Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?

by CHRISTOPHER S. ELMENDORF*

Introduction

This essay advances a tentative hypothesis about the relationship between the status of the right to vote as an individual right and the existence of manageable standards for adjudication. The Supreme Court has long maintained that the right to vote is an individual, personal right,[1]

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* Professor of Law, University of California at Davis. BA, Oberlin College, 1994; JD, Yale Law School, 2001. This paper benefited tremendously from presentation and discussion at the Georgetown University Law Center's Faculty Research Workshop and the *Hastings Constitutional Law Quarterly*'s "Frontiers of Democracy" Symposium; from careful readings and generous feedback offered by Ned Foley, Heather Gerken, Ellen Katz, Ethan Leib, and Mark Scarberry; as well as from conversations and email correspondence with, among others, Vik Amar, Alan Brownstein, Floyd Feeney, Greg Klass, Justin Levitt, Dan Tokaji, and Christine Van Aken. Tony Valizan did valuable work as my research assistant, and Deans Rex Perschbacher and Kevin Johnson provided generous support. Disclosure: the author of this article co-wrote an amicus brief that was filed on behalf of the petitioners in *Crawford v. Marion County Election Board*, Nos. 07-21 & 07-25 (argued Jan. 9, 2008).

1. This idea traces back to *Baker v. Carr*, 369 U.S. 186 (1962), *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713 (1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964). An individualistic sensibility about the right to vote is also apparent from the rhetoric in *Rosario v. Rockefeller*, 410 U.S. 752 (1973) and *Kusper v. Pontikes*, 414 U.S. 51 (1973), where the Court stressed the plaintiff-voter's "fault" or lack thereof in deciding what level of scrutiny to apply to advance-enrollment requirements for voting in primary elections. *See* Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 353-57 (2007) (describing this rhetorical emphasis, but suggesting that the true basis for the line drawn in these decisions probably lay elsewhere).

The Supreme Court has affirmed the nominally individualistic nature of the right to vote in cases about vote dilution caused by the design of equi-populous legislative districts. The "representational" injuries suffered by a racial or partisan group were not seen to implicate the fundamental right to vote at all, because citizens who belonged to the disadvantaged groups remained free to vote (if not to be represented) on equal terms with others. *See* City of Mobile v. Bolden, 446 U.S. 55 (1980) (rejecting argument of dissenting Justices Marshall and Brennan that

and, related to this, that theories of democracy should do no analytical work in constitutional voting rights adjudication.[2] These ideas took root in response to Justice Frankfurter's famous warning that in wading into questions about the right to vote and the apportionment of population among legislative districts, the Court would be adjudicating Republican Form of Government claims in disguise—contrary to precedent and unbefitting an institution whose proper role is to protect individual rights. He warned that in so doing, the Court jeopardized its reputation as an institution above partisan politics—a reputation upon which public acceptance of its rights-enforcing role was thought to depend.[3]

My hypothesis is that the "individual rights" and "no theory" precepts, which have served the Court adequately for more than forty years, will soon need to be abandoned—for the very reasons that initially motivated their adoption. Justice Frankfurter's worries were well placed but his prescription that courts should touch upon "political" matters only as the incidental byproduct of enforcing individual rights, is outdated.[4] Under contemporary circumstances, the courts would have an easier time developing judicially manageable rules for decision if they adopted an expressly structural understanding of the right to vote, while scaling back the individual entitlement to vote free from burdens that are not shared by others. Scrutiny levels should be tied to the aggregate consequences of voting requirements for the rate and demographics of voter participation. A workable approach along these lines could be founded upon (1) a perfectionist account of what it means for a legislative body to be "chosen by the people" within the meaning of Article I and the Seventeenth Amendment (against which the results of actual, imperfect elections may be compared); and (2) a story about the deference due to states by virtue of

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racial vote dilution claims may be founded on the "fundamental rights" prong of equal protection analysis).

The nominal status of the right to vote as an individual right was reiterated most recently in *Bd. of Estimate of City of N.Y. v. Morris*, 489 U.S. 688 (1989), where the Court stressed, in the context of a one person, one vote challenge to borough-based representation on the Board of Estimate, that "[t]he personal right to vote is a value in itself . . . ." *Id.* at 698.

2. The path of this idea is chronicled in Daniel R. Ortiz, *Got Theory?*, 153 U. PA. L. REV. 459 (2004).

3. *See generally* Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases:* Baker v. Carr *and Its Progeny*, 80 N.C. L. REV. 1411 (2002).

4. This is not to deny that the Supreme Court's adoption of an expansive political question doctrine (as Frankfurter espoused) would enable it to avoid much partisan political conflict. But once it is clear that the courts are going to adjudicate constitutional voting rights claims—as it is today—the "individual rights" perspective may make it difficult to develop manageable rules of decision.

their constitutionally-assigned role as regulators-in-the-first-instance of the time, place, and manner of federal elections.

To date, the Court's interventions in the political process seem not to have occasioned the loss of judicial legitimacy that Frankfurter feared.[5] But there is afoot, it appears, an important change in the number and composition of constitutional voting rights cases reaching the courts. For the first time in a generation, the courts face a significant number of cases in which the plaintiffs maintain that a state has unconstitutionally hindered voting-eligible citizens' ability to cast a valid, correctly-counted ballot.[6] (Following Professor Karlan, I shall refer to these as voter participation claims.[7]) Unlike the first generation of voter-participation claims, however, the new litigation does not target *de jure* vote denial. The state laws and regulations under attack do not purport to identify and exclude a class of citizens that ought not to participate in the selection of elected officials.[8] Rather, these laws merely define the process by which voting-eligible citizens may record their political preferences come election time. The "nuts and bolts" at issue include voting machine technologies, voter registration laws, voter identification requirements, voter-database maintenance procedures, laws authorizing partisan "challengers" at the polling place, regulations of third-party voter registration drives, and

5. *Cf.* James L. Gibson et al., *The Supreme Court and the U.S. Presidential Election of 2000: Wounds, Self-Inflicted or Otherwise?*, 33 BRIT. J. POL. SCI. 535 (2003) (finding that by early 2001, there appeared to be few residual effects of the Court's decision in *Bush v. Gore* on the Court's legitimacy); Herbert M. Kritzer, *The American Public's Assessment of the Rehnquist Court*, 89 JUDICATURE 168 (2005) (finding little change in support for the Court by Democrats and Independents following *Bush v. Gore*). Note, however, that political conflict over judicial appointments, which the Court's involvement in high-stakes political questions may feed, has been shown to affect judicial legitimacy. *See* James L. Gibson & Gregory Caldeira, *Supreme Court Nominations, Legitimacy Theory, and the American Public: A Dynamic Theory of the Positivity Bias* (working paper, July 4, 2007), *available at* http://ssrn.com/abstract=998283.

6. This claim is admittedly impressionistic. It is based upon my initial reading of lower-court decisions from the 1960s to the present. I have not yet tried to quantify what I believe is a recent upsurge in voter participation litigation. Some suggestive evidence is provided in Charles Anthony Smith & Christopher Shortell, *The Suits That Counted: The Judicialization of Presidential Elections*, 6 ELECTION L.J. 251 (2007). Smith and Shortell document a massive increase in pre-election litigation during presidential-election years from 1992 through 2004, with voter access and vote-counting issues being the focus of half of the lawsuits in 2000 and well over half in 2004. *Id.* at 254-56.

7. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993) (distinguishing participation-, representation-, and governance-based claims).

8. The principal exception is the handful of suits challenging felon disenfranchisement. These claims are largely grounded on the Voting Rights Act rather than the Constitution, as felon disenfranchisement was approved for constitutional purposes in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

more.[9] As I write, the leading edge of the wave of litigation has just reached the Supreme Court, in the form of a facial challenge to Indiana's recently-enacted photo ID requirement for voting, said by many to be the most restrictive voter identification law in the nation.[10] The Court's last decision concerning regulatory barriers to the exercise of the franchise by adult, voting-age citizens was issued in 1974.[11]

The current upsurge in voter participation litigation may have been spurred, in part, by the Supreme Court's decision in *Bush v. Gore*[12] and the resulting wave of legislative attention to the voting process.[13] Renewed attention to the logistics of election administration has occurred at a time when the two major political parties are evenly matched at the national level,[14] giving each a powerful incentive to re-jigger the voting process so as to facilitate or retard (as the case may be) the casting of ballots by each party's core constituencies.[15] The conventional wisdom has it that Republicans nowadays take advantage of unified party control of government by enacting stringent voter-ID requirements, restrictions on voter registration drives by civic groups, and the like, whereas Democrats seek to expand voter participation via election-day registration, early-voting centers, vote-by-mail reforms, and related measures.[16] When critics

9. For a sampling, see Election Law @ Moritz, Major Pending Cases, http://moritzlaw.osu.edu/electionlaw/litigation/index.php.

10. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007).

11. O'Brien v. Skinner, 414 U.S. 524 (1974).

12. Bush v. Gore, 531 U.S. 98 (2000).

13. *See* Smith & Shortell, *supra* note 6, at 258-59 (noting that forty-one cases during the 2004 election year "arose as a direct result of electoral reform[s]" enacted after the 2000 presidential election).

14. *See* Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 947-50 (2006).

15. Smith and Shortell provide convincing evidence that the increase in pre-election litigation during presidential-election years has been driven by partisan strategy. Litigation is not randomly distributed; rather, it has been concentrated in states that are competitive as between the two major parties, and that have large troves of Electoral College votes. *See* Smith & Shortell, *supra* note 6, at 259-64. Moreover, both parties increased their direct participation in litigation from 2000 to 2004, with the number of cases in which one party was named as a litigant rising from five in 2000 to eighteen in 2004. *Id.* at 258.

16. Richard L. Hasen, *The Untimely Death of* Bush v. Gore, 60 STAN. L. REV. 1, 15-28 (2007) ((describing the "rise in partisan election administration laws") ("[E]lection administration has become more, rather than less, politicized [since *Bush v. Gore*]. State legislatures have not searched for an honest broker to design and implement fair and impartial electoral rules. Many Democrats appear concerned only about problems of voter 'access,' while many Republicans appear to care only about voter fraud or 'ballot integrity.'")) (alteration in original). *Compare* United States Senate Republican Committee, *The Need for New Federal Reforms: Putting an End to Voter Fraud* (Feb. 15, 2005), *available at*

of the Republican agenda have lost out in the legislature, they have turned to the courts[17]—so far with mixed success. Photo-ID requirements have been enjoined in Georgia,[18] Missouri,[19] and New Mexico,[20] and allowed to take effect in Arizona,[21] Georgia,[22] Indiana,[23] and Michigan.[24] Restrictions on voter-registration drives have been enjoined in both Florida and Ohio;[25] and in Texas, a criminal law that limited who may possess a voter's absentee ballot was trimmed back through judicial action.[26]

The litigants' mixed success in the courts corresponds to a striking partisan divide among judges. That is the lesson to date of the voter-ID litigation. By my count, there have been fourteen votes by Democratic judges against the constitutionality of photo-ID requirements, and only three votes indicating that the requirement at issue is permissible.[27] For Republican judges, the respective numbers are three (against constitutionality) and fifteen (for constitutionality). These numbers must

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http://rpc.senate.gov/_files/Feb1504VoterFraudSD.pdf (proposing national anti-fraud reforms), *with* Press Release, Democratic National Committee, DNC Announces Expanded National Voter Protection Effort (Aug. 3, 2006), *available at*, http://www.democrats.org/a/2006/08/dnc_announces_e.php (announcing a multi-pronged offensive against asserted Republican efforts to disenfranchise Democratic voters).

The conventional wisdom is probably correct, but there is a pressing need for quantitative empirical research examining how the partisan composition of state legislatures affects the development and adoption of electoral reforms.

17. There are few if any doctrinal hooks for challenging the Democrats' preferred reforms on constitutional grounds. Then again, these reforms do not appear to have had their hoped-for partisan effects. *See generally* Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471 (2005).

18. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

19. Weinschenk v. State, 203 S.W. 3d 201 (Mo. 2006).

20. ACLU of N.M. v. Santillanes, No. Civ. 05-1136, 2007 WL 782167 (D.N.M. Feb. 12, 2007).

21. Gonzalez v. Ariz., No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), *aff'd*, 485 F.3d 1041 (9th Cir. 2007).

22. *Billups*, 504 F. Supp. 2d at 1333.

23. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007).

24. *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).

25. League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (issuing a preliminary injunction against a law that fined voter registration organizations for late submissions); Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006) (preliminarily enjoining law that establishes registration and training requirements, backed by criminal penalties, for paid participants in voter-registration drives).

26. Ray v. State of Texas, No. 2:06-CV-385 (E.D. Tex., Oct. 31, 2006) (order granting preliminary injunction against state law penalizing possession of absentee ballots by most persons other than the voter herself).

27. *See* Appendix (for a summary of the judicial votes).

be taken with several grains of salt,[28] but the pattern has an intuitive ideological logic.

Unlike many other constitutional questions about election law, the new voter participation claims present legal issues as to which a judge's ideological and jurisprudential commitments are very likely to dovetail with the electoral interest of her appointing President's political party.[29] Liberal judges probably believe that the Constitution, as glossed by the

28. First, the sample size is small and I have not conducted any statistical analysis. Second, a number of the judicial votes included in my summary figures were taken on preliminary injunction motions, or motions for rehearing en banc. It is conceivable that judicial partisanship or its appearance will prove less pronounced on merits rulings. Third, the Appendix only includes votes on photo-ID laws, which among all the recent voting reforms have been the object of the fiercest partisan controversy in the legislative arena and the most attention in the press. Judicial partisanship or its appearance may prove less pronounced as to issues (like voter-registration reform) that have been less prominently featured in the press. As with the question of how state government party control affects the adoption of electoral reforms (*see supra* note 16), here too there is a pressing need for systematic empirical research.

29. By way of comparison, consider retrogression claims under the Voting Rights Act, and one-person, one-vote claims under the Equal Protection Clause. It is conventional wisdom that, within a system of single member districts, "majority minority" districts benefit the Republican Party by concentrating reliable Democratic voters into a small number of districts. *See, e.g.*, DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997). Yet ideologically, the creation of majority minority districts manifests a kind of race consciousness that is distasteful to many republicans. This has resulted in judicial decisions like *Georgia v. Ashcroft*, 539 U.S. 461 (2003), in which the five conservative Justices voted to relax the retrogression standard in a manner that gives the Democratic Party more flexibility to spread out minority voters for maximum political advantage, with the four liberal Justices dissenting. A nearer correspondence between ideology and partisanship would seem to be presented by challenges to at-large elections under section two of the Voting Rights Act, the dismantling of which is conventionally thought to benefit democrats as well as minority voters. There is some evidence that democrats were more likely than republicans to vote to dismantle such districts, but the evidence is equivocal. *See* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1 (2008). A serious partisan division on this front may well have been avoided thanks to the Supreme Court's establishment of a reasonably mechanical test for adjudicating these claims. *See* Thornburg v. Gingles, 478 U.S. 30, 57-58 (1986).

As to one-person, one-vote claims, the empirical evidence suggests that democratic judges were more likely than republican judges to find malapportionment violations as the constitutional standard was being developed. *See* Randall D. Lloyd, *Separating Partisanship from Party in Judicial Research: Reapportionment in the U.S. District Courts*, 89 AM. POL. SCI. REV. 413 (1995). But because both parties are able to use malapportioned plans for partisan purposes, this ideological effect does not have a clear partisan valence. (It is true that partisan effects were also present, in the sense that, other things equal, judges were more likely to vote against plans developed by the opposing party than by their own party. *Id.* at 417-18. But, strikingly, judges were also more likely to vote against plans developed by their own party than against nonpartisan or bipartisan plans. *Id.*

Warren Court,[30] is a charter for popular self-government, and that every adult citizen must be enabled and encouraged to vote.[31] Conservative jurists may well see the generic right to vote as an illicit, a-textual "right" that exists only because the Warren Court made it up.[32] The conservative may point out that although the Constitution by its terms bars discrimination with respect to voting on the basis of race, sex, age (for citizens over eighteen), and, for purposes of federal elections, failure to pay a tax, the Constitution also expressly authorizes the states to set "qualifications" for electors in state and congressional elections. The natural implication is that the states have substantial discretion to limit the franchise to those citizens most likely to exercise it in a considered, responsible manner, so long as the franchise-limiting enactment does not discriminate on the expressly forbidden grounds.[33]

This position was rejected in *Harper v. Virginia State Board of Elections*[34] and *Kramer v. Union Free School District No. 15*.[35] But judges who see *Harper* and *Kramer* as interpretively illegitimate may want to read them narrowly, so as to give the states some room to set voter qualifications *sub silentio*. Such a jurist might well see photo-ID laws, for example, as ideal *sub silentio* qualifications. A photo-ID requirement could serve to limit the franchise, de facto, to those citizens who either are full-fledged participants in the modern, formal economy (and as such almost surely possess a driver's license or passport), or who care enough about voting to incur the cost and inconvenience of obtaining a driver's license or passport for this purpose. The costs will be greatest for citizens who do not already possess an official copy of their birth certificate, and, the conservative might argue, this is precisely as it should be. Citizens who lack access to their birth certificates probably lead chaotic, irregular lives, and such citizens cannot be trusted with the franchise.

If I am right about these basic differences in normative outlook, it should not be surprising that judges operating within an indeterminate

30. *See, e.g.*, Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969).

31. *See, e.g.*, STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005).

32. None of the Warren Court's foundational voting rights decisions were well-grounded in the text, early history, or structure of the Constitution.

33. There was, of course, a long history in the United States and elsewhere in the Western world of reserving the franchise to those citizens believed capable of exercising it in a responsible manner. Property qualifications and literacy tests for voting are familiar examples.

34. *Harper*, 383 U.S. at 668.

35. *Kramer*, 395 U.S. at 626-27.

doctrinal framework reach seemingly partisan decisions. That it is not surprising does not make it any less worrisome, however. Frankfurter's anxieties about judicial legitimacy may yet be borne out. Political scientists have repeatedly shown that the U.S. Supreme Court, at least, enjoys a "reservoir" of support among the mass public that is substantially independent of citizens' agreement with the merits of particular court rulings.[36] Sometimes labeled "diffuse support," this willingness to accept judicial judgments with which one disagrees and to defend the institution of judicial review seems connected to citizens' perception of the Court as a distinctly legal, as opposed to political, institution.[37] Some scholars have speculated that the trappings of legality—the black robes, the stylized modes of argumentation, etc.—are responsible for this.[38] But whatever the origins of diffuse support, it seems fair to expect that the mass public's perception of courts as above politics will gradually erode if highly partisan election-law issues become a recurring part of the judicial docket and judges consistently take "their" respective party's side in answering the question presented.[39] The mainstream media is catching on to the emerging pattern of judicial partisanship[40] and the public cannot be kept in the dark indefinitely.

The partisan judicial divide in voter-participation litigation also raises serious questions about whether American courts, as presently constituted, can perform the functional role ascribed to them by the most widely accepted normative account of constitutional judicial review: the role of representation reinforcer.[41] When one political party uses its position of control over the legislative and executive branches of government to enact voting requirements that the other major party regards as a ploy to deter its constituents from exercising the franchise, the need for representation-reinforcing review would seem to have reached its apogee. Yet if judges

36. *See, e.g.*, Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635, 637 (1992).

37. *Id.*; *see also* John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181 (2001); John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000).

38. *E.g.*, Caldeira & Gibson, *supra* note 36, at 659.

39. *Cf.* Stephen P. Nicholson & Robert M. Howard, *Framing Support for the Supreme Court in the Aftermath of* Bush v. Gore, 65 J. POL. 676 (2003) (finding that a results-oriented framing of the Court's decision undermines public support).

40. *See, e.g.*, Robert Barnes, *Partisan Fissures Over Voter ID; Justices to Hear Challenge to Law*, WASH. POST, Dec. 25, 2007, at A1. My impression is that in reportage on election law decisions, it is increasingly common to note judges' political party affiliations.

41. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST (1980); Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491 (1997).

(despite their situational remove from ordinary politics) have partisan prejudices or ideological commitments that consistently lead them to side with "their side" in the legislature, it is hard to see what good can come from judicial review in such cases. We certainly cannot expect judicial review to make the law substantively fairer, or more reasonable, or better aligned with constitutional precepts. Nor can we count on the courts to perform a legitimation function, keeping factions that lose out in the political arena from disavowing the system altogether.[42] If judges answer political-process questions as if they were de facto agents for their political party of choice, what reason is there for losing factions to defer to the judicial determination?

Now, assuming I am correct about all of this[43]—the new partisan interest in shaping the composition of the voting public, the related proliferation of voter-participation cases, the correspondence between judicial ideology and party interest in the resolution of such cases, and the threat that this poses to the judicial legitimation function and public acceptance of judicial independence—it hardly follows that the courts must adopt a structural understanding of the right to vote, one grounded in a political theory of the franchise and its regulation under our Constitution. All that is needed, one might think, is a rule-bound doctrinal framework that permits little judicial discretion. There's no *a priori* reason to believe that such a framework could not be grounded upon an individualistic or even an agnostic understanding of the right to vote. Indeed, if the last forty years is any guide, the Supreme Court would seem perfectly capable of developing bright-line rules to regulate the voting process without overt recourse to a political theory of voting.[44]

This objection is correct in one important respect. My argument for a structural approach is contingent rather than logical. It rests on what I see as the presently available individualistic, agnostic, and structural/aggregate-consequences approaches, and the advantages and disadvantages of each.

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42. *Cf.* CHARLES L. BLACK, JR., THE PEOPLE AND THE COURT (1960) (arguing that this legitimation function is the principal service performed by the U.S. Supreme Court).

43. This is a big "if." The stylized facts I have presented will need further empirical corroboration before the argument of this paper can be described as anything more than a very tentative conjecture.

44. Examples include: the one-person, one-vote rule of *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), including the "10% safe harbor" exception for state and local legislative districts. (*see* Brown v. Thompson, 462 U.S. 835, 842 (1983)); the fifty-day upper bound on advance registration requirements for voting in general elections (*see* Marston v. Lewis, 410 U.S. 679, 681 (1973); Burns v. Fortson, 410 U.S. 686, 687 (1973)); and the prohibition against state laws that condition political participation upon payment of a fee or ownership of property (*see, e.g.*, Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966); Lubin v. Panish, 415 U.S. 709 (1974)).

In another respect, however, the objection oversimplifies matters. The "manageability" of a doctrinal standard for regulating partisan conflicts over the ground rules of electoral competition is not just a function of its rule-like clarity (or lack thereof).[45] As to some politically contentious questions in election law, it may not be possible for judges to reach agreement on a bright-line rule for classifying regulations as presumptively permissible or presumptively impermissible on their face. The available candidates for a bright-line rule may be ludicrous, or too easy for exclusion-minded legislators or election administrators to end run. No one would suggest, for example, that a voter ID law should be subjected to strict scrutiny simply because the law requires voters to display *photographic* ID. The mere fact that a photograph is required tells little about whether the ID law will be easy or difficult for voters to comply with.

If a bright-line/facial-classification rule is not in the cards, jurists must come up with other ways of thinking about the manageability of plausible alternatives. For the purpose of resolving constitutional challenges to highly partisan electoral reforms, I would deem a doctrinal approach "more manageable" to the extent that: (1) it does not require or invite judges to rely upon their own sense of justice or political fairness, insofar as those judgments correlate with the partisan interest of the political party with which the judge is associated in the public's mind;[46] (2) it represents an acceptable compromise for a spectrum of liberal and conservative judges—so that its adoption does not look like a purely political decision by a fractured Supreme Court, and so as to increase the odds of good-faith application by the run of lower court judges;[47] (3) it limits the total number of cases that the courts will have to decide;[48] (4) it operates to time judicial intervention propitiously, facilitating intervention during times when the

45. For a sensitive treatment of this point, see Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274, 1287-93 (2006).

46. *Cf. id.* at 1289-90 (arguing that open-ended standards are relatively "manageable" when there is a consensus about the correct application of the underlying norms, yielding predictable and consistent results).

47. *Cf.* Edward B. Foley, Crawford v. Marion County Election Board*: Voter ID, 5-4? If So, So What?*, 7 ELECTION L.J. 63 (2008) (calling on the Supreme Court to make a special effort to find a ground for decision in the Indiana voter ID case acceptable to liberal and conservative Justices, so as to reaffirm the idea that the courts play a meaningfully nonpartisan role in policing the fairness of the voting process).

48. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 292-93 (2004) (plurality opinion of Scalia, J.) (arguing, contra Justice Stevens in dissent, that the doctrinal standard used to adjudicate racial gerrymandering claims would not be manageable vis-à-vis partisan gerrymandering claims, because of, *inter alia*, "the reality that setting out to segregate voters by race is . . . rare, and setting out to segregate them by political affiliation is . . . ordinary.").

partisan fires are relatively cool (especially to be avoided are judicial rulings in the immediate aftermath of the requirement's enactment and, even more so, post-election rulings when the election hangs in the balance[49]); and (5) it is intelligible and attractive to the general public, so that court decisions that come under attack can be convincingly portrayed by their defenders as sensible and lawful. It may not be possible to achieve all of these desiderata in any one doctrinal standard, but each has evident appeal, and none should be ignored in developing or assessing proposed standards.

Keeping these factors in view, I wish to suggest that the courts' best hope for adjudicating the new generation of voter participation claims lies in an approach that minimizes (without denying entirely) the individualistic component of the right to vote, while establishing that the aggregate pattern of voter participation is a proper object of constitutional concern. In order to adopt this approach, however, the Court would need a "political theory" that privileges certain patterns of voter participation. The approach I favor would highlight the franchise's role in maintaining the lines of accountability contemplated by Article I and the Seventeenth Amendment, and the role of the states as front-line regulators of the voting process. Many others have argued that a structural understanding of the right to vote makes sense on normative grounds.[50] My point here is more pragmatic. Whatever may be the best understanding of the right to vote as a matter of first principles, a structural approach is the most plausible way to avoid quagmire and resulting injury to the courts' reputation for reasoned, impartial decision-making.

I shall proceed as follows. Part I provides a quick sketch of the doctrinal terrain on which the new voter participation claims will be adjudicated, briefly retracing the Court's path from *Kramer v. Union Free School District No. 15*,[51] to *Storer v. Brown*,[52] to *Burdick v. Takushi*.[53] Part II takes up and critiques (on manageability grounds) a reading of the *Burdick* framework premised on an individualistic understanding of the right to vote. Part III examines several approaches to *Burdick* that remain

49. *Cf.* Hasen, *supra* note 14, at 991-99 (recommending greater use of laches to avoid post-election, outcome-determinative judicial rulings).

50. *See, e.g.*, Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099 (2005); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217 (1999).

51. Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969).

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

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

agnostic on the status of the right to vote as individualistic or collective in nature. Part IV explains the manageability advantages of approaches to *Burdick* that treat the right to vote as a right in service of democratic self-government. Part V addresses the textual and doctrinal defensibility of one such approach.

I. The *Burdick* Framework

It is by now well established that the right to vote on equal terms with others is fundamental, and that no state may exclude any class of adult, nonfelon, citizen residents from what I shall term the *normative electorate*—the class of persons to whom elected officials are supposed to be accountable.[54] The holding of elections requires much more than the definition of a normative electorate, however. Also needed are dates and venues for voting; technologies for recording and tabulating ballots; procedures through which would-be voters prove up their membership in the normative electorate; and rules concerning who and what shall appear on the ballot (to say nothing of rules that define constituencies and aggregate votes into decisions). Many such regulations of the electoral process may be said to burden rights of political participation, which raises the question of whether burdens of this sort may be so onerous or unnecessary as to be unconstitutional.

The answer to that question is clearly yes. Since the early 1970s, the Supreme Court has addressed the constitutionality of most "electoral mechanics" burdens using a balancing standard.[55] In a foundational 1974 decision, *Storer v. Brown*, the Court formulated the standard thus:

> [There is] no litmus-paper test for separating those [electoral] restrictions that are valid from those that are invidious under the Equal Protection Clause. [There] is no substitute for the hard judgments that must be made. Decision in this context . . . is very much a matter of degree, very much a matter of considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification. What the result of this process will be in any specific case may be very difficult to predict with great assurance.[56]

54. The leading case that establishes this principle (though not in so many words) is *Kramer v. Union Free School Dist. No. 15*, *supra*. The felony exception was established a few years after *Kramer*, in *Richardson v. Ramirez*, 418 U.S. 24 (1974).

55. For an in-depth examination of this body of Supreme Court case law, see Elmendorf, *supra* note 1.

56. *Storer*, 415 U.S. at 730.

Storer was a ballot access cases, but in a later dictum the Court indicated that *Storer* balancing was appropriately employed across the run of cases about "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process."[57] The framework was subsequently refined in *Burdick v. Takushi*,[58] where the Court provided this instruction:

> 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 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.
>
> Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. [W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.[59]

Burdick furnishes the rubric within which doctrinal standards for adjudicating voter participation claims will almost surely be developed. And as of this writing, that rubric can support almost any standard one wishes to project onto it. Some of this uncertainty is due to the fact that the Court has not decided a case about barriers to the exercise of the franchise by voting-eligible citizens since the early 1970s.[60] Almost all of the Court's applications of the *Storer-Burdick* framework have concerned who

57. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). *Cf.* Burdick v. Takushi, 504 U.S. 428, 433 (1992) (quoting this statement from *Anderson*); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 345 (1995) (distinguishing *Anderson* on ground that challenged ban on anonymous political leafleting did not "control the mechanics of the electoral process," but rather was a content-based "regulation of pure speech").

58. *Burdick*, 504 U.S. 428 (1992).

59. *Id.* at 434 (internal citations and quotation marks removed).

60. This statement glosses over *Bush v. Gore*, 531 U.S. 98 (2000), a decision that is arguably about barriers to the exercise of the franchise (the counting of votes cast), but whose doctrinal import is famously obscure, and which does not even cite to *Storer* or *Burdick*, or otherwise explain the standard of review that the Court meant to be applying.

or what appears on the ballot, or the associational rights of political parties. But even in these areas, basic questions about *Burdick* remain unanswered.

For example: Does *Burdick* prescribe open-ended balancing like *Storer*, or does it convert the mush of *Storer* into a firmly two-tiered standard of review, with one level of scrutiny for "severe" and another for "non-severe" burdens? Judge Posner, for one, reads *Burdick* and associated cases to call for open-ended balancing: "[T]he constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves. No greater precision in the articulation of the governing standard seems possible."[61] Without disavowing Posner's position, the Supreme Court's practice since *Burdick* has been rather different. The Court almost always characterizes the burden at issue as "severe" or "minor" and then applies strict scrutiny or lenient review as appropriate.[62]

Following the Court's practice, many lower courts have read *Burdick* to prescribe two-tier review, with strict scrutiny for severe burdens and something else for lesser ones. But what is this something else? Is it meaningfully different from the ordinary rational basis test? Again, the Court has not addressed this. The Court has, however, upheld assertedly non-severe restrictions on the basis of hypothetical parades of horribles, albeit without using the magic words "rational basis" or citing to the iconic rational basis precedents.[63] As if to call a spade a spade, a few lower courts have applied rationality review to non-severe burdens.[64] Others have vehemently rejected the proposition that any burden on fundamental rights of voting and political association must be sustained if hypothetically rational.[65]

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61. Griffin v. Roupas, 385 F.3d 1128, 1130 (7th Cir. 2004).

62. *See* Elmendorf, *supra* note 1, at 330-76.

63. *See id.* at 330 n.66 (describing "de facto rational basis" review under *Burdick*).

64. *See, e.g.*, Werme v. Merrill, 84 F.3d 479, 485 (1st Cir. 1996) ("defendants need only show that the enactment of the regulation had a rational basis," given that the burden at issue is "slight"); Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333, 1381 (N.D. Ga. 2007) ("[T]he appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further.").

65. *See, e.g.*, McLaughlin v. N.C. Bd. of Elec., 65 F.3d 1215, 1221 n.6 (4th Cir. 1995) (stating that "a regulation which imposes only moderate burdens could well fail the *Anderson* balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational," and disagreeing with decisions by the Eighth and Eleventh Circuits that the *McLaughlin* court read as applications of the rational basis test); Reform Party of Allegheny County v. Allegheny County Dep't of Elec., 174 F.3d 305, 314-15 (3d. Cir. 1999) (striking down a ban on cross-endorsements by minor parties after applying an "intermediate level of scrutiny"); Cotham v. Garza, 905 F. Supp. 389, 398-401 (S.D. Tex. 1995) (holding that "limited, not severe"

Of all the open questions under *Burdick*, the most important for purposes of the new voter participation claims is how to characterize the severity of barriers to the casting of valid, properly counted ballots. A quick survey of the approaches that lower courts have taken in characterizing the burden of voter ID requirements is enough to reveal the thoroughly unsettled state of the law. Some judges have evaluated voter ID burdens in terms of their consequences for voter turnout; the best example is Posner's opinion for the Seventh Circuit in *Crawford*.[66] Other judges have linked burden severity to a normative conception of what the state may reasonably expect of citizens who wish to vote. Burdens not exceeding what the reasonable voter can reasonably bear are de minimis as a matter of law. Any corresponding exclusion is said to be the voter's fault, and not of constitutional moment.[67] Still other judges have tied

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administrative restrictions on the right to vote may not be sustained without a showing of necessity).

66. When adjudicating constitutional challenges to an ID requirement for voting, Posner wrote, a judge must weigh "the effect of requiring... ID in inducing eligible voters to disfranchise themselves," against the number of instances of impersonation fraud that the ID requirement successfully prevents. *Crawford*, 472 F.3d at 953-54. Judge Posner emphasized in upholding the law that "the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting." *Id.*

Several other judges presiding over voter ID lawsuits have emphasized consequences for turnout in their rulings, although none has been as single-minded about this as Posner. For example, the district judge in *ACLU of New Mexico v. Santillanes*, No. Civ. 05-1136, 2007 WL 782167 (D.N.M. Feb. 12, 2007), entered a preliminary injunction against the City of Albuquerque's photo ID requirement after finding that "surprise or confusion about the... requirement and the bureaucratic hurdles it imposes is likely to discourage—if not disenfranchise—a significant number of Albuquerque voters... on the next municipal election day." *Id.* at *31; *see also* Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). In characterizing as severe the burden of Georgia's first photo ID requirement for voting, the court wrote that it would "prevent [many of] Georgia's elderly, poor, and African-American voters from voting," and speculated that the availability of absentee voting (for which no ID was required) wouldn't cure the problem because "[t]he majority of voters—particularly those voters who lack Photo ID—would not plan sufficiently enough ahead to vote via absentee ballot successfully." *Id.* at 1364-65. It should be noted, however, that there are non-consequential strains in both of these opinions, and that the court in the Georgia litigation subsequently adopted an individualistic, "reasonable voter" approach. *See infra* note 67.

67. This "reasonable voter" approach is nicely illustrated by the latest opinion in the federal litigation over Georgia's photo ID requirement for voting. *See* Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007). The district court determined that the burden of Georgia's requirement simply was not "appreciable," given (1) that Georgia authorized no-excuses absentee voting, without ID; (2) that Georgia made free voter-ID cards available to any registered voter who needed one, and who came forward with minimal documentary evidence of his or her identity; and (3) that Georgia had made "exceptional efforts" to contact voters who lacked state-issued driver's licenses and inform them of the new requirement. *Id.* at 1377-80. Under these circumstances, any eligible voter who failed to cast a valid ballot had only himself to blame. For other illustrations of this analytic approach, *see* Barilla v. Ervin, 886 F.2d 1514, 1524-25 (9th Cir. 1989) (applying lenient review to 20-day advance registration requirement,

scrutiny levels to the apparent purpose behind the ID requirement (was it meant to exclude certain voters because of the way they may vote?);[68] the form that the burden takes (is the ID requirement fairly analogized to an express financial condition on the franchise?);[69] or the discretion vested in pollworkers (is the ID requirement likely to result in arbitrarily disparate treatment of similarly situated voters?).[70]

If the law is to have normative coherence, the question of how the *Burdick* framework applies to voter participation claims cannot be divorced from the question of what is the proper judicial stance toward the nature of the right to vote. If it is proper for courts to treat the right to vote as individual and personal in nature, that will have one set of implications for characterizing the severity of burdens on the franchise. If the courts should remain studiously agnostic on the nature of the right to vote, that will have another set of implications. And if the right to vote is a right in service of a collective interest in legitimate or duly accountable government, that will have still other implications. Notice, though, that the lines of causation could also run the other way. Given an array of plausible understandings of the proper judicial stance toward the right to vote, the courts might choose among them on the basis of the feasibility of crafting manageable rules for decision consistent with that understanding.[71] To that end, the balance of this essay examines the manageability problems that are likely

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reasoning that voters were "disenfranchised by their willful or negligent failure to register on time"); ACORN v. Bysiewicz, 413 F. Supp. 2d 119 (D. Conn. 2005) (holding that plaintiffs' evidence showing that elimination of Connecticut's 14-day advance registration requirement would increase the rate of voter participation by 5.5 percent was beside the point, since modest registration requirements simply do not constitute "severe" burdens); Friedman v. Snipes, 345 F. Supp. 2d 1356 (S.D. Fla. 2004) (holding that state rules that merely require voters to "act promptly" in requesting and returning absentee ballots constitute a "light" imposition).

68. Dissenting from the Seventh Circuit's denial of rehearing en banc in *Crawford*, Judge Diane Wood proposed: "[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny." 484 F.3d 436, 437 (2007).

69. Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1366-70 (N.D. Ga. 2005) (holding that first version of Georgia's photo ID requirement for voting was tantamount to a poll tax because the state charged fees for the one form of qualifying ID it made available to all citizens); Weinschenk v. State, 203 S.W.3d 201, 213-14 (Mo. 2006) (applying strict scrutiny, pursuant to state-law version of the severe/lesser burden test, because, inter alia, "[the] Photo ID requirement requires payment of money to exercise the right to vote").

70. *Santillanes*, 2007 WL 782167, at *25-28 (suggesting that disparate treatment of even a "small percentage" of voters, pursuant to a vague standard regarding what forms of ID qualify for voting purposes, may be enough to trigger strict scrutiny).

71. *Cf.* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (extending previous work of Daryl Levinson and others concerning the impact of remedial options on the definition of rights).

to arise—or be avoided—on competing understandings of the proper judicial stance toward the nature of the right to vote.

II. Applying *Burdick*: The Model of Individual Rights

Perhaps the most straightforward way of fleshing out the *Burdick* test is to assess burden severity in terms of the practical barriers to the exercise of the franchise confronted by individual citizen-plaintiffs who wish to vote. On this view, a voting requirement creates a "severe" burden within the meaning of *Burdick* if it represents a substantial impediment to voting for some citizens but not for others. A showing of differential hardship is required because the right to vote as such is not fundamental; rather, what the Constitution has been held to protect is the right to vote *on equal terms with others*.[72] One other caveat is necessary to round out the model: if the voter could have surmounted the barrier at issue through the exercise of reasonable civic diligence, the burden he now faces shall not be deemed severe—even if the voter is wholly excluded from the upcoming election.[73] Thus, a voter who fails to register in time will not be granted an exemption from a modest advance registration requirement; his failure to register promptly will be chalked up to civic lassitude.[74] I shall call this approach the *individual-right/practical-barrier* gloss on *Burdick*.

This approach would seem to follow almost axiomatically from the premise that the right to vote on equal terms with others is a personal,

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72. In the 1960s, Justices Douglas, Fortas, and Warren took the view that the right to vote was fundamental as such, and that certain legislative and gubernatorial offices therefore had to be made elective. *See, e.g.*, Fortson v. Morriss, 385 U.S. 231, 242 (1966) (Fortas, J., dissenting). But the distinction between legislative and non-legislative offices was rejected as unworkable in *Avery v. Midland County, Tex.*, 390 U.S. 474 (1968), and *Hadley v. Junior College Dist. of Metro Kansas City, Mo.*, 397 U.S. 50 (1970), and since then the Equal Protection Clause has been the root of most of the constitutional right-to-vote jurisprudence. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626-27 (1969) (explaining that strict scrutiny must be applied to statutes that "distribut[e] the franchise" to some citizens while "denying [it] to [other] citizens who are otherwise qualified by residence and age.").

73. This caveat is suggested by several Supreme Court decisions from the early 1970s. *See, e.g.*, Rosario v. Rockefeller, 410 U.S. 752, 758 (1973) ("if [the petitioners'] plight can be characterized as disenfranchisement at all, it was not caused by [the state's advance enrollment requirement], but by their own failure to take timely steps to effect their enrollment"); Kusper v. Pontikes, 414 U.S. 51 (1973) (striking down a longer advance enrollment requirement, which prevented the diligent plaintiff from voting in her new political party's primary). *Cf.* O'Brien v. Skinner, 414 U.S. 524, 537 (1974) (Blackmun, J., dissenting) (objecting to the majority's decision finding unconstitutional a state's failure to provide absentee ballots to pre-trial detainees incarcerated outside their county of residence, because the plaintiffs "were in jail through their own doing, just as the petitioners in *Rosario v. Rockefeller* . . . found themselves unable to vote because of their failure to meet an enrollment deadline").

74. *See Rosario*, 410 U.S. at 758.

individuated right, akin to privacy rights or liberty of conscience.[75] Just as a state's decision to ban a particular technique for conducting pre-viability abortions, for example, is presumed to be unconstitutional vis-à-vis any woman for whom the permitted abortion procedures would pose a significant health risk (relative to the banned procedure),[76] so too is the state's decision to mandate a particular voting protocol (thereby "banning" others) unconstitutional vis-à-vis any citizen for whom compliance would entail unusual hardships due to personal circumstances for which the voter cannot be faulted, such as a medical condition. Once the showing of significant and differential hardship has been made, the statute as written can be applied to the plaintiff-voters only if it passes strict scrutiny.

This model has many attractions. Most prominently, a holding that "burden severity" within the meaning of *Burdick* is a function of the size of the hurdle faced by the plaintiff-voter, relative to the size of the hurdle faced by others, would reconcile the *Storer-Burdick* framework with foundational voting rights precedents like *Kramer v. Union Free School District No. 15*[77] and *Dunn v. Blumstein*,[78] in which the Court applied strict scrutiny to state laws that categorically denied the franchise to some citizens while extending it to others. The more cumbersome and difficult an administrative requirement is for certain citizens to comply with, the

75. *Cf.* Lucas v. Forty-Fourth Gen. Assembly of Colo., 377 U.S. 713, 736-37 (1964) (analogizing the right to vote to the right to be free from compelled speech, and the right to "life, liberty, and property . . . and other fundamental rights").

76. In *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007), the Court's latest abortion decision, both the majority and the dissent agreed that an abortion restriction creates an "undue burden" within the meaning of *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), if it results in a serious health risk for a single woman. The dissent states this explicitly. Thus, in discussing the *Casey* plurality's statement that an abortion restriction is unduly burdensome if "in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion," the dissent asserts: "[T]he numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the 'large fraction' test." *Gonzales*, 127 S. Ct. at 1651 n.10 (Ginsberg, J., dissenting) (quoting *Casey*, 505 U.S. at 895). The *Gonzales* majority's embrace of the idea that a significant health risk to even one woman is enough to trigger strict scrutiny (and then a remedial exemption) is implicit in the majority's admonition that "the proper means to consider exceptions [to a ban on an abortion procedure] is by as-applied challenge" "in a discrete case." *Id.* at 1638-39. (It should be noted that *Gonzales*'s prescription for fact-specific, as-applied adjudication of abortion-rights claims represents a departure from the lower courts' practice in the *Casey* era. *Cf.* Lisa R. Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 459-83 (2007) (reviewing and criticizing lower court decisions for failing to take into account the particular circumstances of rural women in gauging the "burden" of mandatory waiting periods and other abortion restrictions)).

77. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626-27 (1969).

78. Dunn v. Blumstein, 405 U.S. 330 (1972).

more that requirement resembles a categorical denial of the franchise to the most burdened citizens. It may be said to follow from *Kramer* and *Dunn* that these heavily burdened citizens are owed an exemption, unless the state establishes that its voting requirement is narrowly tailored to advance a compelling state interest.

Second, adoption of the individual-right/practical-barrier model could help to lower the stakes of litigation over the most controversial of the new voting rules, the photo ID requirements. To illustrate, consider *Crawford v. Marion County Election Board*,[79] the constitutional challenge to Indiana's photo ID requirement for voting presently before the Court. The Indiana Democratic Party brought this case as a facial challenge, asking the federal courts to rule Indiana's photo ID law valid or invalid in its entirety. The lower courts accepted the case in this posture and ruled accordingly. But when the case reached the Supreme Court, the U.S. Solicitor General intervened to argue that it should be dismissed as an improper facial challenge.[80] Under *United States v. Salerno*,[81] the SG observed, a facial challenge must fail unless the plaintiff "establish[es] that no set of circumstances exists under which the Act would be valid."[82] Because Indiana's photo ID requirement imposes virtually no burden at all on the voter who shows up at the polls with his driver's license in his pocket, the plaintiffs cannot satisfy the *Salerno* standard, and their facial challenge must be dismissed. The SG acknowledged at oral argument that the Indiana requirement might well be unconstitutional as applied to an indigent voter who was unable to obtaining qualifying ID without payment of a fee.[83] But, he continued, the proper way to consider that question is in the context of an as-applied challenge by such a voter.[84] Moreover—and very importantly—the presumptive remedy in such a case would be a tailored exemption for the unduly burdened voter or voters, not an injunction against enforcement of the law altogether. As the Department of Justice's brief put it:

79. Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *cert. granted* 128 S.Ct. 33 (2007).

80. Brief for the United States as Amicus Curiae Supporting Respondents at 11-18, Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21 & 07-25) (2008) (hereinafter *SG's Brief*).

81. United States v. Salerno, 481 U.S. 739, 745 (1987).

82. *Id.* at 745.

83. Transcript of Oral Argument at 52-53, Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21 & 07-25) (hereinafter *Transcript*).

84. *Id.* at 53-58.

> If, as petitioners contend, [the Indiana voter ID requirement] is unconstitutional as applied to a homeless person . . . because he is unable to obtain a BMV-issued ID card . . ., then a narrow[] remedy would be to enjoin BMV from denying an ID on the ground that a person has no address, or to enjoin the [state] from a collecting a search fee for birth certificates in that circumstance.[85]

Over a series of cases, then, the courts could use the individual-right/practical-barrier gloss on *Burdick* to trim away the most egregious features of the new voting requirements, without ever passing on the basic legitimacy of Republicans' preferred techniques for combating voter fraud. This is no doubt attractive for judges who would like to avoid a head-on clash with a major political party over one of the party's top legislative priorities.[86]

A third attraction of the individual-right/practical-barrier model lies in the promise it may hold for bridging ideological differences. The model seems to have normative appeal across the political spectrum. On the conservative side, the model undergirds the amicus brief and oral argument of the Republican Solicitor General in *Crawford* (an argument that was well received by Justice Scalia and Chief Justice Roberts). On the left, the model was applied by Democratic appointee and district judge Harold Murphy in upholding Georgia's photo ID requirement for voting,[87] and seemed to inform Justice Ginsburg's questioning at oral argument in *Crawford*.[88] Indeed, reading between the lines, one can see the model at work in the *Crawford* amicus brief of stalwart liberal Erwin Chemerinsky, who argued that any state law that operates to "completely deny" the right to vote to any voting-age citizen must be subjected to strict scrutiny.[89] And then there is Justice Kennedy, the presumptive swing vote on so many issues, whose previous writings make clear that he thinks the burden of a voting requirement should be assessed from the point of view of those

85. *SG's Brief*, *supra* note 80, at 16.

86. It should be noted, however, that successful as-applied challenges do not always result in narrow remedies. Per *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320, 329-30 (2006), the court must ask whether the application of the statute to the plaintiffs may be severed, or whether severance would entail improper judicial "rewriting [of] state law" or be contrary to the legislature's wishes.

87. *See supra* note 67.

88. *See Transcript*, *supra* note 83, at 14-16, 48-49, 52-55 (focusing on the particular burden on certain indigent voters allegedly created by the Indiana photo ID law).

89. Brief of Professor Erwin Chemerinsky as *Amicus Curiae* in Support of Neither Party, Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21 & 07-25).

voters whom it affects most harshly.[90] Given this confluence of opinion, it is not unreasonable to think that the individual-right/practical-barrier model could anchor a substantially unanimous Supreme Court opinion establishing new guidelines for voter participation litigation.

Notice too that on a certain view of the adjudicative process, the individual-right/practical-barrier model might enable the bridging of ideological differences not only on the model's correctness in principle, but also on its application to particular facts. It is part of the lore of U.S. legal practice that the experience of adjudicating cases premised on particularistic facts can cleanse a judge of her initial ideological prejudices. And whether or not so cleansed, liberal and conservative jurists who would not see eye to eye if asked to gauge whether a given voting requirement is reasonable overall (in the sense that its benefits outweigh its costs) may nonetheless agree that an exemption for some narrowly defined class of voters for whom compliance is particularly difficult would improve the cost-benefit balance. By orienting constitutional adjudication toward the creation of such exemptions, the individual-right/practical-barrier model may foster trans-ideological judicial compromise.

Notwithstanding these attractions, the individual-right/practical-barrier model should be rejected by any judge who worries about debilitating

90. Consider his dissent from the Court's decision to uphold Hawaii's ban on write-in voting in *Burdick v. Takushi*, 504 U.S. 434 (1992). The majority conceptualized write-in voting as an alternative means of ballot access for independent candidates and third parties. Because Hawaii's principal channels for ballot access were constitutionally adequate, the majority reasoned, the constitutional burden of the write-in voting ban was necessarily minor. *See Id.* at 438-39. Kennedy saw the restriction rather differently: "*[f]or those voters affected*," he wrote, the ban operates as a "total" infringement on "the right to vote for the candidate of their choice." *Id.* at 447 (Kennedy, J., dissenting) (emphasis added). Time and again, Kennedy's choice of phrasing manifests his individualistic take on the nature of the right to vote. *See id.* at 446 ("I submit the conclusion [regarding the "character and magnitude" of the burden on constitutionally protected rights] must be that the write-in ban deprives *some voters* of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.") (emphasis added); *id.* ("*some voters* cannot vote for the candidate of their choice without a write-in option") (emphasis added); *id.* ("a write-in ballot permits a voter to effectively exercise *his individual constitutionally protected franchise*") (quoting Socialist Labor Party v. Rhodes, 290 F. Supp. 983, 987 (S.D. Ohio 1968)) (emphasis added); *id.* at 448 ("The majority's analysis ignores *the inevitable and significant burden* a write-in ban imposes *upon some individual voters* by preventing them from exercising their right to vote in a meaningful manner. . . . In my view, a State that bans write-in voting in some or all elections *must justify the burden on individual voters* by putting forth the precise interests that are served by the ban.") (emphasis added); *id.* ("Hawaii's write-in ban . . . imposes a significant burden *on voters such as petitioner*.") (emphasis added). Kenendy's individualistic take on the right to vote comports with his general view that the protection of fundamental individual liberties is the Court's foremost responsibility. *See generally* Helen J. Knowles, *From A Value to a Right: The Supreme Court's Oh-So-Conscious Move from 'Privacy' to 'Liberty,'* 33 OHIO N.U. L. REV. 595, 607-20 (2007) (surveying Justice Kennedy's "liberties" jurisprudence).

judicial entanglement in partisan political conflict. The model threatens the Court's long-held premise that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases."[91] To see why, consider the following hypotheticals:

- A working mother challenges the state's failure to include "working mothers" among the classes of citizens authorized to vote absentee.[92] The plaintiff alleges that in-person voting is vastly more burdensome for her than it is for the typical citizen, due to her extraordinary child care and employment responsibilities. Just as a woman whose unusual medical condition puts her at special risk from the statutorily authorized abortion procedure must be allowed to use a banned procedure that would be much safer for her, so too, the plaintiff says, must the state allow absentee voting by a citizen whose unusual life circumstances make in-person voting exceptionally difficult. In the alternative, the plaintiff requests a court order moving Election Day to a weekend, or requiring the state to establish "early voting" sites for in-person voting before Election Day.

- A Native American citizen who cannot read English brings suit challenging the state's failure to print ballots in her native language. There are few members of her language group in the locality in question, so the jurisdiction faces no obligation to provide voting materials in translation pursuant to the Voting Rights Act (VRA).[93] Nonetheless, the plaintiff insists that because the right to vote is an individual right, strict scrutiny must be applied to the state's failure to provide her with a translated ballot, given that voting an English-language ballot is impractical for her, through no fault of her own. (For a variation on this theme, imagine a suit brought by a limited-

91. Storer v. Brown, 415 U.S. 724, 730 (1974).

92. *Cf.* Griffin v. Roupas, 385 F.3d 1128 (7th Cir. 2004) (rejecting claim of working mothers).

93. Under Section 203 of the Voting Rights Act, states and political subdivisions must provide voting materials in translation if the jurisdiction's voting-age population of Latino, Asian American, Native American, or Native Alaskans (of a single language group) is equal to or greater than 10,000 or 5 percent of the voting age population, and the language minority's illiteracy rate is higher than the national average. *See* 42 U.S.C.A. § 1973aa-1a(b)(2)(A). For a useful overview of the VRA's language-minority protections, *see* Jocelyn Friedrichs Benson, *¡Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 270-74 (2007).

English-proficiency voter whose language group is not protected by the VRA.)

- A voter who had to wait in line for more than forty-five minutes to cast a ballot brings suit seeking a declaratory judgment (1) that the state must purchase and implement new computer technology that would notify voters upon arriving at the polling place of their expected waiting time; and (2) that the state must furnish absentee ballots to those voters who face a projected line of more than forty-five minutes, and count all such absentee ballots postmarked by the day after Election Day. The plaintiff insists that forty-five minutes is just too long to expect a reasonable citizen to wait before voting, especially when some citizens face no wait at all.

- Imagine that Congress decides to weaken the Help America Vote Act's protections for voters with disabilities. Congress replaces the current mandate—that states provide "at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place"[94]—with a requirement that states do this *or* set up early voting centers, at a distance of no more than twenty miles from one another, with similarly accessible voting machines. A blind voter brings suit, arguing that the nearest early voting center is not accessible to him because it would require a long trip by public transit or a costly cab fare, whereas previously he, like most other voters, was able to vote at a precinct within walking distance of his home.

- A resident of a remote, sparsely populated ranching community, whose home is thirty miles along bad roads from the nearest polling place, brings suit seeking a right to vote absentee. "At the very least," she says, "I should be entitled to vote absentee in elections held during calving season."

Common to these scenarios is the following: (1) due to fortuities of her life circumstances and the state's mandated procedures for voting, the plaintiff-voter must incur substantially greater costs than the average citizen in order to cast a valid, properly counted ballot; (2) the voter is not civically negligent—she cannot reasonably be faulted for the circumstances that make it difficult for her to use the available means of voting; (3) there

94. 42 U.S.C.A. § 15481(a)(3)(C).

is little basis other than the judge's personal sense of justice upon which to found a determination that the plaintiff's burden is so much greater than that faced by the typical voter as to warrant classification as "severe"; and (4) the plaintiff's as-applied claim cannot be vindicated without an intrusive remedy. In granting relief, the courts would be requiring the state to print ballots in new languages; to expand the class of persons entitled to vote absentee; to establish an in-person "early voting" option; to change the date of Election Day; or to purchase and implement costly, new-fangled voting technologies.

It follows that if a severe barrier to participation for any given voter (relative to the barriers faced by typical voters) is enough to trigger strict scrutiny of the challenged voting requirement, the courts will either need to assume responsibility for micromanaging the details of election administration, or to set an extremely high severity threshold. And the latter would surely meet with fierce resistance from liberal judges if the individual-right/practical-barrier model is to be the exclusive means of policing the constitutionality of voting requirements. The prospect of such resistance may be enough to make a high severity threshold seem "unmanageable" to the very conservatives Justices who believe it correct on the merits. Strenuous dissents from the liberal Justices could be enough to make the conservative position appear partisan (with a capital R) to onlookers even if it is in fact principled, and serve to discredit the standard in the eyes of the lower court judges charged with applying it.

It should be apparent, too, that the individual-right/practical-barrier model rests on a dramatic leap of faith concerning the likelihood that particularistic facts will dislodge judges from their ideological habits and enable judicial agreement about the severity of the associated burden. Here and there, appellate courts may be able to craft bright-line rules to settle disputes over burden severity (for example, concerning maximum waiting times at polling stations). But if the substance of the burden test is whether the challenged voting requirement makes participation substantially burdensome for her, bright-line rules will be few and far between. Given that liberal and conservative judges are likely to approach the burden question with very different normative intuitions—most especially about matters like voter fault and civic responsibility[95]—there would remain

95. Compare the different attitudes of liberal and conservative judges toward asserted "voter fault" in *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *O'Brien v. Skinner*, 414 U.S. 524 (1974); and *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), *vacated as moot by* 473 F.3d 692 (6th Cir. 2007). Note also Justice O'Connor's telling exasperation, during oral argument in *Bush v. Gore*, 531 U.S. 98 (2000), at the failure of certain Florida voters to fully "punch through" the chad on punch-card ballots. *See* Transcript of Oral Argument, *Bush*, at 57-58 ("Well, why isn't

considerable cause for concern about partisanship or its appearance in judicial decision-making. A doctrine that makes scrutiny levels highly dependent on the judge's own normative intuitions seems to this writer ill advised for an election law domain in which jurisprudential intuitions and partisan interests coincide.

Fortunately, the doctrinally settled premise that the right to vote is, at least in part, an individual right does not compel the practical-barrier gloss on *Burdick*. The Court has remarked that the right to vote signifies the would-be elector's status as a full member of the political community.[96] One could argue, then, that burdens on the franchise incidental to the state's pursuit of legitimate election administration goals, such as fraud prevention, are of no constitutional concern unless they are so pointlessly extreme as to manifest willful indifference to the voter's status as a member of the normative electorate. Going further, one could insist that "severe" harms to the individualist/dignitary interest protected by the right to vote arise only if the exclusionary regulation at issue (1) purports to define the normative electorate, rather than to advance election administration values like convenience, affordability, security, or conclusiveness, or (2) facially discriminates on impermissible grounds (e.g., assigning Democrats to one voting technology and Republicans to another). Some such circumscribed understanding of the individual right to vote is probably for the best if the courts are to avoid excessive and essentially standardless entanglement in the nuts and bolts of the voting process. Again, however, it is extremely difficult to imagine liberal judges acceding to so parsimonious a conception of the individual right unless voting is acknowledged to have other, non-dignitary functions that the courts may protect in other ways.

III. Applying *Burdick*: The Agnostic Models

As one might expect from the Court's oft-stated position that it has no "political theory" about voting, it is possible to implement the *Burdick*

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the standard *the one that voters are instructed to follow*, for goodness sakes? I mean, it couldn't be clearer. I mean, why don't we go to that standard?") (emphasis added).

96. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 567 (1964) ("[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen"). *Cf.* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government"). *See also* James A. Gardner, *Liberty, Community, and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893 (1997) (arguing that the expressive/membership conception of the right to vote has had much more influence over the Supreme Court's constitutional voting rights decisions than the Court overtly acknowledges).

framework without expressly adopting an individualistic or a structural conception of voting. This Part examines three prominent approaches to *Burdick* that are compatible with an agnostic stance toward the status of the right to vote: *purpose tests*, under which the level-of-scrutiny-determining question is the apparent reason for the challenged requirement's enactment; *reasonable tailoring on a requirement-by-requirement basis*, under which the constitutionality of voting rules turns on an all-things-considered assessment of whether the law is reasonably designed to advance legitimate objectives without creating unnecessary barriers participation; and *judicially prescribed mandates on a class-of-requirements basis*, whereby the courts undertake to specify features that certain kinds of voting requirements must have in order to qualify as presumptively permissible.

These strategies are agnostic in the sense that they can be implemented without judicial specification of the values that the right to vote is supposed to protect. Further, they can function as indirect ways of protecting both dignitary/individualistic and structural/collective interests, and in this sense they may facilitate agreement among judges who come to the bench with different conceptions of the right to vote. The strategies discussed below are also prominent, in that they have been promoted by leading scholars or judges, and have a footing in Supreme Court precedents.

A. Purpose Tests

In *Carrington v. Rash*,[97] the Supreme Court held that no state may exclude a citizen from the normative electorate "because of the way [he] may vote."[98] Dissenting from the Seventh Circuit's denial of rehearing en banc in *Crawford*, Judge Diane Wood similarly posited: "[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny."[99]

Such purpose tests are compatible with both individualistic and structural understandings of the right to vote. At the personal level, the challenged law may be said to disrespect the voter's prerogative to form her own political views and to participate in the electoral process free from state-created impediments that target her because of those views. At the collective level, a voting requirement that was enacted for viewpoint-

97. Carrington v. Rash, 380 U.S. 89 (1965).

98. *Id.* at 94.

99. Crawford v. Marion County Election Bd., 484 F.3d 436, 437 (7th Cir. 2007).

discriminatory reasons may be presumed to have distortionary effects on the political demographics of voter participation.[100]

Purpose tests do not, however, offer a judicially manageable means of policing the constitutionality of the new voting requirements. Partisan-exclusionary purposes may not be legitimate, but they are unavoidably pervasive when party-affiliated lawmakers undertake to reform the ground rules of electoral competition. If election laws are not to be found unconstitutional whenever enacted by a substantially party-line vote of the legislature, a court applying a motive or purpose test must differentiate between "but for" and "predominant" partisan motives, and reserve strict scrutiny only for those laws that are infected by extreme or excessive partisanship. But the line between extreme and ordinary partisan motives is next to impossible to draw,[101] except perhaps on the basis of the judge's subjective assessment of the law's merits. (If the judge finds the law wholly indefensible, she will conclude that partisan motives thoroughly overwhelmed the good judgment of the legislators who enacted the law.) And if purpose tests invariably devolve into substantive assessments of the law's reasonableness, what is gained by affixing the incendiary label, "illegitimate purpose"?

A further and perhaps even more daunting problem with partisan-purpose tests is that they would invite attention to any pattern of partisanship in the courts' own decision-making. It is bad enough that the courts have split along partisan lines in evaluating whether photo ID requirements excessively burden the right to vote. It would be that much worse if these split decisions turned overtly on whether the legislature acted for impermissible partisan reasons. Notably, not one Justice suggested during the *Crawford* oral argument that partisan motives were germane to the Indiana law's constitutionality—notwithstanding that the State's voter ID requirement was enacted on a straight party-line vote, that it appears to be the strictest of its kind in the nation, and that the Supreme Court has held it impermissible to exclude a citizen from the franchise because of the way he may vote. That principle is sound, but it is not one the courts can practicably enforce with holdings founded on the partisan purpose behind a requirement's enactment.

B. Reasonable Tailoring on a Requirement-by-Requirement Basis

Several law professors, myself included, filed amicus briefs in *Crawford* arguing that the Indiana photo ID requirement should not be

100. *See Elmendorf, supra* note 1, at 364-66.

101. *Cf.* Vieth v. Jubelirer, 541 U.S. 267 (2004).

upheld unless found to be reasonably necessary to advance important state interests.[102] By shifting attention from the ultimate consequences of Indiana's law to its apparent necessity (in light of voter-verification practices elsewhere and other readily imagined alternatives), this mode of analysis would allow the courts to dodge ultimate questions about the purpose of the right to vote.

I increasingly worry, however, that the Supreme Court's embrace of this approach would do little to reduce the appearance of partisanship in future judicial decisions. "Reasonable tailoring" is in the eye of the beholder. This is well illustrated by the Indiana photo ID requirement. Accepting that Indiana has a legitimate interest in verifying voters' identity, one might say that the State's ID requirement is not reasonably necessary to advance this interest because it appears more restrictive than the voter ID protocols in use in every other state.[103] On the other hand, a showing of government-issued photo ID has become *de rigueur* for many identity-sensitive activities in private life; from this perspective, Indiana's new voting requirement is just an unexceptional effort on the part of the State to catch up with developments in the private sector.[104] The skeptic will respond that even if photo ID requirements for voting are not unreasonable as such, Indiana's law is not reasonably tailored to prevent fraud because it exempts absentee voters, and absentee voting fraud by all accounts is a bigger problem than in-person voter impersonation.[105] The proponent will say that absentee voting fraud cannot practicably be countered with a photo ID requirement; different problems require different solutions.[106] The skeptic next points out that Indiana's statute features a very cumbersome accommodation for indigent voters who cannot obtain ID without payment of a fee and persons with a religious objection to being photographed.[107] These citizens may vote before Election Day at the county clerk's office in the county seat, or they may vote a provisional ballot at their normal polling station on Election Day—but the provisional ballot will only count if the voter makes a second trip within 10 days to complete an

102. *See* Brief of Amicus Curiae Christopher S. Elmendorf & Daniel P. Tokaji in Support of Petitioners, Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21 & 07-25) (hereinafter *Elmendorf & Tokaji Brief*); Brief of Amicus Curiae Professor Rick Hasen in Support of Petitioners,. Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21 & 07-25) (hereinafter *Hasen Brief*).

103. *See Elmendorf & Tokaji Brief*, *supra* note 102, at 30-32.

104. *See Debate, Voter ID: What's At Stake?*, 156 U. PA. L. REV. PENNUMBRA 241, 244 (2007) (Opening Statement of Bradley A. Smith).

105. *See, e.g.*, *Hasen Brief*, *supra* note 102, at 7.

106. *See, e.g.*, *Crawford*, 472 F.3d at 953.

107. *See, e.g.*, *Elmendorf & Tokaji Brief*, *supra* note 102, at 15-19.

indigency/religious-objector affidavit at the county clerk's office or election board.[108] Can the state's failure to make this affidavit available at the polling place truly be said to be reasonably necessary to an important state interest? Perhaps: the law's proponents respond that this arrangement minimizes lines at the polling place, and also serves the state's interest in an uncomplicated and hence easily administered system of election law (by consolidating all verification of provisional ballots in specialist fora).[109]

At the end of the day, whether one sees the Indiana voter identification regime as reasonably necessary to important state interests probably depends on what one thinks about the bona fides of political coalition behind its enactment, or on unstated assumptions about its likely effects and the manner in which one values those effects. Precisely because of this, there's little reason to think that a reasonable tailoring standard would be applied in a consistent manner by liberal and conservative judges.

All this is subject to an important caveat. While consistent application of the reasonable necessity standard seems unlikely to be achieved by trial judges acting individually or three-judge panels of the federal circuit courts, the standard might be implemented rather more successfully if defined in procedural or institutional terms. For example, a voting requirement could be said to fail the reasonable necessity test if and only if an ideologically diverse and well informed body of disinterested observers agreed, by supermajority, that it was beyond the pale.[110]

This is not how constitutional questions about election law are resolved today, but it is conceivable that the courts could be pressured from below to apply the reasonable necessity standard in accordance with the decisions of such a body. In the hopes of creating similar bottom-up pressure for broadly acceptable decisions in politically fraught litigation post-election litigation, Edward Foley has recommended the formation of bipartisan "shadow courts" that would submit amicus briefs with proposed rulings in litigation where the winner hangs in the balance.[111] If Foley's shadow courts were to prove their mettle in that context, they might well facilitate the adoption and implementation of the reasonable necessity

108. Brief of State Respondents at 57-59, Crawford v. Marion County Election Bd., __ U.S. __ (Nos. 07-21, 07-25).

109. *Id.*

110. *Cf.* Jacob E. Gersen & Adrian Vermeule, Chevron *as a Voting Rule*, 116 YALE L.J. 676 (2007) (proposing that *Chevron* deference be institutionalized via supermajoritarian judicial voting rules rather than a doctrine instructing judges to defer to reasonable agency interpretations of statutes).

111. Edward B. Foley, *A Model Court for Contested Elections (Or, the "Field of Dreams" Approach to Election Law Reform)*, Moritz College of Law, Election Law & Moritz, June 19, 2007, *http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=157.*

standard in constitutional challenges to allegedly burdensome conditions on voter participation. It would, however, be quite a step for the Supreme Court to announce that the presumptive constitutional status of challenged voting requirements depends on the judgment of a privately established advisory body.

C. Judicially Prescribed Mandates on a Class-of-Requirements Basis

A third agnostic strategy for implementing *Burdick* is to categorize challenged requirements as presumptively permissible or presumptively impermissible ("severe") on the basis of whether the requirement features certain judicially proscribed or judicially mandated terms. The proscription strategy, at least, is quite common in the Court's election law jurisprudence, and it well serves the agnostic jurist by enabling her to conceal the normative judgments and empirical suppositions that motivate particular holdings. Leading examples include the *Harper* line of cases, in which the Court established that no state may expressly condition political participation upon ownership of property or payment of a fee;[112] *Marston v. Lewis*[113] and *Burns v. Fortson*,[114] in which the Court held that fifty days "approaches the outer constitutional limits" of permissible advance-registration requirements for voting in general elections;[115] and *Kusper v. Pontikes*,[116] in which the Court said that advance-enrollment requirements for voting in partisan primaries go too far if the advance period is longer than the interval of time between primary elections.[117]

Perhaps inspired by these precedents, Edward Foley has argued that the Supreme Court should dispose of *Crawford* by holding that photo ID requirements are constitutionally permissible only if they include a general purpose hardship exception.[118] I am skeptical, however, that new judicially prescribed mandates can be used to regularize the adjudication of voter ID challenges or many of the other "new vote denial"[119] claims. The sheer

112. Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); *see also* Hill v. Stone, 421 U.S. 289 (1975); Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969).

113. Marston v. Lewis, 410 U.S. 679 (1973).

114. Burns v. Fortson, 410 U.S. 686 (1973).

115. *Id.* at 687.

116. Kusper v. Pontikes, 414 U.S. 51 (1973).

117. On this interpretation of *Kusper*, *see Elmendorf*, *supra* note 1, at 353-57.

118. *See Debate, Voter ID: What's At Stake?*, 156 U. PA. L. REV. PENNUMBRA 241, 247-51 (2007) (Rebuttal by Edward B. Foley); *Foley*, *supra* note 47, at 78-79.

119. I borrow this phrase from Professor Dan Tokaji. *See* Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

variety of regulations now subject to challenge is too great, and many will resist classification on the basis of formal distinctions.

Foley's proposed hardship exemption for photo ID requirements illustrates the point. Even if, as Foley hopes, the liberal and conservative wings of the Court were to agree that such laws are permissible only if they feature a hardship exemption, it would probably be a compromise for one day only. Before long, plaintiffs would be back in court arguing that this or that hardship exemption is unreasonable or discriminatory because it is unnecessarily cumbersome, or because it defines hardship too stringently, or because it vests too much discretion in election officials to pass on whether a particular voter's hardship is severe enough to qualify for the exemption.[120] Agreement in principle on the requirement of a hardship exemption is unlikely to yield agreement on the particulars, particularly in view of the different attitudes toward voter fault that liberal and conservative jurists bring to the table. And Foley's constitutional standard for evaluating these particulars—do they "reasonab[ly] accommodate[e] the interests on both sides"[121]—requires that judges make the very policy determination that has divided liberals and conservatives in the legislative arena.

The Supreme Court's adoption of Foley's proposal would also lead to problems in the lower courts. Constitutional challenges to voter ID requirements are part of a larger wave of voter participation claims. A decree from the Supreme Court on the exemption necessary to make an ID requirement "reasonable and nondiscriminatory" would shed no light on what is necessary, for example, to make regulations of third-party voter registration drives constitutionally permissible,[122] or on what safeguards must be implemented if a state undertakes to update its voter rolls by cross-

120. *Cf.* ACLU of New Mexico v. Santillanes, No. Civ. 05-1136, 2007 WL 782167, at *36-37 (D.N.M. Feb. 12, 2007) (enjoining City of Albuquerque voter ID requirement found to vest too much discretion in poll workers).

121. *Foley*, *supra* note 47, at 79.

122. *Cf.* Ass'n of Cmty. Orgs. for Reform Now v. Cox, No. 06-1891, slip op. at 16-17 (N.D. Ga. Sept. 28, 2006) (order granting preliminary injunction) (invalidating a regulation that required persons registering to vote to seal their completed application prior to submitting it to any person other than the state registrar or deputy registrar, and that prohibited the copying of completed voter registration applications); Project Vote v. Blackwell, 455 F. Supp. 2d 694 (N.D. Ohio 2006) (entering a preliminary injunction against a law that established registration and training requirements, backed by criminal penalties, for paid participants in voter registration drives); League of Women Voters of Fla. v. Cobb, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (issuing a preliminary injunction against a law that fined voter registration organizations for late submissions).

referencing other databases.[123] The Supreme Court's decision would suggest, however, that judges may properly resolve such cases by making free-form pronouncements about what further statutory provisions must be added to one or another regulation of the voting process. Whether or not Foley is right that "unanimous Platonic Guardianship" of this sort from a nine-member, ideological diverse Supreme Court would be healthy for our democracy,[124] most of the guardianship in practice would take place via trial judges acting individually, or three-judge appellate panels composed without regard for ideological balance and using simple-majority voting rules. At a time of renewed and highly partisan legislative attention to the nuts and bolts of the voting process, this is not a happy prospect for anyone worried about judicial partisanship or its appearance in the resolution of conflicts over the ground rules of electoral competition.

The mandate/prohibition strategy might not be quite so risky if it were developed in a procedurally oriented fashion, however. Rather than undertaking to prescribe exemptions that a class of controversial voting requirements must feature to qualify as permissible, the Supreme Court might try to establish procedural norms for electoral reform in the face of partisan dissensus. For example, the Court might presume a voting requirement unreasonable if (1) it was enacted substantially along partisan lines, and (2) its burden has been shown to fall disproportionately upon voters affiliated with the dissenting party, unless (3) the requirement includes appropriate sunset and monitoring provisions (somehow defined). From a manageability perspective, this procedural approach has the advantage of a broad domain (it would extend to all partisan voting reforms); the potential for bright-line cutoffs (a sunset provision might be deemed reasonable if shorter than x years; a vote of the legislature would be deemed substantially partisan if no more than y percent of the opposition party members voted for the bill); and minimal intrusiveness (the legislature could maintain its substantive vision for the electoral process by periodically reenacting the contested requirements).

The development of such procedural rules for lawmaking in the teeth of partisan disagreement might be justified as a means of protecting public confidence in the fairness of the political process,[125] or as a strategic

123. *Cf.* Florida State Conference of the N.A.A.C.P. v. Browning, No. 4:07-cv-00402 (N.D. Fla. Dec. 18, 2007) (order granting motion for a preliminary injunction).

124. *Foley*, *supra* note 47, at 79.

125. *Cf.* Purcell v. Gonzales, 127 S.Ct. 5, 7 (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."); Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1968) (positing that the right to vote on equal terms with others is fundamental because "[a]ny unjustified discrimination in determining who

measure to foster the production of data that will make clear whether the challenged requirement have unconstitutional effects.[126] These predicates for judicial intervention are no doubt controversial, however, as is the very idea that the courts may use constitutional holdings to establish procedural requirements for certain classes of legislation. Moreover, a procedural mandate would only buy the courts time. The fundamental right to vote has substantive bite, and eventually the Supreme Court will have to explain how this right constrains state efforts to regulate the process by which members of the normative electorate are invited to record their political preferences.

IV. Applying *Burdick*: The Right to Vote as a Right in Service of Democratic Self-Government

The best hope for applying *Burdick* to the new generation of voting claims without undermining the judiciary's reputation for impartiality is, I think, to focus the "burden" inquiry on how voting requirements affect electoral participation by the normative electorate as a whole. Instead of asking whether the requirements at issue make voting excessively difficult for the plaintiff-voters (the individual rights approach); or about the reasons for their enactment, the reasonableness of their tailoring, or the presence or absence of key provisions (the agnostic approaches); the courts would ask whether the requirements cause the number or distribution of participating voters to deteriorate by more than a given amount ($x\%$). If so, the requirements would be deemed presumptively impermissible, and would face strict scrutiny. If not, the requirements would be deemed presumptively permissible, and reviewed very leniently.

To implement this strategy, the courts would have to answer a number of further questions. Perhaps the most important is whether to privilege voter participation as such, or rather the representativeness of the voting public (vis-à-vis the normative electorate as a whole). On the former approach, a requirement is constitutionally suspect to the extent that it reduces the total number of eligible citizens who participate. On the latter approach, departures from universal participation are unimportant except insofar as those voters who do participate comprise a politically skewed subsample of the normative electorate, in the sense that the distribution of

may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").

126. Such data would be relevant on a structural understanding of the right to vote. *See infra* Part IV.

interests and concerns among the voting public is unlike the corresponding distribution within the normative electorate as a whole.

A second critical choice is the regulatory benchmark to use in deciding what effects may be properly attributed to the challenged requirements for level-of-scrutiny purposes. Elections are and must be thoroughly regulated, so it makes little sense to presume a libertarian, no-regulation benchmark for this purpose. The level or distribution of voter participation under the challenged requirements might instead be compared with that which would have obtained under the previous state law, or under the typical alternative to the challenged requirements found in other states, or under the least skewing or least dampening alternative found elsewhere.

Third, the courts will have to settle upon measures of voter participation or skew, and to choose quantitative cutoffs separating "severe" from "lesser" effects.[127] Judges will also have to decide whether and if so how to allow plaintiffs to aggregate voting requirements—challenging several at once—in the hopes of establishing a cumulative effect sufficient to trigger strict scrutiny of a set of requirements, each of which would be deemed innocuous if considered on its own.[128] (Some allowance for aggregation seems advisable, so as not to leave legislatures and administrative agencies with free rein to erect exclusionary barriers in a piecemeal fashion.) Finally, the courts will need a rhetoric that makes their choices on all these fronts intelligible and attractive to the citizenry at large.

It should be apparent that the adoption of any such effects-oriented rendition of *Burdick* would put great strain on the "individual rights" and "no theory" precepts that have long informed the Supreme Court's constitutional voting rights jurisprudence. On traditional understandings, an individual right is an entitlement that the rights-holder may exercise or not as she wishes. Thus, the fact that a right has not been exercised need not be probative of the existence of potentially unconstitutional burdens on

127. To be sure, it is not strictly necessary that the courts establish a formal cutoff and employ a two-tiered standard of review—but manageability considerations strongly militate in favor of this strategy. *Cf.* Vieth v. Jubelirer, 541 U.S. 267, 294 (2004) (plurality opinion) ("Having failed to make the case for strict scrutiny of political gerrymandering, Justice STEVENS falls back on the argument that scrutiny levels simply do not matter for purposes of justiciability. He asserts that a standard imposing a strong presumption of invalidity (strict scrutiny) is no more discernible and manageable than a standard requiring an evenhanded balancing of all considerations with no thumb on the scales (ordinary scrutiny). To state this is to refute it. As is well known, strict scrutiny readily, and almost always, results in invalidation.").

128. *Cf.* Clingman v. Beaver, 544 U.S. 581, 607-08 (2005) (O'Connor, J., concurring) ("A panoply of regulations, each apparently defensible when considered alone, may nevertheless have the combined effect of severely restricting [electoral] participation and competition. Even if each part of a regulatory regime might be upheld if challenged separately, one or another of these parts might have to fall if the overall scheme unreasonably curtails associational freedoms.").

the right. The approach I suggest here inverts traditional rights-based thinking: What matters is not the form or size of the barrier faced by particular rights-bearers, or the state purpose behind the barrier, but whether the barrier is surmounted, and the right exercised, by a large or representative share of the citizenry. The constitutional good associated with voting is realized—or not realized—at an aggregate level.

An aggregate-effects gloss on *Burdick* would also undermine the "no theory" maxim. Without a theory, how are the courts to choose, for example, between the maximal-participation and representative-participation norms? The aggregate rate of voter participation might be thought an object of constitutional concern insofar as it signifies the legitimacy of the political order. The representativeness of the voting public might be valued on the theory that a representative voting public best approximates the electoral ideal in which public officials are chosen by and accountable to the normative electorate as a whole. Perhaps there are other reasons to prefer one of these approaches over the other. But once one commits to an aggregate-consequences framework, a choice must be made—and defended—about which consequences to privilege. The question of what goods are served by the exercise of the franchise can longer be papered over. The very explicitness of consequential approaches to the *Burdick* test—the need to make overt choices about measures of impact, regulatory benchmarks, severity cutoffs, and the like—would create pressure for the development of a political theory about voting and its regulation under the Constitution.

The balance of this Part explains why an aggregate-consequences approach should prove less threatening to the judiciary's reputation for impartiality than the individual-right/practical-barrier or the agnostic glosses on *Burdick* outlined above. By way of preview: the consequential alternatives rely upon an objective, empirically discernable phenomenon as the predicate for judicial intervention, rather than the individual judge's sense of political justice; they provide opportunities for compromise between values cherished by liberals and those cherished by conservatives; they can be designed to curtail judicial intervention under contemporary circumstances substantially, yet without sacrificing the prospect of a judicial remedy in the event that a state establishes new voting rules with severe consequences; they should tend to delay judicial intervention until some time after the enactment of polarizing legislation; and they are readily explained to the general public.

A. Objectivity

The individual-right/practical-barrier and agnostic approaches surveyed above require judges to make essentially personal and

unquantifiable judgments about matters such as the extent of relative burden among voters that a democracy ought to tolerate, the voter's civic responsibility to deal with certain barriers, the reasonableness of a voting requirement's design vis-à-vis the ends it is supposed to accomplish, or the reasonableness of particular legislative efforts to comply with the judiciary's mandatory-terms requirements (e.g., hardship exemptions to voter ID).

An aggregate-consequences approach along the lines sketched here would not entail such judgments. Lower courts would undertake to measure the effects of challenged laws, not their fairness or justice. If the effects reach a certain magnitude, the challenged laws will face presumptively fatal strict scrutiny laws; if the effects do not rise to that level, the laws will almost surely be upheld.

To be sure, the development and application of this framework would present many occasions for the exercise of judicial discretion. Appellate courts would have to settle upon measures of skew and cutoffs for separating severe from lesser skewing effects. Trial judges would have to weigh the testimony of competing expert witnesses. Trial judges might also need to sort and classify the regulatory strategies of other states for the purpose of defining regulatory benchmarks and presumptive remedies.

All this leaves much more to the discretion of individual judges than, for example, determining whether an advance registration requirement is longer or shorter than fifty days,[129] or whether deviations from perfect population equality under a redistricting plan exceed ten percent.[130] But there would be important constraints. Judges would lack authority to intervene absent quantitative evidence concerning the challenged requirements' impact. Honest judges would have little choice but to abide any consensus that emerges among social scientists regarding the effects of particular laws or the best methodology for measuring such effects. And in cases where the evidence admits of competing interpretations, it would at least be clear what judges ought to be doing—and that that would not consist of giving effect to the judge's own assessment of the challenged law's reasonableness, fairness, or justice.

B. Compromise

An aggregate-consequences framework would be comparatively conducive to enduring compromise between liberal and conservative

129. *Cf.* Burns v. Fortson, 410 U.S. 686, 687 (1973) (remarking that fifty days "approaches the outer constitutional limits" of permissible advance-registration requirements for voting).

130. *Cf.* Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (indicating that deviations of less than 10% are presumptively permissible).

jurists. This follows from the framework's broad domain of application (once fleshed out, the framework could be used to adjudicate most any claim that a state has hindered qualified electors' participation by structuring the voting process in unacceptable ways) and the range of choices that must be made in elaborating the framework.

To illustrate, one can imagine a relatively conservative Justice going along with the "skewing effects" gloss on what consequences matter, if in return the liberal Justices accept the "typical state practice" regulatory benchmark (rather than a "previous state law" or "least skewing alternative" benchmark) and a high threshold as the trigger for strict scrutiny. Liberals would obtain ratification of the principle that elected officials ought to answer to all adult resident citizens in the jurisdiction, rather than a privileged subset thereof. Conservatives would gain the liberals' commitment not to displace ordinary state practices, and to refrain from intervening absent really serious departures from the representative-participation ideal. There would be further opportunities for compromise on the question of how skewing effects will be measured (i.e., what dimensions of political identity will be privileged); and on the constitutional standard that will be applied to individualistic/dignitary voting claims (will it reach anything but de jure exclusion from the normative electorate?).

If, in the interest of protecting the judiciary's reputation for impartiality, a compromise along these lines can be reached, that should facilitate good-faith application of the doctrinal standard by liberals and conservatives alike in the lower courts. Subterfuge seems less likely if the governing doctrinal standard does not emerge in a polarizing 5-4 opinion from an ideologically divided Supreme Court.

It is true, of course, that liberal-conservative compromises may also be reached on particular facts under the individual-right/practical-barrier model of adjudication, or as to particular requirements under the agnostic approaches. But an enduring compromise should be easier to attain under the structural approach. The structural approach depersonalizes adjudication. In recognition of the perils of seemingly partisan judicial pronouncements on the reasonableness of particular voting requirements (or applications of those requirements), the structural approach requires judges to set an abstract standard for what effects will be tolerated. Once set, this standard will yield an answer in most any subsequent voter participation case. The judge presiding over that case need not and should not say whether the challenged requirement or application is sensibly tailored or benignly intended or appropriately leavened with accommodations for burdened voters. This is important. A judge who writes or signs onto a compromise opinion concerning the latter questions

inevitably compromises her integrity to some degree. She must say something about the challenged requirement that she does not believe. A pattern of compromise in such circumstances seems unlikely. Compromise should be easier to come by if the doctrinal standard is unequivocally objective, such that its application implies nothing at all about the judge's own views concerning the fairness or reasonableness of the requirements at issue.

C. Disruptiveness

One might fear that an aggregate-consequences approach would prove disruptive of longstanding election administration practices, particularly if the courts were to privilege the representative-participation norm (and even if ordinary state practices were used to define the regulatory benchmark and presumptive remedy). The more disruption there is, the more the courts will be under attack and in the news. Judicial partisanship or its appearance would be that much harder to obscure from the general public's view.[131]

The fear of disruption is plausibly rooted in two observations. The first concerns the demographics of political participation: elderly, highly educated, and affluent citizens are overrepresented among the voting public, whereas poor people, poorly educated people, young people, and members of certain minority groups vote in disproportionately low numbers relative to their share of the normative electorate.[132] Second, because voting is a "low-benefit, low-cost activity," "small changes in the cost of voting might have sizable effects on overall turnout rates and influence the turnout of some groups more than others."[133] Such changes may result from any number of modest regulations whose true purpose is fraud reduction or administrative convenience.

The fear of disruption is greatly exaggerated—and particularly so if the courts were to privilege representative participation over sheer extent of participation. Political scientists who have studied the distribution of political views among the voting and non-voting publics have generally concluded that the voting public is, in fact, fairly representative of

131. *Cf.* Veith v. Jubelirer, 547 U.S. 267, 292-93 (2004) (plurality opinion) (where Justice Scalia suggested that a vague standard could be deemed manageable for relatively rare racial gerrymandering claims, but would not suffice for regulating the much more pervasive practice of partisan gerrymandering).

132. For a review of the literature, see Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997).

133. Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 PERSP. POL. 507, 508 (2004).

nonvoters.[134] To be sure, there are some research findings to the contrary,[135] but much of the empirical work stands as an antidote to what political scientists Benjamin Highton and Raymond Wolfinger call "the widespread belief 'that if everybody in this country voted, the Democrats would be in for the next 100 years.'"[136] Moreover, it's far from clear that removing the remaining barriers to voter participation (such as registration requirements, in-person voting requirements, etc.) would do much to improve the representativeness of the voting public. Reviewing the evidence to date, MIT professor Adam Berinksy argues that recent reforms meant to lower the cost of voting "may have increased turnout slightly but [have] not had the hypothesized partisan effects."[137] If anything, these reforms have increased the socioeconomic bias of the electorate, boosting the frequency with which the politically engaged participate in elections but doing little to draw in the marginalized.[138] For nonparticipants, Berinsky hypothesizes, the predominant barrier to participating is not the "direct cost[] of registration and getting to the ballot box," but rather the "cognitive cost[] of becoming engaged with and informed about the political world."[139]

That this is generally so today does not mean it will be so tomorrow. In times past, poll taxes and literacy tests proved remarkably effective as

134. Much of this literature is canvassed in Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 BRIT. J. POL. SCI. 179, 180-86 (2001). *See also* Jack Citran et al., *What If Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75 (2003).

135. *See, e.g.*, Adam J. Berinsky, *Silent Voices: Social Welfare Policy Opinions and Political Participation in America*, 46 AM. J. POL. SCI. 276 (2002) (finding that nonvoters are more liberal on social welfare policy questions); Zoltan Hajnal & Jessica Trounstine, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515 (2005) (agreeing that "fears of a skewed electorate leading to biased outcomes are largely unfounded" vis-à-vis national elections, but demonstrating that skew is much more pronounced in low-turnout local elections).

136. *Highton & Wolfinger*, *supra* note 134, at 179 (quoting John Kenneth Galbraith, Interview, CAL. MONTHLY, Feb. 1986, at 11).

137. *Berinsky*, *supra* note 17, at 472.

138. *Id.*

139. *Id.* at 472. *See also Highton*, *supra* note 133 (reviewing empirical literature and arguing that "there are minimal partisan implications of contemporary registration laws and that registration reform has probably reached its limits of enhancing turnout). This is not to say that there are no electoral mechanics reforms that could increase the representativeness of the voting public. *Cf.* Raymond E. Wolfinger et al., *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 STATE POL. & POL'Y Q. 1 (2005) (estimating that the establishment of policies such as mailing voters a sample ballot and information about their polling places, extending the hours that polls are open, and requiring employers to give workers time off to vote, can increase turnout of registered voters by about three percentage points with a disproportionate increase among the young and less well educated).

tools of disenfranchisement.[140] It remains to be seen whether recently enacted photo ID requirements and restrictions on voter registration drives will significantly affect participation rates among disadvantaged groups. But the recent empirical research should provide some comfort to anyone who worries that judicial embrace of the proposed framework would increase judicial intervention in the political process. Indeed, if paired with a restrictive understanding of the personal right to vote, the consequential/representative-participation approach should have precisely the opposite effect.[141]

D. The Timing of Judicial Intervention

Under the agnostic glosses on the *Burdick* test, voter participation claims can be brought right after the enactment of the challenged requirement. Under the individual-right/practical-barrier approach, claims can be brought as soon as differentially burdened individuals are identified.[142]

Under the aggregate-consequences approaches, by contrast, judicial review of new voting requirements would be delayed until social scientists have developed a record of their effects. One may regret that this would allow unconstitutional laws to take effect, but from a manageability perspective, delay should be salutary. Delay gives the political branches a chance to reverse or modify burdensome legislation before the courts step in—a possibility that should not be discounted with respect to bills that spark heated partisan conflict. Delay also means that when it comes time for the courts to act, the courts will have more information about how the challenged requirements have been received by the general public, and about the dimensions, intensity, and persistence of associated partisan conflict.

To be sure, there may be some requirements whose consequences the courts could assess pre-implementation. For example, if State A adopts a

140. *See generally* ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES (2000).

141. A sheer-numbers version of the consequential approach has the potential to be somewhat more disruptive. For example, a state's failure to adopt same-day voter registration might well be vulnerable to constitutional challenge, although the adoption of a "typical state practices" regulatory benchmark could forestall this and related challenges until same-day registration has been adopted in more than half of the states. (Regarding the impact of advance-registration periods on turnout, see Stephen Ansolabehere & David M. Konisky, *The Introduction of Voter Registration and Its Effects on Turnout*, 24 POL. ANALYSIS 83 (2006), and sources cited therein.).

142. During the *Crawford* oral argument, the Solicitor General acknowledged under questioning from Justices Ginsburg and Kennedy that a pre-implementation as-applied challenge could be brought against Indiana's ID requirement by any voter for whom obtaining ID would pose a hardship. *See Transcript*, *supra* note 83, at 57-58.

measure identical in most respects to a measure recently judged unconstitutional in State B, the evidentiary record developed in the challenge to State B's law may provide enough information for a court to draw "more likely than not" conclusions about the effects of State A's requirements. Notice, though, that pre-implementation challenges will be feasible mostly for old, familiar forms of voting regulation. If the courts look to typical state practice in defining the regulatory benchmark, many of these will enjoy a strong presumption of constitutionality. Truly novel requirements will not be susceptible to pre-implementation challenge, and on manageability grounds, at least, this should be welcomed rather than regretted.

E. The Public Accessibility of the Standard

The aggregate-consequences approaches to voter participation claims have the virtue of normative transparency. A court cannot deploy this method of analysis without being clear about what consequences matter. From a manageability perspective, however, normative transparency is a mixed blessing. It may facilitate public explanation and defense of judicial interventions. Then again, it may open judicial decisions to criticism on the ground that the court privileged the wrong norms, or fundamentally misunderstood the empirical evidence. Normative transparency has not been a characteristic feature of the Supreme Court's jurisprudence of political rights to date—recall the "no theory" precept—which perhaps suggests that the Justices credit the risks of normative transparency more than the benefits.

The advantages and disadvantages of transparency are not independent of the mix of cases that reach the courts, however. Obscuring the normative foundations of its decisions may sometimes help the Supreme Court to dodge criticism, but at the price of leaving the lower courts bereft of guidance when confronted with constitutional challenges to new kinds of voting requirements. Thus, the more varied and numerous the politically contentious election law cases that stand to reach the courts, and the more that judges' intuitions about the correct decision in such cases correlate with interests of their political parties, the greater the risk to the judiciary's reputation for impartiality if the Supreme Court leaves the normative bases of its holdings unspecified.[143] Agnosticism may not suit the present age.

* * *

143. This assumes, of course, that the Supreme Court's specification of the normative foundations of its decisions would be honored by lower courts when they face questions as to which there is no Supreme Court holding directly on point.

One could agree with everything I have said to this point and still maintain that the aggregate-consequences approaches are beyond the judicial ken for the simple reason that they require the courts to immerse themselves in the fine points of social scientific research. This objection has considerable force. As I have elsewhere explained at length, one of the defining features of the Supreme Court's *Storer-Burdick* jurisprudence as a whole is an apparent reluctance to ground burden characterization, and hence scrutiny levels, on empirical evidence about how the requirements at issue actually affect the political process.[144] The Court sets scrutiny levels mainly "on the basis of relatively simple, formal inquiries into (1) the type of burden created, (2) proxies for impact . . . , and, somewhat more equivocally, legislative purposes."[145] The same inclination toward formalism can be seen in other domains of the constitutional law of democracy, including the malapportionment cases (consider the rigidity with which the court enforces the one person, one vote requirement,[146] albeit only once every ten years[147]); the campaign finance jurisprudence (consider the contribution/expenditure distinction[148]); and the manner in which the Court undertook to regulate poll taxes and other voter qualifications (with *ipse dixit* declarations of what is and is not permissible[149]).

This preference for formalism in is entirely understandable. It keeps the courts from getting mired in technically complicated questions about measurement. It often yields bright line rules, whose prudential virtues are obvious enough when the courts are asked to adjudicate the disputes of warring political parties and their interest-group allies over the ground rules of political competition. And it allows the Supreme Court to avoid articulating a precise account of the constitutional harms that supposedly

144. *See Elmendorf, supra* note 1.

145. *Id.* at 376.

146. *Cf.* Karcher v. Daggett, 462 U.S. 725 (1983) (rejecting notion that there is any safe harbor for one person, one vote claims at the national level).

147. League of United Latin Am. Citizens v. Perry, 126 S. Ct. 2594, 2611 (2006) (noting that "States operate under the legal fiction that their plans are constitutionally apportioned throughout the decade [between censuses], a presumption that is necessary to avoid constant redistricting, with accompanying costs and instability.").

148. Under the Court's cases, limits on financial contributions to candidates receive strict scrutiny, whereas limits on candidate expenditures are generally subject to deferential review. *See, e.g.*, Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 385-88 (2000) (discussing *Buckley v. Valeo*, 424 U.S. 1 (1976), and explaining that "[w]hile we did not then say in so many words that different standards might govern expenditure and contribution limits affecting associational rights, we have since then said so explicitly.").

149. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621 (1969); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).

warrant judicial intervention in the political process, which is convenient given how little the Constitution says about the law of democracy, and given the conventional understanding that courts should only enforce personal constitutional rights.

But I do not think the Court's uneasiness about empirically oriented standards forecloses an aggregate-consequences approach to voter participation claims—if the regulatory benchmark is defined in terms of ordinary state practices and if threshold for strict scrutiny is set high enough. The Court's resistance to empirical glosses on the *Burdick* test has been most strenuous when plaintiffs have argued that the state should be required to come forward with evidence that problems it has targeted with ordinary requirements are real and substantial.[150] That, said the Court, "would invariably lead to endless court battles over the sufficiency of the 'evidence,'" and "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."[151] An ordinary-state-practices benchmark would obviate this problem. Note also that under the approach I have suggested, expert testimony would only become relevant if there is a case to be made that the challenged requirements have had a large impact on voter participation, cresting the relevant threshold.

It also bears mention that the Supreme Court could commit itself normatively to an aggregate-consequences approach and then use presumptions to lessen the need for complicated empirical inquiries.[152] For example, the Court might hold that in the absence of reliable empirical evidence about skew, strict scrutiny will be triggered if reasonably objective "danger signs" suggest that the challenged requirements are likely to have substantial skewing effects. Along these lines, Professor Daniel Tokaji and I have argued that strict scrutiny may well be appropriate in *Crawford* because of "the Indiana photo ID requirement's extreme outlier status relative to the practices of other States; the law's enactment by a substantially party-line vote of the legislature; and its cumbersome procedure for accommodating indigent voters."[153] There is support in the case law for the danger signs approach, though the Court has not yet

150. *See* Munro v. Socialist Workers Party, 479 U.S. 189, 194-95 (1986).

151. *Id.*

152. *Cf.* Elmendorf, *supra* note 1, at 345-48 (presenting an interpretation of *Storer v. Brown*, 415 U.S. 724 (1974), under which courts are to make presumption-guided empirical inquiries in cases concerning the stringency of restrictions on independent candidates' and third parties' access to the ballot).

153. Elmendorf & Tokaji Brief, *supra* note 102, at 5, 26-34.

characterized its electoral mechanics jurisprudence in these terms.[154] But whether the approach can be cashed out in a sufficiently mechanical way—sufficient to obtain a tolerable degree of consistency in application across liberal and conservative judges—remains to be seen.

The Court's apparent uneasiness about linking the constitutionality of election laws to social scientific findings is, I think, the strongest "manageability" count against an aggregate-consequences approach to voter participation claims.[155] Thus, whether the manifest problems with the alternative approaches will prompt the Court to overcome this uneasiness also remains to be seen.

V. Textual and Doctrinal Foundations for an Aggregate-Consequences Approach

It may be objected that the putative manageability advantages of an aggregate-consequences approach are of academic interest only, because there is no foundation in the Constitution or in the Supreme Court's case law for such an approach. I disagree. In my view, the most normatively attractive version of the aggregate-consequences approach has a better foundation in the Constitution and in Supreme Court case law than its principal normative competitor, the individual-right/practical-barrier model. The latter claim especially will no doubt seem a stretch to many, given the nominal doctrinal status of the right to vote as an individual right. But as I shall show, this nominal status does not tell the whole story, and, more particularly, it does not support the proposition that a voting regulation that makes it substantially more difficulty for the plaintiff-voter than for others to participate has "severely" burdened anyone's rights within the meaning of *Burdick*.

The consequential approach I wish to defend rests on the following ideas. One, there is a constitutional injury associated with any voting requirement that causes the political demographics of the voting public—the subset of the citizenry that regularly participates in elections—to depart from the demographic profile of the normative electorate. Second, the mere fact of such a departure does not warrant judicial invalidation of the offending voting requirements. The constitutional cost may be justified.

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154. *See id.* at 27-30; Elmendorf, *supra* note 1, at 324, 335-80 (suggesting that much of the *Storer-Burdick* jurisprudence may be understood in "danger signs" terms).

155. *Cf.* Fallon, *supra* note 45, at 1291 (noting that "[a] test may be deemed judicially unmanageable if would require courts to make empirical findings . . . for which they lack competence," but observing that this consideration has usually been invoked only if the courts also conclude that "another institution is both better situated and constitutionally obliged to make the requisite assessments.").

Third, the courts should presume that departures from representative participation are justified if they result from ordinary voting requirements, defined as those found in a majority or plurality of the states, unless the plaintiff establishes that the ordinary requirements in question have persisted only because of the self- or party-entrenching interests of elected officials.[156] Fourth, to trigger strict scrutiny, plaintiffs would have to establish that the challenged requirements cause a quantitatively "severe" skew in voter participation, relative to the level of skew that would be obtained if the challenged requirements were replaced with commonplace alternatives found in other states.

A. Foundations in the Constitution Proper

The proposition that the Constitution privileges the representative-participation norm is debatable, as is the notion that it calls for a substantial measure of judicial deference to the states in matters of election administration. But there are hooks in the Constitution's text for these ideas, which is more than can be said for the individual-right/practical-barrier alternative.

The Constitution speaks to voting in three ways. First, and most obviously, it speaks through the prohibitory voting amendments—the Fifteenth, Nineteenth, Twenty-fourth, and Twenty-sixth—which disallow discrimination with respect to voting on the basis of race, sex, payment of a tax (for purposes of federal elections), and age (for citizens over eighteen). Given their group-specific reach, these amendments cannot support a generic right to vote, one that could be invoked by any citizen who seeks an exemption from regulatory barriers to electoral participation.

Second, there is the Guarantee Clause of Article IV, Section 4, which specifies that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."[157] However the Guarantee Clause is best read, it too seems an extremely improbable hook for the individual-right/practical-barrier conception of voting rights. As the Supreme Court has suggested when holding Guarantee Clause claims nonjusticiable, the Clause seems to be concerned with the overall structure

156. The evidentiary standard for this showing should be demanding. For example, plaintiffs might be required to prove that the requirement does not exist in most states that provide for lawmaking by ballot initiative. *Cf.* Nathaniel Persily & Melissa Cully Anderson, *Regulating Democracy Through Democracy: The Use of Direct Legislation in Election Law Reform*, 78 S. CAL. L. REV. 997 (2005) (examining whether election laws differ systematically as between states that provide for lawmaking by ballot initiative and states that require all laws to be passed by the legislature).

157. U.S. CONST. art. IV, § 4.

or functioning of state governments, rather than individuated rights.[158] (The Guarantee Clause might provide a home for the representative-participation norm, but that question is largely academic given the Clause's longstanding status as nonjusticiable.)

Third, the Constitution addresses voting in its prescription for the selection of Members of Congress in the Elections Clause of Article I and in the Seventeenth Amendment. Here the document may be read to furnish both a normative ideal against which actual selection mechanisms may be evaluated, and an allocation of regulatory authority with respect to the selection process. The normative ideal is this: congressional representatives are to be "chosen by the people" of their respective states.[159] Not by the people's state legislators, not by a monied or landed aristocracy, but by the people as a whole. As for the allocation of regulatory authority, Article I defines the normative electorate for congressional elections derivatively; each state's congressional delegation is to be selected by those persons who are qualified to vote for the most numerous house of the state's legislature.[160] As a result, the states have exclusive authority to establish who may vote in federal elections. Article I also empowers the states to regulate the time, place, and manner of congressional elections.[161] These state regulations are subject to congressional override, unlike state rules concerning the qualifications of electors.

Do Article I and the Seventeenth Amendment provide a plausible basis for the individual-right/practical-barrier model? No. "Choice by the people" implies preference aggregation across the multitudes who make up the citizenry of each state. That a voting regulation erects high hurdles to

158. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 552 (1946) ("The basis for th[is] suit [challenging the apportionment of population among legislative districts] is not a private wrong, but a wrong suffered by Illinois as a polity."); Pac. States Tel. & Tel. Co. v. Oregon, 223 U.S. 118, 149-51 (1912) (distinguishing legislative authority "as to purely political questions" concerning the "framework and political character" of a state government, from judicial authority over "justiciable controversies" involving rights specific to the defendant).

159. U.S. CONST. art. I, § 2; U.S. CONST amend. XVII.

160. Article I, section 2 provides, "The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature." The Seventeenth Amendment specifies, "The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof.... The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures."

161. *See* U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall by prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.").

electoral participation by one or another citizen tells us nothing about whether that regulation substantially distorts the aggregation process.

"Choice by the people" may serve, however, as an implied limitation upon the states' power to set voter qualifications and the states' and Congress's authority to regulate the time, place, and manner of federal elections. Consider a silly example. Imagine that a state enacts a qualification such that in order to vote for the most numerous branch of its legislature, one has to be a citizen of France. Assume that these electors proceed to vote for the state's representatives in Congress, pursuant to the second clause of the first sentence of Article I, Section 2. It could no longer be said that the House of Representatives had been chosen "by the People of the several States." The House would have been chosen by the people of most of the states, plus the people of France.

Once one pushes beyond the silly examples, however, it is not obvious how to give content to the idea of "choice by the people." Probably the most commonsensical (and also the most historically grounded) understanding is in terms of a perfectionist ideal that will never be realized: an election in which (1) all members of the normative electorate cast valid, properly counted ballots, (2) the normative electorate is defined broadly enough to have a fair claim to speak on behalf of the people as a whole, and (3) a simple majority vote determines the winners.[162] (Thanks to the

162. *Cf.* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994). Amar argues that in the Founding, Antebellum, and Reconstruction Eras, the words "the People" were understood to refer to citizens competent for self government—what I have termed the "normative electorate." A republican government was one whose structure was "derived from [these citizens]," and was "legally alterable by a [simple] 'majority' of them." *Id.* at 749. Bones of contention arose not over this principle, but rather over the two associated "denominator problems," one geographic (was a State or the Nation the relevant whole?), *id.* at 766-68, the other demographic (*who* belongs in the normative electorate?), *id.* at 768-73. It doesn't follow, of course, that the Guarantee Clause requires legislators to be selected through a simple majority vote of the civically competent class of citizens. Yet given the settled understanding of what it meant for a form of government to be chosen by the people, and hence republican, it would be incongruous to read the constitutional text's requirement that Members of Congress be chosen by the people as directing anything other than majoritarian choice by those citizens competent for self-government.

That the Framers understood that "choice by the people" could be distorted and even defeated by state regulations of the time, place, and manner of elections is also suggested, I think, by the Convention and ratification debates concerning congressional enforcement power under Article I, § 4. For an illuminating treatment of those debates, see the dissenting opinion of Justice Harlan in *Wesberry v. Sanders*, 376 U.S. 1 (1964). Harlan considered them to be evidence that Congress was to have exclusive authority (not shared with the courts) under Article I to superintend state election administration. *Id.* at 23 (Harlan, J., dissenting). That inference seems to me a stretch, given how little agreement there was in 1789 regarding the judicial review as a mechanism for enforcing any constitutional provision. What is more significant, I think, is that the Framers and the ratifiers apparently believed that "choice by the people" was a substantive (if not well

Warren Court, it is now well settled as a matter of precedent—if not text and history—that the normative electorate in national and statewide elections must include all adult, non-felon, citizen residents of the jurisdiction.[163])

If this is right, how should courts assess the inevitable shortcomings from the perfectionist ideal? One answer is, not at all. "Choice by the people" could be treated as decorative language, without justiciable content. Alternatively, one might say that a constitutional cost is incurred whenever a state employs election administration rule *X* instead of *Y*, if the rate of voter participation would increase under *Y*. But this position could lead to some peculiar results. For example, assume a status quo in which one out of every four voting-qualified citizens elects to participate. Citizens who participate are demographically and politically representative of the citizens who do not. Several Democratic-controlled state legislatures then pass laws directing that a $100 "voting bonus" be paid to each citizen who lacks a high school degree or who falls into the bottom quartile of the population by family income, and who agrees to vote in the next five elections. This results in a massive increase in participation by low-income and poorly educated voters, who overwhelmingly favor Democrats. The Democrats' formerly tenuous hold on Congress becomes very secure, and the ideological center of the legislature shifts sharply to the left. Turnout has increased but are we closer or farther from the normative ideal of a legislative body "chosen by the people" as a whole? I would say farther. For purposes of maintaining the lines of accountability contemplated by Article I and the Seventeenth Amendment, it is more important that voter participation be representative than that it be rampant.[164]

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specified) ideal that the states could, if left to their own devices, undermine with misdirected regulations of the time, place, and manner of elections.

There is not much case law on the import of "choice by the people" within the meaning of Article I, Section 2, but, notably, the Supreme Court has held that it protects a qualified voter's right to have her ballot counted (even as against non-state actors, and even in the context of a primary election), United States v. Classic, 313 US. 299 (1941); that it commands the rule of "one person, one vote" for purposes of legislative apportionment, *Wesberry*, 376 U.S. at 18; and that it offers some protection against vote dilution through the stuffing of ballot boxes, *id.* at 17 (citing United States v. Saylor, 322 U.S. 385 (1944)).

163. *See supra* note 54 and accompanying text.

164. To be sure, one can conceive of doctrinal standards that would allow courts to vindicate max-participation claims without exacerbating problems of skew. For example, a court might hold that strict scrutiny will be triggered if plaintiffs demonstrate that there is a practicable alternative to the challenged requirements that would increase participation by *x% without exacerbating skew*. I do not see any particular problems with inviting claims of this sort—other than the perennial risks that attend to judicial involvement in political questions—but neither do I see much benefit. If the challenged laws operate to dampen political participation rates but do not

Now, even if I'm right that the constitutional aspiration of "choice by the people" is more fully realized under conditions of representative rather than skewed voter participation, it hardly follows that representative participation is the only permissible goal for states to pursue in regulating the time, place, and manner of elections. Surely it is also legitimate for the states to enact laws designed to make voting more convenient or secure, or better informed, or less costly to administer, even if such laws have some incidental adverse effect on turnout numbers or the representativeness of the voting public. As the Court has long recognized, the Constitution's delegation of election administration authority to the states implies that the states have some discretion to make judgments about how best to organize elections.[165]

The Constitution is perhaps best understood as requiring legislators and election administrators to make a good faith effort to honor the "choice by the people" norm while reasonably pursuing other permissible goals. But this is not a standard the courts can administer. The courts need a template with sharper edges, especially when dealing with politically fraught questions about voting requirements, and especially when extending a norm that, if not properly limited, might be thought to require forms of electoral regulation, such as compulsory voting, that are utterly foreign to the American experience.[166]

Hence the second component of my proposed test: a strong presumption of permissibility for ordinary voting requirements. This presumption yields a portion of the needed template—a regulatory benchmark.[167] If the challenged requirements perform as well as the regulatory benchmark (vis-à-vis the representative-participation norm),

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skew participation, elected officials can probably be counted on to reform the requirements that have outlived their usefulness.

165. *See, e.g.*, Storer v. Brown, 415 U.S. 724, 729-30 (1974) (suggesting that Constitution's delegation to the states of authority to set voter qualifications and regulate the time, place, and manner of congressional elections rules out any judicial doctrine that would "automatically invalidate[] every substantial restriction on the right to vote or to associate").

166. Compare the apportionment of population among legislative districts, which the Court undertook to regulate by pronouncing a good faith requirement, *see* Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable"), and then proceeded to implement with fairly hard-edged rules about permissible population deviations, *cf.* Brown v. Thomson, 462 U.S. 835, 842-43 (1983) (stating that deviations of less than 10 percent are presumptively permissible).

167. The other essential component of the template is a quantitative cutoff to separate "severe" from "lesser" skewing effects (where, of course, the effects fairly attributable to the challenged requirement are understood to consist of the difference between the degree of skew under the status quo with the degree of skew that would obtain were the challenged requirements replaced with the benchmark regulatory alternatives).

they too shall be deemed beyond judicial reproach. The presumption of permissibility for ordinary voting requirements may be justified in either of two ways. It may be treated, first, as an implied correlate of the States' constitutionally conferred responsibility for regulating the time, place, and manner of elections. Compare *Storer v. Brown*,[168] where the Supreme Court remarked that the Constitution's delegation to the states of authority to set voter qualifications and regulate the time, place, and manner of congressional elections rules out any judicial doctrine that would "automatically invalidate every substantial restriction on the right to vote or to associate."[169] Alternatively, the presumption may be conceptualized as a response to judges' epistemic limitations. If the typical state legislator takes seriously his or her sworn obligation to uphold the Constitution, judicial reliance on the presumption may well result in more correct decisions over the run of cases than if individual judges undertook to assess, case by case, whether common voting requirements and their functional equivalents actually emerged from "a good faith effort to honor the representative participation norm while reasonably pursuing other goals." The concurrent wisdom of the several states is likely sounder than the perceptions of a single federal judge (or a panel of three or nine).

B. Doctrine

A critic of my proposed approach might respond to the textual argument by saying that it's all beside the point. There is too much water under the bridge. The right to vote on equal terms with others is well established as an individual right, whereas "choice by the people" within the meaning of Article I and the Seventeenth Amendment has never been recognized as the source of a justiciable representative-participation norm. This argument greatly overstates the extent to which the character of the right to vote is doctrinally settled.

1. The Surprisingly Thin Basis in Precedent for the Individual-Right/Practical-Barrier Model

The Supreme Court has indicated that the right to vote is a individual right in two lines of decisions, one establishing the "one person, one vote" standard for reapportionment,[170] the other applying strict scrutiny to state laws that excluded a class of adult, non-felon, citizen residents from the

168. *Storer*, 415 U.S. 724.

169. *Id.* at 729-30. *See also* Clingman v. Beaver, 544 U.S. 581, 593 (2005) (stating that "ordinary and widespread" restrictions on political participation should not be deemed "severe" for level-of-scrutiny purposes).

170. *E.g.*, *Reynolds*, 377 U.S. 533.

normative electorate.[171] But neither of these lines of precedent requires the individual-right/practical-barrier gloss on *Burdick* as to voting requirements that the state defends not as appropriate restrictions on who should exercise the franchise, but as tools for keeping elections orderly, convenient, and secure. There are precious few Supreme Court decisions involving such requirements. The decisions in question, all from the early 1970s, offer rhetorical support for the individual-right/practical-barrier model, but upon closer inspection one discovers a Court back-pedaling away from this model.

In *Dunn v. Blumstein*,[172] a 1972 decision, the Court applied strict scrutiny to a one-year durational residency requirement, reasoning that it operated as an absolute bar to the plaintiff's participation in the upcoming election.[173] This is entirely consistent with the individual-rights/practical-barrier model.[174] The Court conceded that Tennessee had a compelling interest in preventing fraudulent voting by nonresidents.[175] But this did not save the challenged requirement, given that the states were already making do with a congressionally mandated thirty-day cap on residency requirements for presidential elections.[176] If thirty days was long enough for presidential elections, no longer durational residency requirement could be presumed necessary for other elections.

Just one year after *Dunn*, however, the Court upheld a pair of fifty-day advance registration requirements in *Marston v. Lewis*[177] and *Burns v. Fortson*.[178] The Court did so via brief, per curiam opinions, without any discussion of scrutiny levels, and over the fierce objection of dissenting Justices who attacked the Court for disregarding basic tenets of strict scrutiny.[179] The dissenters were right: if the Court had been applying strict

171. *E.g.*, Dunn v. Blumstein, 405 U.S. 330 (1972).

172. *Id.*

173. *See id.* at 336 ("Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards.").

174. It is consistent because a law that absolutely bars some citizens from voting while allowing others to participate obviously erects a very "severe" impediment to participation for the former group of citizens, relative to the costs of participation for the latter.

175. *Dunn*, 405 U.S. at 345.

176. *Id.* at 345-49, n.19.

177. Marston v. Lewis, 410 U.S. 679 (1973).

178. Burns v. Fortson, 410 U.S. 686 (1973).

179. *Id.*; *Lewis*, 410 U.S. 679. Also telling is *O'Brien v. Skinner*, 414 U.S. 524 (1974), a contemporaneous decision in which the plurality applied arbitrariness review in holding that a state may not provide absentee ballots to persons incarcerated within their county of residence while denying such ballots to persons incarcerated elsewhere. Three concurring justices (the dissenters in *Marston* and *Burns*) would have reached the same result by applying strict scrutiny. *Id.*

scrutiny, it would have struck down the fifty-day requirements as longer than necessary.[180] Evidently the Court thought that something more than a severe burden on *one* citizen in *one* election was necessary to trigger strict scrutiny, contra the individual-right/practical-barrier model.

Marston and *Burns* were shortly followed by a pair of cases concerning advance enrollment requirements for voting in partisan primaries. *Rosario v. Rockefeller* applied lax scrutiny and sustained an eleven month requirement;[181] *Kusper v. Pontikes* struck down a twenty-three month requirement, applying much more stringent review.[182]

Distinguishing *Rosario*, the *Kusper* Court observed: "Unlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary."[183] (Mrs. Pontikes had voted in the Republican primary during the previous election cycle, and the advance enrollment period exceeded the interval of time between election cycles.) This much is consistent with the individual-right/practical-barrier model, which disregards burdens that fall upon the civically negligent. But despite the Court's attention to whether the named plaintiffs could fairly be faulted for their disenfranchisement, *Rosario* and *Kusper* are not easy to square with the individual rights model.

The problem is this: in *Kusper* and subsequent cases, the Court has treated moderate advance enrollment requirements (like that in *Rosario*) as beyond constitutional reproach.[184] Yet as I have elsewhere observed:

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180. For a thoughtful treatment of the departure from strict scrutiny analysis in *Marston* and *Burns*, *see Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989), *overruled on other grounds by* Simpson v. Lear Astronics Corp., 77 F.3d 1170, 1174 (9th Cir. 1996).

181. Rosario v. Rockefeller, 410 U.S. 752 (1973).

182. Kusper v. Pontikes, 414 U.S. 51 (1973).

183. *Id.* at 60.

184. *See, e.g.*, Clingman v. Beaver, 544 U.S. 581, 593 (2005) (citing the advance enrollment requirement upheld in *Rosario* as a paradigmatic example of the sort of "ordinary and widespread" barrier to political participation that must not be deemed severe); Democratic Party of U.S. v. Wisconsin *ex rel.* La Follette, 450 U.S. 107, 135-36 (1981) (suggesting that the different outcomes in *Rosario* and *Kusper* reflected the fact that the long advance period in *Kusper* simply "went too far in interfering with the freedom of the individual voter," unlike the more moderate advance period in *Rosario*); Storer v. Brown, 415 U.S. 724, 731-32 (1974) (suggesting that the import of *Rosario* and *Kusper* is that courts must draw careful, measured lines between permissible voting requirements and those that go too far); *Kusper*, 414 U.S. at 59 ("It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute under review in *Rosario*.").

> Every advance enrollment requirement has the effect of absolutely precluding from participation in the upcoming primary those new, bona fide party adherents whose change-of-partisan-heart occurred after the enrollment deadline. A failure to enroll in advance of the deadline is only voluntary for those citizens who knew, prior to the deadline, that they would want to vote in the party primary at issue.[185]

From an individualistic perspective, then, every advance enrollment requirement creates a severe burden on *some* citizen. Yet the Court has never so much as hinted that it would apply strict scrutiny to a modest advance enrollment requirement if only the plaintiff could show that his partisan identity changed after the enrollment deadline. Seen in this light, *Rosario* and *Kusper*'s rhetoric of voter fault merely provided a convenient means of rationalizing decisions whose true basis must lie elsewhere.[186]

After *Kusper* came *Storer*, where the Court held that "reasonably diligent" independent candidates have a constitutionally protected interest in appearing on the ballot—as independents, not as "party men."[187] The extension of the Constitution's shield only to those candidates who are reasonably diligent is congruent, at least, with an individualistic approach to assessing burdens on voter participation. (The individual has a right to participate in the political process as voter or as candidate, but in order to exercise this right, she must live up to certain civic responsibilities. The unreasonable, dithering voter or candidate may be said to forfeit his right of participation.)

Having recognized the reasonably diligent independent candidate's constitutionally protected interest in ballot access, however, the *Storer* Court set a constitutional standard for judging ballot access laws quite at odds with an individualistic understanding of constitutional rights. The

185. Elmendorf, *supra* note 1, at 354-55.

186. *See id.* at 353-57 (suggesting that *Kusper* and *Rosario* are best understood as a judicial effort to strike and enforce a balance between two competing structural values: keeping the candidate selection process responsive to new participants and ideas, and guarding the selection process against opportunistic "raiding" by voters who do not intend to support the nominee at the general election).

187. *Storer*, 415 U.S. at 728 (noting that the state must "provide feasible means for other political parties and other candidates [not just the two major parties] to appear on the general election ballot"), 742 (asking, as part of the constitutional inquiry, "[C]ould a *reasonably diligent* independent candidate be expected to satisfy the signature requirements . . . ?") (emphasis added), 745-46 (rejecting State's argument that the existence of a fair opportunity to qualify for the ballot as the candidate of a third party obviates the constitutional problem that would otherwise result from a barrier to ballot access for independent candidates—because by availing himself of the third-party route to ballot access "the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status.").

Court established what amounts to an aggregate-performance standard for ballot access regimes, under which reasonably diligent independent candidates must be able to qualify "more than rarely."[188] Applying this standard, a court's job is to assess how the challenged regime functions over the run of candidates and elections.[189] If the regime passes this test, it would be gross abuse of discretion for a court to grant as-applied relief to a reasonably diligent candidate for whom the ballot access rules, in conjunction with her personal circumstances, put qualifying for the ballot out of reach. That would amount to entering a constitutional remedy in the absence of a constitutional wrong.

Beyond the framework it establishes for adjudicating the ballot-access claims of independent candidates, *Storer*'s underlying suppositions about constitutional judicial review of electoral mechanics are hard to square with the individual-right/practical-barrier model. The *Storer* Court said judicial review would entail separating "specific *provisions* . . . that are valid from those that are invidious," by "considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."[190] The unit of constitutional analysis was to be a statute or its provisions—keeping in view the full sweep of benefits and costs—rather than a particular application. *Storer* observed that the states had enacted "most substantial" regulations of "the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates,"[191] yet confidently announced that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases."[192] It seems likely, though, that most "most substantial" regulation of the political process will end up making participation difficult for *someone*, thus calling the *Storer* Court's basic assumption of permissibility into doubt if a single voter or candidate is the proper unit of analysis.

188. *See Storer*, 414 U.S. at 741-43; Elmendorf, *supra* note 1, at 346-48 (explicating the *Storer* standard).

189. The *Storer* Court also established what I have termed "structural presumptions" to guide this inquiry when the data are murky. *See* Elmendorf, *supra* note 1, at 347-48.

190. *Storer*, 415 U.S. at 730 (emphasis added) (quoting Williams v. Rhodes, 393 U.S. 23, 30 (1968) and Dunn v. Blumstein, 405 U.S. 330, 335 (1972)).

191. *Storer*, 415 U.S. at 730.

192. *Id.*

2. Doctrinal Precursors for Skewing-Effects Claims

The nominal doctrinal status of the right to vote as individual and personal in nature is further weakened by a sequence of opinions in which the Court seems attentive to the role of the franchise as an instrument of representation and accountability. Representational concerns were featured in *Reynolds v. Sims*, where the Court posited that "in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators";[193] in *Harper v. Virginia State Board of Elections*, where the court pronounced that legitimate "[v]oter qualifications have no relation to wealth";[194] in *Kramer v. Union Free School District No. 15*, where the Court reiterated that the right to vote is fundamental because "preservative of other basic civil and political rights";[195] in *Gordon v. Lance*, where the Court rebuffed a *Reynolds*-based challenge to a supermajority voting rule for bond referendum elections, because "no independently identifiable group or category [of voters] . . . favors bonded indebtedness over other forms of financing";[196] in *Bullock v. Carter*[197] and *Lubin v. Panish*[198] where the Court struck down filing fees thought to disproportionately impede candidates who would appeal to low-income voters; and in *Anderson v. Celebrezze*, where the Court observed after reviewing these and other cases: "[I]t is especially difficult for the State to justify a restriction that limits political participation by *an identifiable political group* whose members share a particular viewpoint, associational preference, or economic status."[199]

Taken together, these cases support the hypothesis that a voter who continues to participate notwithstanding a burden that causes many of her natural political allies to drop out of the voting public suffers a constitutional injury because her ability to cast an effective vote (or, put differently, her ability to engage in collective action for political change[200])

193. Reynolds v. Sims, 377 U.S. 533, 565 (1964).

194. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966).

195. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969) (quoting *Reynolds*, 377 U.S. at 562).

196. Gordon v. Lance, 403 U.S. 1, 5 (1971).

197. Bullock v. Carter, 405 U.S. 134 (1972).

198. Lubin v. Panish, 415 U.S. 709 (1974).

199. Anderson v. Celebrezze, 460 U.S. 780, 793 (1983) (emphasis added).

200. *Cf.* RICHARD L. HASEN, THE SUPREME COURT AND ELECTION LAW 88-92 (NYU Press 2003) (positing that the Supreme Court should protect an "equality right" of citizens to engage in collective action for political change).

has been harmed by state action that dissuades her political fellow-travelers from participating.[201]

The strongest decisional counterpoints to this hypothesis are the Supreme Court's vote dilution cases following *Mobile v. Bolden*.[202] These cases have all concerned the design of legislative districts. The plaintiff, though free to cast a ballot, alleges that the state has denied her adequate representation by lodging her in a district where members of her group (a cohesive racial bloc, or a political party) are an ineffective, outnumbered political minority, notwithstanding that a different configuration of districts would have enabled her to join forces with other members of her group and elect responsive representatives.

The *Mobile* Court, over a strong dissent by Justice Marshall, firmly held that vote dilution claims may not be founded upon the fundamental rights prong of equal protection analysis.[203] The right to vote on equal terms with others does not include a corresponding right to representation. To win a constitutional vote dilution claim, then, plaintiffs must show *intentional discrimination* on an illicit ground plus a substantial burden on their group's "representational rights."[204] By contrast, the conventional threshold for strict scrutiny in an equal protection/fundamental rights claim is whether the right has been granted to some and denied to others.[205]

A critic of my proposed approach (and a defender of the individual-right/practical-barrier alternative) might point out that the constitutional injury under a skewing-effects approach to voter participation claims—damage to the plaintiff's ability to join with like-minded citizens and engage in collective action through voting—is much the same as the injury

201. Note, then, that damage to the lines of accountability contemplated by Article I and the Seventeenth Amendment need not be the sort of "generalized" injury that precludes standing. *Cf.* Lance v. Coffman, 127 S. Ct. 1194 (2007) (holding that plaintiff-citizens of Colorado did not have standing to challenge order of Colorado Supreme Court as contrary to the Elections Clause of Article I, § 4). Citizens who belong to political groups whose turnout is differentially and adversely affected by a voting requirement would suffer a distinct injury. *Cf.* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1724-27 (2001) (presenting theories of standing for vote-dilution claims).

202. Mobile v. Bolden, 446 U.S. 55 (1980).

203. *Id.* at 76.

204. The term "representational rights" is from Justice Kennedy's opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 307-10 (2004) (Kennedy, J., concurring). Since *Davis v. Bandemer*, 478 U.S. 109 (1986), every Justice who has recognized partisan vote dilution claims as justiciable has understood proof of discriminatory intent to be a necessary element of the claim. *See generally id.*; *Vieth*, 541 U.S. 267; *League of United Latin Am. Citizens v. Perry*, 126 S. Ct. 2594 (2006).

205. *See, e.g.*, Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626-27 (1969) (explaining that strict scrutiny must be applied to statutes that "distribut[e] the franchise" to some citizens while "denying [it] to [other] citizens who are otherwise qualified by residence and age").

in a vote dilution challenge to the design of legislative districts.[206] In each case, the citizen and her political allies, though entitled to participate by voting, suffers a representational injury thanks to the mechanics of the electoral process. That the mechanics in one scenario are anti-fraud safeguards and in the other govern the translation of votes into representation is immaterial, my critic will say. The doctrinal home for a "skewing effects" participation claim, insofar as one exists at all, should be sought in partisan vote dilution precedents. And there are serious questions about whether partisan vote dilution claims are even justiciable.[207]

The critic's argument supposes that the doctrinal rules that apply to any given voting rights claim depend—exclusively—upon the nature of the voter interest at stake. The participation interest is protected with one framework; the representational interest with another. But the Court's constitutional jurisprudence of political rights is not organized in this way. Although the Court has required a showing of discriminatory intent in constitutional vote dilution challenges to the design of equally populous legislative districts, it has protected voters' representational interests vis-à-vis other types of election laws (and other types of challenges to the design of legislative districts) with doctrines that do not require such a showing. These doctrines include: (1) the equi-population mandate for the design of legislative districts;[208] (2) strict scrutiny for laws that condition candidates' access to the ballot upon payment of a fee;[209] and (3) the nominal balancing test applied to other restrictions on independent candidates' or third parties' access to the ballot.[210] In developing each of these doctrines, the Court undertook to safeguard the instrumental value of voting, not merely the voter's "personal" interest in participating as such.

If the nature of the voter's interest does not determine the applicable doctrinal test, what does? There is no simple answer. The Court's variegated political rights doctrines seem to emerge from pragmatic, domain- and claim-specific judgments about the risk of institutionally

206. *Cf.* Gerken, *supra* note 201, at 1676-89 (explaining the conception of injury behind vote dilution claims).

207. There are serious questions about whether partisan vote dilution (as opposed to racial vote dilution) claims are even justiciable. In *Vieth*, 541 U.S. 267, four Justices treated partisan vote dilution claims as political questions, and the fifth, Justice Kennedy, expressed extreme reluctance to entertain such claims absent a clear-cut standard grounded in traditional practices. The extent of Kennedy's reservations became apparent in *League of United American Citizens*, 126 S. Ct. 2594, where he rejected the plaintiff's proposed per-se rule against mid-decade redistricting—a standard that was both clear-cut and grounded in tradition.

208. *E.g.*, Karcher v. Daggett, 462 U.S. 725 (1983).

209. *E.g.*, Lubin v. Panish, 415 U.S. 709 (1974).

210. *E.g.*, Storer v. Brown, 415 U.S. 724 (1974).

debilitating entanglement in partisan conflict;[211] the need for judicial involvement;[212] the extent to which the values the court is asked to vindicate are constitutionally discernable;[213] the feasibility of crafting doctrines that are amenable to consistent application in the lower courts;[214] the risk of deterring or preventing useful legislative activity;[215] and the options for limiting the generative potential of particular interventions so as not to cast doubt upon popular, time-honored practices.[216]

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211. *See Vieth*, 541 U.S. at 301 (plurality opinion) ("Is the regular insertion of the judiciary into districting, with the delay and uncertainty that brings to the political process *and the partisan enmity it brings upon the courts*, worth the benefit to be achieved—an accelerated (by some unknown degree) effectuation of the majority will? We think not.") (emphasis added).

212. *Id.*; *see also* Davis v. Bandemer, 478 U.S. 109, 152 (1986) (O'Connor, J., concurring in the judgment) (suggesting that partisan gerrymandering claims should be deemed nonjusticiable because, inter alia, "there is good reason to think that political gerrymandering is a self-limiting enterprise."). Contrast *Reynolds v. Sims*, 377 U.S. 533, 562 (1964), where the Court upended an entrenched, half-century-old pattern of malapportionment in the Alabama legislature, remarking that "since the right to exercise the franchise in a free and unimpaired manner is *preservative of other basic civil and political rights*, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.") (emphasis added).

213. *See* Vieth, 541 U.S. at 287-88 ("[A]ppellants' test would invalidate the districting only when it prevents a majority of the electorate from electing a majority of representatives. Before considering whether this particular standard is judicially manageable we question whether it is judicially discernible in the sense of being relevant to some constitutional violation. Deny it as appellants may (and do), this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle.").

214. This probably accounts for the penchant for formalism that runs through the *Storer-Burdick* jurisprudence, *see* Elmendorf, *supra* note 1; and also the *Vieth* plurality's extreme aversion to open-textured standards for judging partisan gerrymandering claims, *see* Fallon, *supra* note 45, at 1287-90. *See also* N.Y. State Bd. of Elections v. Lopez Torres, 128 S. Ct. 791, 799 (2008) ("None of our cases establishes an individual's constitutional right to have a 'fair shot' at winning the party's nomination. And with good reason. What constitutes a 'fair shot' is a reasonable enough question for legislative judgment, which we will accept so long as it does not too much infringe upon the party's associational rights. But it is hardly a manageable constitutional question for judges . . . ."). Regarding the implications of this passage from *Lopez Torres* for the development of doctrinal standards in future electoral mechanics cases, see Chris Elmendorf, *On* Lopez Torres *and Line Drawing*, ELECTION LAW @ MORITZ, Jan. 22, 2008, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=239.

215. This is a recurrent theme in the *Storer-Burdick* jurisprudence. *See, e.g.*, *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) ("to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently."). *Cf.* Alan Brownstein, *How Rights Are Infringed: The Role of Undue Burden Analysis in Constitutional Doctrine*, 45 HASTINGS L.J. 867, 908-19 (1994) (arguing that the Court properly applies a relaxed balancing test in election law cases where the purpose of the challenged regulation is to facilitate the voting process).

216. This concern is probably at the root of the Court's unwillingness to develop doctrines that would enable third parties to challenge state laws that damage the party's electoral prospects—for such a doctrine could cast doubt upon single-member district, first-past-the-post,

This is why strict scrutiny can be reflexively applied in constitutional challenges to de jure voter qualifications (laws that restrict the class of citizens to whom elected officials are supposed to be accountable) no matter how few in number the excluded citizens, but not in cases about laws whose nominal purpose is to minimize the risk of fraud or error, or to keep the cost of election administration within reason. Once the Warren Court concluded that there was no important state interest in limiting the normative electorate on grounds other than age, citizenship, and residence, the Court could apply "fatal in fact" strict scrutiny to any other de jure contraction of the normative electorate without worrying about undesirable side effects. By contrast, there are manifestly important state interests in limiting the number of candidates who appear on the ballot, and in preventing electoral fraud. Hence the *Storer/Burdick* framework, which in explicit recognition of the powerful state interests supporting much regulation of mechanics of the electoral process,[217] reserves strict scrutiny for the narrow subset of electoral mechanics cases in which the challenged restriction is so "severe" as to be presumptively unconstitutional. This is why *Storer/Burdick*, not *Kramer/Dunn*, furnishes the proper doctrinal framework for the new voter participation cases, and why scrutiny levels under *Burdick* must be set with reference to the aggregate effects of the challenged requirement, rather than the plight of an individual voter or candidate.

Conclusion

Judges and law professors alike have worried that an avowedly structural approach to constitutional adjudication of political rights would embroil the courts in contested questions that are beyond their competence to resolve.[218] This essay calls that premise into question. I have tried to show that the Supreme Court's severe/lesser burden framework for

elections. In this regard, it is instructive to compare the majority and the dissenting opinions in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997), with the Eighth Circuit's decision in the same case. In striking down Minnesota's ban on fusion candidacies, the Court of Appeals relied on evidence that minor parties had enjoyed a measure of success when fusion candidacies were allowed. *See* Twin Cities Area New Party v. McKenna, 73 F.3d 196, 197-99 (8th Cir. 1996). In the Supreme Court, however, neither the majority nor the dissent rested its position on the fusion ban's consequences for minor party success. *See Timmons*, 520 U.S. 351.

217. *See supra* note 215.

218. *See, e.g.*, HASEN, *supra* note 200, at 144-53 (arguing that such an approach would be an invitation to judicial hubris and far-reaching judge-led reforms). *Cf.* Gerken, *supra* note 3, at 1463 (speculating that "[t]he most likely explanation for the Court's adherence to a conventional individual-rights approach is that it fears the untrammeled exercise of judicial power in the political arena.").

electoral mechanics cases, if meshed with a wholly individualistic conception of voting rights, threatens to open a Pandora's Box of new constitutional claims that judges would have little choice but to resolve on the basis of their personal sense of political fairness. By contrast, a conception of "burden" linked to aggregate patterns of voter participation would enable the courts to develop objective and self-limiting standards for when to intervene. To be sure, the "representative voting public" norm that I have advanced could be applied in an aggressive manner by an activist court. But suitably limited—with a strong presumption of permissibility for ordinary voting requirements, and with a threshold requirement that plaintiffs demonstrate large, politically substantial effects as the trigger for heightened scrutiny—the norm would not be threatening.

Appendix

The following table summarizes the votes to date by lower federal and state court judges in litigation over the constitutionality of photo ID requirements for voting. It is included to convey some sense of the apparent pattern of judicial partisanship. The table includes judicial rulings on motions for preliminary injunctions, merits rulings, and decisions on appeal from those rulings. However, it excludes rulings by motions' panels of appellate courts on requests for stays pending a decision on the merits by the appellate tribunal, which in general seem unlikely to be probative of the judge's view of the merits of the constitutional question.[219]

With the possible exception of the fourth and fifth columns, the table should be self-explanatory. The fourth column, "pro/anti," is my classification of what the judge's vote indicates about his or her views regarding the constitutional merits of the ID requirement—with "pro" meaning "permissible" and "anti" meaning "impermissible" (cross-party votes are depicted in bold font). Note that because many of the decisions recorded in this table are *not* decisions on the constitutional merits (for example, a decision to grant or deny a preliminary injunction motion, or to grant or deny a petition for rehearing en banc), the indication offered in the "pro/anti" column is *only* an indication. That judges sometimes change their minds as a case progresses is illustrated by Judge Murphy's opinions in the federal litigation over Georgia's revised photo ID requirement for voting. (He initially granted the plaintiffs' motion for a preliminary injunction, then ruled for the defendants after a bench trial.)

The fifth column shows the party affiliation most plausibly ascribed to the judge. In the case of appointed judges, it is the party affiliation of the appointing president or governor. In the case of judges chosen through partisan elections, it is the party in whose name the judge ran for office.

By way of summary, Democratic judges have expressed "anti" views on the constitutionality of photo ID requirements 14 times, and "pro" views

219. With the possible exception of the surprising and unexplained decision of a Ninth Circuit motions panel (comprised of two Democratic appointees, Judges William P. Fletcher and Atsushi Tashima), to enjoin enforcement Arizona's Proposition 200 pending disposition, after full briefing, of the appeal of the district court's denial of a preliminary injunction. The motion panel's decision was vacated by the U.S. Supreme Court in a short per curiam opinion warning against eleventh hour injunctions (just before an election) in election law litigation. *See* Purcell v. Gonzalez, 127 S. Ct. 5 (2006).

only 3 times. For Republican judges, the respective numbers are 3 (anti) and 15 (pro).[220]

[*Table Begins on Following Page*]

220. These summary statistics are slightly different than what the reader will find if she or he tallies up the votes in the table, because I have excluded votes on the petition for rehearing en banc in *Crawford* cast by the three Seventh Circuit judges who sat on the merits panel. It would be double-counting to treat their rehearing votes as a separate expression of views regarding the constitutionality of Indiana's voter ID requirement.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Common Cause/ Ga. v. Billups (I), 406 F. Supp. 2d 1326 (N.D. Ga. 2005)[221]	Harold L. Murphy	To grant prelim. injunction.	Anti	D	10/8/ 2005
Ind. Dem. Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006)[222]	Sarah Evans Barker	To grant defendants' motion for summary judgment.	Pro	R	4/14/ 2006
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007)[223]	Richard A. Posner	To affirm the district court's grant of summary judgment to defendants	Pro	R	1/4/ 2007
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007)	Dianne Sykes	To affirm the district court's grant of summary judgment to defendants	Pro	R	1/4/ 2007
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007)	Terrance Evans	To reverse the district court's grant of summary judgment to defendants	Anti	D	1/4/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Frank H. Easterbrook	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007

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221. At issue was the photo ID requirement enacted by the Georgia legislature in 2005.

222. At issue was the photo ID requirement enacted by the Indiana legislature in 2005.

223. This case is *Rokita* on appeal sub. nom.; at issue was the photo ID requirement enacted by the Indiana legislature in 2005.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Joel M. Flaum	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Michael S. Kanne	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Daniel A. Manion	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Richard A. Posner	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Kenneth F. Ripple	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Ilana Diamond Rovner	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	**Anti**	R	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Diane S. Sykes	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007

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CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Diane P. Wood	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	Anti	D	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Terrance T. Evans	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	Anti	D	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Ann Claire Williams	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	Anti	D	4/5/ 2007
Gonzalez v. Ariz., No. CV 06-1268-PHX-ROS, 2006 WL 3627297 (D. Ariz. 2006)[224]	Roslyn O. Silver	To deny plaintiffs' motions for a preliminary injunction.	**Pro**	D	9/11/ 2006
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	John T. Noonan	To affirm district court's denial of a preliminary injunction	Pro	R	4/20/ 2007
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	George P. Schiavelli	To affirm district court's denial of a preliminary injunction	Pro	R	4/20/ 2007
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	Mary M. Schroeder	To affirm district court's denial of a preliminary injunction	**Pro**	D	4/20/ 2007

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224. At issue were the identification requirements for registration and voting found in Proposition 200, an immigration ballot initiative adopted by the voters in 2004.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Common Cause/Ga. v. Billups (II), 439 F. Supp. 2d 1294 (N.D.Ga. 2006)[225]	Harold M. Murphy	To grant plaintiffs' motion for a preliminary injunction	Anti	D	7/14/ 2006
Common Cause/Ga. v. Billups (III), 504 F. Supp. 2d 1333 (N.D.Ga. 2007)[226]	Harold M. Murphy	To enter judgment for defendants after bench trial.	**Pro**	D	9/6/ 2007
ACLU v. Santillanes, 2007 WL 782167 (D. N.M. 2007)	M. Christina Armijo	To grant plaintiffs motion for summary judgment & permanent injunction	**Anti**	R	2/12/ 2007
Weinschenk v. State, No. 06AC-CC00587 (Cole Cty. Dist. Ct., Mo. 2006)	Richard G. Callahan	To grant plaintiffs' motion for declaratory judgment and permanently enjoin enforcement of ID requirement	Anti	D	9/14/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Nancy S. Rahmeyer	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Laura D. Stith	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/ 2006

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225. At issue was Georgia's revised photo ID requirement for voting, enacted in 2006.

226. At issue was Georgia's revised photo ID requirement for voting, enacted in 2006.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Richard B Teitelman	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Ronnie White	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Michael A. Wolff	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Charles B. Blackmar	To affirm lower court's declaration and permanent injunction.	**Anti**	R	10/16/ 2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Stephen N. Lindbaugh	To vacate lower court's decision on ripeness grounds.	?[227]	R	10/16/ 2006
Lake v. Perdue, 2006-CV-119207 (Sup. Ct. of Fulton Cty, Ga.)[228]	T. Jackson Bedford, Jr.	To enjoin enforcement of law.	Anti	?[229]	9/22/ 2006

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227. Because this was a justiciability holding, I shall refrain from classifying it as "pro" or "anti" photo ID. *Cf.* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1986) (arguing that courts properly use standing and related doctrines to avoid reaching the merits—and thereby conferring legitimacy on one side or the other—with respect to politically contentious constitutional questions).

228. At issue was Georgia's revised photo ID requirement for voting, enacted in 2006, challenged here on the ground that ID requirements are qualifications for voting and hence beyond the legislature's authority to enact under the Georgia constitution.

229. The presiding judge was selected in a nonpartisan election.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	?[230]	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	?[231]	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	George Carley	To vacate order below on ground that plaintiffs' lacked standing	?[232]	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	P. Harris Hines	To vacate order below on ground that plaintiffs' lacked standing	?[233]	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Leah Sears	To vacate order below on ground that plaintiffs' lacked standing	?[234]	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Hugh Thompson	To vacate order below on ground that plaintiffs' lacked standing	?[235]	D	6/22/ 2007

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230. I am skeptical that the Justices' decision to dismiss this case on standing grounds—where, as the Court pointed out, the "sole remaining plaintiff" acknowledged that she had qualifying ID—reveals anything about the Justices' view concerning the constitutional permissibility of the photo ID requirement. *Cf.* BICKEL, *supra* note 227.

231. *See supra* note 230.

232. *See supra* note 230.

233. *See supra* note 230.

234. *See supra* note 230.

235. *See supra* note 230.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Harold Melton	To vacate order below on ground that plaintiffs' lacked standing	?[236]	R	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	?[237]	D	6/22/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Michael F. Cavanagh	To advise that ID requirement is facially unconstitutional	Anti	D	7/18/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Marilyn Kelly	To advise that ID requirement is facially unconstitutional	Anti	D	7/18/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Robert P. Young, Jr.	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007

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236. *See supra* note 230.

237. *See supra* note 230.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Mauro D. Corrigan	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Stephen J. Markman	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Clifford W. Taylor	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007
In re Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Elizabeth A. Weaver	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007

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