

# Equal Citizenship and the Individual Right to Vote<sup>†</sup>

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*An emerging consensus among election law scholars urges courts to break out of “the stagnant discourse of individual rights and competing state interests” and instead adopt a jurisprudence of “structural” democratic values that sidelines individual rights. This structuralist approach won out in the great “rights-structure” debate in election law, and came to dominate the field, during a period in which the main controversies—vote dilution, gerrymandering, ballot access, campaign finance—were all ones in which the structuralist move was illuminating. However, structuralism is now causing both scholars and courts to evaluate the new wave of vote denial controversies, over such issues as voter identification laws and voter roll purges, in problematic ways that bypass the importance of each individual voter’s right to cast a ballot.*

*This Article breaks out of the rights-structure debate by offering a distinctive, pluralistic account of the interests at stake in all voting controversies. Some of these interests are indeed structural, in the sense that they are interests of the polity*

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as a whole; some are the interests of groups; and others are irreducibly individual in nature. This pluralistic account explains why structuralism was the right approach to certain election law questions and yet is leading both scholars and courts to misjudge the new vote denial cases. This Article argues, through both political theory and American voting rights law, that the individual right to cast a ballot matters for reasons that are independent of election outcomes and structural concerns. By allowing individuals to vote, the polity includes them within the circle of full and equal citizens. This Article excavates this individual interest in equal citizenship, demonstrates its centrality to the foundations of our modern voting rights regime, and explores how taking it seriously would reshape both the scholarship and the jurisprudence of election law, especially in the domain of “the new vote denial.”

#### INTRODUCTION

In 2008, when the Supreme Court decided *Crawford v. Marion County Election Board*,<sup>1</sup> the case upholding Indiana’s law requiring voters to show photo identification, the reaction among election law scholars was swift and negative.<sup>2</sup> The problem was not necessarily the result. It was that the doctrinal framework the Court deployed—balancing an individual right to vote against the state’s interest in preventing fraud and “safeguarding voter confidence”<sup>3</sup>—seemed to miss what was really at stake in the case.<sup>4</sup> This dissatisfaction with *Crawford* reflected a much larger trend in election law scholarship. An emerging consensus in the field holds that courts make a mistake when they rely on the doctrinal framework the Court employed in *Crawford*: balancing an individual right (the right to vote) against a “structural” interest of the state (here, preventing fraud and “safeguarding voter confidence”). Instead, this emerging consensus holds that courts ought to focus on “structural” benefits and harms—benefits and harms that affect the structure of our whole democracy—on both sides of the ledger. As Sam Issacharoff and Rick Pildes argued in their important article *Politics as Markets*, the Court must break out of

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1. 553 U.S. 181 (2008).

2. See, e.g., *Airtalk with Larry Mantle* (Apr. 28, 2008), <http://www.fluctu8.com/podcast-episode/airtalk-for-monday-april-28-2008-hour-2-4320-25805.html> (interviewing guest Richard Hasen, who argued that the “most troubling” aspect of the decision is that its reasoning ignores whether legislators enacted the law in order to skew the electorate in a partisan fashion); Edward B. Foley, *Crawford and the Amicus Court: Further Support for a Non-Partisan Advisory Tribunal*, ELECTION LAW @ MORITZ (Apr. 29, 2008), <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=413> (decrying the “doctrinal weakness” of *Crawford*); Daniel P. Tokaji, *Crawford: It Could Have Been Worse*, ELECTION LAW @ MORITZ (Apr. 29, 2008), <http://moritzlaw.osu.edu/blogs/tokaji/2008/04/crawford-it-could-have-been-worse.html> (explaining his “most serious disagreement” with the decision: its “focus on the individual voter misses the likely systemic impact of the law”).

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

4. See, e.g., *supra* note 2.

“the stagnant discourse of individual rights and competing state interests” if it is to address the main issues at stake in election law controversies.<sup>5</sup>

Issacharoff and Pildes’s critique captivated academics, and inspired the “structural turn” in election law scholarship, for good reason. The critique had considerable force. The Court’s basic doctrinal approach to election controversies, with its focus on individual rights and competing state interests, was arguably well suited to the early, so-called “first-generation” voting rights claims: claims attacking barriers that prevented blacks from voting.<sup>6</sup> But the Court applied this same rights-based doctrinal approach to “second-generation” controversies far beyond this initial domain—from quantitative and racial vote dilution to the “expressive harm” of racial gerrymandering<sup>7</sup>—and also to controversies in areas such as campaign finance and party rights. Many of these controversies involved interests on the plaintiff’s side that were essentially either group based or structural: it was at least awkward, and perhaps impossible, to disaggregate the interests at

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5. Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 717 (1998). The authors argued that “courts avoid confronting fundamental questions about the essential political structures of governance and instead apply sterile balancing tests weighing individual rights of political participation against countervailing state interests in orderly and stable processes.” *Id.* at 645. This article built on previous work by both authors and also by Pam Karlan. See Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1113–30 (2005) (explaining the trajectory of “structuralist” scholarship and the rights-structure debate); see also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 630 (2002) (calling for an approach that “moves away from the notion of individual rights as the prime protector of the integrity of the political process, and looks instead to the structural vitality of politics”); Richard H. Pildes, *The Supreme Court, 2003 Term; Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 29, 40 (2004) (arguing that while “[c]onstitutional lawyers are trained to think in terms of rights and equality . . . politics involves, at its core, material questions concerning the organization of power”); *id.* at 59 (“[F]amiliar and conventional models of individual rights . . . will provide no solace in addressing structural problems concerning the proper allocation of political representation.”).

Issacharoff and Pildes themselves have not yet taken a position on the question of how to apply structuralism to the new vote denial. But adherents of the structuralist approach, such as Spencer Overton, Chris Elmendorf, and Jim Gardner, have now done so. See *infra* notes 13–19 and accompanying text.

6. *But see* Issacharoff & Pildes, *supra* note 5, at 652–68 (discussing the White Primary Cases and arguing that their critique extends back even to first-generation claims).

7. Racial vote dilution claims form the core of what scholars have come to call the “second generation” of voting rights claims. See, e.g., Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001); Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–94 (1991). Second-generation claims look beyond questions of participation to questions of aggregation. See *infra* notes 30–32 and accompanying text.

There is also, conceptually, a “third generation” of voting rights claims that concern questions of governance. See Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 125 (Mark E. Rush ed., 1998). However, the actual trajectory of voting controversies seems to be backward toward the “new vote denial” rather than forward into this third generation.

stake into coherent burdens on particular individuals' rights. Thus, the structuralist scholars' critique repeatedly hit its mark. The individual-rights-versus-state-interests doctrinal framework plainly was not capturing the real interests at stake on both sides of these cases. Structuralist scholars urged the Court to reorient its jurisprudence toward promoting the interests of the whole polity, framed in terms of democratic values: competitiveness, participation, "democratic contestation," the disruption of "lockups," and other indicia of a healthy democratic order.<sup>8</sup> These scholars' side of the great "rights-structure" debate in election law scholarship now "has come to dominate the field."<sup>9</sup>

The aim of this Article is not to rehearse the case for the opposite, "rights" side of that debate. This Article does not endorse the broad view of scholars such as Richard Hasen, who argues more or less categorically, on the basis of a considered distrust of the Court's ability "to make contested value judgments in political cases," that the Court should eschew structural democratic considerations.<sup>10</sup> The project here is different. Rather than claiming that one broad doctrinal framework—rights or structure—works best across the entire landscape of election law, this Article articulates and defends a more pluralistic and contextual approach. Specifically, this Article defends the proposition that while the Court's individual-rights-versus-state-interests doctrinal framework was the wrong approach to certain kinds of cases, it was the right approach to *Crawford* and will remain the right approach to the rapidly expanding area of litigation now known as "the new vote denial."

*Crawford* was the Court's first encounter with a fast-growing storm of highly politicized controversies in election administration in which efforts to prevent fraud clash with efforts to protect voters from disenfranchisement. Future flashpoints will likely include registration list purges, partisan challengers inside the polls, the treatment of voters attempting to vote at the wrong location, provisional ballot rules, early voting rules, absentee ballot rules, residency rules (particularly in relation to college student voters), and/or the processes and venues for registering

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8. For an argument for participation, see Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 85 (2004). For "democratic contestation," see Michael S. Kang, *Race and Democratic Contestation*, 117 YALE L.J. 734 (2008). For the disruption of "lockups," see Issacharoff & Pildes, *supra* note 5. Some versions of structuralism focus not on effects or outcomes but on the state's reasons for acting; in either case, the structuralist approach contrasts with a rights-based approach focused on harms to individual plaintiffs. *E.g.*, Richard H. Pildes, *Avoiding Balancing: The Role of Exclusionary Reasons in Constitutional Law*, 45 HASTINGS L.J. 711, 729 (1994) ("[O]nce the structural conception of rights is adopted, the focus is not on the quantum of individualized harm involved, but rather on the qualitative justifications for the state's exercise of authority.").

9. See Charles, *supra* note 5, at 1119. Charles's article provides an excellent overview of how structuralism became the dominant approach.

10. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 139, 154 (2003); *cf.* Chad Flanders, *How to Think About Voter Fraud (And Why)*, 41 CREIGHTON L. REV. 93, 150 n.138 (2007) (siding with the "individualist" rather than the "structuralist" analysis of voter fraud controversies but concluding, "it is solely in the case of voter fraud that I find the individualist analysis most persuasive").

voters. Dan Tokaji has termed these controversies “the new vote denial”<sup>11</sup> because, unlike many other current election law questions that concern issues of representation and the aggregation of votes, these hark back to a different, older set of battles over which individuals should be allowed to cast ballots at all.

The rapid proliferation of these new vote denial controversies has reshaped the landscape of election law that gave rise to the structuralist critique.<sup>12</sup> As the structuralists correctly charged, the individual-rights-versus-state-interests doctrinal framework developed in first-generation voting rights cases offered the wrong toolkit for adjudicating many second-generation controversies. But unlike those second-generation controversies, the new vote denial controversies implicate the individual right to cast a ballot and have it counted. Thus, the doctrinal claim of the Article is this: just as the individual rights-based doctrine developed in first-generation controversies was the wrong set of tools for adjudicating many second-generation controversies, a purely structural approach of the kind scholars have now developed in response to second-generation controversies is the wrong set of tools for adjudicating the new vote denial. The problem is conceptual: the individual right to vote matters for reasons that are not entirely reducible to the structural interests of the polity as a whole. Each individual voter also has an independent interest in her status as a full, equal citizen. Those who advocate approaches to the new vote denial controversies that sideline this individual interest in favor of broader, structural concerns are encouraging the Court to *repeat* the mistake it made in the second-generation cases—in reverse.

In recent years both structuralist scholars and anti-fraud activists have pointedly urged the Court to make exactly this mistake by recasting the harm of disenfranchisement in wholly structural terms. Some versions of this approach frame the harm of disenfranchisement in terms of a decline in the overall level of participation or turnout.<sup>13</sup> For the structuralist scholars, a central argument is that disenfranchising citizens has the effect of lowering the rate of participation, a key structural variable important to the health of a democracy. For example, Chris Elmendorf suggests that in order to decide how closely to scrutinize an election regulation, courts could “ask whether the requirements cause the number or distribution of participating voters to deteriorate by more than a given amount

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11. See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 701–18 (2006).

12. As recently as 2004, a structuralist scholar could write that “at least in mature democracies, cases concerning democratic processes today do not often implicate what might be considered intrinsic political liberties (leaving aside in the American context, perhaps, the few remaining access-to-the-ballot-box issues, such as voter-registration or felon-disenfranchisement laws).” Pildes, *supra* note 5, at 52. Today, the exception consigned to that parenthetical—“access-to-the-ballot-box issues”—is swallowing a substantial part of the rule. An increasingly large and hotly-contested subset of all election law controversies are vote denial controversies. See Tokaji, *supra* note 11, at 709–18.

13. See, e.g., Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote?*, 35 HASTINGS CONST. L.Q. 643, 675–77 (2008); Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 634, 657–58 (2007).

(x%).”<sup>14</sup> Anti-fraud activists essentially concur with this conceptual framework but add some questionable empirical claims: they argue that while a bit of disenfranchisement does indeed reduce participation, anti-fraud measures so increase “confidence” in the electoral process that more people vote, and net turnout actually *rises*.<sup>15</sup> Either way, the key is overall participation, not individual rights; disenfranchisement matters because, and to the extent that, participation drops. Similarly, Spencer Overton and others argue that voter identification laws should be rejected on the basis of what amounts to a cost-benefit calculus weighing the number of fraudulent votes prevented against the number of legitimate votes deterred.<sup>16</sup> This argument has become sufficiently commonplace that some election law scholars now simply assume that some version of it is the correct framework for resolving the new vote denial controversies.<sup>17</sup> Yet another version of the all-structural approach uses as its yardstick the ultimate *representativeness* of elected officials, which might also be negatively affected by sufficiently widespread disenfranchisement (or fraud).<sup>18</sup> What all these proposals have in common is that they direct our attention away from questions of individual right and toward structural features of the democracy as a whole.<sup>19</sup>

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14. Elmendorf, *supra* note 13, at 675. This argument may be an application of the general proposition that courts’ focus, in their review of “electoral mechanics,” ought to be on the structural question of “whether something is seriously amiss with the democratic process.” Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313, 325 (2007).

15. As one congressional advocate of a recent anti-fraud bill put it: “Despite all the claims that disenfranchisement would ensue” after the enactment of Arizona’s law requiring voters to show identification and prove their citizenship, “testimony in Phoenix revealed that registration went up 15 percent . . . . The fact is, people are encouraged to vote when they believe their vote will count and know that their vote will not be canceled out by an illegal vote.” 152 CONG. REC. 18,738 (2006) (statement of Rep. Ehlers). However, available empirical evidence does not support the proposition that anti-fraud measures increase turnout. *See infra* note 70 and accompanying text.

16. Overton, *supra* note 13, at 635 (“If further study confirms that photo-identification requirements would deter over 6700 legitimate votes for every single fraudulent vote prevented, a photo-identification requirement would increase the likelihood of erroneous election outcomes.”). For a discussion of “erroneous election outcomes,” *see infra* notes 109–10 and accompanying text.

17. *See, e.g.*, Michael J. Pitts & Matthew D. Neumann, *Documenting Disenfranchisement: Voter Identification During Indiana’s 2008 General Election*, 25 J.L. & POL. 329, 330 (2009) (“At its most foundational level, the debate surrounding photo identification requirements can be resolved by balancing a photo identification requirement’s ability to preserve the integrity of elections by preventing in-person voter fraud against the extent to which such a law limits access to democracy by preventing legitimate voters from casting countable ballots.”); *id.* at 330 n.6 (clarifying that this essentially means balancing “the number of legitimate voters excluded” against “the number of illegitimate voters prevented from casting fraudulent ballots”).

18. *See* Elmendorf, *supra* note 13, at 675–77.

19. *See generally* James A. Gardner, *The Dignity of Voters—A Dissent*, 64 U. MIAMI L. REV. 435, 462–63 (2010) (arguing that “a robust individually held right” is not “the proper vehicle for vindicating the relevant constitutional values” and arguing instead for “[e]ither a purely structural approach” or an approach in which individual rights claims are “treat[ed]”

Part of the appeal of these proposals is that they seem to allow courts to compare like with like: instead of weighing an individual right against a structural interest, these proposals would have courts use structural criteria to evaluate both sides. Some conservative activists and politicians have recently also proposed the opposite approach: using *rights* to evaluate both sides in the new vote denial controversies. These advocates have advanced the novel claim that fraudulent votes “disenfranchise” legitimate voters—and therefore, that blocking a few legitimate voters from casting ballots may be an acceptable price to pay to combat the greater disenfranchisement purportedly caused by fraud.<sup>20</sup> This approach, too, holds out the promise of a doctrine that compares like with like.

Courts have mostly resisted both of these moves, although each of these ideas is beginning to make inroads in court opinions, including those of the Supreme Court.<sup>21</sup> Most of the time, courts stubbornly refuse *either* to recast the structural problem of fraudulent votes as a violation of individual voters’ rights *or* to recast the individual right to vote as an instrument for achieving structural values such as overall participation or representativeness.

This Article offers an explanation for, and a defense of, courts’ resistance to these innovations. The basic argument, which Part I develops, is that there are multiple, irreducibly distinct interests at stake in voting controversies. Some of these interests are individual in nature, others are group interests, and still others are structural in that they are interests of the polity as a whole. Conflating these interests can lead to problems. When we recast an interest as something it is not, we often erase part or all of why we valued it in the first place. In particular, each of the conceptual moves courts are (so far) mostly resisting—recasting certain forms of fraud as disenfranchisement, or recasting disenfranchisement as a purely structural rather than an individual-rights problem—would have the effect of bypassing or erasing part of what is valuable about the individual right to participate.

Thus, Part II offers a defense—specific to the new vote denial cases—of the Court’s much-criticized doctrinal framework balancing the individual right to vote against competing structural state interests. The Court developed this framework in a series of cases beginning with the ballot access case *Anderson v. Celebrezze*<sup>22</sup> and refined it in *Crawford*. The argument of Part II is not that this still-developing

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as “structural and instrumental”). Gardner’s argument is not specifically addressed to the new vote denial controversies, but covers all controversies that arise at “the end-stage of the election process,” which includes most of the new vote denial. *Id.* at 462.

20. See *infra* Part II.A.2. Richard Hasen has also endorsed a version of the view that rights are on “both sides” of at least some vote denial controversies. See Richard L. Hasen, *You Don’t Have to Be a Structuralist to Hate the Supreme Court’s Dignitary Harm Election Law Cases*, 64 U. MIAMI L. REV. 465, 466 (2010) (“In *Bush* and the voter-identification cases, the Court failed to recognize rights on *both sides* of the case and that the rights of voters on (what turned out to be) the losing side easily trumped rights on the winning side of the case.” (emphasis in original)).

21. See *infra* Part II.A.2.

22. 460 U.S. 780 (1983). *Anderson* built on precedents including *Storer v. Brown*, 415 U.S. 724 (1974), but those prior cases did not develop the flexible balancing approach that makes *Anderson* notable. See also *Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (applying *Anderson*).

*Anderson/Crawford* doctrinal approach is perfect, but that it has great potential and is significantly better than the competing options that are being urged on the Court from all sides. In different ways, each of the competing alternatives fails to account for a central part of why the individual right to vote matters.

The first two Parts of this Article rest on a premise: that the individual right to vote matters, in significant part, for reasons that are not reducible to structural values. That is, the analytic argument in Part I and the doctrinal argument in Part II both rest on an idea that the individual right to vote is valuable for reasons that cannot be fully captured by broader, structural variables such as the overall level of participation, representativeness, democratic accountability, and so on.

Part III takes some initial steps toward the broader project of developing an account of *why* the individual right to vote matters—and therefore, why vote denial matters—for reasons that are individualistic rather than structural. This argument fills a surprising gap in the existing election law literature. Although we commonly refer to the right to vote as an individual right or a fundamental right, surprisingly little work has been done in election law scholarship to develop a robust normative or interpretive account of the harm(s) involved in vote denial. The first-generation cases simply did not require any such account; the wrongness of black disenfranchisement was sufficiently overdetermined that the early cases did not require scholars to develop a theory of vote denial. But today this theoretical gap is becoming more noticeable as the new vote denial controversies escalate.

Part III argues that the right to vote matters because by allowing individuals to vote, the polity includes them in the circle of full and equal citizens. The harm of disenfranchisement thus cannot be reduced to its impact on election outcomes—even though it is possible that disenfranchising enough people could swing the results of an election, and even though that possibility may be what motivates the partisans on both sides of the new vote denial controversies. The disenfranchisement of any one person is also a dignitary harm to her in particular. This individual dignitary harm is distinct from the expressive aspect of voting, which is similarly independent of outcomes.<sup>23</sup> This dignitary harm is intertwined with an equality claim, as Part III explores.<sup>24</sup> The dignitary harm may be especially acute when the individual who is disenfranchised is someone whom society does not always treat as a full and equal citizen in other contexts, such as a citizen who is disabled, homeless, or poor. That is, the dignitary harm may be especially acute when, and because, it is part of some broader pattern of unequal, second-class treatment.<sup>25</sup>

This equal citizenship dimension of the right to vote is entirely invisible if we imagine that “voters are little more than worker bees in a complex, collective enterprise the *only* point of which is to register . . . decisions made by the

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23. See Adam Winkler, Note, *Expressive Voting*, 68 N.Y.U. L. REV. 330, 331 (1993).

24. This link between dignity and equal citizenship is at the heart of my disagreement with Gardner, who argues against recognizing “the dignity of voters.” See Gardner, *supra* note 19, at 441; see also *infra* notes 202–12 and accompanying text.

25. Such broader patterns sometimes can be stated in terms of the treatment of groups. For example, the harm of disenfranchisement may be more acute because it is part of a broader pattern of racial group subordination. However, these broader patterns need not fall along group lines. See *infra* Parts III.E & III.G.



collectivity.”<sup>26</sup> It is not captured by any analysis of election outcomes. But it is at the core of why the right to vote matters—especially for individuals who are not always treated as full, equal citizens in other areas of political and social life.

The account this Article offers of why the individual right to vote matters is necessarily preliminary and incomplete. But it should be sufficient to justify making a clear distinction between the individual right to vote and structural concerns such as turnout and representativeness. This Article suggests that we must be careful to avoid arguments that subtly recharacterize the individual right to vote as a mere means to some other, different end, such as a high level of participation. And it provides a useful normative foundation for an important task courts will not be able to avoid in the years ahead: developing standards for weighing the competing interests at stake in the new vote denial controversies.

### I. ELECTION LAW PLURALISM

This Part defends what we might call “election law pluralism”: the proposition that there are multiple, irreducibly distinct interests at stake in voting controversies, only some of which are best framed as instances of the “right to vote.”<sup>27</sup> Pluralism is inevitably unsatisfying in some respects. It would be easier to decide certain controversial questions if one fundamental interest or value were all that mattered: the polity’s interest in disrupting lockups,<sup>28</sup> for example, or the interests of racial and political groups in achieving fair representation, or the interest of individual voters in casting their ballots and having them count. But the interests at stake in voting controversies are not so simple. When we pretend that all the relevant interests have the same shape, we are pressing square pegs into round holes; they fit only if we carve away part of what made them distinct, and valuable, in the first place.

In a 1993 article, Pam Karlan usefully distinguished three domains of interests at stake in voting controversies: participation, aggregation, and governance.<sup>29</sup> These domains are, roughly, temporal stages. First, voters vote; then the votes are

26. Gardner, *supra* note 19, at 462 (emphasis added) (endorsing this view).

27. This proposition is closely related to Guy-Uriel Charles’s view that multiple *principles*—such as “majority rule, political participation, accountability, responsiveness, substantial equality, and interest representation”—are at stake in controversies over democratic politics. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1142 (2002). Rick Pildes has similarly suggested that the right to vote “protect[s] several different core interests” that are “qualitatively distinct.” Richard H. Pildes, Response, *What Kind of Right Is “The Right to Vote”?*, 93 VA. L. REV. IN BRIEF 45, 45 (2007); see also Richard H. Pildes & Richard G. Neimi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483, 499–506 (1993) (reading *Shaw* as a case defending value pluralism against gerrymanders that reflect “value reductionism” by treating racial representation as the only value at stake). I thank Chad Flanders for suggesting the descriptive label “election law pluralism” for the proposition I defend here.

28. See Issacharoff & Pildes, *supra* note 5.

29. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1708 (1993).

aggregated in some way to determine outcomes; and finally, those who were elected govern. We all have interests at each stage.

The participation domain includes the individual right to cast a ballot and have it counted. As Part III will discuss, this amounts to a right to be included as a full citizen of the polity. The participation domain also includes the polity's interest in a high overall level of turnout. What participation interests have in common is that they are independent of election outcomes. They are independent of questions of how votes are aggregated—except on the limited but important point that a given vote *is* aggregated, rather than being left in a dusty box somewhere, erased from a memory card, or otherwise improperly excluded from the count (whether accidentally or through deliberate, fraudulent acts by election officials).

Aggregation interests, by contrast, are “essentially outcome-regarding.”<sup>30</sup> The archetypal aggregation interest is probably the one found in a clause of section 2 of the Voting Rights Act (VRA), added in the 1982 Amendments, which holds that members of a protected group (a group defined by race, color, or language minority status) cannot “have less opportunity than other members of the electorate . . . to elect representatives of their choice.”<sup>31</sup> This simple formulation has wide applicability beyond the VRA. As a general matter “*each* voter has an interest in the adoption of aggregation rules that enable her to elect the candidate of her choice.”<sup>32</sup> Defined this way, aggregation interests are at the heart of one-person-one-vote claims, racial vote dilution claims, and numerous other claims regarding the district lines, processes, and rules by which votes are translated into outcomes. In aggregation claims our right to cast a ballot is not at issue. Rather, our interests generally turn on who is in the set of other voters or groups of voters with whom our votes are aggregated, as well as the rules governing that aggregation.

Voters also have interests in governance: in what elected officials actually do once in office. Each of us has an interest in the enactment of policies we favor. Making policy, at least in a legislative setting, involves legislators other than one's own representative. Thus, a concern for policy outcomes will generally entail a concern for the “overall composition of the governing body.”<sup>33</sup> I have an interest in the virtual representation I may receive because legislators who do not represent my district nonetheless share my political party, my policy views, my race, or some other politically salient characteristic that leads them to govern in ways I prefer.<sup>34</sup> The Court recognized a governance interest of this kind in *Georgia v. Ashcroft*<sup>35</sup> when it held that there was no retrogression of minority voters' interests under section 5 of the VRA where the losses to minority voters' *aggregation* interests (i.e., electing candidates of their choice) were offset by gains in terms of “putting in office people that are going to be responsive.”<sup>36</sup>

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30. *Id.* at 1713.

31. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b) (2006)).

32. Karlan, *supra* note 29, at 1712–13 (emphasis added).

33. *Id.* at 1717.

34. *See id.*

35. 539 U.S. 461 (2003).

36. *Id.* at 489 (quoting testimony of Congressman John Lewis). The dissenters in *Ashcroft* would have held that the section 5 retrogression inquiry should be concerned

*A. Interests and Interest Bearers in Voting Controversies: A Conceptual Scheme*

The domains of participation, aggregation, and governance do not specify anything about the interest *bearers*. Three different kinds of interest bearers—individuals, groups, and the polity as a whole—each have interests in each domain.<sup>37</sup> Thus, nine conceptually distinct combinations of interests and interest bearers are potentially at stake in voting controversies. We might visualize them this way:

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exclusively with aggregation interests: the question should simply be the opportunity of members of the minority group to elect candidates of their choice (including through coalition districts). *See id.* at 492–93 (Souter, J., dissenting).

37. I use “groups” here broadly: the groups with interests at stake in election law controversies include groups defined by geography, political party, and race, as well as groups defined by any other variable that is sufficiently politically relevant that members of the group share some political interests in common.

Interest Bearer:	A. Individual	B. Group	C. Polity
<b>1. Participation</b>	<ul style="list-style-type: none"> <li>• My interest in having the right to cast a ballot and have it counted</li> </ul>	<ul style="list-style-type: none"> <li>• Our interest in our members having the right to cast ballots and have them counted</li> <li>• Our interest in our group's rate of participation</li> </ul>	<ul style="list-style-type: none"> <li>• The polity's interest in its members having the right to cast ballots and have them counted</li> <li>• The polity's interest in promoting a high overall level of participation</li> </ul>
<b>2. Aggregation</b>	<ul style="list-style-type: none"> <li>• My interest in aggregation rules that allow me to elect my candidates of choice</li> <li>• My interest in aggregation rules that give my vote influence over the outcome</li> </ul>	<ul style="list-style-type: none"> <li>• Our interest in aggregation rules that allow us to elect our candidates of choice</li> <li>• Our interest in aggregation rules that give our votes influence over the outcome</li> </ul>	<ul style="list-style-type: none"> <li>• The polity's interest in impartial and fair aggregation rules</li> <li>• The polity's interest in making sure that election outcomes are not altered by fraud</li> <li>• The polity's interest in values such as competition or stability that depend on aggregation rules</li> </ul>
<b>3. Governance</b>	<ul style="list-style-type: none"> <li>• My interest in representatives I favor being elected (whether from my district or not)</li> <li>• My interest in having policies I favor enacted</li> <li>• My interest in constituent services responsive to my individual situation</li> </ul>	<ul style="list-style-type: none"> <li>• Our interest in representatives we favor being elected (whether from our district(s) or not)</li> <li>• Our interest in having the policies we favor enacted</li> </ul>	<ul style="list-style-type: none"> <li>• The polity's interest in having good public policies, and/or its preferred public policies, enacted</li> <li>• The polity's interests in the processes of policy making, such as transparency and anti-corruption</li> </ul>

Delineating these three interest bearers in addition to Karlan's three domains helps clarify what is distinct about interests that might otherwise seem the same. On the "participation" row, an *individual's* interest in participation is entirely concerned with her individual right to cast a ballot and have it counted. Having this right enacts a form of civic inclusion that does not depend on whether a voter actually *exercises* the right.<sup>38</sup>

38. See *infra* Part III. A freedom *not* to vote is sometimes taken to be an important right of citizenship, but that idea is contested and beyond the scope of this Article.

For groups and for the polity as a whole, however, more than one type of participation interest is in play. Groups and the polity as a whole have interests in protecting the rights of their members and affirming their inclusion.<sup>39</sup> In addition, groups and the polity as a whole have interests in the aggregate *level* of participation or turnout (either within the group or overall).

A polity might value a high overall level of participation for its own sake, or on the grounds that high levels of participation are instrumentally useful for promoting other democratic values such as civic engagement, accountability, or representativeness. A strong tradition within democratic theory emphasizes broad participation as a foundation of a healthy democratic order.<sup>40</sup> Bruce Ackerman argues that, in comparison to most other civic activities that are more time intensive and costly, “voting is the paradigmatic form of *universal* citizenship participation”; thus, a high level of participation in the form of voting is a necessary component of a robust democracy.<sup>41</sup> Similarly, a group might value a high level of participation among its members, either because it values its members’ political engagement or for the instrumental reason that if its members vote, the group will have greater political clout.

#### *B. Distinguishing the Interests of Individuals, Groups, and the Polity*

Before moving further it is worth pausing to clarify why it makes sense to speak of individuals, groups, and the polity as having distinct interests even though individuals make up groups and the polity as a whole. Distinguishing these interests can help us clarify which ones are doing the real work in a given controversy—and ultimately, which ones ought to anchor courts’ analysis.

The polity’s interests are conceptually distinct from the interests of individuals and groups. Benefits (and harms) to the interests of the polity are public goods (and bads). They are nonrivalrous and nonexcludable. There is no way for me to live in a stable or competitive or noncorrupt polity without my neighbor also doing so. Individual and group interests, in contrast, do not work this way. Some individuals and groups may enjoy the right to vote while others do not. Some can aggregate their votes together to elect their candidates of choice while others cannot. Some will see their preferred policies enacted while others will not.

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39. These interests are parallel to an individual voter’s interest in her own right to vote; we might think of them as many individual voters’ interests added together.

40. While this tradition generally does not limit participation to voting, voting is central. For the classic normative political theory argument, see CAROLE PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* (1970). See generally STEPHEN MACEDO, YVETTE ALEX-ASSENSOH, JEFFREY M. BERRY, MICHAEL BRINTNALL, DAVID E. CAMPBELL, LUIS RICARDO FRAGA, ARCHON FUNG, WILLIAM A. GALSTON, CHRISTOPHER F. KARPOWITZ, MARGARET LEVI, MEIRA LEVINSON, KEENA LIPSITZ, RICHARD G. NIEMI, ROBERT D. PUTNAM, WENDY M. RAHN, ROB REICH, ROBERT R. RODGERS, TODD SWANSTROM & KATHERINE CRAMER WALSH, *DEMOCRACY AT RISK: HOW POLITICAL CHOICES UNDERMINE CITIZEN PARTICIPATION AND WHAT WE CAN DO ABOUT IT* (2005).

41. I BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 239 (1991) (emphasis in original). This point naturally raises the question of compulsory voting, which is a subject for another article.

Just because some interests are group interests does not mean that the law must recognize “group rights.”<sup>42</sup> Our law often takes careful account of the interests of individuals, groups, and the polity as a whole without conferring rights or standing on all the corresponding interest bearers. As Heather Gerken has pointed out, many claims of the type she calls “aggregate rights” involve legal claims by individuals, yet “fairness is measured in group terms.”<sup>43</sup> When an individual plaintiff brings a claim of vote dilution, the right to an undiluted vote “rises and falls with the treatment of the group” and “is unindividuated among members of the group” in that “no group member is more or less injured than any other group member.”<sup>44</sup> Indeed, there is no way to evaluate whether the claim should succeed or fail without reference to the overall interests of the group.<sup>45</sup> Though the law may confer standing on individuals, it is the group’s interests that the law sees.

This phenomenon—the law’s unambiguous recognition of certain group interests, even where the plaintiffs are individuals rather than groups—is not unique to election law. An employment discrimination plaintiff with a disparate impact claim under Title VII makes a case of exactly the same shape: she argues that a particular employment practice has a disparate impact on her *group’s* opportunities and, for that reason, violates her *individual* rights.<sup>46</sup> What the law is doing here is accounting for where the real interests lie—even where that entails acknowledging that the real interest bearer is not the same as the party with legal rights and, indeed, may be the sort of interest bearer (e.g., a racial group) that could not itself be a rights bearer or appear in an American courtroom.<sup>47</sup>

To determine whether the real interest bearer is an individual, a group, or the polity as a whole, the basic question we need to answer is straightforward. If the benefit or burden rises and falls with the group, affecting all group members

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42. For a discussion of how individual rights may protect group interests, and vice versa, see Robert C. Post, *Democratic Constitutionalism and Cultural Heterogeneity*, 25 AUSTL. J. LEGAL PHIL. 185, 191–95 (2000).

43. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1681 (2001).

44. *Id.*

45. To see why, consider a simple example: Under conditions of racially polarized voting, one minority voter lives in a majority-minority district and another lives in the nearly all-white district nearby. Suppose the first voter can always elect her candidate of choice and the second voter never can. Their individual aggregation interests have no relevance to a racial vote dilution claim. Either both of the voters, or neither, experienced vote dilution; the answer turns on the aggregation interests of the *group*.

46. See, e.g., *Connecticut v. Teal*, 457 U.S. 440, 453–54 (1982) (explaining that Title VII protects “the individual employee, rather than . . . the minority group as a whole,” yet the disparate impact inquiry turns entirely on whether the employment practice has a disparate impact on the group).

47. Indeed, in vote dilution claims, some members of the relevant group may not even have the right to vote. In one-person-one-vote claims, children are “persons,” as are noncitizens. See U.S. CONST. amend. XIV, § 2 (requiring Congressional reapportionment on the basis of the “whole number of persons in each State”); *Garza v. Cnty. of L.A.*, 918 F.2d 763, 775 (9th Cir. 1990) (affirming the use of persons, rather than citizens, in redistricting as well). The groups most relevant in election law cases, such as racial groups, often include both citizens and noncitizens.

equally, then we are in the group column; if the benefit or burden rises and falls with the whole polity, affecting all members of the polity equally, then we are in the polity column. This framework allows us to see some of the underlying richness of what might otherwise seem the most pedestrian of election law claims: the one-person-one-vote cases.

Justice Frankfurter famously held in *Colegrove v. Green* that malapportionment was an injury to the interests of the polity as a whole, rather than to the interests of any one individual or group.<sup>48</sup> Unlike contemporary structuralist scholars who view the democratic interests of the polity as a whole as a proper—or *the* proper—object of judicial protection in election law cases, Justice Frankfurter held that malapportionment was a polity-level harm in the context of his broader argument that “[c]ourts ought not to enter this political thicket.”<sup>49</sup> But Justice Frankfurter was wrong about the interests at stake in malapportionment, and the Court ultimately recognized this and overturned *Colegrove*.<sup>50</sup> The main harm of malapportionment is not an injury to the whole polity—it is an injury to group aggregation interests. Malapportionment creates obvious winners and losers along various group axes: geography, political preferences, and even race.<sup>51</sup> The Court recognized this.<sup>52</sup> Malapportionment may also have been a public bad, but framing the harm exclusively in polity terms (as Justice Frankfurter did) simply did not adequately account for the interests at stake.

While the normative force of malapportionment claims comes from group aggregation interests, the *legal* force of these claims seems to come from a different place: a close but imperfect analogy to individual disenfranchisement. The Court built a right against numerical vote dilution on the foundation of the individual right to cast a ballot.<sup>53</sup> This close analogy hardened into doctrine when the Court held in *Reynolds v. Sims* that “the right of suffrage can be denied by a debasement or dilution of the weight of a citizen’s vote just as effectively as by wholly prohibiting the free exercise of the franchise.”<sup>54</sup>

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48. 328 U.S. 549, 552 (1946) (“This is not an action to recover for damage because of the discriminatory exclusion of a plaintiff from rights enjoyed by other citizens. The basis for the suit is not a private wrong, but a wrong suffered by Illinois as a polity.”).

49. *Id.* at 556.

50. See *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding, contrary to *Colegrove*, that malapportionment is “within the reach of judicial protection under the Fourteenth Amendment”); *Wesberry v. Sanders*, 376 U.S. 1, 6–7 (1964).

51. The racial disparities created by malapportionment seem to have been important to Earl Warren. See Sanford Levinson, *One Person, One Vote: A Mantra in Need of Meaning*, 80 N.C. L. REV. 1269, 1296 (2002).

52. See, e.g., *Gray v. Sanders*, 372 U.S. 368, 379 (1963) (noting the “end result” of Georgia’s malapportionment: it “weights the rural vote more heavily than the urban vote”); see also Charles, *supra* note 5, at 1129–30.

53. See *Colegrove*, 328 U.S. at 570 (Black, J., dissenting) (arguing that “the constitutionally guaranteed right to vote and the right to have one’s vote counted”—the individual participation interest—“clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast”—the individual aggregation interest).

54. 377 U.S. 533, 555 (1964). In other early one-person-one-vote cases the Court made similar moves. See Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV.

This move was a little too quick. While “debasement or dilution” indeed undermines a voter’s ability to affect election outcomes, outcomes are not the only reason the right to vote is valuable. The Court goes too far in *Sims* in claiming that “[t]o the extent that a citizen's right to vote is debased, he is that much less a citizen.”<sup>55</sup> The analogy between denial and dilution is not perfect enough: an outdated map giving my vote less “weight” harms my outcome-related interests, but it does not harm me in quite the same way as a scheme in which I am blocked from casting a ballot.<sup>56</sup>

The Court today frames malapportionment claims in terms of the “weight” of an individual’s vote<sup>57</sup>—an individual aggregation claim.<sup>58</sup> But group aggregation interests are still doing the real normative work. The “weight” of my individual vote does not do much practical work for me. In particular, it does not actually tell me anything about my chances of being able to elect my candidate of choice.<sup>59</sup> Instead the weight of my vote is something much more artificial and abstract.<sup>60</sup> Perhaps there is an individualized interest at stake in being only one of 100,000 constituents rather than one of 200,000 from the point of view of constituent services (an individual *governance* interest). But essentially what is going on here is that the Court has found an individualistic way to recast what are really the interests of equally numerous groups of citizens in electing their candidates of

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601, 658–59 (2007).

55. *Sims*, 377 U.S. at 567.

56. The difference is especially obvious when the purported “debasement” of the individual right to vote amounts to some tiny fractional deviation from perfect equipopulation. See Issacharoff, *supra* note 5, at 609 (“[N]o credible individual rights claim could be made where districts numbering in the many thousands deviated from the ideal size by less than one percent.”); see also Gardner, *supra* note 19, at 452 (criticizing the Court for framing one-person-one-vote claims in terms of “some conception of voter dignity” even where the “indignity” in question is “trivially fractional”).

Still, there are transitional cases that lie at the edge of this distinction between denial and dilution. Altering the boundary of a town to exclude certain voters can prevent them from voting at all in local elections. This differs from the ordinary legislative redistricting case in which voters are simply moved from one district to another. See *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 347 (1960) (holding that altering the boundaries of Tuskegee, Alabama to exclude blacks was *denial* of the right to vote on account of race).

57. *E.g.*, *Voinovich v. Quilter*, 507 U.S. 146, 160–61 (1993) (explaining that the purpose of the equipopulation requirement is “so that each person’s vote may be given equal weight,” although this rule is “not an inflexible one”); *Wesberry v. Sanders*, 376 U.S. 1, 2–3 (1964) (in numerical vote dilution case, defining Georgia voters’ claim in terms of a right “to have their votes for Congressmen given the same weight as the votes of other Georgians”).

58. Such individual aggregation claims are a kind of hybrid at the intersection of individual participation and group aggregation.

59. Indeed, the Court has explicitly rejected attempts by litigants to offer models, such as the Banzhaf test, that would measure the individual’s chances of affecting the election outcome. See *Bd. of Estimate of N.Y.C. v. Morris*, 489 U.S. 688, 698 (1989).

60. Under conditions of equal “weight” as the law defines it, a voter who lives in a district that happens to contain many noncitizens, children, or nonvoters will have far greater influence on election outcomes than a voter elsewhere. See *Garza v. Cnty. of L.A.*, 918 F.2d 763, 781–82 (9th Cir. 1990) (Kozinski, J., concurring and dissenting in part). Individual influence is not protected. See also Levinson, *supra* note 51, at 1277–89 (detailing a variety of ways that one-person-one-vote does not result in districts with equal numbers of voters).



choice. The Court would have no reason to protect the weight of an individual vote if this group interest were absent.<sup>61</sup>

This rich example illustrates that there are multiple interests at stake even in the most familiar election law claims—and even in claims framed in terms of “the right to vote”—but that some of these interests are stronger than others. In particular, in the aggregation domain, individual interests are not where the action is; it is group- and polity-level interests that really do the work. Contrast this with the participation domain. Here, it is the individual interest in participation—in casting a ballot—that serves as the paradigmatic interest from which the Court draws its analogies.

The Court does not, and need not, always directly acknowledge the interests in play. Its doctrinal structures do not (and need not) always grant rights to the relevant interest bearers. But the doctrine must provide some way to account for the interests that are doing the normative work. When the Court does what it did in *Colegrove*—account for the relevant interests in such a myopic way as to leave the most normatively compelling interests out of the adjudicative calculus entirely—the gap between doctrine and reality leads to pressure on the doctrine. In the end, misidentifying or omitting normatively central interests yields both bad doctrine and bad results.

### *C. The Merits and Limits of Structuralism: A First Cut*

Disaggregating the interests of individuals, groups, and the polity as a whole illuminates both the power and the limits of structuralism. The case for adjudicating election law questions in wholly structural terms is at its strongest where the underlying interests at stake in the controversy are in fact interests of the whole polity.

As structuralist scholars have noted, election law jurisprudence is replete with irreducibly polity-level interests. The “expressive harms” the Court identifies in racial gerrymanders are, as Pildes argues, “not the tangible burdens they impose on particular individuals but the way in which they undermine collective understandings.”<sup>62</sup> Karlan has argued persuasively that both in the racial gerrymandering cases and in *Bush v. Gore*, “[t]he Court deploys the Equal Protection Clause not to protect the rights of an identifiable group of individuals . . . but rather to regulate the institutional arrangements within which

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61. Karlan identifies that rare animal, the “purely individual” aggregation claim independent of group interests, in the supermajority (60%) requirement for bond issues that was challenged unsuccessfully in *Gordon v. Lance*, 403 U.S. 1 (1971). See Karlan, *supra* note 29, at 1713 n.30. Plaintiffs argued that the 60% threshold gave more weight to negative votes than affirmative votes. *Id.* The Court rejected the argument because it “discern[ed] no independently identifiable group or category” of voters, “no sector of the population,” whose interests were harmed. *Gordon*, 403 U.S. at 5. In effect, the Court rejected the claim because it correctly judged that there was no group aggregation interest here, and, without one, the importance of the individual aggregation interest was mysterious.

62. Richard H. Pildes, *Why Rights Are Not Trumps: Social Meanings, Expressive Harms, and Constitutionalism*, 27 J. LEGAL STUD. 725, 755 (1998); see also Pildes & Neimi, *supra* note 27, at 506–16.

politics is conducted.”<sup>63</sup> In other words, the relevant interests here are not those of individuals or groups but the interests of the polity as a whole. In such cases, courts may invoke “rights” to trigger legal scrutiny of a challenged practice, but rights are not what courts ultimately weigh.

The key insight of Issacharoff and Pildes in *Politics as Markets* was that the “discourse of individual rights and competing state interests” has often obscured the real stakes in controversies where the essential interests on both sides are structural.<sup>64</sup> Cases challenging restrictions on fusion candidacies or write-in candidacies are primarily about the structure of political competition.<sup>65</sup> Both sides in such cases make arguments about democratic structure: the pro-fusion and pro-write-in sides advocate a democratic order that is more open to competition from outsiders and third-party candidates, while defenders of the restrictions advocate an order less open to such competition and ostensibly more “stable.” Although there are other individual and group interests in play in these cases, the main normative claims on both sides address these polity-level concerns. Yet the individual-rights-versus-state-interests doctrinal framework leads courts to focus on the structural, polity-level interests on one side only—the side defending the regulations. Thus, in controversies of this kind, the structuralist critique has real analytic force.

However, not all controversies have this shape. In particular, some interests are essentially individual in nature; they belong in the Column A of Table 1.<sup>66</sup> These interests do not rise and fall with the treatment of any group or the polity as a whole. The most important of these interests is the individual citizen’s interest in her right to vote.

In the new vote denial controversies that the next Part will discuss—the fights over such measures as voter identification requirements and registration list purges that aim to prevent fraud but also disenfranchise some legitimate voters—it is surprisingly easy to lose sight of the individual right to vote. In part this is because the main players in these controversies are almost never individual voters. They are usually political parties, from whose perspective all the real action is in the “group” column. To these highly experienced and litigious adversaries, what matters most is who will turn out to vote and what effects, if any, the proposed anti-fraud measures will have on the relative levels of participation of different political groups. Meanwhile, to many advocates and scholars, what matters about the new vote denial controversies is their overall effects on structural variables such as turnout

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63. Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1346 (2001) (footnote omitted). There is broad agreement on this point in the academy, even among those who resist structuralism *tout court*. See, e.g., Hasen, *supra* note 20, at 467 (agreeing that in such cases, the Court “couched its decision[s] in terms of individual rights” but in fact was concerned with broader, structural interests).

64. Issacharoff & Pildes, *supra* note 5, at 717.

65. See *id.* at 668–87.

66. Cf. Charles, *supra* note 5, at 1114 (“Structuralists sometimes lose sight of the fact that the ultimate point of judicial supervision of politics is to protect, operationalize, or give content to the individual right to self-government.”). But see, e.g., Gardner, *supra* note 19, at 457–58 (“In democratic proceedings, the real party in interest is the public, not the individual voter.”).

and representation, as well as their effects on racial and political groups. None of these interests is the same as an individual voter's interest in being able to cast a ballot and have it counted. Although a full discussion of the value of this individual interest will have to wait until Part III, the next Part will explain why taking this interest seriously makes a difference to both the doctrine and the jurisprudence of the new vote denial.

## II. ADJUDICATING THE NEW VOTE DENIAL CONTROVERSIES

### *A. The Interests at Stake*

Across the landscape of the new vote denial controversies—from registration list purges to provisional ballot rules and from partisan challengers to photo identification requirements—the two sides' main stated aims are clear: preventing fraudulent votes versus preventing disenfranchisement. But these general aims require some careful unpacking: they may stand for a variety of distinct interests. Some of these are truly individual interests, but others, even if stated in individualistic terms, are actually interests of groups or of the polity as a whole.

#### 1. Interests of Individuals, Groups, and the Polity in the New Vote Denial Cases

First consider the interests of the polity as a whole. The first and most obvious reason to prevent fraudulent votes is that they might alter an election outcome, either if the number of fraudulent votes is large or if the margin of victory is small—and some margins of victory are very small. Outcome-altering fraud would be a major problem for the entire polity. Even if the probability of this occurring is not high, the whole polity has an interest in reducing that probability.<sup>67</sup> We all benefit from making sure election outcomes are not altered by fraud, and it is not logically possible for you to enjoy an election whose outcome was safe from fraud while I do not. Thus, keeping election outcomes safe from fraud is, in the first instance, a polity-level aggregation interest.

Both sides also point to other polity-level interests. Opponents of anti-fraud measures argue that such measures will dampen overall turnout (a polity-wide participation interest), or that they will distort turnout in such a way as to reduce representativeness (a polity-wide aggregation interest). Advocates of anti-fraud measures sometimes argue that they will improve voters' "confidence" in the election process. As the Court put it in a 2006 case: "Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government."<sup>68</sup> Some press this claim further and argue that improving confidence and trust through measures such as voter identification requirements will increase overall turnout.<sup>69</sup> Both of these claims lack empirical support. Available empirical evidence indicates that identification laws have no effect on voter confidence and

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67. The strength of this interest will depend on (a) just how small that probability is to begin with and (b) to what extent a new anti-fraud regulation actually reduces it.

68. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam).

69. See *supra* note 15 and accompanying text.

that, in any event, an individual's perception of the level of fraud has no effect on her likelihood of voting.<sup>70</sup> Nevertheless, this turnout argument invokes a polity-wide interest in the overall level of participation.

Both sides also invoke group interests. Some partisans look favorably on tougher anti-fraud measures out of a view that their opponents generally engage in (more) fraud; therefore, they believe that reducing fraud will improve the prospects of electoral success for groups, like their own, that have (relatively) clean hands. This is a group aggregation interest, with the group typically being a political party or other faction.<sup>71</sup> The strongest versions of this argument take the form of charges that the other party is engaged in massive, coordinated fraud.<sup>72</sup> But leaving the effects of fraud itself on group electoral prospects entirely to one side, *anti*-fraud measures may have predictable side effects on group turnout—and therefore, on different groups' chances of electing their candidates of choice. Depending on one's perspective such effects might be a feature or a bug. Different courts evaluating the voter identification law at issue in *Crawford* noted correctly that “partisan considerations may have played a significant role in the decision to enact” the statute<sup>73</sup> and, by the same token, in the plaintiffs' decision to challenge the statute.<sup>74</sup>

At the intersection of polity and group interests, a few structuralists advocate adjudicating the new vote denial claims on the basis of whether the regulations

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70. See Stephen Ansolabehere & Nathaniel Persily, *Vote Fraud in the Eye of the Beholder: The Role of Public Opinion in the Challenge to Voter Identification Requirements*, 121 HARV. L. REV. 1737, 1751–58 (2008). Indeed, some evidence suggests that the group of voters who are disillusioned by the flawed machinery of the political process is disproportionately black; their concerns include voter suppression, fear that their votes will not be accurately counted, and concern about the anti-fraud agenda itself. See Ian Urbina, *Democrats Fear Disillusionment in Black Voters*, N.Y. TIMES, Oct. 27, 2006, at A5 (citing polling data).

As far as the relationship between voter identification laws and turnout, there is some debate over whether sufficient data yet exists to draw firm conclusions, but there is certainly no evidence of a positive effect on turnout; some methodologies show a negative effect, but the effect may not be statistically significant. See generally Robert S. Erikson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L. J. 85 (2009).

71. Not always, however. See *infra* note 88 and accompanying text.

72. For example, in 2000, Missouri Republican Secretary of State Matt Blunt accused his opponents of “a major criminal enterprise designed to defraud voters” and steal the election by holding the polls open late so that illegitimate voters could vote. Carolyn Tuft, *Bond Wants Federal Investigation of Problems at City Polls—He Accuses Democrats of “Criminal Enterprise” in Keeping Polls Open Late—Democrats Criticize Election Board*, ST. LOUIS POST-DISPATCH, Nov. 10, 2000, at A1.

73. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 203 (2008) (Stevens, J.) (plurality opinion). In dissent on the Seventh Circuit panel in *Crawford*, Judge Evans called the law “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.” *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 954 (7th Cir. 2007) (Evans, J., dissenting), *aff'd*, 553 U.S. 181 (2008).

74. *Crawford*, 472 F.3d at 952 (Posner, J.) (“[T]he motivation for the suit is simply that the law may require the Democratic Party and the other organizational plaintiffs to work harder to get every last one of their supporters to the polls.”).

cause political distortion or skew—and, sometimes, whether that group effect was one that legislators intended. For example, some have proposed that courts should invalidate (or more strictly scrutinize) regulations that cause partisan entrenchment,<sup>75</sup> or that “courts should apply strict scrutiny whenever a challenged law disproportionately disenfranchises people with an identifiable set of political preferences.”<sup>76</sup> Such standards can be read to track either impact or intent. One circuit judge in *Crawford* argued that strict scrutiny ought to apply “when 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.”<sup>77</sup> This intent- or purpose-based standard raises many of the same difficult questions that have bedeviled the Court’s partisan gerrymandering jurisprudence: assuming that partisan advantage may legitimately play some role in legislators’ decisions about election regulations, it is difficult to clarify precisely the “limiting principle” that separates the “permissible” from the “invidious.”<sup>78</sup> In practice, almost any regulation that causes a favorable turnout skew may be viewed as “imposing an additional significant burden” on some group of voters as compared to others. Thus, although legislative intent may play a useful role in the analysis of challenges to election regulations—for example, by coloring the evaluation of the state’s purported interest in the regulation—it is problematic for legislative intent to drive the entire analysis.<sup>79</sup>

Finally, both sides invoke individual interests. The most basic argument against the anti-fraud measures is that they disenfranchise legitimate voters by burdening or violating their individual right to vote.<sup>80</sup> Of course, groups also have an interest in protecting their members from disenfranchisement; the polity as a whole has an interest in safeguarding the rights of its members.<sup>81</sup> But these interests are derivative of the individual voters’ interests. As individuals attempt to vote, they

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75. See, e.g., Bryan P. Jensen, Comment, *Crawford v. Marion County Election Board: The Missed Opportunity to Remedy the Ambiguity and Unpredictability of Burdick*, 86 DENV. U. L. REV. 535, 558 (2009).

76. Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U. L. REV. 1174, 1178 (2007).

77. *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 437 (7th Cir. 2007) (Wood, J., dissenting from the denial of reh’g en banc), *aff’d*, 553 U.S. 181 (2008).

78. *Vieth v. Jubelirer*, 541 U.S. 267, 337–38 (2004) (Stevens, J., dissenting); see also Elmendorf, *supra* note 13, at 668–69. For a thorough argument against intent-based standards, see Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843.

79. Even critics of deciding the validity of election regulations based on legislative intent acknowledge that legislative intent may usefully play some secondary role. See, e.g., Hasen, *supra* note 78, at 888–89. For example, obvious intent to entrench or shut out a political party ought to make us more skeptical of the purported (structural) state interest justifying an election regulation. *But see infra* note 106 and accompanying text (discussing the fact that courts are often reluctant to make such determinations).

80. See *infra* Part III (discussing individual voters’ interest in their right to vote in more detail).

81. Indeed, the polity’s collective interest in safeguarding its members’ right to vote has proved crucial in voting rights litigation in which the United States wished to intervene. Thanks to Owen Fiss for pointing this out.

succeed or fail one by one.<sup>82</sup> Their right to vote does not rise or fall with the treatment of the group (or the polity as a whole), nor is it unindividuated among members of the group (or the polity). To say this is not to denigrate the polity's interest, or groups' interests, but to clarify the level on which the main action takes place.<sup>83</sup> In general, when we focus on the interest in being able to cast a ballot that is counted, the basic interest bearer is the individual.

## 2. Fraud-As-Dilution and Fraud-As-Disenfranchisement

In recent years, proponents of anti-fraud measures have developed two innovative arguments that fraudulent votes themselves violate the rights of individual voters. These arguments move away from a focus on outcome-altering fraud and instead attempt to reconceptualize each fraudulent vote—even one fraudulent vote—as something that harms *individual* (legitimate) voters. The purpose of these moves is to rebut or counterbalance the charge that anti-fraud measures disenfranchise legitimate voters. These moves fight fire with fire, inviting courts to weigh both fraud and the disenfranchisement caused by anti-fraud measures as essentially commensurate violations of individual rights.

First, advocates of anti-fraud measures offer the argument that fraud dilutes the votes of legitimate individual voters, reducing those votes' "weight" in a manner analogous to malapportionment. On this view, even if we leave aside the possibility that fraud could alter an election outcome—which would vitiate multiple interests of groups and the whole polity—the weight of my individual vote is diluted whenever someone, somewhere in my district, has cast one fraudulent vote. Instead of being one out of a thousand votes, my vote is now one in 1001, even if the fraudulent vote goes to a write-in candidate with no chance of winning. This argument amounts to an individual aggregation claim. Senator Christopher "Kit" Bond, who emerged as a leader of the Republican anti-fraud efforts during the Help America Vote Act debate, put it simply: "Illegal votes dilute the value of votes cast legally."<sup>84</sup>

This argument is plausible, but its normative force is mysterious. First, if we are talking about dilution in terms of the power to affect outcomes, the claim proves too much: *legal* votes dilute the value of other votes cast legally. (If nobody else votes but me, I have complete power to choose my elected officials. It's the other voters who get in the way.) Adding a fraudulent vote, from this perspective, is no different from adding a legitimate vote. Both dilute the abstract value of my vote by

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82. See Flanders, *supra* note 10, at 147 ("[G]roups may start movements in order to have the right to participate, but once this right is granted that right must be taken one person at a time . . .").

83. The group interest is only partly derivative of individuals' interests. Even if I can personally cast a ballot, it affects my group interests if others in my group are disproportionately blocked from voting. See Overton, *supra* note 13, at 673–74 ("[P]hoto-identification requirements that exclude legitimate voters dilute the political choices of not only those who are unable to produce photo identification but *also their allies* who do produce a photo-identification card." (emphasis added)).

84. 147 CONG. REC. 3660–61 (2001) (statement of Sen. Christopher Bond debating the Safeguard the Vote Act).

adding one more. Either way, the important interests at stake here depend on election outcomes. Unless election outcomes are altered, my aggregation interests are unaffected: I still have the same chance of being able to aggregate my votes with others and elect my candidate of choice that I would have had absent fraud.

Where outcomes are unaffected, my interest in the “weight” of my vote looks very much like the individual interest in the weight of a vote that the Court identified in one-person-one-vote cases—but here, the normatively crucial group aggregation interests are absent.<sup>85</sup> No equally populous group gets more or less than its fair share of representation as a result of the one fraudulent vote (or a few fraudulent votes, as long as they are non-outcome-altering). There is no representational harm. On the other hand, where there is a chance that my candidate or party will actually lose the election because of fraud, my strong interest in preventing that very bad outcome is an interest that rises or falls with the interests of my party (or the group of supporters of my chosen candidate). In that case, my interest is much stronger, but it is actually a *group* interest, not an individual one.

This dilution argument has now become a familiar part of the anti-fraud arsenal. But because dilution is not quite the same thing as disenfranchisement,<sup>86</sup> the fraud-as-dilution argument is not quite able to rebut the claim that anti-fraud measures disenfranchise legitimate voters. One line of attack available to the anti-fraud side is to argue that any voters disenfranchised by anti-fraud measures were not legitimate voters to begin with. In 2001, Senator Bond responded deftly to charges of disenfranchisement: “You may call me cruel and even discriminatory, but I will persist in trying to limit the voting franchise to human beings who are not dead yet.”<sup>87</sup> In Georgia, the state representative who was the chief sponsor of that state’s photo identification law pressed the argument further. She told U.S. Department of Justice (DOJ) voting section attorneys that “if there are fewer black voters because of this bill, it will only be because there is less opportunity for fraud.”<sup>88</sup> This line of attack neatly undermines the disenfranchisement argument by asserting that no *legitimate* voters are actually being disenfranchised. But it depends on the implausible empirical premise that every single person disenfranchised by these laws is an illegitimate, fraudulent voter.<sup>89</sup>

Some anti-fraud activists and legislators now also pursue a more direct line of attack: the claim that fraud itself disenfranchises individual voters by cancelling out their votes. This one-to-one cancellation is not the same as a one-in-1001 dilution.

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85. *See supra* note 61.

86. *See supra* note 56 and accompanying text.

87. Christopher S. “Kit” Bond, Op-Ed., ‘Motor Voter’ Out of Control, WASH. POST, June 27, 2001, at A25.

88. Section 5 Recommendation Memorandum: August 25, 2005, at 6, available at <http://www.truthaboutfraud.org/pdf/08-25-05%20Georgia%20ID%20Preclearance%20Memo%20-%20DOJ%20Staff.pdf>. This claim alarmed the DOJ line attorneys, a majority of whom ultimately recommended against preclearing the bill. *See id.* at 1, 51. However, the DOJ precleared the change despite this recommendation. *See* Daniel P. Tokaji, *If It’s Broke, Fix It: Improving Voting Rights Act Preclearance*, 49 How. L.J. 785, 816–17 (2006).

89. One could, of course, argue that only voters with identification are “legitimate,” but this move is question begging. Procedural requirements do not determine who is *eligible* to vote.

The claim here is that one fraudulent vote actually takes away the right to vote of one legitimate voter, who, presumably, is voting for the opposing candidate. With this claim, and with the modern rhetoric of fraud as a form of disenfranchisement, proponents of tough anti-fraud measures are aiming squarely at the upper-left-corner box of Table 1: individual participation. As Hans van Spakovsky put it: “Every vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot *in the same way that* an individual who is eligible to vote is disenfranchised when he is kept out of a poll or is somehow otherwise prevented from casting a ballot.”<sup>90</sup>

This argument is deeply flawed.<sup>91</sup> As Part III will discuss, it is not true that my right to vote matters only because of its outcome effects: my right to vote matters in part because it enacts my inclusion as a full citizen. Suppose both of us are legitimate voters, and you go to the polls and vote against my preferred candidate. The outcome effect of my vote has indeed been counterbalanced, but I am no less a first-class, equal, voting citizen.<sup>92</sup> From the point of view of inclusion, the situation differs radically from one in which I am, in von Spakovsky’s words, “kept out of a poll” or “otherwise prevented from casting a ballot.”

Moreover, this fraud-as-disenfranchisement argument assumes that the fraudulent voter is voting against my candidate. In a contested two-party election, there will always be some legitimate voter for whom that assumption holds. But there are other legitimate voters whose votes’ outcome effects are *magnified* by the fraudulent voter’s vote. One must apparently conclude—through the looking glass of fraud-as-disenfranchisement—that such voters are doubly enfranchised. And in a way that is precisely the problem: political parties may fear that their opponents are gaining unfair extra numerical advantages through fraud. But at this point, we are

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90. Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 TEX. REV. L. & POL. 277, 278 (2005) (emphasis added). Hans von Spakovsky, a conservative election lawyer, published this law review article under the pseudonym “Publius” while working at the DOJ. See Dan Eggen, *Official’s Article on Voting Law Spurs Outcry*, WASH. POST, Apr. 13, 2006, at A19.

Senator Bond began to adopt this fraud-as-disenfranchisement rhetoric during the Help America Vote Act debate when he argued that “[t]here can be no graver example of disenfranchisement” than fraud. 147 CONG. REC. 15,851 (2001) (statement of Sen. Christopher Bond). Congressional Republicans emphasized this argument during the 2006 debate over the Federal Election Integrity Act of 2006, a bill that would have imposed a federal voter identification requirement. See, e.g., 152 CONG. REC. 18,743 (2006) (statement of Rep. Mark Green) (“Every one of those illegal votes cancels out a vote legally cast, cancels out a vote from a citizen for whom that right is so precious . . .”).

91. Gardner views the rise of this flawed fraud-as-disenfranchisement argument (along with the fraud-as-dilution argument) as a reason to reject the Court’s entire individual-rights-based doctrinal approach in favor of structuralism. Gardner, *supra* note 19, at 458–63. But the real problem with fraud-as-disenfranchisement is that this argument mischaracterizes group and/or polity interests as individual interests; in that important way the fraud-as-disenfranchisement argument differs from claims by individual voters who actually face disenfranchisement.

92. In theory, if fraud were so extreme and widespread that democratic elections became meaningless, one can imagine a case in which voting ceased to function as an enactment of full citizenship. This scenario is far removed from the new vote denial controversies.



talking about group aggregation interests, not individual participation interests. Fraudulent votes are bad for more than one reason, but they are not the same thing as disenfranchisement.

Fraud-as-dilution and fraud-as-disenfranchisement have both made some notable inroads in recent court decisions. In 2000, the Missouri Court of Appeals reversed an injunction that had held polling places open late in St. Louis.<sup>93</sup> The court held that as important as it is to ensure that “every properly registered voter has the opportunity to vote . . . equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.”<sup>94</sup> In 2004, a federal district judge in Ohio was an early adopter of something like the fraud-as-disenfranchisement argument, in combination with the claim that perceived fraud hurts participation. “Where persons who are eligible to vote lose faith that their ballot will count,” the court wrote, “[t]hey may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken from them forcibly.”<sup>95</sup> In 2008, the Sixth Circuit characterized the Help America Vote Act as protecting votes from being “diluted” by fraud and explained that “[e]nabling the casting of one vote does little good if another voter fraudulently cancels it out.”<sup>96</sup>

In 2006, the Supreme Court took a tentative step down this path in *Purcell v. Gonzalez*,<sup>97</sup> a cryptic, brief opinion vacating a Ninth Circuit decision to enjoin enforcement of an Arizona voter identification law. The Court disclaimed any opinion about the merits of the case, and in dicta it correctly stated the main categories of interest at stake: “the State’s compelling interest in preventing voter fraud” (a polity-aggregation interest) was in conflict with “the plaintiffs’ strong interest in exercising the ‘fundamental political right’ to vote” (an individual-participation interest).<sup>98</sup> But at the same time, the Court also stated: “Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.”<sup>99</sup> This remarkable passage invokes, or at least suggests, several different claims. First,

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93. *Missouri ex. rel. Bush-Cheney 2000, Inc. v. Baker*, 34 S.W.3d 410, 411–12 (Mo. Ct. App. 2000).

94. *Id.* at 413. Here, the purported dilution was from “improper[]” votes cast by those not “entitled to vote” who “were improperly permitted to cast a ballot after the polls should legally have been closed.” *Id.* at 413, 413 n.6. The fraud-as-dilution argument migrated from politics to the courts but also back the other way: Senator Bond grabbed hold of this judicial language and has quoted it repeatedly. *See supra* note 84 and accompanying text.

95. *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) (upholding Ohio’s refusal to allow certain first-time voters to use a regular, rather than a provisional, ballot).

96. *Ohio Republican Party v. Brunner*, 544 F.3d 711, 713 (6th Cir. 2008) (en banc) (Sutton, J.), *vacated on other grounds*, 555 U.S. 5 (2008) (per curiam).

97. 549 U.S. 1, 1 (2006) (per curiam).

98. *Id.* at 4 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)).

99. *Id.*

immediately after the quoted sentences, the Court quotes the “debasement or dilution” language from *Sims*, evoking the one-in-1001 fraud-as-dilution argument.<sup>100</sup> Second, the passage makes a version of the polity-level claim that fear of fraud reduces participation and therefore, implicitly, that an anti-fraud measure might improve our “participatory democracy.”<sup>101</sup> Finally, when it invokes the idea that legitimate votes might be outweighed by fraudulent votes and when it makes the singular claim that voters will “feel disenfranchised,” the Court at least gestures toward the one-to-one cancellation argument—fraud-as-disenfranchisement.

Whether the Court truly embraced fraud-as-disenfranchisement in *Purcell* depends on how one reads the word “feel.” On the one hand, perhaps “feel” is a hedge: the Court saw that the one-to-one cancellation model of fraud-as-disenfranchisement was an imperfect analogy and declined to embrace it. On the other hand, if we (incorrectly) believed that disenfranchisement itself were exclusively a symbolic, subjective harm, then the harm of being disenfranchised and the harm of feeling disenfranchised might essentially be the same. Robinson Everett, who brought the *Shaw* challenges in North Carolina, once suggested something like this line of attack.<sup>102</sup> His clients, he said, “felt disenfranchised by the legislature’s . . . racial gerrymandering.”<sup>103</sup> As Pam Karlan argued in response, “no pre-existing definition of ‘disenfranchisement’ . . . describes the *Shaw* plaintiffs’ situation. *Feeling* disenfranchised is not the same thing as *being* disenfranchised. Each of the *Shaw* and *Cromartie* plaintiffs was able to go to the polls and to cast a ballot for the candidate of his or her choice.”<sup>104</sup>

### 3. Bypassing the Individual Right to Vote

One or both sides in the new vote denial controversies invoke all of the following interests. On this chart, a plus sign indicates a reason that supports the anti-fraud proposals, while a minus sign indicates a reason against these proposals. Interests in italics are derivative of other interests.

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100. *Id.* (quoting *Reynolds v. Sims*, 377 U.S. 533, 555 (1974)).

101. *Id.*

102. *Shaw v. Reno*, 509 U.S. 630, 632 (1993).

103. Robinson O. Everett, *Redistricting in North Carolina—A Personal Perspective*, 79 N.C. L. REV. 1301, 1310 (2001).

104. Karlan, *supra* note 63, at 1350 (emphasis in original). Perhaps a better (if less pithy) way to state the point is this: the *Shaw* plaintiffs’ claim sounded in aggregation, not participation. The problem was not that the claim had some subjective as well as objective elements—rather, the problem was that it was not actually a claim of disenfranchisement at all.

<b>Table 2: Interests at Stake in the New Vote Denial Controversies</b>			
Interest Bearer: Interest:	<b>A. Individual</b>	<b>B. Group</b>	<b>C. Polity</b>
<b>1. Participation</b>	<p>- An individual voter's right to cast her ballot and have that ballot counted</p> <p>(+ <i>an individual voter's purported interest in avoiding the "disenfranchisement" of fraud</i>)</p>	<p>(- <i>Political parties' and other groups' interests in their members' rights to cast ballots and have them counted</i>)</p> <p>+/- Political parties' and other groups' interests in their group's [absolute or relative] level of participation/turnout</p>	<p>(- <i>The polity's interest in its members' rights to cast ballots and have them counted</i>)</p> <p>+/- The polity's interest in a high overall level of participation/turnout</p> <p>+/- The polity's interest in safeguarding voter confidence</p>
<b>2. Aggregation</b>	<p>(+ <i>An individual voter's interest in protecting the "weight" of her vote against fraud-based dilution</i>)</p>	<p>+/- Political parties' and other groups' interests in electing their candidates of choice</p> <p>+ Political parties' interests in preventing opponents from stealing elections through fraud</p>	<p>+ The polity's interest in reducing the probability that an election outcome could ever be altered by fraud</p> <p>+/- The polity's interest in avoiding political distortion or skew</p> <p>+/- The polity's interest in the representativeness of the legislature</p>
<b>3. Governance</b>			
<p>+ interests providing reasons <i>for</i> the anti-fraud proposals</p> <p>- interests providing reasons <i>against</i> the anti-fraud proposals</p> <p>(<i>interests derivative of other interests</i>)</p>			

As the new vote denial controversies play out in legislatures and courts, different players have reasons to emphasize different interests on this chart. Political parties, who are common litigants in the new vote denial cases, have strong reasons to litigate to protect their group interests (Column B). Because partisan interests loom large in legislative decision making,<sup>105</sup> these group interests often drive legislation as well. Norms of public reason, however, encourage

105. See Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2338–47 (2006).

partisans to state their goals in terms of the interests of the polity as a whole (Column C). Thus, debates about proposed changes in election administration whose real drivers may be partisan advantage usually take place on different terrain, as debates about the interests of the polity.

Restating group interests, especially partisan interests, in terms of the public interest is a very familiar feature of legislative life. Courts are wary of looking too deeply into the partisan motivations that may in fact have prompted legislation (Column B) if the legislation also serves valid interests of the polity as a whole (Column C).<sup>106</sup> Thus it is unsurprising that much of the legislative action in the new vote denial controversies consists of partisan maneuvering couched in terms of the interests in Column C. Structuralist scholars have likewise pressed courts toward viewing the new vote denial controversies in terms of “structural” benefits and burdens that affect the whole polity (Column C). These frames bypass the individual right to vote (top of Column A).

Most election regulations place some burdens on the individual right to vote. The polity’s interests are often strong enough to justify those burdens. However, balancing an individual interest (Column A) against a structural one (Column C) differs in a fundamental way from answering the purely structural question of whether the competing interests in Column C alone have been balanced in the way that maximizes the overall social good. Of course, the polity has an interest in the inclusion of all its members (Column C, Row 1). But if the state is undermining one would-be voter’s full inclusion as a citizen in the polity, it does not necessarily address that problem to show that the state is doing so pursuant to a policy that was put in place with the aim of promoting the inclusion of some other people—or of the greatest number of people. *Each* voter’s interest in inclusion matters.<sup>107</sup>

Advocates of anti-fraud measures seem aware of the distinct normative value of an individual’s right to vote. It is what gives these advocates a reason to press the fraud-as-dilution and fraud-as-disenfranchisement arguments: these moves challenge their opponents’ claims on the moral high ground of protecting the individual right to vote. Anti-fraud advocates have stronger and more straightforward arguments that are based on the interests of the polity in preventing fraud from altering election outcomes. But perhaps in order to incorporate and capture the disenfranchisement rhetoric of their opponents,<sup>108</sup> and perhaps out of

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106. See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204 (2008) (“[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators.”). This acknowledgment of multiple legislative motivations underscores the difficulties involved in urging courts to evaluate election regulations primarily in terms of the motivations of legislators. See *supra* notes 78–79 and accompanying text.

107. See *infra* Part III.G.

108. Cf. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de Facto ERA*, 94 CAL. L. REV. 1323, 1330–31 (2006) (“As movement and counter-movement struggle to persuade (or recruit) uncommitted members of the public, each movement is forced to take account of the other’s arguments, and in time may even begin to incorporate aspects of the other’s arguments into its own claims . . .”).

fear that courts will hold that the right to vote trumps the polity's interest in fraud prevention, these advocates turn to fraud-as-dilution and fraud-as-disenfranchisement arguments, attempting to recharacterize their claims in terms of protecting individual voters.

Some opponents of the new anti-fraud measures have recently made parallel and opposite moves. Consider Spencer Overton's focus on the likelihood of "erroneous election outcomes."<sup>109</sup> This argument challenges anti-fraud advocates' claim to the moral high ground of protecting the "accuracy" or "integrity" of election results. Overton defines the accuracy of an election outcome in terms of how close it comes to an implicit baseline: the intentions of eligible voters who would in fact vote if not turned away or deterred by the anti-fraud measure under consideration.<sup>110</sup> While fraudulent votes could cause departures from this baseline, so could the disenfranchisement of eligible voters who are turned away because of anti-fraud measures. Overton's argument is an important and sophisticated move. The likelihood of erroneous outcomes provides a yardstick capable of rendering total fraud and total disenfranchisement commensurable: both are simply factors that cause possible error in election outcomes. From a policymaking point of view, that is a very useful starting point. However, this argument, like other arguments that focus exclusively on polity-level interests, bypasses the individual voter's interest in inclusion. Arguments of this kind collapse the issue of any one voter's possible disenfranchisement into a data point in the calculus of predicted outcomes and/or turnout.

### *B. Structuralism and Judicial Role*

Judge Richard Posner has begun to develop a distinctive jurisprudence of the new vote denial that involves adjudicating these controversies in entirely structural terms. Judge Posner treats both preventing fraud and protecting citizens from disenfranchisement as fundamentally structural; he frames the harm of disenfranchisement in terms of the polity's interest in the aggregate level of turnout. Thus, in new vote denial cases, for Judge Posner, the right to vote weighs equally "on both sides of the ledger."<sup>111</sup>

In a 2004 case involving absentee ballot rules, and again in 2007 in *Crawford*, Judge Posner held that "the striking of the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry."<sup>112</sup> This unusually deferential standard ("strongly convinced," "grossly awry") appears to be unique to Judge Posner. But it should not come as a surprise. The task of balancing different and competing structural

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109. Overton, *supra* note 13, at 635.

110. *Id.* (explaining that "erroneous election outcomes" may occur because of either type of error: fraudulent votes or the disenfranchisement or deterrence of eligible voters who would otherwise have voted).

111. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Posner, J.), *aff'd*, 553 U.S. 181 (2008).

112. *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (Posner, J.).

benefits and burdens that accrue to the polity as a whole does not sound like the kind of project that courts understand to be at the core of their expertise.

Courts' role-anxieties about making decisions among competing paradigms in democratic theory are longstanding and somewhat overblown. Despite Justice Thomas's famously skeptical view of his colleagues' "resort to political theory,"<sup>113</sup> the Court does inevitably make some use of political theory in resolving many election law claims.<sup>114</sup> However, a court that frames election law claims in wholly structural terms, in effect confining the analysis to the polity column, avoids undertaking a particular kind of analysis that differentiates its role from that of a legislature: weighing the distinct claims of a plaintiff against a defendant's defenses. Just as an individual-rights approach can erase certain structural values from consideration—as structuralist scholars correctly charge—the all-structural approach can have the effect of erasing the actual plaintiffs' interests and circumstances from the adjudicative calculus.

### 1. Structuralism and Individual Disenfranchisement

Consider the following hypothetical: suppose all the talk of ballot "integrity" has made voters in a particular jurisdiction so concerned about fraud that many will stay home and refuse to participate<sup>115</sup> unless they see signs of a state crackdown on illegal voting. Suppose the state can produce those signs by turning away every hundredth would-be voter, and suppose this results in a net increase in turnout.<sup>116</sup> Assuming a sufficient number of voters, the effect of this program on election outcomes is negligible. Only the outcome-independent right to participate of every hundredth voter is affected. If our analysis remained entirely in the structural mode, we would balance the participatory benefits of increased turnout, on the one hand, against the polity's interest in the inclusion of one percent of its citizens, on the other. For a legislator, considering the interests of the whole polity in this way would hardly seem unreasonable. But no court would choose this approach. The outright disenfranchisement of random voters cries out for some analysis of those individual voters' rights.

It is a distinctive role of courts to protect the fundamental rights of individuals against the maneuverings of a hostile or indifferent state. Courts have a responsibility to do this in part because others will not. It is not always in the interests of the political branches and the political parties—whose partisans inhabit the political branches—to ensure that the law reflects equal concern and respect for *all* citizens, especially where some believe there is much to be gained from

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113. *Holder v. Hall*, 512 U.S. 874, 893 (1994) (Thomas, J., concurring) ("[O]nly a resort to political theory . . . can enable a court to determine which electoral systems provide the 'fairest' levels of representation or the most 'effective' or 'undiluted' votes to minorities.").

114. *See generally* Charles, *supra* note 27 (arguing that courts should use political theory to decide election law cases, and that in any event, they cannot avoid doing so).

115. This aspect of the hypothetical is meant to be illustrative and is not realistic.

116. This raises some tricky questions about official candor: would anyone really be impressed with an integrity-promoting measure that officials admitted amounted to nothing more than random disenfranchisement? Let us leave these questions to one side.

burdening other citizens' fundamental rights.<sup>117</sup> A titanic clash of legislation and litigation between warring political parties across many fora may not always adequately account for some individuals' fundamental right to vote.

The basic theme of all the structuralist proposals for adjudicating the new vote denial controversies is that they invite courts to evaluate disenfranchisement in terms of interests of the polity as a whole: participation levels, representativeness, or perhaps accuracy or partisan fairness. From any of these perspectives, the overall burdensomeness of a law has nothing to do with the severity of the burden on any one voter. Of all the judges to evaluate the Indiana voter identification law, Judge Diane Wood was the only one to note this problem:

[A]s a matter of law the Supreme Court's voting cases do not support a rule that depends in part for support on the idea that no one vote matters. Voting is a complex act that both helps to decide elections and involves individual citizens in the group act of self-governance. Even if only a single citizen is deprived completely of her right to vote—perhaps by a law preventing anyone named Natalia Burzynski from voting without showing 10 pieces of photo identification—this is still a “severe” injury for that particular individual.<sup>118</sup>

Of course, we could imagine an even simpler law that states outright that a person named Natalia Burzynski can never vote. That law would fail almost any test. Even the most committed structuralist would likely balk at a jurisprudence that framed outright *de jure* disenfranchisement in structural rather than individual-rights terms. Elmendorf allows that “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 . . . .”<sup>119</sup> But he draws a bright line separating such *de jure* qualifications from all other barriers, and he argues that all other barriers should be evaluated in structural rather than individual terms.<sup>120</sup> In effect, Elmendorf takes the view that the *formal* right to vote is an individual right deserving strict scrutiny, but that the substantive right to vote should be evaluated at a structural rather than individual level. But as we shall see, there are good reasons for rejecting this sharp dichotomy.<sup>121</sup>

Elmendorf argues that the structural approach is preferable to the “individualistic conception of voting rights” because the structural approach avoids opening a politically charged “Pandora’s Box of new constitutional claims” by

117. See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (arguing that justice requires the law to treat individuals with equal concern and respect rather than reducing all questions of justice to questions of utilitarian welfare maximization).

118. *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 438 (7th Cir. 2007) (Wood, J., dissenting from the denial of reh’g en banc), *aff’d*, 553 U.S. 181 (2008). The dissent’s focus on whether the restriction was “severe,” *id.* at 437–38, applies the framework from *Burdick*.

119. Elmendorf, *supra* note 13, at 701.

120. *Id.* at 701–02.

121. See *infra* Parts III.B, III.D.

particular voters who are affected by a given regulation.<sup>122</sup> He further argues that evaluating what constitutes a “severe” burden presents courts with an open-ended question that particular judges tend to resolve in predictably partisan ways, with most judges appointed by Democrats finding burdens such as voter identification laws severe and most judges appointed by Republicans finding them reasonable and nondiscriminatory.<sup>123</sup> These are both strong arguments. I will discuss the Pandora’s box claim below. As to the problem of partisanship in judicial evaluation of election regulations, the objection proves too much: it applies to structural as well as individualistic approaches to these problems. We have already begun to see dramatic gaps, largely along partisan lines, in the kinds of evidence and conclusions judges are willing to embrace about the likely structural effects of election regulations. Indeed, some courts have already embraced the wholly unsupported partisan claim (repeated by many politicians) that imposing voter identification laws raises confidence in such a way that net participation will increase.<sup>124</sup> Thus, while partisanship is a concern any time courts intervene in election law disputes, this concern provides no justification for choosing a purely structuralist approach over an approach that begins with individual rights claims.

## 2. Data, Anecdote, and Individual Plaintiffs

Proponents of structural approaches to the new vote denial controversies have issued urgent calls for more data and more empiricism on the part of courts.<sup>125</sup> Overton argues convincingly that judges without data tend to engage in “ad hoc, contestable conjecture,” citing anecdotes and inflammatory partisan arguments of dubious validity.<sup>126</sup> More data is certainly needed if courts are to evaluate properly the magnitude of the state’s interest in measures that would prevent particular types of fraud. An individual-rights-versus-state-interests balancing test requires data of this type in order to accurately assess the strength of the state’s interests. It is far less clear that courts should wade into the social science of estimating how many people a law will disenfranchise—or even more speculatively, of attempting to predict the effects of anti-fraud regulations on turnout. Structuralist scholars would require courts to gather and rely on this second category of data along with the first.

Courts have begun to demand both of these categories of data. In a brief concurrence in *Purcell*, Justice Stevens suggested that allowing elections to go forward in Arizona with the new identification law in place could help generate useful data to resolve “two important factual issues”: “the prevalence and character of the fraudulent practices that allegedly justify” the law and the “scope of the disenfranchisement” that the law will produce.<sup>127</sup> Similarly in *Crawford*, Justice

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122. Elmendorf, *supra* note 13, at 702.

123. *See id.* at 647–48, 656 & app.

124. *See supra* note 70 and accompanying text; *see also* Dan M. Kahan, “Ideology in” or “Cultural Cognition of” Judging: What Difference Does it Make?, 92 MARQ. L. REV. 413, 419–22 (2009) (demonstrating, in a voter identification case, that value disagreements color judges’ views of basic factual questions).

125. *See, e.g.,* Overton, *supra* note 13, at 634–37.

126. *Id.* at 665–67.

127. *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring).



Souter argued in dissent that after he had shown that the “Voter ID law . . . threatens to impose serious burdens on the voting right . . . the next question . . . is whether the number of individuals likely to be affected is significant as well.”<sup>128</sup>

In the course of his compelling evisceration of courts’ use of anecdotes to support findings that fraud is a significant phenomenon, Overton favorably cites Judge Posner for articulating a way in which data is better than anecdote: “The significance of a story of oppression depends on its representativeness . . . . [T]o evaluate policies for dealing with the ugliness we must know its frequency, a question that is in the domain of social science rather than of narrative.”<sup>129</sup> Legislators and policymakers indeed ought to know something about the frequency of a given “ugliness” before implementing costly measures to reduce it. Courts also need this same information to evaluate the magnitude of the polity’s interests that justify regulation. However, abstracting away from a particular “story of oppression” is a highly unusual, and problematic, way for a court to evaluate an individual’s claim that the state is violating her fundamental rights.

Consider Kathleen Weinschenk, the lead plaintiff in a pre-*Crawford* challenge to a voter identification law in Missouri.<sup>130</sup> Weinschenk, a woman with cerebral palsy, testified that she could not truthfully swear (as required by the statute for her to cast a provisional ballot) that by reason of her disability alone, she was entirely unable to obtain photo identification.<sup>131</sup> Nonetheless, she testified, it would be extremely difficult for her to obtain it, largely because it was hard for her to procure a birth certificate from her birth state of Arkansas.<sup>132</sup> Other individual plaintiffs and affiants testified that name changes, mobility problems, out-of-state birth certificate issues, and other combinations of particular, individualized circumstances made it difficult for them to jump through the hoops required to generate the documents the state demanded.<sup>133</sup>

Weinschenk’s “narrative” was not just a “story of oppression.” It was an actual *claim* of oppression by a plaintiff in court. Her story was not an anecdote offered in the spirit of illuminating underlying population data—a task for which anecdotal narratives are indeed of limited value. Her story was before the court because the government’s policy caused her a personal injury from which she sought relief. The significance of her story does not depend on its representativeness. It depends instead on the severity of the burden that Missouri’s photo identification law placed on her right to vote.

It would be different if her claim were one of the many election law claims concerning group or polity interests, such as a vote dilution claim, a claim concerning signature requirements for ballot access, or a claim that a districting map was gerrymandered in an overly race-conscious way. Unlike those claims,

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128. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 218 (2008) (Souter, J., dissenting).

129. Overton, *supra* note 13, at 644 n.68 (quoting Richard A. Posner, *Legal Narratology*, 64 U. CHI. L. REV. 737, 742 (1997)) (alteration in original).

130. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006) (en banc) (per curiam) (enjoining Missouri’s voter identification law).

131. *Id.* at 206, 209.

132. *Id.* at 209.

133. *Id.*

Weinschenk's claim did not depend on any group interest or structural value. Her claim was simply that she, personally, was being excluded from the circle of full and equal citizens entitled to cast a ballot. Recasting this claim as a problem of democratic structure—such as a problem of reducing turnout or representativeness—disguises it and drains away much of its force.

*C. In Defense of Balancing Individual Rights Against State Interests in the New Vote Denial Cases*

This subpart offers a defense of the much-maligned doctrinal approach the Court has begun to apply in the new vote denial cases: a flexible balancing approach that weighs the magnitude of the state's interests against the burden on an individual's right to vote. The doctrinal underpinnings of this approach were developed in cases that had little to do with the inclusion of individual voters. Courts have only just begun to apply this approach to the new vote denial controversies; so far, the doctrine has not yet developed to the point that it offers clear guidance. But through future as-applied challenges by individual plaintiffs, this approach has the potential to enable courts to isolate and weigh serious burdens on citizens' rights, and remedy those burdens, without becoming overly embroiled in comprehensive policy debates about how best to optimize the overall voting regime.

1. Burdens on an Individual Right

In the late 1960s and early 1970s, in cases such as *Dunn v. Blumstein*<sup>134</sup> and *Kramer v. Union Free School District*<sup>135</sup> and statutes such as the 1975 VRA Amendments,<sup>136</sup> Congress and the Court transformed the right to vote from a formal, theoretical guarantee into a substantive entitlement of citizenship.<sup>137</sup> By the time the Court decided *Crawford* in 2008, those precedents were thirty or forty years old. In the intervening years, the Court had surprisingly few opportunities to develop its jurisprudence of vote denial.

It did develop jurisprudential approaches to a series of other, related areas of election law. One of those areas was ballot access. In *Anderson v. Celebrezze*,<sup>138</sup> the Court held that Ohio's early filing deadline, which required independent presidential candidate John Anderson to submit his petitions in March in order to appear on the ballot in November, "placed an unconstitutional burden on the voting and associational rights of Anderson's supporters."<sup>139</sup> Justice Stevens, writing for the Court, held that there was no "litmus-paper test"<sup>140</sup> that could "separate valid from invalid restrictions."<sup>141</sup> Instead, courts must weigh "the asserted injury to the

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134. 405 U.S. 330 (1972) (striking down a one-year durational residency requirement).

135. 395 U.S. 621 (1969) (striking down a law limiting school board elections to parents and property owners).

136. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975).

137. See *infra* Parts III.C & III.D.

138. 460 U.S. 780 (1983).

139. *Id.* at 782.

140. *Id.* at 789 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

141. *Id.*

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.”<sup>142</sup> Such a flexible approach was necessary in *Anderson* because it would make little sense for the Court to subject every filing deadline to the same level of scrutiny. The length of a filing deadline is a continuous variable. As the length increases, the relevant burdens gradually become more severe and more likely to outweigh the state’s interests. Thus, a relatively flexible balancing test was required.

Later, in *Burdick v. Takushi*, the Court upheld Hawaii’s rule disallowing write-in voting against a challenge, this time by an individual voter, Alan Burdick, rather than a candidate.<sup>143</sup> Burdick argued unsuccessfully that the ban burdened his First and Fourteenth Amendment rights of free expression and association.<sup>144</sup> The Court elaborated on its holding in *Anderson*, noting that “to subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently”; thus, the “more flexible standard” of *Anderson* applies.<sup>145</sup> Neither *Anderson* nor *Burdick* concerned any individual citizen’s right to cast a ballot. *Anderson* focused first, on John Anderson’s rights as a candidate, and second, on his supporters’ (related) “associational choices protected by the First Amendment.”<sup>146</sup> Similarly, while Burdick “characterized” his case “as a voting rights rather than [a] ballot access case,” the rights in question were the same ones at issue in *Anderson*: voters’ First Amendment rights to free expression and association.<sup>147</sup>

In light of this history it may seem odd at first blush that the Court turned to *Anderson* and *Burdick* as precedents in *Crawford*, a case concerning burdens on an individual voter’s basic right to cast a ballot.<sup>148</sup> But *Anderson* and *Burdick* were useful to the Court in *Crawford*. Although they concerned a different set of individual rights—expression and association, rather than participation—these cases began to develop a jurisprudence of the right shape to adjudicate the new vote denial cases.

This is not to say that *Anderson* and *Burdick* were stellar examples of judicial craft. This doctrinal approach of balancing individual rights against state interests was an imperfect fit for the ballot access cases in which it originated. Issacharoff and Pildes among others have convincingly critiqued *Burdick*’s shallow, favorable account of the state’s purported interest in keeping independent write-in candidates away from the general election ballot.<sup>149</sup> As Issacharoff and Pildes argue, this

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142. *Id.*

143. 504 U.S. 428, 430 (1992).

144. *Id.* at 437–38.

145. *Id.* at 433–34.

146. *Anderson*, 460 U.S. at 793–94.

147. *Burdick*, 504 U.S. at 437.

148. *Cf.* Brief of Professor Erwin Chemerinsky as *Amicus Curiae* in Support of Neither Party at 6–9, *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (No. 07-21, 07-25) (arguing that the “indirect” burdens on voting rights in *Anderson* and *Burdick* differ markedly from burdens that involve actually disenfranchising voters, where strict scrutiny applies).

149. See Issacharoff & Pildes, *supra* note 5, at 670–74.

jurisprudence bypasses the structural value of increasing competition and disrupting partisan lockups that may be the best reason to favor the plaintiffs in those cases and some others.<sup>150</sup> But in the new vote denial cases, beginning with *Crawford*, this doctrinal approach has found an application to which it is ideally suited. *Anderson* and *Burdick* provided a doctrinal approach of the appropriate shape for the new vote denial cases in the sense that these cases began to make the “hard judgments” about whether structural state interests were sufficiently weighty to justify various burdens on individual rights.<sup>151</sup> Flexible balancing doctrines of this kind are not nearly as common as one might assume.<sup>152</sup>

Some—in particular Justice Scalia—have tried to read into *Burdick* a binary threshold inquiry in which each regulation is either “severe” (triggering strict scrutiny) or reasonable and nondiscriminatory (triggering rational basis review).<sup>153</sup> Imposing this kind of binary threshold test would simply hide the ball. Justice Stevens’s approach in *Anderson* and in *Crawford* acknowledges the unavoidable need to engage in careful balancing of individual rights against state interests.<sup>154</sup> In particular, this means that even where a burden is insufficiently severe to trigger the strictest scrutiny, a standard approaching a narrow tailoring analysis, perhaps “narrow tailoring light,” along with a showing of an important interest or a “compelling interest light,” is required. As the Court put it in *Anderson*: “[T]he Court must not only determine the legitimacy and strength of each of [the State’s] interests, it must also consider *the extent to which* those interests make it necessary to burden the plaintiff’s rights.”<sup>155</sup>

The reason such balancing is necessary—and inevitable<sup>156</sup>—is that almost all election regulations impose burdens on at least some voters’ right to vote. Consider

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150. *Id.*; see also *id.* at 679–81 (applying a similar analysis to the purported state interests invoked in *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997)).

151. *Anderson*, 460 U.S. at 790 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

152. This observation was Pildes’s key insight in *Why Rights Are Not Trumps*: much of the rights adjudication that is framed in terms of balancing is actually about policing the reasons for state action. Pildes, *supra* note 62, at 733–34. The *Anderson/Crawford* framework, however, really is about balancing the weight of the individual rights against the weight of the state’s interests. In this flexible framework, differences of degree matter.

153. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 204–05 (2008) (Scalia, J., concurring in judgment) (“*Burdick* forged *Anderson*’s amorphous ‘flexible standard’ into something resembling an administrable rule. . . . [A] two-track approach.” (citation omitted)). But see *id.* at 190 n.8 (Stevens, J.) (“Contrary to Justice Scalia’s suggestion,” *Burdick* “applied the ‘flexible standard’ set forth in *Anderson*.”).

154. Cf. James E. Fleming, “*There Is Only One Equal Protection Clause*”: An Appreciation of Justice Stevens’s Equal Protection Jurisprudence, 74 *FORDHAM L. REV.* 2301 (2006) (tracing Justice Stevens’ general jurisprudential skepticism about threshold inquiries into tiers of scrutiny).

155. *Anderson*, 460 U.S. at 789 (emphasis added).

156. Other doctrinal alternatives, such as proportionality review, could serve the same basic function as the balancing test the Court has developed. What is inevitable here is not the particular doctrinal test but the necessity of developing some doctrinal mechanism for weighing varying burdens on individual rights against varying state interests.

Indeed, Justice Breyer has argued that the form of balancing employed in cases such as *Anderson* and *Burdick* is itself a form of proportionality review. See *District of Columbia*

a claim that the polls' early closing hour imposes a burden on a plaintiff's right to vote. The strength of this claim will obviously vary depending on whether the polls are closing at 2 p.m., 5 p.m., or 8 p.m.; all closing times place some burden on voters, but the 2 p.m. burden is much more severe. The variable here is continuous, like the filing deadline in *Anderson*. No single, binary "litmus-paper test" can reliably "separate valid from invalid restrictions." Similarly, consider a claim that there are insufficient polling locations. The strength of such a claim will often be weak, but that will depend on how many polling places the state has provided in relation to the expected number of voters, the geography of the area, whether no-excuse absentee voting is available to the plaintiff bringing the claim,<sup>157</sup> and so on. The *Anderson/Crawford* doctrinal framework usefully requires that courts weigh such considerations on the plaintiff's side not in isolation but in relation to the strength of the state's interests (which in these cases will primarily be an interest in containing costs).

There is something philosophically unsatisfying about a balancing test that involves balancing two incommensurable things: burdens on an individual right, and interests of the state or polity. Such balancing may seem overly open ended, inviting arbitrary decisions. But that is largely because courts are only beginning to develop this jurisprudence; the precedents that will give it shape do not yet exist. *Crawford* was the first new vote denial case to reach the Court. Future cases will need to develop a jurisprudence that can guide "hard judgments" by providing benchmarks against which future burdens and interests can be measured.

As courts develop these precedents, they will not be writing on a blank slate. As Part III will discuss, existing voting rights law provides some significant guidance on the question of why and in what ways the individual right to vote matters. This background should provide the conceptual framework for future case law weighing different burdens on that right and deciding when they are sufficient to overcome the state's interests. The other materials from which courts will fashion this jurisprudence are more case specific: the circumstances of individual plaintiffs vary, and by focusing on the particular plaintiffs rather than on structural arguments supporting the plaintiffs' side, courts can begin to assess the character and magnitude of different burdens plaintiffs face. For this to happen, courts need plaintiffs who will challenge election regulations as applied to them.

## 2. As-Applied Challenges and Multiple Paths to Voting

Many election regulations will impose a burden on *some* voter that is relatively severe. Critics of the individual-right-to-vote approach to adjudicating the new vote denial controversies therefore worry that focusing on claims by individual voters opens up a Pandora's box of challenges that would invalidate a large portion of state election laws unless judges set limits on these claims in some ad hoc, relatively lawless way.<sup>158</sup>

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v. *Heller*, 554 U.S. 570, 689–90 (2008) (Breyer, J., dissenting) (citing *Burdick*, among other cases, as precedent for a "proportionality" approach to "interest-balancing" in American law); see also *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 402–03 (2000) (Breyer, J., concurring) (similarly citing *Anderson*).

157. See *infra* note 323.

158. See, e.g., Elmendorf, *supra* note 13, at 663–66.

This worry is misplaced. The scenario in which most election regulations fail because they severely burden one idiosyncratic voter would be a scenario in which each challenge is a facial challenge.<sup>159</sup> In *Crawford*, the Court made it clear that it wants to hear plaintiffs challenge the laws *as applied to them*.<sup>160</sup> This may significantly circumscribe the effects of plaintiffs' challenges in the new vote denial cases.<sup>161</sup> It will make it much more difficult for a group like the Democratic Party, whose primary interest may be in total partisan turnout, to use the particular individual circumstances of citizens like Kathleen Weinschenk to invalidate entire regulations that dampen or skew turnout. For such groups, the individual right to vote is merely a vehicle for advancing group interests.

But in comparison to facial challenges aimed at invalidating entire regulatory schemes, as-applied challenges could turn out to be more precise instruments for vindicating individual voters' rights. A successful facial attack on a photo identification law, aimed at replacing the law with some less intrusive method of identifying voters such as signature matching, would greatly alleviate the extreme burdens on the voters who have the toughest time qualifying for the identification cards. But presumably under the resulting signature-match system, some other (likely much smaller) group of voters would actually face heavier burdens than before: for example, voters who by reason of disability cannot make a consistent signature mark.<sup>162</sup> Choosing one best method for everyone seems to lead inexorably toward counting up the number of people disenfranchised instead of taking each voter's rights seriously. This suggests that if we are thinking exclusively in terms of choosing one best method by which everyone must vote, we are thinking about the problem in the wrong way.

Every jurisdiction currently offers multiple routes to casting a ballot. Protecting the rights of each individual as a full, equal citizen may involve expanding the list of distinct routes or expanding access to existing routes. Relief in as-applied challenges is not limited to the plaintiffs. It need not be limited to the set of citizens whose circumstances are a precise match for those of the plaintiffs. However, the promise of as-applied challenges will not be realized if courts define classes so narrowly that endless piecemeal litigation is required. The Court's jurisprudence of as-applied challenges in election law cases is still in its infancy.<sup>163</sup> Depending on how it develops, this jurisprudence could turn out to be nothing more than a barrier aimed at making voting rights litigation prohibitively difficult, or it could yield a

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159. This is not Elmendorf's assumption. *See id.*

160. *See Crawford*, 553 U.S. at 189 (holding only that "the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute" but leaving open a possibility of a future as-applied challenge).

161. *See* Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873, 880–81 (2005) (arguing that the facial and as-applied challenges are more of a continuum than a dichotomy, but noting the general rule that as-applied challenges allow the challenged rule to be enforced in some circumstances).

162. *See, e.g., Weinschenk v. State*, 203 S.W.3d 201, 206–07, 209 (Mo. 2006) (discussing one plaintiff's inability to make a consistent signature mark due to a disability).

163. *See generally* Nathaniel Persily & Jennifer S. Rosenberg, *Defacing Democracy?: The Changing Nature and Rising Importance of As-Applied Challenges in the Supreme Court's Recent Election Law Decisions*, 93 MINN. L. REV. 1644 (2009).

jurisprudence that takes seriously the specific burdens on the rights of different voters in different situations.<sup>164</sup>

If a court begins from the premise that each individual citizen has a fundamental, individual right to cast her ballot and have it counted, the question is not whether a given regulation generally disenfranchises more people than it helps. The question is whether, and by what routes, the plaintiff will be allowed to cast her ballot. Once that question is answered, other voters should generally be allowed to follow the first voter's path unless the state has countervailing interests that justify restricting the path in some way to a specific group similar to the first voter.<sup>165</sup>

For example, if a plaintiff comes forward who will be disenfranchised by a photo identification law, a court should create another route by which that person can vote on election day, unless sufficiently weighty state interests make this impossible. The Indiana law in fact offered such a route, although it involved its own serious burdens.<sup>166</sup> Rather than strike down the whole photo identification system on the basis of the inadequacy of its alternate route, a court could instead expand the alternate route. For example, it could hold that the plaintiffs before it, and some as-yet-undetermined set of others similarly situated, can cast provisional ballots without identification if they sign an affidavit at the polls attesting that they are who they say they are and that they lack identification.<sup>167</sup> The court could hold that officials should count such provisional ballots unless there is evidence—such

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164. The Court's early jurisprudence of as-applied challenges in election law cases invokes two different ways in which a challenge might be "as applied": (a) post-enforcement rather than pre-enforcement, or (b) as applied to subsets of voters rather than to everyone. See Gillian E. Metzger, *Facial and As-Applied Challenges Under the Roberts Court*, 36 *FORDHAM URB. L.J.* 773, 774 (2009). Of these, only (b) does the work of making vote denial jurisprudence more attentive to differences in voters' needs and situations. There is some evidence that the Court's early jurisprudence of as-applied challenges in election law cases focuses on (a) as well. See *id.* at 780–81 (describing the Court's justifications for rejecting facial challenges in two election cases, which include the need to wait for evidence of how a law operates in practice). Focusing courts' attention on post-enforcement rather than pre-enforcement review presents serious problems in the election law context because of the particular difficulties post-election relief entails.

165. For example, once a state has determined the conditions under which it will allow some voters to vote early or absentee, the question should be the weight of the state's interests in restricting those paths. Eliminating needless restrictions on the use of existing routes to casting ballots can greatly alleviate, if not entirely solve, many individualized problems. See, e.g., Elmendorf, *supra* note 13, at 664–66 (listing some difficult hypothetical claims by individual voters about particular burdens, many of which arise only because early and/or absentee voting are highly restricted).

166. See *Crawford*, 553 U.S. 181, 216–18 (2008) (Souter, J., dissenting) (describing the burden on voters of making a separate trip to the county seat if they want their provisional ballots to be counted and then signing an affidavit attesting that they are "indigent" or have religious objections to being photographed).

167. The scope of the "similarly situated" group entitled to relief matters a great deal here. See Persily & Rosenberg, *supra* note 163, at 1673 (concluding that even within the "as-applied" framework, "broader relief beyond that narrowly tailored to a plaintiff's circumstances ought ordinarily to be available").

as a non-matching signature—that suggests any doubt about the voter’s identity, in which case further investigation is required.

A state in Indiana’s position could argue that it has a strong interest in preserving its current extra-trip-to-the-county-seat rule (and its strange rule requiring voters to attest that they are “indigent”). The state would have to offer interests that outweigh the additional burdens this regime imposes on the plaintiffs’ rights. Similarly, the state could offer interests that justify limiting the set of “similarly situated” citizens eligible to pursue this new or revised route, from a broad category such as “those who lack identification” to a narrower category such as “those for whom procuring a birth certificate presents a burden.” The question is simply whether the state’s interests justify these limits.

In Connecticut, in November 2008, over 27,000 eligible but unregistered voters took advantage of a provision of state law allowing them to cast a ballot for president and vice president (and no other offices) by appearing at their town clerk’s office before the close of the polls on election day.<sup>168</sup> The process and requirements are essentially the same as those for registering to vote.<sup>169</sup> From the point of view of inclusion, it is fair to ask why the state is excluding these individuals from participating in non-presidential elections. In 2005, a federal district court upheld this distinction against a challenge, holding that “the Connecticut General Assembly has apparently decided that, whatever benefits election-day registration might provide in terms of increasing voter turnout, those benefits are . . . outweighed by the State’s interest in minimizing fraud, crowding, and confusion at the polls.”<sup>170</sup> The court declined to question the legislature’s judgment about how best to “stri[k]e the appropriate balance between promoting smooth and accurate elections, on the one hand, and encouraging voter turnout, on the other . . . .”<sup>171</sup> Framing the issue in these essentially structural terms, the court viewed the only possible remedy as eliminating Connecticut’s registration deadline and replacing it with a system of election-day registration.<sup>172</sup> The court may have been prompted to adopt this view of the case by the plaintiffs, who proffered extensive expert testimony about the structural benefits of election-day regulation, in particular the positive relationship between election-day regulation and turnout.<sup>173</sup> If so, those structural arguments backfired badly. The court understood the plaintiffs to be asking the court “to re-weigh the competing public interests—in Learned Hand’s famous words, to assume the role of a ‘third legislative chamber’—and impose election-day registration by fiat upon the citizens of

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168. E-mail from Michael Kozik, Office of the Connecticut Secretary of State, to author (Mar. 20, 2009) (on file with author); see CONN. GEN. STAT. ANN. § 9-158c (West 2009).

169. Compare CONN. GEN. STAT. ANN. § 9-158d (requiring applicants for a special “presidential ballot” to attest in writing to their age, citizenship, residency, and the fact that they have not “forfeited [their] electoral privileges because of conviction of a disfranchising crime”), with CONN. GEN. STAT. ANN. § 9-23g(e) (requiring regular voter registration applications to be signed and dated and show the applicant’s age, citizenship, and residency).

170. ACORN v. Bysiewicz, 413 F. Supp. 2d 119, 124 (D. Conn. 2005).

171. *Id.*

172. *Id.*

173. *Id.* at 133–36.



Connecticut.”<sup>174</sup> In response, the court invoked Judge Posner’s unusually deferential standard that “we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.”<sup>175</sup>

Although the district court’s reasoning was careful and credible, it ultimately answered the wrong question. The question should have been whether sufficiently weighty interests of the state justified limiting the alternate route Connecticut already offered to “presidential ballots” alone. The court first ought to have asked whether the state’s interests justified this limit *as applied* to individual voters like one of the plaintiffs, who found herself in the position of voting the “presidential ballot” only because she believed, in good faith but, as it turned out, mistakenly, that she had registered in her new jurisdiction.<sup>176</sup> From the point of view of such individual voters, who have already provided the state with all the usual information required for registration, the question is why the state is not including them as full, voting citizens for most federal and state offices.<sup>177</sup>

This is a type of work that courts are accustomed to undertaking: deciding, on the basis of the facts of an individual plaintiff’s case, whether the burdens the state has placed on individual rights are justified by the state’s interests, or whether some other route to casting a ballot needs to be widened or created. Courts are less comfortable deciding on massive structural reforms that alter the way everyone votes in the hope of striking a better balance between vital but competing structural interests.<sup>178</sup> That is why a lawsuit was an unlikely route to election-day registration in Connecticut.

### 3. Two Cheers for *Crawford*

These considerations lead me to a qualified defense of much of the Court’s approach in *Crawford*. The plurality opinion correctly states the shape of the interests it is balancing: the polity’s interest in preventing fraud against an individual voter’s interest in avoiding disenfranchisement. *Crawford* does not transmute individual disenfranchisement into a collective interest in turnout. Nor does it reframe fraudulent votes as a mysterious form of “disenfranchisement” or as a form of dilution. It asks whether the state’s interests were “sufficiently weighty to justify the limitation” on the individual right.<sup>179</sup>

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174. *Id.* at 124 (emphasis omitted).

175. *Id.* (quoting *Griffin v. Roupas*, 385 F.3d 1128, 1131 (7th Cir. 2004) (Posner, J.)).

176. *Id.* at 147.

177. Perhaps the state’s interests could have justified this exclusion. But the judge found the regulation sufficiently “reasonable and nondiscriminatory” that he never closely scrutinized those interests. *Id.* at 154.

178. *Cf.* Michael S. Kang, *When Courts Won’t Make Law: Partisan Gerrymandering and a Structural Approach to the Law of Democracy*, 68 OHIO ST. L.J. 1097, 1112–17, 1119–20 (2007) (discussing courts’ unwillingness to answer structural questions, even when they are willing to ask them).

179. *Crawford*, 553 U.S. 181, 190 (2008) (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)). The opinion did embrace the empirically unsupported premise that anti-fraud measures increase “public confidence in the integrity of the electoral process” which in turn “encourage[] citizen participation.” *Id.* at 197.

The most serious harm of fraud is the potential harm the whole polity might suffer: the harm that an election could be stolen by fraud. This has implications for the kind of fraud the state has the strongest interests in preventing: fraud by the corrupt officeholders, election officials, and political organizations that have the potential to alter many votes or stuff boxes with many illegal ballots.<sup>180</sup> That is not to say that there is no interest in preventing and deterring the kind of small-time, individual-voter fraud that was the target of the voter identification law in *Crawford*. But it is important to be specific. One reason I can offer only two cheers for *Crawford* is that its treatment of the government's interest in preventing fraud was not sufficiently specific about what kinds of fraud the law would prevent (as Justice Souter pointed out in dissent).<sup>181</sup>

The more significant problem with *Crawford* is that despite correctly framing the problem—balancing the individual right to vote against the state's interests—the Court sometimes lapsed into a structural analysis of the interests on both sides. Justice Stevens, writing for a plurality upholding the law, found the plaintiff's evidence wanting in two respects, only one of which is consistent with the individual-rights-versus-state-interests framework. He found that the record did not provide enough of a basis to determine the *severity* of the burdens on the right to vote, especially the burden on voters who are indigent or who have religious objections to being photographed.<sup>182</sup> But he also repeatedly noted that the record did not show “how common the problem is”—that is, how many people would be affected by a given burden.<sup>183</sup> The Court was far more preoccupied than it should have been—given the plurality's correct statement of the interests at stake—with such questions of *how many*.<sup>184</sup>

But it could hardly have been otherwise. The litigants in *Crawford* did not include any actual individuals who had been excluded from full citizenship in the polity. The first of the consolidated lawsuits in the case was filed by the Indiana Democratic Party,<sup>185</sup> whose standing depended, first and foremost, at least in the

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180. See Flanders, *supra* note 10, at 92, 97, 132–37 (arguing that minute amounts of fraud are comparable to “noise” in the election results, whereas “massive” fraud presents a serious structural danger).

181. *Crawford*, 553 U.S. at 224–33 (Souter, J., dissenting) (explaining that although the state has a general interest in preventing fraud, this statute addresses only a single, highly “unlikely” form of fraud).

182. *Id.* at 201 (Stevens, J.) (“The record says virtually nothing about the difficulties faced by either indigent voters or voters with religious objections to being photographed.”).

183. *Id.* at 202.

184. Justice Stevens engaged in a lengthy back-and-forth with Justice Souter regarding such demographic questions as “how many indigent voters lack copies of their birth certificates,” disputing Justice Souter's inferences as “[s]upposition based on extensive Internet research.” *Id.* at 202 n.20. Questions of “how many” similarly preoccupied the lower courts. Judge Posner held that the “fewer the people harmed by a law, the less total harm there is to balance against” the interests of the state. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Posner, J.), *aff'd*, 553 U.S. 181 (2008). That balance weighs structural interests. “Total harm” is of only very indirect relevance to the question of whether a burden on one individual's right to vote is justified.

185. *Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782–83 (S.D. Ind. 2006), *aff'd sub nom. Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), *aff'd*,

view of the Seventh Circuit, on the increased resources it would likely have to expend to enable its members to vote, and only secondarily, almost as an afterthought, on “the rights of those of its members who will be prevented from voting by the new law.”<sup>186</sup> Various Justices nonetheless tried to conjure up the missing individuals whose interests were at stake in the case. Justice Souter urged the Court to consider “[r]ecord evidence and facts open to judicial notice” in order to estimate the numbers of individuals whose rights were severely burdened by the law.<sup>187</sup> Justice Breyer mostly eschewed numerical estimates in favor of estimating burdens on typical “nondriver” voters.<sup>188</sup> None of this was necessary. What the Court needed was some individual voters who faced the prospect of disenfranchisement, preferably in the role of plaintiffs. In their absence, the Court had no choice but to work like a legislature, using available analytic tools to get as solid a grip as possible on either the aggregate scope of the problem or an average or typical instance of it.

*Crawford* opened up the possibility of a different and more productive form of litigation by inviting future litigants to bring as-applied rather than facial challenges. Here, *Crawford* may have done the court system, and litigants, a service. It nudged courts’ role away from the broad structural evaluation and redesign of election administration regimes and toward a clear focus on whether individual voters are being excluded. To be sure, this narrower role will involve courts deeply in adjudicating—critics would say micromanaging—the burdens regulations place on particular voters and groups of voters. Judges will continue to see these issues through lenses somewhat colored by partisanship, which is probably inevitable. But litigants will be able to step away from broad policy arguments such as those focused on increasing turnout, with all the social-scientific uncertainty such arguments entail, in favor of a clear focus on the burdens on individual voters’ rights.

To make the as-applied approach a viable means of adjudicating the new vote denial, courts will need to get several things right in doctrinal areas that are beyond the scope of this Article. They will need to avoid defining the classes affected by each as-applied challenge in such a narrow way that litigation becomes entirely impractical; they will need to allow pre-election as-applied challenges and/or forward-looking injunctive relief to avoid the problem of meaningless post-election remedies. So far, the Court has sent mixed signals. In *Crawford*, the future as-applied challenges that the Court invited would likely be challenges by some subset of all voters.<sup>189</sup> But in an earlier case that was not a vote denial case, the Court appeared to use “as applied” in a different way, to mean post-enforcement.<sup>190</sup> We

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553 U.S. 181 (2008). The Marion County Democratic Central Committee also filed. *Id.*

186. *Crawford*, 472 F.3d at 951 (Posner, J.). Plaintiffs in the other consolidated suit included officeholders and various organizations representing poor, homeless, minority, and/or elderly voters. *Rokita*, 458 F. Supp. at 783.

187. *Crawford*, 553 U.S. at 218 (Souter, J., dissenting).

188. *Id.* at 238 (Breyer, J., dissenting).

189. *See id.* at 189 (“[T]he evidence in the record is not sufficient to support a facial attack on the validity of the *entire* statute . . .” (emphasis added)).

190. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 445, 450 (2008) (holding that Washington’s top-two primary system was not facially invalid, but that an as-applied challenge might be brought once the statute had actually been

will find out in the next few years to what extent the Court is serious about making as-applied challenges a viable method of adjudicating burdens on the individual right to vote, and to what extent the Court's newly articulated preference for as-applied challenges is merely a means of eliminating vote denial claims by rendering them narrow, costly, and/or ineligible for meaningful relief.<sup>191</sup> One implication of the argument of this Part is that this is an area in which the new vote denial cases ought to come apart from many other categories of election law claims. In the new vote denial cases, as-applied challenges have the potential to vindicate the rights of the individual voters who face the heaviest burdens by carving out appropriate exceptions for them. In many other kinds of election controversies, the main injuries are actually to the interests of groups or the polity as a whole—in which case, this rationale for as-applied challenges is absent.

The as-applied approach to the new vote denial cases creates an opportunity. To take advantage of it, litigants and courts will need to develop doctrine and precedents that clarify the weight of different kinds of burdens on the right to vote. *Crawford* opens the door to a kind of litigation that could build this future case law: a case law that provides more specific, and nuanced, guidance about how to weigh different state interests against different kinds of burdens on the individual right to vote. It is important that courts get this right.

This enterprise demands a more carefully specified account of why, and in what way, the individual right to vote matters. It is not enough simply to state that voting is an individual right or a fundamental right. To distinguish more severe burdens from less severe ones, and to develop precedents for deciding when such burdens outweigh state interests, courts will need to make at least implicit use of a theory of vote denial: a theory that tells us in what way(s) disenfranchisement harms individuals.

The project of the next Part is to offer the beginnings of such a theory. It is surprising in some ways that an account like the one in the next Part does not already exist. Individual disenfranchisement has long functioned as a basic conceptual paradigm from which other, more complex claims—such one-person-one-vote claims—are derived or analogized. But individual disenfranchisement has also long been entangled with issues of group (especially racial) exclusion and subordination. In part as a result, election law scholars lack a specific theory of vote denial. We lack a specific theory of why the individual right to vote matters.

### III. THE SHAPE OF THE INDIVIDUAL RIGHT TO VOTE

The simplest reason to value the right to vote is that voting affects who wins. In close elections, relatively small changes to who can vote may flip the outcome. That gives political parties and their partisans strong incentives to legislate and litigate. But from the point of view of an individual voter, such outcome effects cannot possibly be the whole reason, or even the main reason, why one's right to

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implemented by the state). For a discussion of this aspect of the case, see Joshua A. Douglas, *The Significance of the Shift Toward As-Applied Challenges in Election Law*, 37 HOFSTRA L. REV. 635, 646–49 (2009). For the distinction between these two meanings of “as applied,” see *supra* note 164.

191. See Douglas, *supra* note 190, at 674–80; Persily & Rosenberg, *supra* note 163, at 1672–75.

vote matters. Rational choice theorists have conclusively established that any one voter's chances of shifting the outcome of a large election are infinitesimal.<sup>192</sup> Famously, this has led such theorists to have trouble explaining why people vote at all.<sup>193</sup> Judge Learned Hand prefigured the conclusions of modern rational voter models when he argued that “[m]y vote is one of the most unimportant acts of my life . . . . [F]or what after all does my single voice count among so many?”<sup>194</sup> And yet he also realized that voting is not entirely reducible to influencing election outcomes: “Of course I know how illusory would be the belief that my vote determined anything; but nevertheless when I go to the polls I have a satisfaction in the sense that we are all engaged in a common venture.”<sup>195</sup> This Part is not about the level of personal satisfaction that one might or might not feel while voting. But it is ultimately about the meaning of this “common venture”—and what it means for a person to be included in that venture or excluded from it.

This Part does not attempt to offer a complete theory of the individual right to vote. Instead it defends several claims about the shape of this right: (1) it is a right deeply linked with equal citizenship; (2) it is necessarily an *individual* right; (3) it is a *universal* right of citizens; and (4) it requires a substantive, rather than merely formal, opportunity to cast a ballot and have that ballot counted. Although these are all normative claims, the main project here is interpretive. In addition to being justifiable from the point of view of political theory, these points all emerge from the story of how American law came to embrace an individual right to vote.

The equal citizenship dimension of the right to vote helps fill in a major lacuna in the rational voter story. If an individual's right to vote were basically “unimportant”—if, as Judge Posner put it in *Crawford*, “[t]he benefits of voting to the individual voter are elusive”<sup>196</sup>—then not only is it hard to see why anyone would vote, it is also hard to see why anyone would much mind being blocked from casting a ballot. The argument of this Part suggests a reason why even if outcomes are unaffected, it might still matter a great deal to some would-be voters to be included among those who can cast a ballot and have it counted. In so doing, this Part offers a foundation for the project of determining which forms of disenfranchisement courts should find the most troubling—that is, which deserve the most weight in the individual-rights-versus-state interests calculus.

#### A. Inclusion and Equal Citizenship

The right to vote is partly constitutive of what it means to be a full citizen.<sup>197</sup> Full citizenship requires more than the right to vote. But ever since Aristotle

192. See RICHARD TUCK, *FREE RIDING* 30–62 (2008).

193. See, e.g., *id.*; DONALD P. GREEN & IAN SHAPIRO, *PATHOLOGIES OF RATIONAL CHOICE THEORY: A CRITIQUE OF APPLICATIONS IN POLITICAL SCIENCE* 47–71 (1994).

194. LEARNED HAND, *Democracy: Its Presumptions and Realities*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 70, 72 (Irving Dilliard ed., 1959).

195. LEARNED HAND, *THE BILL OF RIGHTS: THE OLIVER WENDELL HOLMES LECTURES* 73–74 (1958).

196. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (Posner, J.), *aff'd*, 553 U.S. 181 (2008).

197. See Frank I. Michelman, *Conceptions of Democracy in American Constitutional*

distinguished citizens from “aliens and slaves” by defining citizens as “[w]hoever is entitled to participate in an office involving deliberation or decision,”<sup>198</sup> the right to participate has been central to any plausible account of who is a full citizen and who is not.<sup>199</sup> As Judith Shklar persuasively argued in her Tanner Lectures on citizenship and inclusion, the right to vote confers, and in some ways defines, full citizenship: “The ballot has always been a certificate of full membership in society, and its value depends primarily on its capacity to confer a minimum of social dignity.”<sup>200</sup> Thus to be denied the right to vote is to be something less than a full citizen.<sup>201</sup>

Shklar argues that “[t]he struggle for citizenship in America has . . . been overwhelmingly a demand for inclusion in the polity . . . .”<sup>202</sup> Disenfranchised people have sought “not just . . . the ability to promote their interests” politically, but the “marks of civic dignity” that inhere in counting as a full, equal citizen.<sup>203</sup> Shklar suggests that this is why fights over the boundaries of the franchise have always had such an “extremely intense” character: those excluded “were not merely [being] deprived of casual political privileges, they were being betrayed and humiliated by their fellow citizens.”<sup>204</sup> As Martin Luther King, Jr. put it: “The denial of the vote not only deprives the Negro of his constitutional rights—but what is even worse—it degrades him as a human being.”<sup>205</sup>

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*Argument: Voting Rights*, 41 FLA. L. REV. 443, 451–52 (1989) (arguing that the right to vote has a constitutive as well as an instrumental value).

198. ARISTOTLE, *THE POLITICS* 86–87 (Carnes Lord trans., 1984). Aristotle considered and rejected various alternative definitions of citizen, such as the idea that citizens are the children of other citizens, concluding that only a functional definition, focused on who is entitled to participate, could properly capture the distinction between citizens and noncitizens. *Id.*

199. With the development of modern systems of elected representation, this connection deepened and became intertwined with the modern idea that legitimacy derives from the consent of the governed—that is, the individual consent of *all* citizens—as opposed to, for example, some citizens selected by lot, as in parts of the ancient Athenian democratic model. See BERNARD MANIN, *THE PRINCIPLES OF REPRESENTATIVE GOVERNMENT* 79–93 (1997).

200. JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 2 (1991).

201. In this discussion of citizenship, I will leave aside the many thicker and more demanding conceptions of citizenship that require elaborate social practices and/or place civic activities at the center of one’s life. My concern is with a more basic form of citizenship: full membership in a democratic polity.

202. SHKLAR, *supra* note 200, at 3.

203. *Id.*

204. *Id.* at 38.

205. Martin Luther King, Jr., Speech Before the Youth March for Integrated Schools (Apr. 18, 1959), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 21, 22 (James Melvin Washington ed., 1986). This is the key proposition that Gardner contests. See Gardner, *supra* note 19, at 444–48. Gardner is right that the dignitary aspect of the right to vote is not pre-political; it is not quite the same thing as “the inherent dignity possessed at all times by all humans.” *Id.* at 447. But neither is it simply a mechanism for producing election outcomes. The right to vote enacts a form of civic inclusion, defining not merely who is a “voter,” *id.* at 456, but who is a full citizen. While the dignity of full and equal citizenship is, in Gardner’s terms, “role-specific,” *id.* at 454, the relevant “role” is that of “citizen”; exclusion from the role of citizen is the dignitary harm Shklar and King highlight.

A related line of argument begins with equality rather than dignity. Modern political theorists disagree about the full meaning of equal citizenship, but there is an overlapping consensus that voting is at its very core—that the right to vote is a “minimal condition of political equality.”<sup>206</sup> For Iris Young, the great modern political theorist of democratic inclusion, the right to vote is far from sufficient for establishing equal citizenship—much more is required—but it is a necessary foundation.<sup>207</sup> Kenneth Karst has similarly articulated a conception of equal citizenship that is far broader than voting, but argues that voting “is at the heart of the idea of equal citizenship” because it is “the preeminent symbol of participation in the society as a respected member.”<sup>208</sup> Ronald Dworkin argues that the right to vote has a “symbolic” power: “The community confirms an individual person’s membership, as a free and equal citizen, by according him or her a role in collective decision. In contrast, it identifies an individual who is excluded from the political process as someone not fully respected or not fully a member.”<sup>209</sup>

The claim that full and equal citizenship entails the right to vote can thus be stated in two ways: in terms of dignity and in terms of equality. These two ways of framing the claim are deeply intertwined. It is possible that this may be true of *all* modern rights claims that rest on conceptions of dignity. Jeremy Waldron has argued perceptively that the modern concept of human dignity that we invoke as a ground or justification for basic rights, such as the right to vote, is intertwined with equality: although “dignity” long separated nobles (dignitaries) from the rest of us, the modern concept of human dignity that grounds so much human rights discourse invokes these old, hierarchical dignities for a different, egalitarian purpose.<sup>210</sup> The new dignity, Waldron argues, grants us all an equal, and very high, rank; it defines us all as equals *through* privileges, such as voting, of the kind that were formerly reserved for those with especially exalted status.<sup>211</sup>

The argument of this Part does not require Waldron’s broad claim about the deep relationship between dignity and equality. A narrower claim will suffice: in the specific domain of voting rights, the “social dignity” of full citizenship, which Shklar identifies as the real value of the right to vote, is also, at the same time, a

206. IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 6 (2000); *see also* ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 109–11 (1989) (arguing that all citizens’ rights to cast a vote and have that vote counted equally—“voting equality at the decisive stage”—are essential for a democracy of “political equals,” although much more is also required); ROBERT DAHL, *ON POLITICAL EQUALITY* 8–10 (2006) (same); JOHN RAWLS, *A THEORY OF JUSTICE* 194 (rev. ed. 1999) (arguing that the first principle of justice requires that “all citizens are to have an equal right to take part in, and to determine the outcome of, the constitutional process that establishes the laws with which they are to comply”).

207. *See* YOUNG, *supra* note 206, at 6.

208. Kenneth L. Karst, *The Supreme Court 1976 Term: Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 28 (1977); *see also* KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* 94 (1989).

209. RONALD DWORGIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* 187 (2000).

210. Jeremy Waldron, *Dignity and Rank*, 48 EUR. J. SOC. 201, 217–21 (2007).

211. *Id.* at 226–33; *see also* Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 748–50 (2011) (arguing that a concept of dignity can help us formulate and understand “hybrid equality/liberty claims”).

form of political equality. It is a dignity inhering in the idea that my vote counts just as yours counts—that I am, with respect to the right to vote, your equal.<sup>212</sup> This conception of the relationship between citizenship and the franchise specifies nothing about which offices are democratically elected: when a formerly elected position becomes an appointed position, we all lose our chance to vote for that official, but no one's full or equal citizenship is called into question because we each can still vote *as the equal* of our fellow citizens.<sup>213</sup>

This is in many ways a narrow and individualistic form of political equality. It does not exhaust the rich vein of equality arguments mined by modern voting rights law. More complex claims involving the political power, equal status, and marginalization of groups, the rules for counting and aggregating votes and drawing district lines, and so on, utilize a broader range of conceptions of political equality.<sup>214</sup> But logically prior to these more complex questions, there is a foundational question of inclusion: Who is included within the circle of full and equal citizens that is defined by the right to cast a ballot, and who is left out?

### *B. Formal and Substantive Conceptions of the Right to Vote*

There are two ways one might think about the location of the boundary between those who have the right to vote, and are in that sense full and equal citizens, and those who do not and are not. On one view, which we might call the formal view, it is only de jure state policies of group-based exclusion that count as denials of the right to vote. On this view, only when a state officially disenfranchises a group of citizens, such as women or propertyless men, do members of that group become something less than full and equal citizens. The official policy is essential because, on this formal view, the harm members of disenfranchised groups suffer is

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212. Cf. *Bush v. Gore*, 531 U.S. 98, 104 (2000) (“When the state legislature vests the right to vote for President in its people, the right to vote as the legislature has prescribed is fundamental; and one source of its fundamental nature lies in the equal weight accorded to each vote and the equal dignity owed to each voter.”). This narrow claim is a close cousin to a much broader set of claims advanced by constitutional law scholars about the relationship between liberty and equality in Fourteenth Amendment jurisprudence. See, e.g., Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *MCGEORGE L. REV.* 473 (2002). Although most of the constitutional litigation in this area has concerned the Equal Protection Clause, the idea of equal citizenship has at least as natural a home in the Due Process Clause. See Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 *UCLA L. REV.* 99 (2007).

213. Of course, if a state switched to a form of government that elected *no* officials, or perhaps one that failed to elect the most important officials, instead choosing officials through some other process, that would raise serious questions—not about the equal treatment of individuals, but about whether the state remained a democracy and its inhabitants remained “citizens” at all. See *infra* Part III.C.1. Democratic processes also exist that do not involve voting. A state might choose to elect an office by lot, or by allowing only a small, randomly selected set of citizens to vote (e.g., the jury). Those who are not selected for the jury are not disenfranchised—because such systems of selection are not elections. The question of how we ought to view a polity that governed primarily by jury or lot, eschewing elections, is beyond the scope of this Article.

214. See *supra* Part I.



essentially a symbolic one: a state *message* of official, de jure disenfranchisement inflicts a harm of symbolic group-based exclusion. This harm disappears when the formal barriers are removed.

In contrast, from the perspective of what we might call the substantive view, being included as a full and equal citizen requires more than formal inclusion: it also requires actually being able to cast a ballot. On this view, when any individual citizen attempts to vote but is blocked from doing so, she is being excluded from the circle of full and equal citizens.<sup>215</sup> The state may have good reasons, even compelling reasons, for excluding a would-be voter. Still, on this substantive view, in excluding her—in denying her the right to vote—the state has made her into something less than a full and equal citizen. The harm of being prevented from voting is not wholly dependent on hearing or receiving any symbolic message of exclusion, nor is it necessarily dependent on membership in a group. Messages of subordination matter, but they are not the whole story. A would-be voter could even be rendered something less than a full and equal citizen without her knowledge—for example, if election officials appear to allow her to cast a ballot, but as soon as her back is turned, secretly discard the ballot instead of aggregating it together with the others. On the substantive view, a full and equal citizen is, in necessary part, one who *is* the equal of any other citizen in terms of actually being able to cast a ballot and have it counted.

The rational voter model typically assumes the formal view. In the rational voter model, a barrier to voting other than an outright de jure group exclusion is simply a “cost,” measured in time or effort or money, which a voter might decide to pay—or else decide not to pay and, in Judge Posner’s words, “say what the hell and not vote.”<sup>216</sup> From this perspective, individuals who try to vote but fail are not disenfranchised: they “disfranchise themselves” by declining to pay costs, which is no different conceptually from simply deciding to stay home in the first place.<sup>217</sup> This way of thinking blurs a temporal distinction: in reality, by the time most would-be voters are slapped with the so-called “costs,” it is too late to pay. But for our purposes here, the question is whether the formal view or the substantive view better captures the nature of the “right to vote” that one needs in order to be a full, equal citizen.

The formal view captures part of the story. De jure disenfranchisement does send a powerful message of exclusion and second-class citizenship. This message is not erased in those rare cases when someone who is officially barred from voting does nonetheless manage to cast a ballot (for example, a black person passing as white and voting successfully in a jurisdiction that bars blacks from voting, or a woman voting as an act of protest prior to women’s suffrage).<sup>218</sup> In such cases,

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215. She is not merely being excluded from a narrower “office of voter.” Gardner, *supra* note 19, at 457 n.77 (arguing for a narrow view of the “office of voter . . . taken up very briefly and temporarily by an eligible citizen” and conceptually distinct from the role of citizen).

216. Crawford v. Marion Cnty. Election Bd., 472 F.3d 949, 951 (7th Cir. 2007) (Posner, J.), *aff’d*, 553 U.S. 181 (2008).

217. *Id.* at 952.

218. Susan B. Anthony is the most famous example: she and nearly fifty “Anthony women” registered in Rochester in November 1872. See Judith S. Kaye, *Rewriting History:*

casting a vote strikes a blow against one's exclusion. But it does not erase that exclusion. The message of subordination in the official state policy, by itself, still matters.

The harder and more interesting question is what happens once all the de jure state policies of group-based exclusion are gone. We need to know whether a citizen who formally enjoys the right to vote, but is nonetheless turned away for some reason when she attempts to exercise that right, is being excluded from the circle of full and equal citizens. A central claim of the remainder of this Part is that she is.

If we defined the right to vote exclusively in formal terms, no burden like a voter identification law or a registration list purge could ever constitute disenfranchisement. Only de jure group-based exclusions would disenfranchise. But this sharp distinction between de jure exclusions and "burdens" is very difficult to sustain. Most vote denial, old and new, can be accurately characterized *either* as (a) imposing a "burden" on the right to vote *or* (b) dividing the would-be electorate into two groups, a group of full, first-class citizens who actually get to vote and a group of others who do not. For example, a poll tax imposes a literal financial burden. Alternately, it draws a line that excludes from full citizenship the group of citizens who cannot (or do not) pay. A durational residency rule imposes the burden of waiting a year before voting; or alternately, it excludes the group of citizens who have recently moved. An early registration deadline imposes a logistical burden on the would-be voter to register early; or alternately, it excludes those who have not done so. The new vote denial controversies are no different. A voter identification requirement imposes the burden of obtaining the required identification; alternately, it excludes those voters who cannot or did not do so. A registration list purge imposes burdens of monitoring and reregistration, or alternately, it excludes those who fail to reregister.

As we shall see, many of the rules that prevented blacks from voting in the Jim Crow era look very little like formal, de jure group-based exclusions. They were rules that placed burdens on the right to vote. Thus, any accurate account of how the "old" vote denial disenfranchised voters entails a substantive rather than a formal conception of the right to vote. Such a substantive conception emerged in the twentieth century in American voting rights law, as that body of law embraced the idea that voting is a universal, individual right of citizens.

### *C. Voting and Individual Citizenship*

Within the political domain Charles Taylor calls the "politics of universalism," all sides agree in principle on "the equal dignity of all citizens."<sup>219</sup> Whatever the dispute, we couch our disagreements in terms that do not offend this idea of the equal dignity of all citizens; we "avoid[] at all costs" suggesting that we favor a regime of "'first-class' and 'second-class citizens.'"<sup>220</sup> Voting rights are now at the very center of this political domain. As Taylor points out, by the 1960s, even those

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*The Trial of Susan B. Anthony*, 80 N.Y. ST. B. ASS'N J., Oct. 2008, at 38, 38. Anthony voted and was later convicted. *Id.*

219. Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 37–38 (Amy Gutmann ed., 1994).

220. *Id.* at 37.

who fiercely opposed black voting rights nearly always “found some pretext consistent with universalism” on which to justify rules that would exclude blacks from casting ballots.<sup>221</sup> Within the politics of universalism, the connection between full citizenship and the right to vote is sufficiently tight that it seems almost incoherent to argue that some individuals are full citizens, yet will never be permitted to vote.<sup>222</sup> In other words, today, the tight connection between voting rights and full citizenship, obvious to Aristotle, is obvious once again. Yet for much of American history, this tight connection was not a part of our law.

### 1. Before Universalism: The Logic of Suffrage Restriction

The connection between voting rights and full citizenship was long occluded by the legal fact of birthright citizenship. Birthright citizenship meant that, for much of our history, white women and poor white men who were ineligible to vote were also unquestionably legal “citizens.” They were unable to exercise the political rights of first-class citizens, but birthright citizenship precluded calling them anything other than citizens. *Slaves* were noncitizens. Indeed, slaves were the very paradigm of what it was to be a noncitizen who was not a foreign national.<sup>223</sup> Birthright citizenship meant that American law had to draw one large circle around those who were “citizens,” and another, much smaller circle inside the first, defining the subset of citizens eligible to vote.<sup>224</sup> Citizenship and voting were out of alignment. A basic dimension of political equality among citizens was absent.

The journey from this place to the modern politics of universalism, which restored the tight connection between voting and individual citizenship, took more than a century, from Reconstruction until roughly 1975. This subpart will not retrace that entire arc, but will make a claim about its trajectory: American law followed an individualistic path to a brand of universalism that connects *individual* citizenship with the right to vote. From the point of view of normative political theory, this was the right path. The alternatives were seriously inadequate.

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221. *Id.* at 38.

222. Felon disenfranchisement is one counterexample to the politics of universalism thesis. Some advocates of felon disenfranchisement hold that felons, because they have failed to live up to their responsibilities as citizens, are no longer full, first-class citizens. *Cf.* *Green v. Bd. of Elections of New York*, 380 F.2d 445, 451 (2d Cir. 1967) (Friendly, J.) (justifying felon disenfranchisement in terms of the felon’s violation of the social compact), *cert. denied*, 389 U.S. 1048 (1968).

223. *See* SHKLAR, *supra* note 200, at 16 (“[B]lack chattel slavery stood at the opposite social pole from full citizenship and so defined it.”); *id.* at 16–17 (“[W]here slavery is not just a figure of speech or a chapter in one’s ancient history textbook but is an integral social institution, it is necessarily a threat. To be less than a full citizen is at the very least to approach the dreaded condition of a slave.”). This connection was also particularly apparent to ex-slaves. As Frederick Douglass argued, “Slavery is not abolished until the black man has the ballot.” *Id.* at 52 (quoting 4 THE LIFE AND WRITINGS OF FREDERICK DOUGLASS 167 (Philip S. Foner ed., 1955)).

224. Membership in the larger circle of “citizens” entailed important legal rights, but these were civil rather than political. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 216–18 & n.\* (1998) (discussing the distinction).

Let us briefly consider where things stood at the start of this journey. At the time of the passage of the Fourteenth Amendment, the conceptual connection between citizenship and the right to vote was far too weak to bear any weight. This weakness came into sharp relief shortly after the Amendment's passage, when Virginia Minor brought her historic lawsuit demanding the right to vote.<sup>225</sup> The Fourteenth Amendment had expressly defined United States citizens as "[a]ll persons born or naturalized in the United States, and subject to the jurisdiction thereof" and protected such citizens' "privileges or immunities."<sup>226</sup> And so the Court agreed that on the Amendment's definition—which tracked pre-existing definitions—Minor was obviously a "citizen."<sup>227</sup> The Court was not inclined to enfranchise women in 1874, and so it famously held that voting was not one of the privileges or immunities of citizenship.<sup>228</sup> To justify this holding, the Court had to define the political meaning of "citizen" in a way that did not entail a right to vote.<sup>229</sup> Awkwardly, it did so. It defined citizenship in terms of the "reciprocal obligations" of "allegiance and protection" between the individual and the state.<sup>230</sup>

This definition had a glaring and somewhat embarrassing flaw: it was just as applicable to "subjects" as it was to "citizens." Even medieval serfs were bound to their lords by demands for allegiance in exchange for protection. The Court, to its credit, noticed this problem. But its attempt to work around the problem involved digging deeper into the hole. At the bottom, the Court offered a remarkably frank admission that it had drained away any real difference between what it is to be a citizen and what it is to be a subject or a serf.<sup>231</sup> The Court stated that "the words 'subject,' 'inhabitant,' and 'citizen'" were all just different names for "membership" in a nation, words adopted "[f]or convenience."<sup>232</sup> "Citizen" was the word that "is now more commonly employed . . . [and] it has been considered

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225. *Minor v. Happersett*, 88 U.S. 162 (1874).

226. U.S. CONST. amend. XIV, § 1.

227. *Minor*, 88 U.S. at 165. The Court emphasized that white women had been considered "citizens" throughout American history. *Id.* at 165–66. But with isolated exceptions, notably the brief enfranchisement of property-owning women in New Jersey, which ended in 1807, they had been excluded from the set of first-class, voting citizens. *Id.* at 176–77.

228. *Id.* at 178. The case was one of a string of cases of its era in which the Court eviscerated the Privileges or Immunities Clause by holding that there are essentially no meaningful privileges of national citizenship. *See* *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872); *see also* *Adamson v. California*, 332 U.S. 46, 74–79 (1947) (Black, J., dissenting) (criticizing the limitations the Court imposed on the Fourteenth Amendment in the *Slaughter-House Cases* and related cases of this period).

229. I leave aside here the merits of the question of whether the Fourteenth Amendment ought to have been interpreted in 1874 to guarantee all citizens, including women, the right to vote. *See* Akhil Reed Amar & Jed Rubenfeld, *A Dialogue*, 115 YALE L.J. 2015 (2006) (debating this issue).

230. *Minor*, 88 U.S. at 166.

231. At least in the political sphere. The Court presumably was not intending to eviscerate what was then an important distinction between "citizens" and "inhabitants" in their civil (not political) rights. *See* note 224.

232. *Minor*, 88 U.S. at 166.

better suited to the description of one living under a republican government.”<sup>233</sup> On this account, a “citizen” is just an inhabitant or subject who happens to be fortunate enough to reside in a republic. That is, you are a citizen if you inhabit the kind of place where *some* of the people have the right to participate in the offices involving deliberation and decision—even if you yourself have no such right.

*Minor*’s remarkably weak argument about voting and citizenship was by no means unique, nor was it new in the post-Reconstruction period.<sup>234</sup> Its weakness revealed a longstanding instability and tension between the fact of birthright citizenship and the fact that most “citizens,” from women to non-property-owning white men, were disenfranchised. The only way for the Court to ease this tension was to use a hollowed-out conception of “citizen” that ignored the actual practices, especially voting, that are constitutive of what it means, politically, to be a citizen. This hollowed-out conception of the meaning of citizenship settled the matter for the Court. But it never completely erased from the public mind a different, thicker, and older idea of citizenship in a democratic state, in which full citizenship entails a right to vote. Subsequent movements seeking the right to vote were thus able to make claims on this thicker idea of citizenship in demanding both formal and substantive enfranchisement on the ground that as “citizens,” they had a right to vote as the equal of any other citizen.

This took time. In the immediate post-Reconstruction period, the politics of voting rights was not yet a politics of universalism. State governments retained extensive powers after the passage of the Fifteenth Amendment to make explicit distinctions (on any basis other than race and color) between first-class, voting citizens and the broader category of second-class citizens ineligible to vote. As Alexander Keyssar has shown, by blocking laws that disenfranchised blacks on the basis of race, but only such laws, the Fifteenth Amendment had the indirect effect of encouraging election “reformers” intent on disenfranchising blacks to build up restrictions of other kinds, particularly those based on property and education.<sup>235</sup> Such restrictions also targeted whites who were poor, who were immigrants, or who were otherwise viewed, in the words of one former Alabama governor, as “ignorant, incompetent, and vicious.”<sup>236</sup> As Reconstruction faded, reformers and redeemers in both the South and the North introduced literacy tests, property qualifications, poll taxes, “pauper” restrictions, and “complex, cumbersome

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233. *Id.*

234. See JAMES H. KETTNER, *THE DEVELOPMENT OF AMERICAN CITIZENSHIP, 1608–1870*, at 316–17 (1978). For example, the Supreme Court of North Carolina held in 1838 that “the term ‘citizen’ as understood in our law, is precisely analogous to the term *subject* in the common law, and the change of phrase has entirely resulted from the change of government” from monarchy to republic. *State v. Manuel*, 20 N.C. (3 & 4 Dev. & Bat.) 144, 1838 WL 508, at \*5 (N.C. 1838) (emphasis in original).

235. ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 105–71 (2000).

236. J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910*, at 70 (1974); see *id.* at 39–44, 68–72; see also STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969*, at 11–12 (1999).

registration procedures<sup>237</sup> that had the purpose and effect of limiting the set of first-class, voting citizens to a smaller subset<sup>238</sup> of all citizens.<sup>239</sup>

In order to enact these restrictions, reformers relied constantly on the claim that there was no necessary link between individual citizenship and the vote. To support this claim, they often framed the purpose of voting and elections in an entirely instrumental, structural way: the aim was election outcomes. For example, Francis Parkman, a prominent opponent of universal suffrage, argued in an influential 1878 article against what he called the “superstition” involved in arguments for the individual right to vote.<sup>240</sup> He argued that voting rights advocates “confound” the means and the ends: “Good government is the end, and the ballot is worthless except so far as it helps to reach this end. Any reasonable man would willingly renounce his privilege of dropping a piece of paper into a box, provided that good government were assured to him and his descendants.”<sup>241</sup> This kind of argument differs from the modern rational voter view (in which voting is about achieving outcomes one *prefers*, rather than “good government”). But the arguments lead to a similar place: if outcomes are all that matter, then the individual right to vote has no independent value. Arguments such as Parkman’s provided a philosophical foundation for the wave of restrictions on urban, working class, often immigrant voters whom restrictionist reformers argued were voting illegally, irresponsibly, and for outcomes that did not serve the public interest.<sup>242</sup> These restrictions were hot partisan battlegrounds in the North, pitting Republican reformers intent on cracking down on fraud and protecting the “purity” of the ballot box against Democrats intent on protecting the votes of their urban immigrant supporters.<sup>243</sup>

Some of those arguments continue today in only slightly modified form. But others sound in a register that is unfamiliar to us because it predates our modern politics of universalism and its premise of equal citizenship. In the late nineteenth and early twentieth centuries it was perfectly within the bounds of ordinary political discourse to argue that some citizens were too ignorant, incompetent,

237. KEYSSAR, *supra* note 235, at 129. *See generally* KOUSSER, *supra* note 236.

238. In the Reconstruction era, some noncitizens also had the vote. Alien “declarant” voting, in which noncitizens could vote upon declaring their intent to naturalize, was common during this period, but states almost universally eliminated it as part of the new wave of restrictions on the franchise between the 1890s and 1920s. *See* KEYSSAR, *supra* note 235, at 371–73 tbl.A.12. This arguably had the effect of tying voting *more* closely to citizenship. Since this period, the prohibitions on noncitizen voting in federal elections have since hardened considerably. *See infra* notes 284–85 and accompanying text.

239. *See* KEYSSAR, *supra* note 235, at 128–36; FRANCES FOX PIVEN, LORRAINE C. MINNITE & MARGARET GROARKE, *KEEPING DOWN THE BLACK VOTE: RACE AND THE DEMOBILIZATION OF AMERICAN VOTERS* 31 (2009). For example, by the mid-1920s, thirteen states outside the South were disenfranchising illiterate citizens who met all other requirements. KEYSSAR, *supra* note 235, at 145 & tbl.A.13.

240. KEYSSAR, *supra* note 235, at 124 (quoting Francis Parkman, *The Failure of Universal Suffrage*, 127 N. AM. REV. 1, 10 (1878)).

241. *Id.*

242. *Id.* at 123–24.

243. *Id.* at 153–56; *see also* Dayna L. Cunningham, *Who Are to Be the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE L. & POL’Y REV. 370, 380–88 (1991).

corruptible, racially inferior, or poor to deserve the voting rights of full, first-class citizens.<sup>244</sup> Notably, even some arguments for *extending* the franchise took the form of claims that certain citizens should be recognized as the betters of others. Some suffragists argued for women's right to vote essentially on the grounds that it was an affront to the social standing of "educated, patriotic women" to be disenfranchised while many men who were less deserving of the right to vote nonetheless enjoyed it.<sup>245</sup>

But among the arguments for women's suffrage a different, more universalist line of argument emerged: the claim that, contra *Minor*, each adult citizen was entitled—in virtue of being a citizen—to vote. Broadly speaking, the story of voting rights in the twentieth century is the story of the triumph of this line of argument. It ushered in our modern politics of universalism and equal citizenship with regard to the right to vote. The Nineteenth Amendment was a crucial step along this path because it linked the right to vote much more closely with individual citizenship.

## 2. The Nineteenth Amendment and Individual Citizenship

Opponents of women's suffrage long relied on the premise that there was no necessary connection between citizenship and voting. These opponents argued that although women were citizens—as they must be, given birthright citizenship—women were nonetheless best represented in the political sphere through the votes of male heads of household.<sup>246</sup> This argument amounted to a claim that voting rights accrued to household units rather than individuals (and that men would speak for the household units). As one Congressman argued in 1868: "[I]t is necessary that every citizen may either exercise the right of suffrage himself, or have it exercised for his benefit by some one who by reason of domestic or social relations with him can be fairly said to represent his interests."<sup>247</sup> Actual representation would go to households; many individuals would have only virtual representation.

The "revolutionary core" of the project of women's suffrage was the claim that the state was composed not of households but of individual citizens.<sup>248</sup> As full and equal individual citizens, women deserved the right to vote. Elizabeth Cady Stanton argued forcefully for "our republican idea, individual citizenship."<sup>249</sup> The overall

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244. Rogers Smith has exhaustively traced the trajectory of these deeply antiliberal, exclusionary arguments. See ROGERS M. SMITH, *CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY* 286–409 (1997).

245. KEYSSAR, *supra* note 235, at 178, 198–200; see SHKLAR, *supra* note 200, at 57.

246. For a thorough discussion, see Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 981–87 (2002).

247. Reva B. Siegel, *Collective Memory and the Nineteenth Amendment: Reasoning About "The Woman Question" in the Discourse of Sex Discrimination*, in HISTORY, MEMORY, AND THE LAW 131, 148 (Austin Sarat & Thomas R. Kearns eds., 1999) (emphasis omitted) (quoting CONG. GLOBE, 40th Cong., 2d Sess. 1956 (1868) (statement of Sen. Broomall)).

248. Siegel, *supra* note 246, at 987.

249. *Id.* at 989 (quoting *Hearing of the Woman Suffrage Association Before the H.*

aim of the women's suffrage movement is best understood in terms of ending women's (group) subordination.<sup>250</sup> But because of the distinctive shape of women's subordination in the domain of voting—the state's insistence on enfranchising households rather than individuals—"individual citizenship" was the basic reform suffragists sought.

The argument that individual women were equal citizens, and, as such, had an equal right to vote, shook the conceptual foundations of voting and citizenship in the United States. It replaced the idea that elections merely needed to represent interests with the more individualistic idea that each citizen has a right to vote.<sup>251</sup> The Nineteenth Amendment thus not only overturned the outcome in *Minor* but also repudiated crucial parts of the logic of *Minor*. Specifically, it overturned the hollow conception of the political meaning of citizenship at the heart of *Minor*—the proposition that while "citizens" might have some civil rights, in terms of politics they are nothing more than subjects who happen to reside in a republic. In light of the repudiation of this central pillar of its reasoning in addition to its result, *Minor* is best read today as an anticanonical case.<sup>252</sup> It stands for a disjunction between voting and individual citizenship that our constitutional order has since repaired.

The Nineteenth Amendment extended and arguably completed one of the great projects that the American Revolution began: replacing systems of virtual representation with systems of actual self-government.<sup>253</sup> The colonists' lack of actual representation in the British Parliament was so total that it was incompatible with a variety of conceptions of self-government, not all of them particularly individualistic. But by reaching into the family and defining its adult members as citizens with independent voting rights, the Nineteenth Amendment, along with the Reconstruction Amendments, *channeled* this anti-virtual-representation strain of the ideology of the Revolution in a distinctively individualistic direction. In light of

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*Comm. on the Judiciary*, 52d Cong. 1 (1892) (statement of Elizabeth Cady Stanton)).

250. For example, Stanton argued against laws that made "sex a disqualification for citizenship" by arguing that such laws made "all men rulers, governors, sovereigns, over all women." *Id.* at 990–91 (quoting *Arguments of the Woman-Suffrage Delegates Before the S. Comm. on the Judiciary*, S. MISC. DOC. NO. 47-74, at 5 (1880) (statement of Elizabeth Cady Stanton)).

251. *See id.* at 1034–35.

252. *See* J.M. Balkin & Sanford Levinson, Commentary, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 1018 (1998) (explaining the concept of the anticanon). *Cf.* Charles, *supra* note 5, at 1113 (singling out *Minor* and *Giles v. Harris*, 189 U.S. 475 (1903), as "the egregious cases in election law" in which the Court failed to protect political rights).

One inadvertent but notable illustration of this point is the fact that one commentator, in an attempt to argue against the entire modern line of cases that treat the right to vote as a fundamental right, begins his main argument with an approving discussion of *Minor*, without any reference to the constitutional changes—the Nineteenth Amendment, the civil rights movement—that repudiated *Minor* and its logic. *See* Thomas Basile, *Inventing the "Right to Vote" in Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), 32 HARV. J.L. & PUB. POL'Y 431, 441–42 (2009).

253. As we come to think of voting as part of what defines citizens, rather than merely as a device for balancing their interests, virtual representation becomes untenable. As Frank Michelman once put it: "Virtual representation of interests may be conceivable. Vicarious self-government is not." Michelman, *supra* note 197, at 457.



the success of the movement for women's suffrage, individual citizenship was linked much more closely to an individual right to vote. But the transition was incomplete: until the 1960s and early 1970s states continued to circumscribe the boundaries of first-class voting citizenship in numerous ways. It was in dismantling these limits that American law gave the individual right to vote its full modern meaning.

*D. A Substantive, Universal Right of Citizens*

In the brief period from the early 1960s through 1975, American voting rights law underwent a revolution. The main story of this revolution is the familiar story of black enfranchisement: the litigation, legislation, and social movement activism that led ultimately to the dismantling of the Jim Crow restrictions on black voting rights, fulfilling the Fifteenth Amendment's promise. But that is not where the story ends. Rather than simply dismantling race discrimination in voting, American law took a dramatic universalist turn, sweeping away almost all the bases of suffrage restriction that remained in 1960 and establishing a nationwide norm of universal adult suffrage tied closely to individual citizenship. This universalist turn was the product of both litigation and legislation, and it was codified both in statutes and in constitutional doctrine. This subpart will not tell its entire story, but will make some observations about what the events of this period mean for the philosophical foundations of our voting rights regime.

First, the voting restrictions that fell during this period were not *de jure* race-based restrictions on suffrage but rules that, for a series of reasons, had the substantive effect of blocking blacks and others from casting ballots. The changes that took place in this period thus established unmistakably that democratic inclusion requires more than an end to the official, *de jure* exclusion of one's group from the polity. Full and equal citizenship requires actually being able to cast a ballot—a substantive, rather than merely formal, right to vote.

Second, the universalist turn in this period established that in addition to protections against group-based discrimination in voting, our law now correctly conceives of voting as a universal fundamental right of citizens. The wrongness of disenfranchisement is not simply the wrongness of race discrimination or other similar group-based exclusion: it is also a violation of a fundamental right of citizens.

The exclusions that fell in the early part of this period were typically of a kind that “falsely ascribed personal deficiencies”<sup>254</sup> to voters and then denied them the vote based on those deficiencies, so that many citizens had the franchise in theory but lacked it in practice. As Brian Landsberg vividly describes in his recent account of early voting rights litigation in Alabama, these barriers turned the act of filling out a registration form into a complex and discriminatory test of civic competence that many did not pass.<sup>255</sup> One black citizen told Landsberg, who was at that time a DOJ voting section lawyer, that he had applied three times to register to vote and

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254. SHKLAR, *supra* note 200, at 38.

255. BRIAN K. LANDSBERG, *FREE AT LAST TO VOTE: THE ALABAMA ORIGINS OF THE 1965 VOTING RIGHTS ACT* (2007).

“had never heard whether his applications had been accepted or not, but he figured he had failed the ‘test’ somehow.”<sup>256</sup> “[R]ejected black applicants for registration,” Landsberg writes, “routinely explained to me that they had not been victims of discrimination; they had simply ‘failed’ the registration process in some way.”<sup>257</sup> Barriers of this kind differed from pre-Fifteenth Amendment de jure restrictions on black voting. The new restrictions conveyed a more individualized message of personal inadequacy and failure that purported to justify each voter’s individual exclusion from first-class, voting citizenship. States sometimes described their suffrage-restricting tests as “citizenship” tests, making it as clear as possible that they were calling into question the full citizenship of those who failed the tests, on an individualized voter-by-voter basis.<sup>258</sup>

These voter-by-voter methods certainly conveyed a message of group subordination as well as individual inadequacy, but they did not block every black voter.<sup>259</sup> From a narrow economic perspective, these methods imposed enormous and unfair “costs” on black would-be voters, but some did manage to pay those costs and vote. This voter-by-voter disenfranchisement worked in multiple stages: blacks who did register were often later removed from the rolls through list maintenance practices, such as purging the names of those who had moved or died, that registrars conducted in discriminatory ways.<sup>260</sup> While the continuities between these old vote denial controversies and today’s new vote denial controversies should not be overstated, almost all of the legal domains where the new controversies take place, from registration requirements to list purges to challengers inside the polls, are among the domains where these old battles were fought. This is no accident: action in these domains is what determines whether a formal right to vote becomes a substantive right to vote.

Early litigation against Jim Crow jurisdictions focused on voting rules that provided registrars with wide discretion, which they exercised in discriminatory ways, or on voting rules that had the effect of “freezing” past discrimination against blacks.<sup>261</sup> However, as voting rights litigation and legislation took shape between the early 1960s and 1975, it expanded beyond this initial focus on black voting rights. It ultimately had a far broader and more universal impact: it rendered the right to vote a universal right of citizens. The story of why this occurred is complex. Part of the story is that as the civil rights movement’s efforts to expand black voting rights gained momentum, those efforts became intertwined with the continuing efforts of other, quite different movements to expand the circle of first-

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256. *Id.* at 43.

257. *Id.*

258. For example, Louisiana enacted a statute in 1962 requiring registrars to create “an objective test of citizenship,” which required prospective voters to answer civics knowledge questions. *United States v. Louisiana*, 225 F. Supp. 353, 392 (E.D. La. 1963).

259. Indeed, allowing some blacks to register helped local registration boards stay out of federal court. *See* LAWSON, *supra* note 236, at 88.

260. *See, e.g., id.* at 89.

261. *E.g., Louisiana v. United States*, 380 U.S. 145, 150 (1965) (affirming the invalidation of Louisiana’s “interpretation test [that] . . . vested in voting registrars a virtually uncontrolled discretion”); *see* Owen M. Fiss, *Gaston County v. United States: Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379, 382 (1969).

class, voting citizens. Advocates of black voting rights found themselves in a fraught and uneasy alliance with advocates of the old New Deal agenda of enfranchising poor white voters by eliminating the poll tax, that bastion of conservative Southern power (“Polltaxia”) that President Roosevelt had tried and failed to dismantle.<sup>262</sup> Eliminating the poll tax was also a major part of the unfinished business of the women’s suffrage movement, which had been working since the 1920s to dismantle a barrier that disproportionately disenfranchised women.<sup>263</sup> A synthesis of these agendas led to the 24th Amendment banning poll taxes in federal elections<sup>264</sup> and to the unusual provisions of the VRA of 1965 authorizing DOJ litigation to invalidate poll taxes in state elections.<sup>265</sup>

The VRA itself became radically more universal in sweep as it was amended in 1970 and 1975.<sup>266</sup> First temporarily in 1970, and then permanently in 1975, Congress put into place a nationwide statutory ban on denying any citizen the right to vote in any federal, state, or local election “because of his failure to comply with any test or device . . . .”<sup>267</sup> This ban expanded the much more targeted ban in the original 1965 Act, which had temporarily barred such practices only in the mostly Southern jurisdictions covered by section 5.<sup>268</sup> The change “removed the regional stigma”; it allowed voting rights proponents to move away from talk of Southern racial hierarchy and toward a focus on the idea that each citizen has a fundamental right to vote.<sup>269</sup>

The Court acted in tandem with these legislative developments to steer voting rights law firmly in a universalist direction, pressing far beyond race discrimination. When the Court invalidated poll taxes in 1966, it did so not on the

262. See Bruce Ackerman & Jennifer Nou, *Canonizing the Civil Rights Revolution: The People and the Poll Tax*, 103 NW. U. L. REV. 63, 72 (2009) (describing President Roosevelt’s efforts to “purge conservatives from the [Democratic] party, denouncing them as representatives of ‘Polltaxia’”); see also LAWSON, *supra* note 236, at 57.

263. See Ronnie L. Podolefsky, *The Illusion of Suffrage: Female Voting Rights and the Women’s Poll Tax Repeal Movement After the Nineteenth Amendment*, 7 COLUM. J. GENDER & L. 185, 185 (1998).

264. See U.S. CONST. amend. XXIV.

265. Voting Rights Act of 1965, Pub. L. 89-110, § 10(a)–(b), 79 Stat. 437, 442 (“Congress declares that the constitutional right of citizens to vote is denied or abridged in some areas by the requirement of the payment of a poll tax as a precondition to voting . . . . the Attorney General is authorized and directed to institute forthwith in the name of the United States such actions, including actions against States or political subdivisions, for declaratory judgment or injunctive relief against the enforcement of any requirement of the payment of a poll tax as a precondition to voting”); see Ackerman & Nou, *supra* note 262, at 110 (arguing that the anti-poll tax provisions of the VRA reflect a “‘New Deal-Civil Rights’ synthesis”).

266. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400.

267. See 42 U.S.C. § 1973aa(a) (2006). The term “test or device” includes literacy tests, educational requirements, knowledge tests, moral character tests, and vouching requirements. See *id.* § 1973aa(b).

268. See Voting Rights Act of 1965 § 5 (enjoining tests and devices in covered jurisdictions only).

269. See KEYSSAR, *supra* note 235, at 274.

basis of race but on the ground that “the right to vote is too precious, too fundamental to be . . . burdened or conditioned” by “wealth or fee paying.”<sup>270</sup> This choice was especially notable because in point of fact the evidence was overwhelming that the particular poll tax at issue in the case had been enacted with racially invidious motives; yet the Court bypassed the race-based antidiscrimination route entirely in favor of a more universalist holding.<sup>271</sup> In quick succession the Court then granted relief to a series of citizen plaintiffs asserting their right to vote in the face of restrictions that had very little to do with the problem of black disenfranchisement—or with any analogous group-based exclusion. The Court struck down laws restricting bond elections to property holders<sup>272</sup> and school board elections to parents (and property holders);<sup>273</sup> it also struck down laws preventing members of the military from establishing residency for purposes of voting.<sup>274</sup> Together the Court and Congress enfranchised eighteen-year-olds<sup>275</sup> and radically cut back on the ability of states to impose residency requirements.<sup>276</sup> As Alexander Keyssar notes, “What occurred in the course of a decade was not only the reenfranchisement of African Americans but the abolition of nearly all remaining limits on the right to vote.”<sup>277</sup> Congress and the Court moved “from a focus on black enfranchisement to an embrace of universal suffrage.”<sup>278</sup> Rather than (only) extending the group-based protections against racial discrimination in voting to cover additional groups, both Congress and the Court embraced the idea that voting is a fundamental right of each individual citizen. The Court held that *all* restrictions on voting, not just those that disenfranchise a protected group, “must be carefully

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270. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966). The broad holding also invalidated pauper exclusions, which still then existed in at least ten states. See KEYSSAR, *supra* note 235, at 271.

271. See Jane S. Schacter, *Unenumerated Democracy: Lessons from the Right to Vote*, 9 U. PA. J. CONST. L. 457, 462–64 (2007) (Despite “blatant evidence of racial intent,” the Court “declined to take [the] . . . more well-established[] path [of] striking down the poll tax as a form of race-based voting discrimination. One might reasonably read the Court’s failure to do so as reflecting an interest in elaborating a more general right of political equality.”).

272. See *City of Phoenix v. Kolodziejcki*, 399 U.S. 204 (1970); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

273. See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969).

274. See *Carrington v. Rash*, 380 U.S. 89 (1965).

275. The 1970 Voting Rights Act Amendments also attempted to enfranchise eighteen-year-olds. See Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 318. When the Court ruled that Congress had the power to do this only for federal elections, *Oregon v. Mitchell*, 400 U.S. 112, 117–18 (1970) (plurality opinion), Congress quickly followed up with the 26th Amendment, enfranchising eighteen-year-olds in all elections, which the states ratified in 1971. U.S. CONST. amend. XXVI, § 1.

276. Voting Rights Act Amendments of 1970 § 6. The 1970 Amendments prohibited states from imposing residency requirements longer than thirty days (and allowed those who move within thirty days of an election to cast an absentee ballot at their previous residence). *Id.* The Court not only upheld this restriction, see *Oregon v. Mitchell*, 400 U.S. at 147–50, but went on to invalidate state laws restricting the franchise in *state* elections to one-year residents, see *Dunn v. Blumstein*, 405 U.S. 330, 332–33 (1972).

277. KEYSSAR, *supra* note 235, at 281–82.

278. *Id.* at 282.

scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice.”<sup>279</sup>

This universalist turn linked the right to vote firmly to individual citizenship. For the first two centuries of American political development, the question of whom to treat as first-class, voting citizens had been a policy question states might decide on the basis of any number of considerations, including the kind of election outcomes that a given line between the voters and the nonvoters could reasonably be expected to produce. That view was the Court’s view as late as 1959, when even some justices who thought poll taxes were unconstitutional nonetheless voted to uphold a literacy test on the ground that it could promote “intelligent use of the ballot.”<sup>280</sup> But in the turn toward the politics of universalism, something changed: voting became a fundamental right of citizens, closely tied to citizenship itself, that could only be denied or abridged by the state with compelling reason. Instead of enumerating grounds on which the right to vote must not be denied, the Court began to list the only permissible qualifications for voting that remained, and it was a short list—age, citizenship, and residency<sup>281</sup>—the same three qualifications that the Court later held to be the only permissible qualifications for federal officeholders.<sup>282</sup> At the same time, states’ latitude in imposing both age- and residency-based voting restrictions was seriously circumscribed.<sup>283</sup> The “age, citizenship, residency” formula does not mention the most significant remaining exception to universalism: most states retain a category of nonvoting citizens consisting of felons and usually at least some ex-felons. But leaving aside that notable exception, the basic conceptual link between citizenship and voting is now firmly established in our law. The only area in which the right to vote has become substantially *more* restricted over the course of this transition to universalism is, instructively, citizenship status: it is now a federal crime for noncitizens to vote in federal elections.<sup>284</sup> States and localities are permitted to allow noncitizens to vote

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279. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 (1969). The Court should probably have said: each resident *adult* citizen.

280. *Lassiter v. Northampton Cnty. Bd. of Elections*, 360 U.S. 45, 51 (1959). Richard Pildes has argued perceptively that *Lassiter* was not necessarily inconsistent with the Court’s 1966 decision to strike down a poll tax in *Harper* because some justices viewed poll taxes (wealth) as an impermissible reason for the government to restrict the franchise but literacy (competence) as a permissible reason. *See Pildes, supra* note 8, at 741–44. However, that view turned out to be a transitional one. The universalist turn swept away *both* of these justifications for restricting the franchise because either one abridged a fundamental right of citizens.

281. *See Kramer*, 395 U.S. at 625–26.

282. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 783 (1995) (holding that states may not impose qualifications for federal office beyond those enumerated in the Qualifications Clause: age, citizenship, and residency).

283. *See U.S. CONST.* amend. XXVI; *Dunn v. Blumstein*, 405 U.S. 330 (1972); *Carrington v. Rash*, 380 U.S. 89 (1965). In 1993, Congress eliminated one of the few remaining ways residency could disenfranchise by requiring that citizens who move within thirty days of election day, and therefore miss the registration deadline at their new location, be allowed to vote absentee at their former residence. *See* 42 U.S.C. § 1973aa-1(e) (2006). Oddly, however, this rule fixes the problem only for presidential elections. *Id.*

284. The Illegal Immigration Reform and Immigrant Responsibility Act of 1996

in state and local elections, and some localities have done so; one way to understand this phenomenon is to view these localities as, in effect, rendering some residents *local* citizens even though they are not U.S. citizens.<sup>285</sup>

In theory, it might have been logically possible to enfranchise blacks without working such a fundamental change in the American conception of the relationship between voting and citizenship. But it seems very implausible that history would have taken such a course. The arguments for black enfranchisement thoroughly dismantled the logic of suffrage restriction that made sense to jurists at the time of *Minor*. Enfranchising blacks, especially in the South, entailed enfranchising poor citizens and illiterate citizens. This required much more than removing explicit barriers such as pauper exclusions, literacy tests, and poll taxes. In order to transform the right to vote from a formal, theoretical guarantee into a substantive entitlement of citizenship, it was necessary to dismantle the whole apparatus of Byzantine registration processes, test-like forms, and “vouching” rules that did the work of distinguishing the inner circle of first-class citizens who could actually vote from the larger set of other citizens whose right to vote was merely notional. All the clever local processes of ascribing personal failings and deficiencies to voters and then judging them to be less-than-first-class citizens on the basis of those deficiencies were called into question by the revolutionary claim that blacks deserved not only a theoretical, on-the-books right to vote but also an actual, substantive opportunity in every election to cast a ballot and have it counted.

This new foundation for the right to vote brought the law into alignment with a modern democratic conception of individual citizenship. Even Justice Harlan, in his dissent from the decision invalidating the poll tax, agreed with the proposition that “[p]roperty and poll-tax qualifications, very simply, are not in accord with current egalitarian notions of how a modern democracy should be organized.”<sup>286</sup> Women’s suffrage and black enfranchisement were assimilated into the deep structure of American election law in part by being transformed into something more abstract, less group-oriented, and more individualistic. This transformation was only partial. American law continues to provide minority groups with powerful protections

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(IIRIRA) made it a federal crime for aliens to vote in federal elections but permitted states and localities to authorize aliens to vote in nonfederal elections if the votes are “conducted independently.” See Illegal Immigration Reform and Immigrant Responsibility Act § 216(a), 18 U.S.C. § 611(a). Some localities indeed permit alien voting in local elections. See PETER H. SCHUCK, *CITIZENS, STRANGERS, AND IN-BETWEENS: ESSAYS ON IMMIGRATION AND CITIZENSHIP* 187–88 (1998).

285. This formulation is consistent with the historical pattern of states enfranchising declarant aliens through the 1920s: in general, those states were arguably treating aliens who declared their intention to become U.S. citizens as state or local citizens for voting purposes. See Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1397–417 (1993).

286. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 686 (1966) (Harlan, J., dissenting). He took the view that these modern egalitarian notions should be a matter of legislative change rather than fundamental constitutional rights. *Id.* at 680–81. The majority disagreed. *Id.* at 666, 670. But either way, the intellectual tide had turned. Justice Black, who took Justice Harlan’s side, was similarly moved to note that he “share[d]” “the Court’s deep-seated hostility and antagonism . . . to making payment of a tax a prerequisite to voting.” *Id.* at 677 (Black, J., dissenting).

against group-based harm.<sup>287</sup> But by bringing voting and citizenship back into alignment, these movements essentially eliminated the conceptual category of second-class, nonvoting citizens; courts and political actors therefore came to treat voting as a fundamental individual right of each citizen, regardless of membership in any group. President Ford, in his remarks as he signed the crucial 1975 extension of the VRA that made permanent the nationwide ban on literacy tests and other devices,<sup>288</sup> notably eschewed all references to blacks, Jim Crow, or civil rights. He told a simpler story: “The right to vote is at the very foundation of our American system . . . There must be no question whatsoever about the right of each eligible American, each eligible citizen to participate in our elective process.”<sup>289</sup>

This individualistic aspect of the right to vote does not exhaust modern voting rights law. The movements for democratic inclusion that began with struggles to enfranchise women, blacks, and the poor have left us with a pluralistic legal regime. One layer of the law—the layer that is the main subject of this Article—protects individual citizens’ right to vote without any regard for group membership. A separate layer of the law protects racial and language minority groups against group-based harm. The Fourteenth Amendment and VRA both operate in each of these layers. When the Court established that voting is a fundamental right as well as a domain for group-based equal protection, or when President Ford framed the VRA extension as a matter of protecting the rights of “each eligible citizen,” these interpreters, among others, were establishing the first, more individualistic layer of voting rights law as we know it today. This layer of the law establishes a floor of individual inclusion: before resolving any questions of group disadvantage, our law ensures that each individual citizen has the right to vote.

#### *E. Marginalized Citizens and the Fundamental Right to Vote*

Democratic inclusion is much larger than voting.<sup>290</sup> Iris Young argued that “[s]ome of the most powerful and successful social movements of this century have mobilized around demands for oppressed and marginalized people to be included as full and equal citizens in their polities.”<sup>291</sup> Those movements were not exclusively about the right to vote. They were not even exclusively about politics. But the right to vote is a foundation for the kind of inclusion that these movements seek. It should not surprise us that *Tennessee v. Lane* repeatedly and extensively discussed voting rights even though it was not a voting case—it was a case about Congress’s

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287. See, e.g., Voting Rights Act § 2, 42 U.S.C. § 1973 (imposing liability for racial vote dilution); *supra* notes 43–47 and accompanying text (discussing the group-based character of the harm of vote dilution). These are not my subject here. More recent statutes such as the Help America Vote Act and the National Voter Registration Act have built a more universalist model of voting rights protection. See Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 *How. L.J.* 741, 743 (2006).

288. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 201, 89 Stat. 400, 400.

289. Gerald R. Ford, Remarks upon Signing a Bill Extending the Voting Rights Act of 1965, Aug. 6, 1975, 2 *PUB. PAPERS* 1118 (1975).

290. See *supra* notes 206–08 and accompanying text.

291. YOUNG, *supra* note 206, at 6.

power to promote the inclusion and equal citizenship of people with disabilities by protecting their fundamental rights to access courthouses and other government services.<sup>292</sup> Justice Ginsburg correctly observed that the statute at issue in *Lane*, Title II of the Americans with Disabilities Act (ADA), “is a measure expected to advance equal-citizenship stature for persons with disabilities.”<sup>293</sup> If it is to accomplish that end, then whatever else it does, it must protect a substantive right to vote.

In the years since Congress and the courts embraced a politics of universalism with regard to the right to vote, a series of marginalized groups—language minorities, people with disabilities, and homeless people, among others—have used the doctrinal and conceptual tools from the universalist turn of the 1960s and 1970s to press their own demands for the dignity of full political inclusion. Language minorities advanced their claims through the 1975 and 1982 VRA Amendments.<sup>294</sup> Disabled voters won a series of legislative provisions in the Voting Accessibility for the Elderly and Handicapped Act of 1984<sup>295</sup> and the National Voter Registration Act of 1993<sup>296</sup> aimed at making both registration processes and polling places more accessible and enabling voters who need assistance to receive it.<sup>297</sup>

Homeless voters won some court victories in the 1980s, as state and federal courts held that the Equal Protection Clause—as read through the key precedents from the universalist turn—protected homeless voters.<sup>298</sup> Regulations pursuant to the National Voter Registration Act then put in place a national procedure through which an individual registering to vote is permitted to indicate and describe a “non-

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292. 541 U.S. 509, 513 (2004). Specifically, it repeatedly discussed evidence that states had placed barriers in the way of the voting rights of people with disabilities. *See id.* at 525, 529, 530, 534 (discussing evidence that states have imposed barriers on the voting rights of people with disabilities as perhaps the leading item in the evidence supporting the Court’s holding that Title II of the ADA was a valid exercise of Congress’s powers under section 5 of the Fourteenth Amendment).

293. *Id.* at 536 (Ginsburg, J., concurring).

294. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 203, 89 Stat. 400, 402; Voting Rights Amendments of 1982, Pub. L. No. 97-205, § 4, 96 Stat. 131 (extending § 203).

295. Pub. L. 98-435, 98 Stat. 1678 (codified at 42 U.S.C. § 1973ee-1 to ee-3 (Supp. 1987)) (providing for registration and polling location accessibility and voting aids).

296. Pub. L. 103-31, 107 Stat. 77 (codified at 42 U.S.C. § 1973gg-5 (Supp. 1994)) (providing for voter registration by agencies serving people with disabilities).

297. The right to vote is also clearly covered under Title II of the ADA. *See* 42 U.S.C. § 12132 (2006) (barring discrimination by public entities on the basis of disability). *See generally* Michael E. Waterstone, Lane, *Fundamental Rights, and Voting*, 56 ALA. L. REV. 793, 824-44 (2005) (explaining the application of the ADA to voting and arguing that, after *Lane*, federalism should present no bar to enforcing the ADA against states to protect voting rights).

298. *See, e.g.*, *Pitts v. Black*, 608 F. Supp. 696, 708 (S.D.N.Y. 1984) (striking down under the Equal Protection Clause New York’s election law that had prevented homeless individuals without residential addresses from registering to vote); *Collier v. Menzel*, 221 Cal. Rptr. 110, 112, 117 (Cal. Ct. App. 1985) (holding that the Equal Protection Clause required registrar to accept registrations from homeless voters listing a city park as their residence).



traditional residence.”<sup>299</sup> Homeless voters face continuing barriers: some find themselves purged from the rolls every election cycle because they lack a valid mailing address, and some have no way to satisfy identification requirements.<sup>300</sup> In addition, as two advocates for the homeless explain, “[m]arginalized people have so often experienced systematic disenfranchisement” in various areas of life that they often do not believe they are entitled to vote.<sup>301</sup> Thus “[t]he misconception that voting is not allowed among homeless persons continues to prevail.”<sup>302</sup>

Because the right to vote is a central mechanism of democratic inclusion, it is particularly important to protect the right to vote of citizens who are already marginalized—treated as less than full and equal citizens—in other domains of political and social life. Such citizens may be less likely to be able to pursue other avenues of participation in politics or the public sphere. For example, compared to other citizens, they may not have the resources to contribute to political campaigns or to engage in persuasive forms of speech. Their marginalization may also mean that others do not listen to their speech. When other paths by which we might contribute to political and public life are closed off, the bare civic minimum—the vote—takes on a greater importance. The significance of the vote as a mark of civic inclusion is greatest for those whose inclusion might otherwise be in doubt.

Thus, for example, it is particularly important to protect the voting rights of citizens with mental disabilities. Advocates for such individuals began arguing in the 1970s that voting could be a “therapeutic and normalizing experience”<sup>303</sup> because “[i]n the United States, the legal right to vote symbolizes that you are a first-class citizen.”<sup>304</sup> Today, unlike physical disability, “mental incapacity” remains a ground on which federal law expressly permits states to remove citizens from the rolls.<sup>305</sup> This is not always a bad thing: the key line to be drawn is whether an individual is able to form a conscious intention to vote.<sup>306</sup> (It does not advance the aim of inclusion to give ballots to people who “do not understand the nature of voting” and therefore constitute “a pool of potential votes that might be cast by anyone with the ability to gain access to those individuals’ ballots.”)<sup>307</sup> However, states do not always draw the line this way. While state laws vary, and in general have improved greatly from the automatic disqualifications of “idiots” of the

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299. See 11 C.F.R. § 9428.4(a)(2) (2010).

300. See Tulin Ozdeger & Jewel Baltimore, *Homeless but Not Voiceless: Protecting the Voting Rights of Homeless Persons*, 40 CLEARINGHOUSE REV. J. POVERTY L. & POL’Y 313, 313 (2006).

301. Jennine Miller & Peter Gonzales, “*I Matter! I Vote!*”: *Overcoming the Disenfranchisement of Homeless and Formerly Homeless Voters*, 11 TEMP. POL. & CIV. RTS. L. REV. 343, 353 (2002).

302. *Id.*

303. Barbara Armstrong, *The Mentally Disabled and the Right to Vote*, 27 HOSP. & COMMUNITY PSYCHIATRY 577, 577 (1976).

304. *Id.* (quoting Robert Plotkin, Attorney, Mental Health Law Project).

305. See 42 U.S.C. § 1973gg-6(a)(3)(B) (2006).

306. This way of drawing this line, upon which I cannot improve, is Pam Karlan’s. See Pamela S. Karlan, *Framing the Voting Rights Claims of Cognitively Impaired Individuals*, 38 MCGEORGE L. REV. 917, 925 (2007).

307. *Id.*

past,<sup>308</sup> some states still automatically disenfranchise all adults who are under guardianship, rather than engaging in the necessary substantive inquiry into whether a given adult might, for example, be able to cast a vote even if he cannot manage his financial affairs.<sup>309</sup> Moreover, vast numbers of citizens with mental disabilities who are not under guardianship require accommodations or assistance to vote.<sup>310</sup>

These barriers to participation matter because, as the struggle for black enfranchisement demonstrated so conclusively, de jure barriers to voting are not the only way to exclude someone from the circle of full and equal citizens. Inclusion comes about when the procedures and requirements for voting are set up in such a way that the individual voter can actually cast her vote and have it count. This aim continues to require legislative action, but courts play an essential role as well.

#### F. Preservative of All Rights?

The Court has long emphasized that the right to vote is a “fundamental political right” because it is “preservative of all rights.”<sup>311</sup> But in what sense is the right to vote “preservative” of other rights? We typically understand the preservative mechanism to be political power: with the right to vote, individuals and groups can protect their other rights through normal politics. That argument is weak. As Owen Fiss has noted, as a practical matter the right to vote is *not* “preservative of all rights” and “[s]ometimes . . . is not even preservative of itself, as emphasized in the post-Reconstruction wave of disenfranchisement.”<sup>312</sup> Voting rights alone are insufficient to protect marginalized groups from the political will of a hostile majority.

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308. The landscape looked very different in the late 1970s. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 464 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part) (“As of 1979, most States still categorically disqualified ‘idiots’ from voting, without regard to individual capacity and with discretion to exclude left in the hands of low-level election officials.”); Note, *Mental Disability and the Right to Vote*, 88 YALE L.J. 1644, 1645–46 & n.7–15, 1658 n.81 (1979) (providing the survey cited by Justice Marshall in *Cleburne*). Still, a surprising number of older, bad laws remain in place. See Jennifer A. Bindel, Note, *Equal Protection Jurisprudence and the Voting Rights of Persons with Diminished Mental Capacities*, 65 N.Y.U. ANN. SURV. AM. L. 87, 92–97 (2009).

309. See Kingshuk K. Roy, *Sleeping Watchdogs of Personal Liberty: State Laws Disenfranchising the Elderly*, 11 ELDER L.J. 109, 113–20 (2003).

310. See Karlan, *supra* note 306, at 923.

311. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); see, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 115 (1980) (Marshall, J., dissenting); *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972); *Reynolds v. Sims*, 377 U.S. 533, 562 (1964).

312. Fiss, *supra* note 261, at 440. Nonetheless, this claim about voting rights and political power has served as a powerful argument for extending the franchise. See Martin Luther King, Jr., Give Us the Ballot—We Will Transform the South, Speech at the Lincoln Memorial During the Prayer Pilgrimage for Freedom (May 17, 1957), in *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.* 197, 197 (James Melvin Washington ed., 1986) (“Give us the ballot and we will no longer have to worry the federal government about our basic rights.”).

Perhaps this “preservative” claim, in its original early nineteenth century incarnation, is a leftover shard of a different argument that is harder for us to access today because we now have an overly outcome-focused, rational choice-inflected perspective on what the right to vote is about. In many state constitutional debates in the early nineteenth century, the vote was “so important” to poor, landless white men precisely because “it meant that they were *citizens*, unlike women and slaves, as they repeated over and over again. Their very identity as free males was at stake.”<sup>313</sup> As one speaker in these debates put it, the right of suffrage should not be understood in “its technical and confined sense, the right to vote for public functionaries” and elect candidates to office, but in a different and more conceptual sense: “Suffrage is the substratum, the paramount right” upon which the other rights of free citizens rest.<sup>314</sup> This formulation suggests that perhaps it was a bit of an anachronism to read “preservative of all rights” exclusively as a theory about political power. Perhaps instead the original idea was, at least in part, that “other rights” depended on a “substratum” of citizenship,<sup>315</sup> the right to vote was “fundamental” because it made citizenship real.

This Part has offered the beginning of an account of why the right to vote is fundamental: a story of democratic inclusion. This story departs radically from conceptions of the value of the right to vote that are rooted in rational choice models of one’s impact on an election outcome. That is part of what recommends this framework. The democratic inclusion story helps us see why some fight hard for their right to vote even though outcome-focused rational choice analysis inevitably concludes that an individual vote has little value.<sup>316</sup> On the flip side, the democratic inclusion story may also suggest at least two explanations for why some eligible voters do not vote. Some people who are confident in their full citizenship, and know their right to vote is entirely secure and unquestioned, may feel no particular need to exercise it. *Having* the right is what does the work of inclusion.<sup>317</sup> In contrast, other people may “have so often experienced systematic disenfranchisement” in various areas of life that they do not believe they are entitled to vote at all.<sup>318</sup>

When courts are not inclined to credit a plaintiff’s complaint of exclusion, they tend to fall back, as Judge Posner did in *Crawford*, on the view that the disenfranchisement was due to the would-be voter’s own negligence: such citizens “disfranchise themselves.”<sup>319</sup> It may be inevitable that when voters try and fail to vote because of some interaction between their individual circumstances and the

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313. SHKLAR, *supra* note 200, at 49 (emphasis added).

314. Speech by Lucas P. Thompson to the Virginia Convention (Nov. 20, 1829), in *DEMOCRACY, LIBERTY, AND PROPERTY: THE STATE CONSTITUTIONAL CONVENTIONS OF THE 1820’S*, at 395, 399–400 (Merrill D. Peterson ed., 1966); *see also* SHKLAR, *supra* note 200, at 50.

315. This part of the old argument I am tracing is the part that is least modern. Modern ideas of human rights demand that all persons, not only citizens, are rights bearers.

316. *See supra* note 192 and accompanying text.

317. *See* SHKLAR, *supra* note 200, at 27.

318. Miller & Gonzales, *supra* note 301, at 353.

319. *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007) (Posner, J.), *aff’d*, 553 U.S. 181 (2008).

actions of the state, courts look for something like comparative fault. It seems relevant to the issue of the severity of the burden: the easier it would have been for a voter to overcome a burden, the less severe the burden looks in retrospect.

But this kind of backward-looking inquiry can lead the analysis astray. It is important to recall that many of the barriers to voting that were dismantled in the great turn toward universalism of the 1960s and 1970s were not *de jure* barriers, but barriers that worked by “falsely ascrib[ing] personal deficiencies” to voters in order to justify their exclusion.<sup>320</sup> If we pick apart the chain of events that led to a would-be voter’s exclusion there is almost always *something* that the voter could have done differently. He could have stood in the correct line. He could have read the newspaper and found out that his address had been reassigned to a new polling place. He could have sent away for a birth certificate and then sought a non-driver’s identification card from the state. He could have reregistered after having been purged from the rolls. He could have made the decision to vote months ago, instead of tuning in to the election shortly before election day and suddenly deciding to vote. And so on. Identifying these deficiencies in the voter’s prior actions and choices does not necessarily mitigate the dignitary harm of exclusion from the circle of first-class, voting citizens. Indeed, particularly for a would-be voter whose full citizenship is already in question in other areas of his life, imputing fault may only underscore the implication that while some other people have earned the substantive right to vote, he has not.

Thus, when an eligible voter appears and tries to vote on an equal basis with his neighbors, the state should have to provide an adequate reason for refusing to let him do so—even if, at some earlier stage, there was something the voter could have done differently. There is no reason to privilege exclusively a distant *ex ante* perspective over the perspective of the would-be voter at the time she is trying to vote. Even if there is something the would-be voter could have done differently at some earlier stage, here he is now, asking to be included as a full citizen in the polity. If there is nothing he can do *now* that would cause the state to allow him to vote, that outcome may well be justified, but this burden on his right to full inclusion is significant enough that the state ought to offer a countervailing interest sufficient to justify not offering him any route by which he can vote.<sup>321</sup>

### G. Weighing the Burdens

In the next few years, in the wake of *Crawford*, courts will face a series of questions about how to weigh the severity of different burdens on the right to vote against competing structural interests. Courts will need to develop new precedents over time to shape these inquiries. The argument of this Part cannot anticipate all the issues that will arise as courts develop those precedents. Still, the argument of

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320. See SHKLAR, *supra* note 200, at 38.

321. Ellen Katz offers an ominous reading of *Crawford* and *López Torres* on this point. She argues that both decisions “concentrate on formal legal access, with little concern for the practical burdens that arise under the system.” Ellen Katz, *Withdrawal: The Roberts Court and the Retreat from Election Law*, 93 MINN. L. REV. 1615, 1631 (2009) (citation omitted). It remains to be seen whether this focus, so characterized, will guide future cases.

this Part has some significant implications for which questions ought to be at the heart of this future jurisprudence.

The weight a court ought to ascribe to a particular burden on the right to vote depends on both its “character” and its “magnitude.”<sup>322</sup> Magnitude is relatively straightforward: *How difficult* does the burden in question make it for the plaintiff to vote?<sup>323</sup> As Part II argued, the proper way to think about this question is in terms of the magnitude of the burden on particular voters—preferably, the plaintiffs—rather than a general assessment of the number of individuals who will be affected. The “character” of the burden is equally important. That is the aspect of the analysis that the argument of this Part helps illuminate.

Different conceptions of why the right to vote matters yield starkly different accounts of which burdens on the right to vote are “severe” in character. If the right to vote mattered *only* as part of the playing field of political competition among candidates and parties, then it might make sense to narrow the initial inquiry to questions of whether particular challenged laws were passed with the intent or effect of making that partisan playing field uneven. If the right to vote were entirely about election outcomes, then disenfranchisement would only be a concern to the extent that it was outcome altering. But if, as this Part has argued, the right to vote matters because of its deep links to equal citizenship and inclusion, then neither of those threshold questions is appropriate. Instead, all disenfranchisement matters. But burdens that have the character of denying or calling into question individual voters’ equal citizenship ought to weigh especially heavily on the individual-rights-versus-state-interests balancing test.

Thus, courts ought to weigh especially heavily those practices that, like the problematic “citizenship” tests of an earlier era, call eligible voters’ full citizenship into question on election day. This category includes, for example, challengers inside the polls who publicly question individual voters’ eligibility and voter registration rules that cause some eligible voters to be turned away on election day, unable to cast ballots.

From the point of view of equal citizenship, courts also ought to weigh especially heavily those burdens that are linked to something about a voter that might cause her to be treated as less than a full citizen in other areas of political and

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322. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (stating that the weight of a burden on the right to vote depends on both “the character and magnitude of the asserted injury”).

323. There are some aspects of this question that are not so straightforward, however. For example, courts will have to grapple with the how to weigh the “magnitude” of a burden that prevents a voter from being able to vote at her polling place on election day, but allows her to cast an absentee ballot. *Compare* *Democratic Party of Ga. v. Perdue*, No. S10A1517, 2011 WL 767753, at \*4, \*7 (Ga. Mar. 7, 2011) (finding the burden of a photo identification law to be “minimal, reasonable, and nondiscriminatory” in part because “an elector who does not wish to obtain a free photo ID can vote by absentee ballot by mail”), *with id.* at \*9 (Benham, J., dissenting) (arguing against this conclusion because a voter has “the right to be among one’s fellow citizens at the polling precinct and to openly exercise his or her right to participate in a democracy” and arguing that “[t]he fact that one does not have the where-with-all to obtain a government-issued photographic identification should not relegate him or her to casting his or her ballot in secret and in absentia”).

social life—for example, that she is homeless, or has a disability, or is old, or young, or poor. The idea here is still to protect the individual plaintiffs, not to introduce a threshold inquiry of whether a group's interests have been harmed. Indeed, a focus on group interests may sometimes make the individual claim invisible. For example, suppose a polity chooses voting regime A (say, touch screen machines) over voting regime B (say, optical scan), and for the majority of voters with disabilities, A was indeed the best choice. Nonetheless, if an individual voter cannot vote under regime A for reasons linked with *her* disability, a court ought to weigh her disenfranchisement relatively heavily and create or expand an alternative path toward casting a ballot unless some relevant state interest weighs very heavily in the other direction. If the meaning of the right to vote is in part that it makes full citizenship real, then courts ought to weigh heavily any burdens that instead reinforce the contrary proposition that because a person has a disability she is something less than a full, equal citizen.

The right to participate is multi-layered. One layer is simply objective: Was a voter able to cast a ballot and have it counted? But the subjective experience of disenfranchisement also matters. Imagine three different scenarios. First, a machine tabulation problem prevents a small number of randomly-selected ballots from being counted. The voters never find out. Second, a poor ballot design creates a trap for the unwary: it causes some ballots, the same number as in the first scenario, to go uncounted, and they tend to be the ballots of voters who are less educated and/or less literate than other voters. Again, those whose ballots are invalidated never find out. Third, imagine a case in which the problem is with the registration system rather than the ballot. Here, the same voters as in the second scenario are blocked from voting, but the experience of it is different. Instead of walking away thinking that they had cast a ballot, they reach the front of the line at the polling place, discover that they are not in fact registered, and are turned away.<sup>324</sup>

Each of these three scenarios involves burdens on the individual right to vote. The magnitude of the burdens is similar: in each case, the voters were prevented from casting ballots. (While in scenarios two and three there is more that a voter might have done, *ex ante*, to avoid disenfranchisement, let us assume that the disenfranchised voters were not capable of doing what was required.) However, the character of the burdens is different. In the first and second scenarios, the voters were objectively disenfranchised but experienced no subjective injury. In the first scenario, there also was no relationship, no correlation or causal link, between the disenfranchisement and any characteristics or group memberships of the voters. Those disenfranchised by the tabulation error were not particularly marginalized voters; they were just random individuals. The disenfranchisement involved in the first scenario should therefore not strike courts as being of a particularly serious character. A court might therefore find, for example, that the expense involved in replacing these voting machines was sufficient to justify the state's decision to retain them despite occasional problems of the type involved in the first scenario. The second scenario is different because here the disenfranchisement falls disproportionately on less educated, less literate voters. Because these voters are likely to be marginalized in some other areas of political and social life, courts

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324. Assume there is no election-day registration.

should find this burden to have a more troubling character. The character of the burden in the third scenario is still more problematic because of an additional layer: voters also have the experience of being turned away and treated as less than full, equal citizens. In these cases, courts ought to require a more pressing interest of the state to outweigh the interests of these citizens.

The problematic character of the burdens in scenarios two and three can be restated in terms of groups: we might frame lack of education or illiteracy (or relative illiteracy) as the boundary of a group and find that those within the boundary are facing disproportionate burdens. A court could, but need not, pursue that analytic path. It is not necessary to draw a clear line demarcating the literate from the illiterate, estimate the relative disenfranchisement rates of those on either side of the line, or even decide whether this is a group that merits heightened statutory or constitutional protection in the first place, to see that the burden on the fundamental right to vote in these scenarios has a problematic character.<sup>325</sup> The individual-rights-versus-state-interests framework allows courts to avoid some of the complex social-scientific questions that arise when plaintiffs are stand-ins either for groups or for the polity as a whole. Instead, this doctrinal framework allows courts to begin by doing something more familiar: focusing on the circumstances of the plaintiffs who are actually before the court and examining the character and magnitude of the burdens they face.

#### CONCLUSION

When we view election law claims through a structural lens, “the focus is not on the quantum of individualized harm involved.”<sup>326</sup> Instead the focus is on either “the qualitative justifications for the state’s exercise of authority”<sup>327</sup> or the legal regime’s effects on aggregate, structural variables.<sup>328</sup> This shift in focus—the structural turn—has been the single most important development so far in the field of election law scholarship. Many problems in election law are not primarily about the interests of individual voters. The structural perspective has brought many of those important problems into sharp relief. But the structural lens has its limits. It blurs the stakes in a different, growing set of controversies in which, at least on one side, what is at stake is the individualized harm of being excluded from the circle of full and equal citizens. Parts I and II of this Article offered a framework for determining which controversies are which. By disaggregating the interests of individuals, groups, and the polity as a whole, we can specify when a structural approach clarifies and when it obscures.

A stubborn gap remains, however, between the perspectives of election law scholars and the practices of courts. With rare exceptions,<sup>329</sup> courts have not

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325. Cf. Yoshino, *supra* note 211, at 774–76, 792–97 (arguing that liberty-based dignity claims can serve as a response to courts’ anxieties about recognizing new group-based equality claims).

326. Pildes, *supra* note 8, at 729.

327. *Id.*

328. See *supra* notes 13–19 and accompanying text.

329. Justice Breyer’s dissenting opinion in *Vieth* is perhaps the best example of a rare judicial attempt to address a “serious democratic harm” directly. *Vieth v. Jubelirer*, 541 U.S.

explicitly followed structuralist scholars' lead—even where structuralist reasoning is warranted. Instead they have applied the individual-rights-based tools of equal protection law, primarily the individual-rights-versus-state-interests doctrinal framework. On the remedial side, courts have been noticeably uncomfortable undertaking structural reforms.<sup>330</sup> And yet a few elements of structuralism seem to be creeping in—often just where they are not needed. We have seen courts counting up how many individuals' rights are burdened instead of determining the severity of the burdens; we have seen courts adopting questionable arguments recharacterizing structural problems such as fraud prevention as rights violations.

The way forward here is to disentangle the new vote denial claims from other kinds of election law claims in which the interests on both sides are structural. Structuralist scholars' longer-term problem—how to convince courts to view even the most structural questions through an explicitly structural lens—remains formidable. But the new vote denial claims are different. In these controversies, courts are uniquely equipped to do what is asked of them. Their role is to adjudicate plaintiffs' claims, treating plaintiffs' individual rights not as trumps but as distinct interests to be balanced carefully against the structural interests of the state. This balancing is not without its own difficulties, the most obvious of which stem from the incommensurability of the competing interests to be weighed. But this is the doctrine the Court has given us, and it has the real virtue of correctly identifying the main interests at stake on both sides. Courts and litigants now have an opportunity to develop this doctrine in a way that takes account of the equal citizenship dimension of the individual right to vote, building precedents that clarify which burdens ought to weigh more heavily against the state's competing interests. Such a doctrine will enable courts to focus on individual claims that partisan legislators may not see. Courts can thereby act as an essential safety valve, protecting individuals from improper exclusion from the circle of full, equal citizens.

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267, 355 (2004) (Breyer, J., dissenting).

330. See *supra* notes 113–14 and 178 and accompanying text.