existing ideas for expanding candidate information on election ballots,[42] which attempt to satisfy the government's interest in holding elections that foster "informed and educated expressions of the popular will."[43]

II. BACKGROUND

The election of public officials remains a cornerstone of America's democratic institution.[44] The Preamble to the United States Constitution proudly proclaims "We the People" as the government's foundation.[45] Article I specifically grants citizens the ability to vote for their representatives.[46] In addition, the United States Supreme Court identifies voting as a fundamental right[47] and recognizes the government's interest in sustaining this right through elections that truly reflect the public will.[48] With the Due Process Clause of the Fourteenth Amendment considered, state governments share this interest.[49]

Given Texas's history as an independent republic, successive Texas constitutions have emphasized the importance of republicanism.[50] Like the Preamble to the U.S. Constitution, the Preamble to the Texas Constitution portrays the people as sovereign[51]—Article I, section 2

(1983).

42. *See* Garrett, *supra* note 17, at 1539 (analyzing the potential use of "ballot notations" to improve voter competence); *cf.* Canary, *supra* note 8, at 91 (advocating publicly-funded voter guides as a means to improving voter competence).

43. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008) (sustaining Washington's blanket primary system under the asserted state purpose of having "educated expressions of the popular will" (quoting *Anderson*, 460 U.S. at 796)); *Anderson*, 460 U.S. at 796 (1983) (finding an early filing date for independent candidates disconnected with government's stated interest in having an informed electorate).

44. *E.g.*, Steven Kull et al., *World Publics Say Governments Should Be More Responsive to the Will of the People*, WORLDPUBLICOPINION.ORG (May 12, 2008), http://www.worldpublicopinion.org/pipa/articles/governance_bt/482.php?lb=btgov&pnt=482 (showing that 96% of Americans still consider elections the most appropriate way to select public officials).

45. U.S. CONST. pmbl.

46. *Id.* art. I, § 2, cl. 1.

47. *See* Reynolds v. Sims, 377 U.S. 533, 561–62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) ("[Voting] is regarded as a fundamental political right, because preservative of all rights.").

48. *See Wash. State Grange*, 552 U.S. at 458 (identifying government's interest in having an informed electorate to guarantee the election of those best representative of the public will).

49. U.S. CONST. amend. XIV, § 1.

50. *See generally* Joseph Milton Nance, *Republic of Texas*, TEX. ST. HISTORICAL ASS'N (June 15, 2010), https://www.tshaonline.org/handbook/online/articles/mzr02 (detailing Texas's history as an independent Republic).

51. *Compare* TEX. CONST. pmbl. ("We, the people of the State of Texas . . ."), *with* U.S. CONST. pmbl. ("We the People of the United States . . .").

explicitly makes this point.[52] Likewise, the Texas Constitution grants citizens the ability to vote, devoting an entire article to suffrage.[53] In lockstep with the Supreme Court, the Supreme Court of Texas recognizes voting as a fundamental right.[54]

In determining whether an election law infringes upon this right, Texas adopted the Supreme Court's balancing test.[55] The balancing test determines the constitutionality of an election law through analysis of the law's effect on the fundamental right of voting, weighed against the state's reason for having such a law.[56] The balancing test is not simply a "litmus-paper" determination.[57] There are three steps in the process.[58] First, a judge examines the magnitude and character of the asserted harm caused by the election law to the plaintiff's First and Fourteenth Amendment rights.[59] Next, the judge determines the state's purpose for having such a law.[60] Finally, the court judges the strength and legitimacy of the state interests and the necessity for those to burden the plaintiff.[61] Generally, regulatory interests justify restrictions of the reasonable and nondiscriminatory kind.[62] However, if the law *severely* inhibits voting rights, it may only survive if "narrowly drawn to advance a state interest of compelling importance."[63]

52. *See* TEX. CONST. art. I, § 2 ("All political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit. The faith of the people of Texas stands pledged to the preservation of a republican form of government, and, subject to this limitation only, they have at all times the inalienable right to alter, reform or abolish their government in such manner as they may think expedient.").

53. *Id.* art. VI.

54. *See* Andrade v. NAACP of Austin, 345 S.W.3d 1, 11 (Tex. 2011) (declaring voting as a fundamental right (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)); Cartledge v. Wortham, 153 S.W. 297, 299 (Tex. 1913) (identifying voting as a "fundamental right"); *see also* Brady v. Fourteenth Court of Appeals, 795 S.W.2d 712, 715 (Tex. 1990) (finding that it is a fundamental right to cast an "effective vote").

55. The Supreme Court of Texas first mentioned the balancing test at length in 1990. *See Brady*, 795 S.W.2d at 715 (restating the applicable balancing test, but failing to use it due to insufficient facts). The court first applied the test in 2002. *See* State v. Hodges, 92 S.W.3d 489, 496 (Tex. 2002) (using the balancing test of *Anderson v. Celebrezze* to consider a challenge to the election code).

56. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 788.

63. The U.S. Supreme Court explained:

> [A]s the full Court agreed in *Anderson* . . . [a] court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise

For example, in *State v. Hodges*,[64] Texas's first application of the balancing test, a judge who voted in an opposing party's primary was unable to run for re-election as his party's nominee due to a restriction in the Texas Election Code.[65] Though the court determined the law restricted the judge's right to vote, it was not a severe restriction.[66] Therefore, the court upheld the statute because the government demonstrated a number of important interests advanced in the law.[67]

Based on its inclusion in the Election Code, it can be assumed Texas's general prohibition on candidate titles[68] is meant to ensure fair, honest, and orderly elections.[69] However, in Texas, there has *not* been any significant examination of the state interests in limiting candidate titles on the ballot.[70] Nevertheless, there has been examination of the issue in other states.[71] To best determine the utility of the law, the justifications for it should be weighed against the effect of restricting the knowledge of low-information voters with the balancing test as a template.[72]

III. HARM IN THE CURRENT STATE

A basic concept of political science underscores the harm in disallowing titles from election ballots. In today's society,[73] opportunity and

> interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Burdick v. Takushi, 504 U.S. 428, 434 (1992).

64. State v. Hodges, 92 S.W.3d 489, 497 (Tex. 2002).

65. *See* TEX. ELEC. CODE ANN. § 162.015(a)(2) (West 2010) ("A person who voted at a primary election or who was a candidate for nomination in a primary is ineligible for a place on the ballot for the succeeding general election for state and county officers as . . . the nominee of a political party other than the party holding the primary in which the person voted or was a candidate.").

66. *Hodges*, 92 S.W.3d at 497.

67. Those interests included regulation of the electoral process, prevention of voter confusion, and the maintenance of the integrity of elections. *Id.* at 497–99.

68. TEX. ELEC. § 52.033.

69. *Cf.* Storer v. Brown, 415 U.S. 724, 730 (1974) (explaining that states established comprehensive and complex election codes to ensure fair, honest, and orderly elections).

70. As previously mentioned, there have been no challenges to the title statute in Texas, and only one reported case has referenced it: Gray v. Curry, 603 S.W.2d 245, 246 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

71. *See, e.g.*, Sooy v. Gill, 774 A.2d 635, 643 (N.J. Super. Ct. App. Div. 2001) (establishing that only a candidate's name and not any title he may have shall be listed on New Jersey election ballots).

72. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (providing the process for resolving a challenge to a state's election laws).

73. According to George Mason law professor Ilya Somin, it is actually rational not to be overly civically engaged because of the statistical meaninglessness of a vote weighed against the concerns of

transaction costs are often too great for voters to research elections in depth without any perceived benefit,[74] especially elections for lower, local offices.[75] This leaves voters with little, if any, knowledge of the distinction between names listed on the ballot.[76] Many citizens simply choose not to vote due to a lack of knowledge.[77] Those who do vote, base their choices on cues obtained from the ballot itself, such as the candidate's placement on the ballot,[78] his party,[79] gender, and sometimes even his perceived ethnicity assumed from his surname.[80] These cues reflect only secondary or tertiary levels of information, less relevant than the primary information gleaned from qualification-related cues not on the ballot.[81] For the low-information voters using these cues, voting tends

life. Somin, *supra* note 6.

74. *See* Garrett, *supra* note 17, at 1543 (arguing that because of opportunity costs and scarcity of attention, Americans devote their resources to things they value, which does not often include voting information); Somin, *supra* note 6 (theorizing that on an individual basis, political ignorance is rational due to the mathematical unimportance of a single vote to the final tally); *cf.* Brockington, *supra* note 7, at 2 ("The cost of information also varies with electoral context. Such costs can be daunting in low information settings . . . .").

75. *See* Brockington, *supra* note 7, at 2 (stating that salient voting cues are not easily obtained for "low profile elections"); *see also* CARPINI & KEETER, *supra* note 5, at 208, 316 (finding that Americans have scarce information about those occupying and running for lower offices); *cf.* Canary, *supra* note 8, at 81–82 (commenting that Americans often lack knowledge of candidates in judicial races because of the intricacies of judicial ethics and lack of media coverage).

76. *See* Brockington, *supra* note 7, at 5 (remarking that voters without knowledge of candidates in a race look for any identifiable distinction on the ballot on which to base their voting decision); Garrett, *supra* note 17, at 1541 ("[M]ost Americans will never allocate much of their limited attention to gathering and assessing information about politics, government, and candidates for public office.").

77. *See generally* News Release, PR Newswire, Dismal Civics Knowledge Linked to Decline in Voting (May 23, 2012), http://www.prnewswire.com/news-releases/dismal-civics-knowledge-linked-to-decline-in-voting-volunteering-among-young-152680795.html (linking trends of lower voting participation and lower civic engagement in youth to civic education).

78. *See, e.g.*, Brockington, *supra* note 7, at 20–21 (concluding that Americans without other information rely on the ballot position of a candidate, which is a rational response to a high cost scenario but yields a high error rate); *see also* Miller, *supra* note 17, at 375–76 (explaining that the "donkey vote" based on ballot position is especially pronounced in elections for lower office).

79. *See, e.g.*, Chertoff & Robinson, *supra* note 17, at 1773–74 (discussing party, particularly straight-ticket selection, as a voting cue for uninformed voters).

80. *See* Brockington, *supra* note 7, at 4 (observing that when no other information is available, voters base their votes on preconceived stereotypes obtained from the name itself on the ballot, such as gender and ethnicity).

81. *See id.* at 3–4 (identifying information obtained from research prior to receiving the ballot as primary, and thus preferable to secondary information obtained from party affiliation, gender, ethnicity, and tertiary information obtained from listing order); *cf.* Canary, *supra* note 8, at 88 (analyzing polling data showing 75% of voters who received a mailed-in voter guide as part of a research study during the 1998 Cook County, Illinois municipal elections used the voter guide for voting preparation).

not to reflect a democratic choice on the voter's part, but a superficial difference generated from the organization of the ballot.[82]

If a large number of voters select candidates based solely on cues not related to merit, one can logically deduce that such voters may elect candidates who enact policies adverse to the true desires of the public. The perception of irresponsive elected officials leads to negative perceptions of government.[83] When citizens view their government with negativity and distrust, they are less likely to participate in the democratic process.[84] Nevertheless, despite the lack of knowledge about the principal democratic foundation of voting,[85] the overwhelming majority of Americans support the nation's tradition of elections.[86] However, larger percentages of Americans than ever identify big government as the nation's greatest threat.[87] Approval of governmental institutions stands at record lows.[88] For the first time, Americans cited "dissatisfaction with government" as the nation's most pressing problem in late 2013.[89] This suggests Americans currently elect government officials who fail to carry out their duties in a manner satisfactory to Americans. Perhaps if voters had improved knowledge of those running for office, they would base their voting decisions on merit and elect more satisfactory officials.[90]

82. *See* Brockington, *supra* note 7, at 4 (determining that low-information voters without additional information tend to base their votes on cues obtained from the ballot such as party affiliation or candidate placement on the ballot).

83. *See* Kull et al., *supra* note 44 ("Trust in government appears to be highly related to how much people perceive the government as being responsive to the will of the people.").

84. *Cf.* Paul R. Abramson & John H. Aldrich, *The Decline of Electoral Participation in America*, 76 AM. POL. SCI. REV. 502, 510–13 (1982) (finding that citizens are less likely to participate in voting when they perceive lack of government responsiveness).

85. *See* CARPINI & KEETER, *supra* note 5, at 208, 316–17 (providing data relating to the American public's knowledge of the democratic process).

86. *See* Kull et al., *supra* note 44 (discovering that 96% of Americans agree that the public should select government leaders through democratic elections).

87. Jeffrey M. Jones, *Record High in U.S. Say Big Government Greatest Threat*, GALLUP (Dec. 18, 2013), http://www.gallup.com/poll/166535/record-high-say-big-government-greatest-threat.aspx (revealing in December 2013, that since first asking in 1965, a record high 72% of Americans identified big government as a greater threat to the nation than big business and big labor).

88. *See* Yu, *supra* note 3 (mentioning a Gallup poll placing Americans' approval of U.S. Congress at 9%—the lowest approval since the question was first asked in 1974—and placing overall trust in the U.S. government at 19%, the lowest since 1992).

89. *See id.* (reporting that for the first time since Gallup began asking the question in the 1930s, Americans believe "dissatisfaction with government" presents the greatest obstacle for the United States).

90. *Cf.* Brockington, *supra* note 7, at 3 ("Increases in information levels allow voters to better approximate optimal strategies of decision making; lower levels decrease the efficacy of 'satisficing' decision strategies.").

However, this may be impossible without voting cues related to merit.[91]

The problems of deficient voter knowledge and loss of interest in participation are even more pronounced in Texas.[92] A University of Texas study placed the state last in civic engagement, and near the bottom in the tendency of citizens to discuss political matters and contact their public officials.[93] In addition, Texas's electoral process does not help to maximize citizens' ability to exert their will through the ballot box.[94] While prohibiting candidate titles,[95] the Texas Election Code furnishes irrelevant cues for voters through the force of law, resulting in random selection arising from the full strength of the primacy effect[96] and perpetuating the factional, partisan[97] stranglehold on the process,[98] against the public's best interest.[99]

While the state cannot directly remedy voter ignorance behind the inadequate voting practices through law,[100] the state can proffer policies to minimize the harm done,[101] or at least offset it. However, before

91. The argument has been made for publicly-funded voting guides to provide candidate information for voters. Canary, *supra* note 8, at 92. This does not guarantee voters will read the guides, especially if the problem is one of time value. *See* Garrett, *supra* note 17, at 1543–44 (stating that individuals place little value on voting and so usually do not take the time to research before going to the polls). It can be logically assumed that cues on the ballot itself will have a greater chance of being read by voters.

92. *See* Rangel, *supra* note 9 (reporting extremely low voter turnout and civic participation in Texas).

93. *Id.*

94. Even outside the candidate title prohibition, scholarship suggests Texas has room for improvement in the way of candidate order rotation and straight-ticket election. *See* Chertoff & Robinson, *supra* note 17, at 1796 (discussing the harm in straight-ticket voting, including that which is caused as a result of the Texas Election Code); Miller, *supra* note 17, at 375, 381 (listing Texas as a state without rotating candidate ballot order, which it identifies as an "old solution" to the "old problem" of low information voters choosing a candidate based on the candidate's ballot position).

95. TEX. ELEC. CODE ANN. § 52.033 (West 2010).

96. *See* Miller, *supra* note 17, at 381 (identifying Texas as a state not taking primacy bias into account by not rotating candidate names).

97. *See* TEX. ELEC. § 52.071 (providing for straight-ticket voting on ballots).

98. *See* Chertoff & Robinson, *supra* note 17, at 1797 (arguing that the ballot option of straight-ticket voting grants too much power to party bosses who already wield strong influence in the selection of candidates).

99. *See, e.g.*, *id.* (focusing on the negative aspects of straight-ticket voting in judicial elections). *But see* Judicial Elections White Paper Task Force, *supra* note 34, at 403–04 (defending partisan elections for their ability to allow low-information voters to select candidates most closely-aligned with the voter's ideology).

100. The state cannot prevent low-information voters from voting in elections through such means as qualification tests. Voting Rights Act of 1965, 42 U.S.C. §§ 1973–1973bb-1 (2012).

101. Improved voter competence is one justification given for posting party identification for candidates. *See, e.g.*, Garrett, *supra* note 17, at 1548 (discussing, in the context of voter competence, party as a voting cue for ideology-based voting).

amending the code, as in any challenge to election laws, the explicit harm in the current state must be fully appreciated as the first step in the balancing test.[102]

A. *Random Selection*

Bias derived from the order in which ballots list candidates for the same office presents itself in nearly every election.[103] Low-information voters are more apt to select the first choice appearing on the ballot,[104] a phenomenon termed the "primacy effect."[105] This effect is more pronounced in elections where voters lack the necessary knowledge to make informed choices.[106] Given the level of the public's ignorance of candidates in lower-office elections,[107] and due to the fact that the Texas Election Code[108] does not allow for the rotation of candidate names on different, individual ballots, the primacy effect is in full force in Texas elections.[109] Frighteningly, this factor can decide elections, and has done

102. *See* Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (outlining the process for challenging a provision of state election laws).

103. However, the magnitude of the effect depends on the level of information available. *See* Brockington, *supra* note 7, at 2 ("While position effect is limited in the United States to low information, nonpartisan races, high profile elections in many democracies are vulnerable, including systems that include compulsory voting or races within parties . . . .").

104. *See id.* at 2 (commenting that because of primacy effect, certain positions on the ballot, such as the top, are more advantageous than others); *see also* Mary Beth Beazley, *Ballot Design as Fail-Safe: An Ounce of Rotation Is Worth a Pound of Litigation*, 12 ELECTION L.J. 18, 52 (2013) (identifying proliferation of common voting mistakes as another negative effect of the non-rotation of candidate names on ballots).

105. *See* Beazley, *supra* note 105, at 20 (defining "primacy effect" as voting in a predictable fashion, typically for the first name on the ballot); Brockington, *supra* note 7, at 4–5 (mentioning that the primacy effect arises when a "fatigued voter" selects from a list of choices with a confirmation bias searching for better reasons not to select the first choice).

106. *See* Brockington, *supra* note 7, at 2–3 (explaining that the primacy effect is more prevalent in elections for lower, local offices and in elections without a partisan cue); Jonathan GS Koppell & Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 279 (2004) (demonstrating the impact of the primacy effect increased the lower the office on the ticket in the 1998 New York City Democratic Party primary).

107. *See* CARPINI & KEETER, *supra* note 5, at 208, 316–17 (reporting 50% of voters polled in 1968 were unable to remember the name of their House Representative in non-election years).

108. *See* TEX. ELEC. CODE ANN. § 52.091 (West 2010) (specifying party candidates "shall be arranged in descending order of the number of votes received statewide by each party's candidate for governor in the most recent gubernatorial general election," and order of parties without a gubernatorial candidate should appear below in an order "determined by a drawing conducted by the secretary of state"); *id.* § 52.094(a) (providing for the order of independent candidates or candidates in a nonpartisan race to be determined through a drawing).

109. *See* Miller, *supra* note 17, at 382 (listing Texas as one of the states that does not allow the rotation of candidate names on ballots to minimize the primacy effect).

so in the past[110]—likening the selection of public officials as analogous to the roll of dice.[111]

Rotating names helps minimize the consequences of the primacy effect,[112] but it does not minimize the effects of other ballot concerns.[113] With rotation, low-information voters will continue to base their votes on the perceived ethnicity and gender of a candidate, gleaned only from that candidate's name.[114] Aside from removing voting from the process of selecting public officials,[115] providing better cues for low-information voters is the accepted method to minimize the harms of voter incompetence.[116] Texas uses party affiliation[117] to remedy this harm.[118] However, party identification only adds another layer of bias, conflating national and local concerns,[119] and threatening democracy through the

110. *See* Jonathan GS Koppell and Jennifer A. Steen, *The Effects of Ballot Position on Election Outcomes*, 66 J. POL. 267, 279 (2004) (concluding from analysis of the 1998 New York City Democratic Party primary that the primacy effect can alter the result of close elections); Brockington, *supra* note 7, at 21 (supplying accounts of elections in which the decision hinged on the primacy effect).

111. *See* Miller, *supra* note 17, at 378–39 (comparing the determination of candidate order by lottery to a game of dice); Express News Editorial Bd., *Judicial Ballot in Dire Need of Reforms*, SAN ANTONIO EXPRESS-NEWS, Nov. 8, 2012, at A16 ("Judicial races have become no more than a roll of the dice with the outcome dictated by winners at the top of the ballot, and it is not good for any of the parties involved.").

112. *See* Miller, *supra* note 17, at 375 (endorsing ballot rotation as "an old solution to an old problem"); *see also* Beazley, *supra* note 105, at 52 (noting that ballot rotation also decreases the effect of common voter mistakes).

113. *But see* Beazley, *supra* note 105, at 52 (arguing that ballot rotation may reduce the chance of voter mistake).

114. *See* Brockington, *supra* note 7, at 4 (explaining that in addition to ballot position, low-information voters rely on party listing as well as the perceived gender and ethnicity of a candidate, garnered from the candidate's name).

115. There have been efforts to replace the election of judges in Texas with merit selection by public officials. However, these efforts have not gained traction toward implementation, and in such a system, voting is still retained for other offices. *See* Kelly, *supra* note 39, at 48–49 (rationalizing that merit selection is unlikely to be implemented in Texas because it would require amendment of the Texas Constitution, for which it would be difficult to gain voter acceptance, and because it raises too many questions of detail).

116. *Cf.* Garrett, *supra* note 17, at 1539 (stating that ballot notations could improve voter competence by providing a relevant cue).

117. *See* TEX. ELEC. CODE ANN. § 52.065 (West 2010) (specifying how political party should be noted on a standard ballot).

118. *Cf.* Judicial Elections White Paper Task Force, *supra* note 34, at 403–04 (arguing that listing party affiliation in judicial elections provides a clearer view of a candidate's judicial philosophy than not listing party affiliation). *Contra* Chertoff & Robinson, *supra* note 17, at 1781 (observing that party ideology is not determinative of a candidate's suitability to serve as a judge).

119. *Cf.* Chertoff & Robinson, *supra* note 17, at 1781 ("Party ideology and factors generally recognized as making for a 'good' judge do not neatly align. Whether a judge or judicial candidate is a Republican or Democrat does not speak to his or her ability to manage a substantial trial docket, to

encouragement of factionalism.[120]

B. *Partisan Control of Elections*

In the Federalist Papers, James Madison warned of the rise of factions as a detriment to republican society.[121] He argued that though it would be against the concept of liberty to attack the causes of factions,[122] it would be beneficial to minimize their harmful effects.[123] Madison believed the Constitution's distribution of power minimized these harms.[124] However, factions of society in the form of parties still exert their divisiveness on society today.[125]

Rather than minimizing the negative effects of factions, the Texas Election Code encourages them. It specifies that candidates for lower office, including judges, be identified on the ballot as having received the endorsement of a political party.[126] Hence, political parties decide who is elected, not necessarily because they are the best representatives for the citizenry but because they are the individuals whom the parties believe will be best to further their political interests.[127] With straight-ticket voting, the problem expands—voters simply endorse the selections of the party leaders without consideration of any individual candidate's merit.[128]

exercise decorum on the bench, or to author intelligent, reasoned opinions."); Kelly, *supra* note 39, at 49 (maintaining that "little logical connection" exists between the practical duties of a lower office such as governing a city and the partisan identity of candidates).

120. *See* THE FEDERALIST NO. 10, at 1 (James Madison) (identifying the creation of strong factions as a threat to republican government).

121. *See id.* ("The instability, injustice, and confusion introduced into the public councils [by factions], have, in truth, been the mortal diseases under which popular governments have everywhere perished . . . .").

122. Including the First Amendment right to assemble. U.S. CONST. amend. I.

123. *See* THE FEDERALIST NO. 10, at 1 (James Madison) ("There are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.").

124. *See id.* at 4 ("In the extent and proper structure of the Union, therefore, we behold a republican remedy for the diseases most incident to republican government.").

125. *See, e.g.*, *Partisan Polarization Surges in Bush, Obama Years*, PEW RESEARCH CTR (June 4, 2012), http://www.people-press.org/2012/06/04/partisan-polarization-surges-in-bush-obama-years (showing party polarization at its highest level in 2012 since the poll began in 1987, and showing a greater divide between those of different parties than between those of different races, education levels, income, religion, and gender).

126. *See* TEX. ELEC. CODE ANN. § 52.065 (West 2010) (providing the basis for how political party should be identified on a standard ballot).

127. *Cf.* Chertoff & Robinson, *supra* note 17, at 1797 (characterizing straight-ticket voting in judicial elections as "an abuse of intelligent democracy" that "corrupts the integrity of the judicial selection system, impairs judicial independence" and causes judges to be accountable to party bosses rather than the voting citizenry).

128. *See* TEX. ELEC. § 52.071 (providing for straight-ticket voting on ballots); Chertoff & Robinson, *supra* note 17, at 1782–83 (arguing that because of the low information nature of judicial

Proponents of partisan elections argue that party labels provide low-information voters with a beneficial cue to identify candidates sharing their interests.[129] However, the national political issues that cause the division between parties do not often concern the duties of lower offices.[130] Mass voting in such a manner leads to undesirable results.[131] For example, in Bexar County, Texas, Republicans swept the lower races contested for election in 2010, reflecting the national attitude.[132] Two years later, Democrats nearly swept the lower races, again reflecting the national attitude.[133] And two years after that, for the same reason, Republicans nearly swept the lower races once more.[134] As a result of these elections, respected and well-qualified judges were removed from their offices on the sole basis of their party affiliation.[135]

Repealing the prohibition on titles and allowing candidates to be identified based on their job experience and education will help to minimize the political parties' monopoly over the election process. It will add another, more helpful cue on which low-information voters can base

races in states with straight-ticket voting, voters simply vote for all candidates of a particular party without even examining the names of candidates).

129. *See* Judicial Elections White Paper Task Force, *supra* note 34, at 403–04 (endorsing party listing for judicial elections to provide voters with an additional voting cue).

130. *Cf.* Chertoff & Robinson, *supra* note 17, at 1781 (expressing that party preference is not an accurate gauge of an individual's effectiveness as a judge); Kelly, *supra* note 39, at 49 (discussing the acceptance of nonpartisan election in several Texas municipalities as beneficial due to its removal of the logically irrelevant cue of party in city business).

131. *See* Chertoff & Robinson, *supra* note 17, at 1780–81 (chronicling county-wide "sweeps" of judges in Texas's lower courts based on changes in the electorate's partisan mood, and arguing these sweeps lead to the removal of experienced judges, leaving "courts to play catch-up" to allow the newly elected judges to transition into their new positions); Jaime Castillo, Editorial, *Our Wrongheaded Judicial Elections Demand Rethinking*, SAN ANTONIO EXPRESS-NEWS, Nov. 11, 2008, at 1B (attacking partisan judicial elections as allowing qualified candidates with bipartisan support to lose based on the party label used on the ballot).

132. *See* Editorial, *Let's Reconsider Our Selection of Judges*, SAN ANTONIO EXPRESS-NEWS, Nov. 4, 2010, at 7B (supporting judicial election reform following the Republican Party's 2010 sweep of Bexar County's judicial elections).

133. *See* Editorial, *Judicial Ballot in Dire Need of Reforms*, SAN ANTONIO EXPRESS-NEWS, Nov. 8, 2012, at A16 (opining on the need for judicial election reform in wake of the Democratic Party's near-sweep of judicial elections in Bexar County).

134. Guillermo Contreras, *GOP Nearly Sweeps All Bexar Judge Races*, MySA.com (Nov. 5, 2014, 9:43 AM), http://www.mysanantonio.com/news/local/article/GOP-nearly-sweeps-all-Bexar-judge-races-5872672.php.

135. *See id.* (listing several Democratic judges in Bexar County with little experience replacing experienced Republican judges as a result of the 2012 partisan sweep); Editorial, *Let's Reconsider Our Selection of Judges*, SAN ANTONIO EXPRESS-NEWS, Nov. 4, 2010, at 7B (identifying respected Democratic judges in Bexar County who were replaced with Republicans as a result of the 2010 Republican Party sweep).

their choice, rather than encouraging them to follow the party bosses.[136]

To truly demonstrate the need for change, the harm here identified in the state's concealment of important voting cues, must be weighed against the state justification for the general prohibition on listing candidate titles on the election ballot,[137] as specified in the Texas Election Code.[138]

IV. STATE JUSTIFICATION

A. *Development in Texas*

With the stated purpose of making sure "the will of the people . . . prevail[s] and that true democracy . . . [does] not perish," the Texas legislature passed the state's first election code in 1951.[139] This came after a 1949 joint committee report endorsed creation of an election code to replace what had been described as the state's "confusing, complex and inadequate" election laws.[140] The 1951 Election Code lacked any mention of the placement of candidate titles on election ballots.[141]

Movement toward the codified exclusion of titles commenced with the 1962 issuance of an additional committee report on Texas election law.[142] In that report, the committee proposed an amendment to the Election Code to prohibit the listing of titles, except under specific circumstances.[143] The only rationale given for the proposed amendment was "there are no provisions in the [Texas] Election Code in regard to use of nicknames and titles on the ballot."[144] The next year, the legislature passed an amendment to the Election Code, adopting the language of the

136. *Cf.* Chertoff & Robinson, *supra* note 17, at 1779 (observing that political parties encourage the use of straight-ticket voting, illustrating the Dallas County Democratic Party chairwoman in 2008 calling for voters to "vote D and you're done").

137. *See* State v. Hodges, 92 S.W.3d 489, 496 (Tex. 2002) (using the balancing test set forth in *Anderson v. Celebrezze* to consider a challenge to the election code).

138. TEX. ELEC. CODE ANN. § 52.033 (West 2013).

139. Act of May 30, 1951, 52d Leg., R.S., ch. 492, § 1, art. 1, 1951 Tex. Gen. Laws 1097, 1097, *repealed by* Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802.

140. H.J. of Tex., 51st Leg., R.S. 542 (1949); S.J. of Tex., 51st Leg., R.S. 953 (1949).

141. *See* REPORT OF THE TEX. ELECTION LAW STUDY COMM., S. 58-30, R.S., at 87 (1962) ("At the present time there are no provisions in the Election Code in regard to use of nicknames and titles on the ballot."); *see also* Act of May 30, 1951, 52d Leg., R.S., ch. 492, § 1, art. 57, 1951 Tex. Gen. Laws 1097, 1120, *repealed by* Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802 (making no mention of candidate titles in the article concerning the official ballot).

142. REPORT OF THE TEX. ELECTION LAW STUDY COMM., S. 57-30, R.S., at 87 (1962).

143. *See id.* ("Except as herein permitted, no title or other designation of status, office, position or attainment shall be affixed to any candidate's name.").

144. *Id.*

proposal.[145] Codified under Texas Election Code Article 6.01(a), it read, "[e]xcept as herein permitted, no title or other designation of status, office, position or attainment shall be affixed to any candidate's name."[146] The 1985 recodification of the Election Code renumbered the statute under chapter 52, and mostly preserved this language, making only stylistic changes.[147] That particular language remains in effect today.[148]

In the only reported use of the statute in a Texas court, the 1980 decision of *Gray v. Curry*,[149] the Texas Court of Civil Appeals in Houston chose not to invalidate the result of an election for the office of Democratic Party precinct chairman, where the incumbent lost his seat to a challenger whom the state mistakenly listed on the ballot under the prefix "Rev."[150] Because the statute made the law clear, the decision turned not on interpretation of the law, but on whether the loser could prove the mistake cost him the election.[151] He could not, and so the result remained unchanged and there was no inquiry into the statute.[152]

B. *Justification Elsewhere*

Considering the lone Texas case on the issue and the fruitless excuse given for its inclusion in the legislative proposal, the prohibition of titles from Texas ballots lacks any substantive justification in Texas law. Nevertheless, in other jurisdictions, proponents of similar laws have provided more detailed rationales.[153]

The 1964 decision of *State ex rel. Rainey v. Crowe*[154] from the St. Louis Court of Appeals gave the first substantive justification for the prohibition of candidate titles.[155] Though the court noted the utility in listing a

145. Act of June 10, 1963, 58th Leg., R.S., ch. 424, § 31, 1963 Tex. Gen. Laws 1017, 1048, *repealed by* Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802.

146. *Id.*

147. *See* Act of May 13, 1985, 69th Leg., R.S., ch. 211, § 1, 1985 Tex. Gen. Laws 802, 870 ("Except as otherwise provided by this subchapter, a title or designation of office, status, or position may not be used in conjunction with a candidate's name on the ballot.").

148. TEX. ELEC. CODE ANN. § 52.033 (West 2010).

149. Gray v. Curry, 603 S.W.2d 245 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

150. *Id.* at 245–46.

151. *Id.* at 246.

152. *Id.*

153. *See* Sooy v. Gill, 774 A.2d 635, 643 (N.J. Super. Ct. App. Div. 2001) (justifying the removal of candidate titles as part of the state's interest in "protect[ing] the electorate from confusion, deceit, or deception"); Toigo v. Columbia Cnty. Bd. of Elections, 273 N.Y.S.2d 781, 783–84 (Sup. Ct. 1966) (disallowing candidate titles as a matter of fairness); State *ex rel.* Rainey v. Crowe, 382 S.W.2d 38, 46 (Mo. Ct. App. 1964) (upholding the prohibition on candidate titles to avoid cluttering the ballot).

154. State *ex rel.* Rainey v. Crowe, 382 S.W.2d 38 (Mo. Ct. App. 1964).

155. *See id.* at 44–46 ("To print the initials 'M.D.' on a ballot would be a listing of a qualification

candidate's status as a licensed physician or lack thereof for the position of coroner,[156] the absence of a Missouri statute specifying this, bound the court to exclude title from the ballot.[157] In the court's view, allowing a title listing in that context would have created a slippery slope leading to further, less purposeful requests that the state would be obliged to approve, thereby cluttering the ballot and confusing voters.[158]

The New York Supreme Court decided similarly two years later in *Toigo v. Columbia County Board of Elections*.[159] Reinforcing *Rainey*'s practical argument, *Toigo* added fairness as a justification, finding it unjust for the presentation of one candidate's ballot listing to differ in such a significant way from the listing of another candidate.[160] Though overlooked at the time, the issues cited in *Toigo* and *Rainey* could have been averted had the states constructed statutes similar to the current statute in Arkansas.[161] Arkansas explicitly limits the use of titles to those holding elected office and clearly defines how the sometimes ambiguous title of "Judge" may be used.[162]

In 2001, the Superior Court of New Jersey furnished a stronger justification than what the previous courts provided. In *Sooy v. Gill*[163] the

of relator and for this there is no provision in the statutes of the State of Missouri.").

156. *See id.* at 45–46 ("We may agree with relator that the public is entitled to know that a duly licensed physician is running for the office of Coroner. But there is nothing in the law that permits either the candidate or the Board of Election Commissioners to use the ballot for campaign propaganda and statements of qualifications of candidates.").

157. *See id.* at 46 ("But since the law makes no such requirement we are compelled to turn a deaf ear to this plea.").

158. *Id.* ("[T]o permit relator to place a set of initials after his name on the ballot under the circumstances of this case would require said Board of Election Commissioners in connection with the names of other candidates to place on the ballot descriptive matter requested by them, which could seriously encumber the ballot and cause confusion in the minds of the voters.").

159. Toigo v. Columbia Cnty. Bd. of Elections, 273 N.Y.S.2d 781 (Sup. Ct. 1966).

160. *See id.* at 783–84 ("It would be neither fair nor practical to permit the insertion of such titles or degrees with candidates' names, much less the myriad appellations and items of descriptive matter that might logically follow and which election fever and ingenuity would undoubtedly generate.").

161. According to the Arkansas Statute:

> A person . . . may add as a prefix to his or her name the title or an abbreviation of an elective public office the person currently holds . . . . A person may use as the prefix the title of a nonpartisan judicial office in an election for a nonpartisan judicial office only if: (i) The person is currently serving in a nonpartisan judicial office to which the person has been elected in the last election for the office; or (ii) The person: (a) Is a candidate for the office of circuit judge or district judge; (b) Is currently serving in the office of circuit judge or district judge as an appointee; and (c) Has been serving in that position for at least twelve (12) months.

ARK. CODE ANN. § 7-7-305 (2012).

162. *Id.*

163. Sooy v. Gill, 774 A.2d 635 (N.J. Super. Ct. App. Div. 2001).

court suggested that allowing candidate titles on the ballot would only create another basis for unnecessary disputes.[164] As an example, the court provided the hypothetical scenario of a candidate with a degree from an unaccredited university.[165] The candidate wishes to use a title on the ballot before or after his name, signifying he received a degree, as if equal to that from an accredited university.[166] If the state mistakenly approved a ballot with the fraudulent title, litigation would likely ensue, as it has when states mistakenly posted candidate titles.[167] However, as previously mentioned, this risk of error already exists. States, including Texas,[168] allow titles for candidates when at least two vying for the same office have similar surnames.[169] Allowing titles for every election may increase the prevalence of fraud, but fraud always has the potential to seep into an electoral process. Additional due diligence from ballot certifiers can help in overcoming such fraud.

164. *See id.* at 640 ("Much mischief can result from permitting discretion in this field without a candidate showing more than he or she is known in the community by the appellation "doctor.").

165. *Id.*

166. *Id.*

167. *See* Gray v. Curry, 603 S.W.2d 245, 246 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ) (choosing not to overturn an election in which a candidate was mistakenly listed as "Rev."); *see also* People *ex rel.* Richter v. Telford, 242 N.E.2d 464, 467–68 (Ill. App. Ct. 1968) (affirming the lower court's decision denying a Democratic Party candidate's mandamus request requiring the county's Republican candidate for coroner not be listed with the prefix "Dr." and suffix "O.D."); Douville v. Docking, 501 P.2d 778, 779 (Kan. 1972) (per curiam) (mem. op.) (finding candidate had passed up his opportunity to challenge his former opponent's use of the suffix "M.D." on the ballot); State *ex rel.* Whetsel v. Murphy, 174 N.E. 252, 253 (Ohio 1930) (per curiam) (maintaining the result of an election for coroner in which one candidate used "M.D." as a suffix).

168. *See* TEX. ELEC. CODE ANN. § 52.032 (West 2010) ("If two or more candidates for the same office have the same or similar surnames, each of those candidates may have printed on the ballot a brief distinguishing description or title . . . .").

169. *See* MICH. COMP. LAWS ANN. § 168.696(3) (West 2012) (mandating that for each candidate with the same or a similar surname as another candidate on the ballot, the election board post each candidate's occupation, birth date, or place of residence on either the ballot itself or on slips laid on the machine used for voting); N.M. STAT. ANN. § 1-10-6 (West 2013) (calling for the placement of both the occupation and the post office address belonging to a candidate, immediately below the name posted on the ballot if the candidate shares a surname or has a surname similar enough to cause voter confusion between that particular candidate and another candidate in the same election); 25 PA. CONS. STAT. ANN. § 2965 (West 2007) (providing the process whereby candidates who share surnames or have surnames similar to other candidates on the ballot for a particular office, file a request at most five days after the deadline for filing nomination documents to have the county's board of elections print the candidate's occupation or residence on the ballot); V.I. CODE ANN. tit. 18 § 511 (1998) (repeating the procedure provided in the Pennsylvania statute with the "Supervisor of Election" having the responsibility to print occupation or residence of a candidate sharing or having a name similar to another candidate for the same position, upon the request of such a candidate).

V. WEIGHING INTERESTS

Despite the differences in the magnitude of harm, any potential legal challenge to the prohibition on candidate titles in the Texas Election Code[170] will likely not succeed in court. A hypothetical plaintiff here would have trouble proving he suffered severe harm as a result of the statute.[171] Moreover, in challenges to election laws, the Supreme Court assumes voters educate themselves on pertinent campaign issues, such as candidate background.[172] Even though it is a state interest to have an informed electorate,[173] the state has no duty to make it so. A legal challenge will not be sufficient to overturn the title statute because the statute is clearly constitutional. Based on other states' justifications,[174] the Texas statute reasonably satisfies the government's regulatory interests in elections.[175] Furthermore, it does not discriminate against any identifiable group.[176] Though institutional harms[177] result from the Texas Election Code, these harms cannot be clearly attributed to the title statute alone.[178] By itself, the statute does not severely inhibit voting rights.[179] However, "[t]he Constitution does not prohibit legislatures from enacting stupid laws."[180] The title statute stands in the way of legal remedy to evident societal harms in constitutionally sound institutions.[181]

The harm that proponents say the prohibition avoids seems miniscule when compared to the harms that the Texas Election Code perpetuates.

170. TEX. ELEC. § 52.033.

171. *Cf.* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (holding that in order for the court to determine whether a regulation was "narrowly drawn to advance a state interest of compelling importance," a "severe" restriction must be shown (quoting Norman v. Reed, 502 U.S. 279, 289 (1992))).

172. *See* Anderson v. Celebrezze, 460 U.S. 780, 796 (1983) ("Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues.").

173. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008).

174. *See, e.g.*, *Sooy*, 774 A.2d at 640 (seeing fraud as justification to prohibit the listing of candidate titles).

175. *See Anderson*, 460 U.S. at 788 (mandating that the state's regulatory interests be reasonable).

176. *See id.* (requiring the state's regulatory interests be non-discriminatory).

177. *See supra* Section III.

178. As discussed, the Texas Election Code does not account for the primacy effect, maintaining the effect of position on the result. Miller, *supra* note 17, at 381. It also uses straight-ticket voting, allowing voters to cast ballots without even considering the candidate's name. Chertoff & Robinson, *supra* note 17, at 1781–83.

179. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (necessitating a showing of severe restriction in the election law).

180. *See* N.Y. State Bd. of Elections v. Lopez Torres, 552 U.S. 196, 209 (2008) (Stevens, J., concurring) (quoting from memory, former fellow Associate Justice, Thurgood Marshall).

181. Based on Supreme Court jurisprudence, "a challenge to Texas-style straight ticket voting would have little chance to prevail before the Court." Chertoff & Robinson, *supra* note 17, at 1789.

Continuing to allow candidates to be listed on the ballot in an arbitrary order[182] alongside notes signifying the endorsement of one private organization (political party),[183] without providing any experience or qualification-related cues for low-information voters, contravenes the state's interest in having an election and a government reflective of the true intentions of the people.[184] These harms strike at the core of democratic society.

On the other hand, the harm asserted as justification for prohibiting titles can be overcome with simple fixes. A new statute can provide clearly defined stipulations to address what candidate information may or may not be included on the ballot.[185] The statute can stipulate that the ballot be organized in a uniform manner to avoid fairness claims. Furthermore, increased due diligence on the part of election certifiers can minimize fraud and allow for greater identification of existing fraud regardless of title inclusion.

Texas already recognizes the utility of using titles when referring to otherwise unidentifiable candidates.[186] The Texas Election Code admits that the use of titles, especially those signifying occupation, as beneficial when one or more candidates have similar names.[187] The use in this context acknowledges the validity of occupation through title as a cue for identifying the best candidate available. If supplying information on the ballot helps voters differentiate between otherwise undistinguishable names in such situations, then such information should always be available on the ballot for lower office contests, in which many voters cannot distinguish between two dissimilar names.[188] Likewise, the state exercises its interest in furnishing relevant information on the ballot during the odd-year November elections. Rather than simply listing propositions by name and number, ballots include short explanations as to how each proposition

182. *See* Miller, *supra* note 17, at 380–81 & n.40 (listing Texas as a state that does not rotate randomized candidate order on ballots, but one that maintains uniformity).

183. *See generally* TEX. ELEC. CODE ANN. § 52.065 (West 2010) (describing how a candidate's political party should be specified on a standard ballot).

184. *See* Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008) (citing *Anderson*, 460 U.S. at 796) (mentioning the state interest in having voters express an informed choice consistent with their will).

185. *See generally* ARK. CODE ANN. § 7-7-305 (2012) (setting clear boundaries for the usage of titles).

186. *See* TEX. ELEC. § 52.032 (indicating ballot procedure for candidates having similar or identical names).

187. *Id.*

188. *Cf.* CARPINI & KEETER, *supra* note 5, at 208, 316–17 (finding Americans routinely lack sufficient knowledge regarding public officials and those running for public office).

amends the Texas Constitution.[189] Such explanations, termed ballot notations,[190] provide voters with the necessary knowledge to make an informed choice. The Texas Election Code's general prohibition on titles[191] impedes voters from making informed choices. In a climate rampant with low-information voters, allowing for the placement of additional, relevant information on the ballot[192] moves toward achieving the state's interest in having a government truly reflect the will of people.[193]

VI. ALTERNATIVES

Lifting the title statute alone would not immediately resolve the issue this Comment addresses. After repeal, the state legislature would need to set reasonable parameters on the usage of titles to counteract the concerns discussed in the previous section. Though there exists many ways to fill the void a repeal would create in the Election Code, two alternatives that maximize the value of information on the ballot. First, there is the Guam model, which allows candidates to list statements, nicknames, or titles below their name on the ballot, not to exceed twenty letters.[194] Second, there is the ballot notation model, currently in use in Texas propositional elections,[195] which provide statements of pertinent facts about a particular choice.[196]

189. *See* TEX. ELEC. § 52.072 ("Except as otherwise provided by law, the authority ordering the election shall prescribe the wording of a proposition that is to appear on the ballot . . . . A proposition shall be printed on the ballot in the form of a single statement and may appear on the ballot only once.").

190. *See* Garrett, *supra* note 17, at 1536–40 (analyzing the utility of such ballot notations as "Declined to Pledge to Support Term Limits," "Disregarded Voters' Instruction on Term Limits," "Signed Term Limits Pledge," "Broke Term Limits Pledge," etc.). *But see* Cook v. Gralike, 531 U.S. 510, 525–26 (2001) (striking down Missouri's use of ballot notations concerning term limits in Congressional elections as inappropriately implying the issue of term limits is important or paramount to the voting decision).

191. TEX. ELEC. § 52.033.

192. *Cf.* Garrett, *supra* note 17, at 1539–40 (arguing that ballot notations can increase voter competence by providing relevant information about candidate viewpoints).

193. *E.g.*, Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 458 (2008) (citing Anderson v. Celebrezze, 460 U.S. 780, 796 (1983)) (identifying government's interest in having an informed electorate to truly reflect the will of the people).

194. 3 GUAM CODE ANN. § 7115 (2013).

195. TEX. ELEC. § 52.072.

196. *Cf.* Garrett, *supra* note 17, at 1537 (using the example of a candidate's position on term limits to define a "ballot notation" as a statement on the ballot providing information about a candidate).

A. *Guam Model*

The Guam Election Code allows candidates to list any message to voters below the candidates' names as long as the message meets two requirements: (1) it does not exceed twenty letters, and (2) it is not obscene.[197] Of the thirty candidates for the territorial legislature in the 2012 election, twenty-five took advantage of the statute.[198] Many used shortened versions of their official name, but others included slogans, titles, or a combination.[199] Of these, titles and slogans have the most potential to provide value for low-information voters.[200] Whereas the utility of nicknames requires voters to know a candidate by that nickname, titles can help show credentials and qualification. Slogans may reveal positions on the issues. Nevertheless, there is danger in slogans that misrepresent candidates or oversimplify issues, turning the ballot into a forum for electioneering.[201]

Guam's relatively liberal restrictions distinguish it from nearly every other territory and state in the United States. The only state with a comparable statute is Nevada, which allows candidates to incorporate a nickname between the candidate's given name and surname, using no more than ten letters.[202] However, the Nevada law stipulates:

> A nickname must not indicate any political, economic, social or religious view or affiliation and must not be the name of any person, living or dead, whose reputation is known on a statewide, nationwide or worldwide basis, or

197. 3 GUAM CODE ANN. § 7115 (2013).

198. *See* GUAM ELECTION COMM'N, SAMPLE BALLOTS (Oct. 10, 2012), https://docs.google.com/a/gec.guam.gov/file/d/0B_3ylv378_szemJlTllFcUNzWHc/edit?pli=1 (listing fifteen Democratic candidates and fifteen Republican candidates for legislature with Democrats Tom Ada, Frank Blas Aguon Jr., and Joe S. San Agustin, and Republicans Mana Silva Taijeron and Bryant McCreadie, not including a statement below their names).

199. Republican Christopher M. Duenas used the shortened name, "Chris"; Democrat Michael F.Q. San Nicolas used the slogan "Responsible Guam"; Democrat Judith P. Guthertz used combination "Judi/Dr.J/Chief"; and Republican Roland Blas used the Chamorro title "Techa." GUAM ELECTION COMM'N, *supra* note 202. "Techa" means prayer director. Chamorro Online Dictionary, http://www.chamoru.info/dictionary/display.php?action=search&by=T&nr_page=4 (last visited Apr. 7, 2015).

200. *Cf.* Canary, *supra* note 8, at 89 (discussing a poll showing voters who were given voting guides about candidates for the 1998 Cook County, Illinois municipal election felt the most beneficial information provided included background and biographical information, which titles can also provide).

201. Electioneering on the ballot itself may be in violation of Texas's prohibition on electioneering at the polling place. *See* TEX. ELEC. § 61.003 ("A person commits an offense if, during the voting period and within 100 feet of an outside door through which a voter may enter the building in which a polling place is located, the person: (1) loiters; or (2) electioneers for or against any candidate, measure, or political party.").

202. NEV. REV. STAT. § 293.2565 (2010).

> in any other manner deceive a voter regarding the person or principles for which he or she is voting.[203]

Were this standard applied to Guam's law, the dangers of misrepresentation and oversimplification through slogans would be eliminated. On the other hand, disallowing the listing of candidate views reduces the value of the statement to low-information voters.

A modified version of the Guam model that keeps most of that law in place but prevents misrepresentation and electioneering could be a viable alternative to the general title prohibition in the Texas Election Code.[204] With that in place, Texas could be at the forefront of a movement to craft election laws that allow voters to better express their preferences. Given the usage of electronic ballots in Texas,[205] limits on the number of letters due to space considerations may not be as great of an issue. Further, the risk of electioneering and misrepresentation could be eliminated if neutral, uninterested parties crafted the statements. The use of ballot notations in this way may be an even more viable option than the Guam model, especially since certain Texas elections already use ballot notations to inform voters on pertinent matters.[206]

B. *Ballot Notation Model*

When the people of Texas determine whether to approve or deny a constitutional amendment, their ballots do not simply list the official name or designation given to the proposition.[207] Ballots must also include statements that allow for an informed choice.[208] For example, the Texas Election Code explicitly states that when a proposition will raise or lower taxes, the ballot must include the amount for which taxes will rise or decrease.[209] The bare listing of a proposition name or designation may give no indication as to whether a change in tax policy will raise or lower taxes.[210] In fact, the Supreme Court of Texas has required that the ballot

203. *Id.*

204. TEX. ELEC. § 52.033.

205. *See id.* § 122.0331 (setting requirements for use of electronic voting systems).

206. *Id.* § 52.072.

207. *Id.*

208. *See* R.R. Comm'n v. Sterling Oil & Ref. Co., 147 Tex. 547, 218 S.W.2d 415, 418 (1949) ("The Constitution requires that certain publicity shall be given a proposed amendment prior to an election. This is done to identify the amendment and to show its character and purposes, so that the voters will be familiar with the amendment and its purposes when they cast their ballots.").

209. TEX. ELEC. § 52.072.

210. *Cf.* Turner v. Lewie, 201 S.W.2d 86, 90–91 (Tex. Civ. App.—Fort Worth 1947, writ. dism'd) (finding the ballot listing of amendment numbers alongside "for" and "against" to be inadequate for voters to make an intelligent choice in a municipal election).

identify a proposition "with such definiteness and certainty that the voters are not misled."[211] This requires that the ballot show the character and purpose of the proposition, "in such language as to constitute a fair portrayal of [its] chief features . . . in words of plain meaning, so that it can be understood by persons entitled to vote."[212]

Despite this fundamental understanding, this principle does not extend to candidates. When it comes to down-ticket candidates—about whom there may be even less available information than the text of propositions—statements providing pertinent information about identification, experience, and qualification may be the only way to prevent voters from being misled. However, "title or designation of office, status, or position" cannot be used to inform voters about a candidate's pertinent traits, due to the Texas Election Code's general prohibition on titles.[213] When applied to candidates, ballot notations may cause voters to take more time to vote, producing long lines that might impede voting.[214] It may also increase the amount of legal disputes related to the ballot arising from statements.[215]

Professor Elizabeth Garrett puts forth several proposals designed to deal with the problems of notations while maintaining their utility.[216] To limit the content, she theorizes that the state should sponsor opinion polls to determine the most pertinent issues to voters.[217] Alternatively, she suggests the candidates themselves provide the notation,[218] similar to the

211. *See* Blum v. Lanier, 997 S.W.2d 259, 262 (Tex. 1999) (quoting Reynolds Land & Cattle Co. v. McCabe, 12 S.W. 165, 165–66 (Tex. 1888)) (deciding that the City of Houston's ballot description of a proposed nondiscrimination charter did not properly describe the proposal).

212. City of McAllen v. McAllen Police Officers Union, 221 S.W.3d 885, 895 (Tex. App.—Corpus Christi 2007, pet. denied) (quoting Wright v. Bd. of Trs. of Tatum Indep. Sch. Dist., 520 S.W.2d 787, 792 (Tex. Civ. App.—Tyler 1975, writ dism'd)) (determining that the City of McAllen misled voters when it failed to provide a "fair portrayal" of a proposed charter); *see also Sterling Oil*, 218 S.W.2d at 418 (specifying that the ballot identify the purpose and character of a proposition).

213. TEX. ELEC. § 52.033.

214. *See* Garrett, *supra* note 17, at 1585–86 (mentioning that a ballot loaded with campaign slogans and candidate statements would increase the size of the ballot and perhaps result in longer waiting lines for voting).

215. *Cf.* Sooy v. Gill, 774 A.2d 635, 640 (N.J. Super. Ct. App. Div. 2001) (explaining that the use of candidate titles on the ballot will likely increase disputes, causing additional litigation over titles).

216. Whereas this Comment pertains more to designations of candidate experience and qualification, Garrett's article concerns notations reflecting the issue positions of candidates. Garrett, *supra* note 17, at 1581.

217. *See id.* at 1582 ("The polling process itself might increase voter interest in the electoral process and the issue raised during the polling period.").

218. *See id.* at 1584–85 ("[E]ach candidate could be allowed the opportunity on the ballot to publish a short statement.").

Guam model but without the strict space limits.[219] Ultimately, she concludes that the ability of ballot notations to increase the competence of voters should lead governments to consider implementing such systems in elections, but she calls for additional academic research on the matter.[220] However, ballot notations relating to issue positions, as Garrett advocates, face strict constitutional limits.[221] The Supreme Court warned against states using the ballot to imply that certain political issues should "decisively influence the citizen to cast his ballot" in a certain way, thus handicapping candidates for political reasons.[222]

Conversely, neutral ballot notations relating to experience and qualification can truly inform voters on relevant matters, rather than steer the election in the state's preferred direction. Notwithstanding the time and litigation concerns,[223] labels, like those Texas already uses in propositional elections,[224] can be applied to elections for public office. Ballots demonstrating the "chief features" of a choice's character and purpose[225] should assist voters in electing candidates best qualified to fulfill the wishes of the nation's citizenry.

VII. CONCLUSION

An uninformed electorate threatens democratic institutions. This threat is elevated in Texas, where civil engagement lags behind other states.[226] The lack of knowledge may or may not be the cause of the government's record low public approval ratings,[227] but the assumption of a relationship

219. *Compare id.* at 1584 (theorizing that candidates could supply notations of 500 words or less), *with* 3 GUAM CODE ANN. § 7115 (2013) (requiring candidate ballot statements be no more than twenty letters).

220. *See* Garrett, *supra* note 17, at 1586 (recognizing the positive aspects of ballot notations and advocating greater research in the academic community).

221. *See* Cook v. Gralike, 531 U.S. 510, 530–32 (2001) (Rehnquist, C.J., concurring) (citing the First Amendment and Equal Protection concerns).

222. *See id.* at 525–26 (quoting Anderson v. Martin, 375 U.S. 399, 402 (1964)) (finding it an unconstitutional violation of the Election Clause for Missouri to use ballot labels with the intention of handicapping candidates for federal office based on the candidate's position on term limits).

223. *Cf.* Sooy v. Gill, 774 A.2d 635, 640 (N.J. Super. Ct. App. Div. 2001) (arguing the use of candidate titles on the ballot could lead to increased amounts of litigation).

224. TEX. ELEC. CODE ANN. § 52.072 (West 2010).

225. *See* City of McAllen v. McAllen Police Officers Union, 221 S.W.3d 885, 895 (Tex. App.—Corpus Christi 2007, pet. denied) ("Ballot wording is sufficient if it identifies the measure and shows its character and purpose . . . 'in such language as to constitute a fair portrayal of its chief features.'" (quoting Wright v. Bd. of Trs. of Tatum Indep. Sch. Dist., 520 S.W.2d 787, 792 (Tex. Civ. App.—Tyler 1975, writ dism'd))).

226. Rangel, *supra* note 9.

227. *See, e.g.*, Yu, *supra* note 3 (mentioning a Gallup poll which lists "dissatisfaction with government" as the nation's most pressing issue for the first time since the poll was first taken in the

is logically sound.[228] When voting for items or candidates with influence over public policy, the ballot's failure to accurately demonstrate the merits of a choice can easily cause voters to make decisions adverse to their interests. Therefore, this Comment suggests a potential remedy to the negative effects of the clearly identifiable problem of low-information voting. That is, a repeal of the general title prohibition in the Texas Election Code, replaced with an alternative statute providing for the inclusion of voting cues containing pertinent candidate information for voters in low information contests.

Though a legal challenge to the current general title prohibition would not likely succeed,[229] the Texas legislature would be wise to replace the Code based on the weight of asserted harms. Harms from the failure to account for the irrelevant cue of ballot position and for the questionable cue of party affiliation[230] outweigh the easily-fixed harms believed to result from inserting additional candidate information on the ballot. This Comment does not argue for the removal of any cues.[231] Instead, qualification-related cues should be allowed on the ballot to offset the negative effects of the existing cues. The Texas legislature has more than sufficient reason to abandon the prohibitions on titles and provide qualification-related cues for low information voters.

1930s).

228. *Cf.* Abramson & Aldrich, *supra* note 84, at 510–13 (discovering that those dissatisfied with government are less likely to participate in civic activities such as voting).

229. The title prohibition does not inhibit any constitutional rights, nor does not impose a severe burden under *Burdick v. Takushi*. Burdick v. Takushi 504 U.S. 428, 434 (1992); *see* Anderson v. Celebrezze, 460 U.S. 780, 796 (1983) ("Our cases reflect a greater faith in the ability of individual voters to inform themselves about campaign issues."). And there is no duty for the state to provide biographical information about candidates. *Anderson*, 460 U.S. at 796.

230. *See* Chertoff & Robinson, *supra* note 17, at 1781 (arguing party label fails to provide an effective determinant of a judge's performance); Kelly, *supra* note 39, at 49 (finding little connection between the duties of municipal office and the philosophies of political parties).

231. While candidate rotation would be beneficial, this Comment does not intend to focus on that, nor does it intend to advocate removal of the partisan voting cue, which is nearly impossible due to the strength of political parties. *See generally* Kelly, *supra* note 39 (conceding that partisan judicial elections in Texas will likely never be replaced with merit selection).