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**Undue Burdens on Voter Participation  
(Is the Right to Vote Like the Right to an Abortion?)**

Christopher S. Elmendorf

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Undue Burdens on Voter Participation  
(Is the Right to Vote Like the Right to an Abortion?)

Christopher S. Elmendorf\*

PRELIMINARY DRAFT (January 1, 2008)

Abstract. During October Term 2007, the Supreme Court will hear its first case in more than thirty years in which the plaintiffs maintain that the state has unconstitutionally hindered eligible voters' access to the polls. The case, *Crawford v. Marion County Election Board*, presents a facial challenge to Indiana's recently enacted photo ID requirement for voting. Relying in part on the Court's recent abortion jurisprudence, the U.S. Solicitor General has filed an amicus brief arguing that the Court should reject the *Crawford* plaintiffs' facial claim while inviting future as-applied challenges by individual voters or precisely defined classes of voters for whom the ID requirement may operate as a severe impediment to voting. This essay argues the SG's abortion/as-applied model for voter participation claims is a Siren's song: enormously appealing and, if followed, sure to lead the federal courts to a place they will no doubt regret: mired in a bog of politically fraught questions about the details of the voting process, and bereft of manageable rules for decision. The best hope for avoiding the bog, I argue, is to treat the right to vote as a right whose doctrinal content derives from the citizenry's collective interest in being governed by representatives who are accountable to "the people," pursuant to Article I and the Seventeenth Amendment. But this will require abandoning the nominal status of the right to vote as right that is merely or primarily individual and personal in nature.

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## INTRODUCTION

The subtitle of this essay is not facetious. During October Term 2007, the Supreme Court will hear its first case in more than thirty years in which the plaintiffs maintain that the state has unconstitutionally hindered eligible voters' access to the polls.<sup>1</sup> For the first time ever, the Court will face the question of how its contemporary, "severe/lesser burden framework"<sup>2</sup> for constitutional challenges to electoral mechanics is properly applied to voter participation claims.<sup>3</sup> It is well settled that severe burdens on voting and associational rights trigger strict scrutiny, and that lesser burdens are subject to a much laxer balancing test.<sup>4</sup> This framework was developed in cases about ballot access and the associational rights of political parties, however, and it remains to be seen how the Court will characterize burdens in cases about voters' access to polls. There is a good chance that the Court, and especially the Justice in the middle of the Court, will be inclined to approach this problem by employing the model of fundamental rights adjudication espoused in *Gonzales v. Carhart*,<sup>5</sup> the Court's latest opinion concerning undue burdens on the right to an abortion.

The pending case, *Crawford v. Marion County Election Board*,<sup>6</sup> is a facial challenge to Indiana's photo ID requirement for voting, thought by many to be the strictest voter identification law in the nation. This law was enacted on a straight a party line vote by a Republican-controlled legislature and, if the plaintiffs' predictions are borne out, it will result in the de facto disenfranchisement of large numbers of voters, most of whom would have supported Democrats.

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<sup>1</sup> The last such case was *O'Brien v. Skinner*, 414 U.S. 524 (1974).

<sup>2</sup> This description of the framework was helpfully provided by Justice Thomas in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999). *See id.* at 207-08 (Thomas, *J.*, concurring in the judgment). On the substance of the framework, see generally Christopher S. Elmendorf, *Structuring Judicial Review of Electoral Mechanics: Explanations and Opportunities*, 156 U. PA. L. REV. 313 (Dec. 2007) (hereinafter "Elmendorf, *Structuring*").

<sup>3</sup> The Court has said that this framework applies in challenges to "the registration and qualifications of voters, the selection and eligibility of candidates, [and] the voting process." *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). Following the usage introduced in my earlier work, see Elmendorf, *Structuring*, *supra* note 2, I will use the shorthand "electoral mechanics" to refer to these regulations of the electoral process.

<sup>4</sup> *See, e.g.*, *Clingman v. Beaver*, 544 U.S. 581 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick*, *supra*.

<sup>5</sup> 127 S.Ct. 1610 (2007).

<sup>6</sup> 472 F.3d 949 (7th Cir.), *cert. granted* 128 S. Ct. 33 (2007).

The Supreme Court has long said that the right to vote is a personal or individual right.<sup>7</sup> If this is so, then the question of what is a “severe” or “undue” burden on the right to vote—the predicate for strict scrutiny—should be answered from the point of view of the individual voter-plaintiff. Here *Gonzales* is instructive. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>8</sup> the seminal 1992 decision affirming that abortion falls within the zone of privacy interests protected by the Constitution, the Court said that a pre-viability abortion restriction is facially invalid because unduly burdensome if “in a large fraction of the cases in which it is relevant, it will operate as a substantial obstacle to a woman’s choice to undergo an abortion.”<sup>9</sup> *Gonzales* refined the *Casey* calculus in two respects. First, Justice Kennedy writing for the majority and Justice Ginsberg writing for the four dissenters concurred that the “denominator” (for purposes of the “large fraction” test) is a single woman seeking an abortion.<sup>10</sup> An abortion restriction is unconstitutional vis-à-vis *any woman* for whom it would create a significant health risk, however large or small the number of other women affected. Second, the majority held that “the proper means to consider [health] exceptions [to an abortion restriction] is by as applied challenge” “in a discrete case,” at least if there is uncertainty about the medical necessity of the restricted abortion procedure.<sup>11</sup> Facial challenges were strongly disfavored.<sup>12</sup>

It does not take a far-reaching imagination to see that *Gonzales* provides the Court with a simple means of disposing of *Crawford*. Reasoning that the right to vote, like the right to an abortion, is an individual right, the Court could uphold the Indiana ID requirement in the posture of the present case—a facial challenge—while inviting future as-applied challenges by precisely defined classes of voters for whom obtaining ID would pose a substantial hardship. Looking to the future, the Court might suggest that in a meritorious as-applied challenge, the proper remedy would be an order directing the state’s election administrator to count the plaintiffs’ provisional ballots notwithstanding their failure to show qualifying photographic ID. Per *Ayotte v. Planned Parenthood of Northern New England*,<sup>13</sup> this remedy would “nullify [no] more of [the] legislature’s work than is necessary”.<sup>14</sup> it would leave the state’s ID requirement in place, supplemented by a

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<sup>7</sup> See *infra* TAN \_\_.

<sup>8</sup> 505 U.S. 833 (1992).

<sup>9</sup> *Id.* at 893.

<sup>10</sup> See *infra* TAN \_\_.

<sup>11</sup> *Gonzales*, 127 S. Ct. at 1638-39.

<sup>12</sup> *Id.*

<sup>13</sup> 546 U.S. 320 (2006).

<sup>14</sup> *Id.* at 329.

minimally intrusive remedy that piggybacks on the existing federal statutory right to cast a provisional ballot. I shall refer to this contemplated decision as the *Gonzales* model for constitutional voting rights. A decision along these lines has been promoted by the Solicitor General in his *Crawford amicus* brief.<sup>15</sup>

We shall see that the *Gonzales* model for disposing of *Crawford* is likely to be extremely attractive to the Justices *if* they frame the problem before them as how to manage the voter ID litigation, in isolation from other voter participation issues. (This is, unfortunately, the frame provided by the briefing in the case.) The attraction is rooted in (a) the prospect of a modest and substantially unanimous opinion, in a case that otherwise threatens to divide the Justices on party lines in a manner that looks like *Bush v. Gore* redux and draws attention to the apparent pattern of judicial partisanship in the lower courts' voter ID decisions; (b) faith in the power of concrete facts to dislodge lower court judges from their ideological priors; and (c) a desire to affirm the familiar, unthreatening status of the right to vote as an ordinary individual right, while enabling its use as an indirect means of enforcing structural norms about how the democratic process should function.

I shall further argue, however, that the *Gonzales* model of voting rights ought to be rejected by any Justice who worries about excessive judicial entanglement in the minutiae of election administration or symbolic partisan conflicts; who aspires to follow precedent; or who takes seriously the idea that judicially enforced constitutional rights ought to be grounded in the Constitution proper rather than in the Justices' personal ideas about what is fair or just.

Rejecting the *Gonzales* model will not be easy, however. To be sure, there are several ways for the Court to dispose of *Crawford* while dodging the question of what effects suffice to classify a voting requirement as a "severe restriction," and hence subject to strict scrutiny. But each such move is problematic. Because of this, *Crawford* could turn out to be the rare and pivotal case in which the Court formally acknowledges that the constitutional right to vote derives much of its content from the collective interest in representative self government, and that "burdens" on the right should generally be assessed accordingly. To that end, the last part of this paper outlines a doctrinal approach for implementing this idea in constitutional challenges to the administrative logistics of the voting process. As the predicate for strict scrutiny, plaintiffs should be required to establish (1) that the challenged requirements are not common (i.e., are not found in more than half of the states); and (2) that replacement of the

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<sup>15</sup> Brief for the United States as Amicus Curiae Supporting Respondents at 10-18, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (Nos. 07-21 & 07-25) (hereinafter "SG's Brief").

challenged requirements with commonplace alternatives would cause the voting public—those persons who cast valid, duly recorded ballots elections—to become substantially more representative of the eligible electorate as a whole. Rational basis would be the default standard of review, applied whenever plaintiffs fail to make the threshold showing (or a suitable alternative threshold showing). The proposed approach is constitutionally discernable and judicially manageable, and it offers some hope for compromise between the Court’s liberal and conservative wings.

I shall proceed as follows. Part I frames the political/institutional challenge that the Court faces in *Crawford*, in light of the emerging pattern of conceptually disparate and seemingly partisan lower court decisions in the voter ID litigation. The task at hand is to forge a decision (1) that does not look like a repeat of *Bush v. Gore*, with the Court divided five-to-four along ideological lines in case that bears on the partisan balance of power in the elected branches; (2) that establishes constraining rules of decision for the lower courts to apply in pending and future voter participation cases; and (3) that is grounded in the Constitution and relevant precedents. Parts II and III take up the substance, the initial appeal, and the ultimate weaknesses of the *Gonzales* model for constitutional voting rights adjudication. Turning next to the alternatives, Part IV considers the principal candidates for a dodge disposition in *Crawford*—one that would remain silent on the nature of the right to vote—and finds them all wanting. Part V presents my preferred “skewing effects” alternative to the *Gonzales* model, and Part VI answers objections.

## I. THE CHALLENGE OF *CRAWFORD*

The challenge of *Crawford* is first and foremost political. The infamous 2000 presidential election ushered in new era of legislative attention to the mechanics of the voting process. Democrats have generally sought to enhance voters’ access to the polls; Republicans have focused on fraud prevention. Some bills, like the national Help America Vote Act (HAVA),<sup>16</sup> were compromise measures enacted by large, bipartisan majorities. Many others, however, were pushed through on party-line votes and signed into law by a governor affiliated with the dominant party in the legislature. Among the most contentious have been Republican enactments that establish photographic identification requirements for voting. Of these, Indiana’s is widely considered the most restrictive in the nation.

ID critics who lost in the legislative arena quickly turned to the courts, with mixed results. Photo ID requirements have been enjoined in Georgia,<sup>17</sup>

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<sup>16</sup> Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

<sup>17</sup> Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

Missouri,<sup>18</sup> and New Mexico,<sup>19</sup> and allowed to take effect in Arizona,<sup>20</sup> Georgia,<sup>21</sup> Indiana,<sup>22</sup> and Michigan.<sup>23</sup> Nearly all of the opinions to date have been issued by federal district courts, or state courts. There are only two decisions so far from the federal circuit courts, and one of the two is but a perfunctory affirmance of the district court's denial of a preliminary injunction.<sup>24</sup>

It is nonetheless possible to make some preliminary observations about the law as it is developing. Two things stand out. First, there has been a proliferation of doctrinal approaches to the threshold question of whether the challenged restriction “severely” burdens the right to vote, and as such warrants strict scrutiny.<sup>25</sup> Some judges have evaluated burdens in terms of their consequences for voter turnout; the best example is Posner’s opinion for the Seventh Circuit in *Crawford*.<sup>26</sup> Other judges have linked burden

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<sup>18</sup> Weinschenk v. State, 203 S.W. 3d 201 (Mo. 2006)

<sup>19</sup> ACLU of New Mexico v. Santillanes, No. Civ. 05-1136, 2007 WL 782167 (D.N.M. Feb. 12, 2007).

<sup>20</sup> Gonzalez v. Ariz., No. CV 06-1268-PHX, 2006 WL 3627297 (D. Ariz. Sept. 11, 2006), *aff’d*, 485 F.3d 1041 (9th Cir. 2007).

<sup>21</sup> Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2007).

<sup>22</sup> Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006), *aff’d sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir.),

<sup>23</sup> *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).

<sup>24</sup> Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007). The entirety of the Ninth Circuit’s analysis of the constitutional voting rights claim is as follows:

The evidence that Arizona citizens may be burdened by the new law consists of four declarations from individuals who are not parties to the litigation. These declarants object that obtaining the documentation sufficient to register would be “a burden.” Because the vast majority of Arizona citizens in all likelihood already possess at least one of the documents sufficient for registration, whether the law severely burdens anyone, as the district court observed, is an “intense[ly] factual inquiry [.]” requiring development of a full record. We therefore agree with the district court that, at this stage in the proceedings, appellants have not raised serious questions going to the merits of this argument.

*Id.* at 1050 (internal citation omitted).

<sup>25</sup> The characterizations of the various doctrinal approaches that I offer in this paragraph are my own. They reflect my best effort to draw out the essential themes from each of the opinions to date, but judicial opinions are not always clear or well thought out, and I readily concede that a judge might disagree with my characterization of his or her handiwork.

<sup>26</sup> When adjudicating constitutional challenges to an ID requirement for voting, Posner wrote, a judge must weigh “the effect of requiring . . . ID in inducing eligible voters to disfranchise themselves,” against the number of instances of impersonation fraud that the ID requirement successfully prevents. Crawford, 472 F.3d at 953-54. Judge Posner emphasized, in upholding the law, that “the plaintiffs have not shown that there are fewer impersonations than there are eligible voters whom the new law will prevent from voting.” *Id.*

severity to a normative conception of what the state may reasonably expect of citizens who wish to vote. Burdens not exceeding what the reasonable voter can reasonably bear are de minimis as a matter of law. Any corresponding exclusion is said to be the voter's fault, and not of constitutional moment.<sup>27</sup> Still other judges have tied scrutiny levels to the apparent purpose behind the law (was it meant to exclude certain voters because of the way they may vote?),<sup>28</sup> the form that the burden takes (is it

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Several other judges presiding over voter ID lawsuits have emphasized consequences for turnout in their rulings, although none has been as single-minded about this as Posner. For example, the district judge in *ACLU of New Mexico v. Santillanes*, No. Civ. 05-1136, 2007 WL 782167 (D.N.M. Feb. 12, 2007), entered a preliminary injunction against the City of Albuquerque's photo ID requirement after finding that "surprise or confusion about the . . . requirement and the bureaucratic hurdles it imposes is likely to discourage—if not disenfranchise—a significant number of Albuquerque voters . . . on the next municipal election day." *Id.* at \*31. *See also* *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). In characterizing as severe the burden of Georgia's first photo ID requirement for voting, the court wrote that it would "prevent [many of] Georgia's elderly, poor, and African-American voters from voting," and speculated that the availability of absentee voting (for which no ID was required) wouldn't cure the problem because "[t]he majority of voters—particularly those voters who lack Photo ID—would not plan sufficiently enough ahead to vote via absentee ballot successfully." *Id.* at 1364-65. It should be noted, however, that there are non-consequential strains in both of these opinions, and that the court in the Georgia litigation subsequently veered in a moralistic direction (see *infra* note 27 and accompanying text).

<sup>27</sup> This "reasonable voter" paradigm is nicely illustrated by the latest opinion in the federal litigation over Georgia's photo ID requirement for voting. *See* *Common Cause/Ga. v. Billups*, --- F. Supp. 2d ---, 2007 WL 2601438 (N.D. Ga. 2007). The district court determined that the burden of Georgia's requirement simply was not "appreciable," given (1) that Georgia authorized no-excuses absentee voting, without ID; (2) that Georgia made free voter-ID cards available to any registered voter who needed one, and who came forward with minimal documentary evidence of his or her identity; and (3) that Georgia had made "exceptional efforts" to contact voters who lacked state-issued driver's licenses and inform them of the new requirement. *Id.* at \*44-47. Under these circumstances, any eligible voter who failed to cast a valid ballot had only himself to blame. For other illustrations of the "reasonable voter" approach, see, e.g., *Barilla v. Ervin*, 886 F.2d 1514, 1524-25 (9th Cir. 1989) (applying lenient review to 20-day advance registration requirement, reasoning that voters were "disenfranchised by their willful or negligent failure to register on time"); *ACORN v. Bysiewicz*, 413 F. Supp. 2d 119 (D. Conn. 2005) (holding that plaintiffs' evidence showing that elimination of Connecticut's 14-day advance registration requirement would increase the rate of voter participation by 5.5% was beside the point, since modest registration requirements simply do not constitute "severe" burdens); *Friedman v. Snipes*, 345 F. Supp. 2d 1356 (S.D. Fla. 2004) (holding that state rules that merely require voters to "act promptly" in requesting and returning absentee ballots constitute "light" imposition).

<sup>28</sup> Dissenting from the Seventh Circuit's denial of rehearing en banc in *Crawford*, Judge Diane Wood proposed: "[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny." 484 F.3d 436, 437 (2007).

fairly analogized to an express financial condition on the franchise?);<sup>29</sup> or the discretion vested in pollworkers (does the law facilitate arbitrarily disparate treatment of similarly situated voters?).<sup>30</sup>

In addition to conceptual proliferation, the other thing defining characteristic of the lower court opinions is, as Rick Hasen has emphasized, the appearance of judicial partisanship.<sup>31</sup> In case after case, judges have split along partisan lines. Democratic judges vote to invalidate reforms enacted by Republican-controlled legislatures; Republican judges come down the other way.<sup>32</sup> By my count, there have been 14 votes by Democratic judges against the constitutionality of photo ID requirements, and only 3 votes indicating that the requirement at issue is permissible. For Republicans judges, the respective numbers are 3 (against constitutionality) and 15 (for constitutionality). A full breakdown of the judicial votes is provided in the Appendix.

To be sure, there have been some notable cross-party judicial votes.<sup>33</sup> But the overwhelming pattern is one in which nominally independent judges

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<sup>29</sup> *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366-70 (N.D. Ga. 2005) (holding that first version of Georgia’s photo ID requirement for voting was tantamount to a poll tax because the state charged fees for the one form of qualifying ID it made available to all citizens); *Weinschenk v. State*, 203 S.W. 3d 201, 213-14 (Mo. 2006) (applying strict scrutiny, pursuant to state-law version of the severe/lesser burden test, because, inter alia, “[the] Photo ID requirement requires payment of money to exercise the right to vote”).

<sup>30</sup> *Women Voters of Albuquerque/Bernalillo County, Inc. v. Santillanes*, --- F.Supp.2d ---, 2007 WL 782167 at \*25-28 (D.N.M. 2007) (suggesting that disparate treatment of even a “small percentage” of voters, pursuant to a vague standard regarding what forms of ID qualify for voting purposes, may be enough to trigger strict scrutiny).

<sup>31</sup> Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 39-43 (2007); Brief of Amicus Curiae Professor Rick Hasen in Support of Petitioners at 3, 14-16, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (Nos. 07-21, 07-25) (hereinafter, “Hasen Brief”).

<sup>32</sup> By “Democratic Judge” and “Republican Judge,” I mean to refer to the political party with which the judge is most visibly associated. In the case of federal judges, that will usually be the party of the appointing president; in the case of state court judges elected in partisan elections, it will be the party in whose name the judge campaigned for office.

<sup>33</sup> For example, after entering three successive preliminary injunctions against Georgia’s ID requirements for voting, Democratic appointee Harold L. Murphy held a bench trial and then wrote an opinion sustaining the Georgia law in which he substantially follows the analysis of the Republican appointee Sarah Evans Barker’s opinion sustaining Indiana’s photo ID requirement. See *Common Cause/Ga. v. Billups*, 504 F. Supp. 2d 1333, 1380-83 (N.D. Ga. 2007). Similarly, Democratic appointee Roslyn O. Silver denied a preliminary injunction against Arizona photo ID requirement for registration and voting, making it very clear that she would not strike down the law absent empirical proof of substantial exclusionary effects. See *Gonzalez v. Ariz.*, No. 06-1268 (D. Ariz. Sept. 11, 2006). Conversely, Republican appointee M. Christina Armijo preliminarily enjoined Albuquerque’s photo ID requirement without demanding any social scientific evidence. See *ACLU of New Mexico v. Santillanes*, No. Civ. 05-1136, 2007 WL 782167 (D.N.M. Feb. 12, 2007).

do the bidding—or appear to do the bidding—of the political party with which they are associated. Exacerbating this appearance is the rhetoric with which some judges have explained their votes. Republican appointee Richard Posner wrote sardonically of voters who might “disenfranchise themselves” rather than “go to the bother” of obtaining the photo ID required by Indiana law.<sup>34</sup> Judge Terrence Evans, a Democratic appointee, began his dissent in the same case by lambasting the ID requirement as “a not-too-thinly-veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic.”<sup>35</sup> The lower court judge, a Republican appointee, had been even less decorous. She opened her opinion by ridiculing the plaintiffs as losers in the political arena who, “in moving to [the] judicial forum, . . . failed to adapt their arguments to the legal arena.”<sup>36</sup> The plaintiffs’ claims, she continued, were based on the “assumption that the Court should give [the Constitution] an expansive review based on little more than their own personal and political preferences.”<sup>37</sup> Later on, she characterized the plaintiffs’ effort to build a “cumulative effects” argument—a type of argument that Justices O’Connor and Breyer had invited in a recent election law opinion<sup>38</sup>—as “resembl[ing] the college student ‘wet Kleenex’ prank of yore in which as entertainment, a soggy wet tissue mass is thrown against the dorm room wall to see if it will stick.”<sup>39</sup>

Tempers boiled over in the Michigan Supreme Court, which split five-to-two along partisan lines in advising that Michigan’s new photo ID requirement for voting is facially permissible. The majority, after concluding its constitutional analysis, wrote that it would “pause . . . to briefly address some of the more inflammatory and emotional arguments made in Justice Cavanagh’s dissent.”<sup>40</sup> In six short paragraphs, the majority variously accused the dissent of offering “simply facetious,” “overwrought,” and (again) “emotional” arguments.<sup>41</sup> And then this: “When all other arguments are unavailing, resorting to a claim of racial discrimination is a frequent substitute. Unfortunately, the [sic] Justice Cavanagh has chosen this tack.”<sup>42</sup>

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<sup>34</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

<sup>35</sup> *Id.* at 954.

<sup>36</sup> Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (N.D. Ind. 2006).

<sup>37</sup> *Id.*

<sup>38</sup> Clingman v. Beaver, 544 U.S. 581, (2005) (O’Connor, J., concurring).

<sup>39</sup> 458 F. Supp. 2d at 830.

<sup>40</sup> *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007), slip op. at 41.

<sup>41</sup> *Id.* at 41-46.

<sup>42</sup> *Id.* at 45.

Justice Cavanagh, in turn, resorted to citing *editorials* from the famously left-leaning *New York Times* as authority for such propositions as:

- In partisan political circles, “the pursuit of voter fraud is code for suppressing the votes of minorities and poor people.”<sup>43</sup>
- [W]hen viewed objectively, the claim of “voter fraud” has repeatedly been exposed as a tactic used to suppress the votes of minorities and the poor.<sup>44</sup>
- “There is no evidence of rampant voter fraud in this country.” Instead, [such] allegations have been used as an excuse to pass legislation that will suppress the votes of the poor, the elderly, and minorities.<sup>45</sup>

The majority, wrote Justice Cavanagh, “[chose] to ignore [such] realities” “simply because it could not then flippantly respond that the dissent is raising a hollow claim of racism.”<sup>46</sup> As yet, no conservative judge has treated the editorial page of the *Wall Street Journal* as the authoritative arbiter of disputed facts, but perhaps that lies just around the bend.

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The emerging pattern of judicial partisanship and recrimination in the voter ID cases is worrying for two reasons. It threatens, first, to undermine public acceptance of judicial legitimacy. Political scientists have repeatedly shown that the U.S. Supreme Court, at least, enjoys a “reservoir of support” among the mass public that is substantially independent of citizens’ agreement with the merits of particular court rulings.<sup>47</sup> Sometimes labeled “diffuse support,” this willingness to accept judicial judgments with which one disagrees and to defend the institution of judicial review seems connected to citizens’ perception of the Court as a distinctly legal, as opposed to political, institution.<sup>48</sup> Political scientists have speculated that the superficial trappings of legality—the black robes, the stylized modes of

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<sup>43</sup> *Id.* (quoting Editorial, *Phony Fraud Charges*, N.Y. TIMES, Mar. 16, 2007).

<sup>44</sup> *Id.* at 14 (citing Editorial, *Phony Fraud Charges*, N.Y. TIMES, Mar. 16, 2007) (Cavanagh, *J.*, dissenting).

<sup>45</sup> *Id.* at 15 (quoting Editorial, *Why This Scandal Matters*, N.Y. TIMES, May 21, 2007).

<sup>46</sup> *Id.* at 21-22.

<sup>47</sup> See, e.g., Gregory A. Caldeira & James L. Gibson, *The Etiology of Public Support for the Supreme Court*, 36 AM. J. POL. SCI. 635 (1992).

<sup>48</sup> *Id.*; see also John M. Scheb II & William Lyons, *Judicial Behavior and Public Opinion: Popular Expectations Regarding the Factors That Influence Supreme Court Decisions*, 23 POL. BEHAV. 181 (2001); John M. Scheb II & William Lyons, *The Myth of Legality and Public Evaluation of the Supreme Court*, 81 SOC. SCI. Q. 928 (2000).

argumentation, etc.—are responsible for this.<sup>49</sup> But whatever the origins of diffuse support, it seems fair to expect that the mass public’s perception of courts as above politics will gradually erode if highly partisan election law issues become a recurring part of the judicial docket and judges consistently take “their” respective party’s side in answering the question presented. The mainstream media is catching on to the emerging pattern of judicial partisanship;<sup>50</sup> the public cannot be kept in the dark indefinitely.

The partisan judicial divide in voter participation litigation also raises serious questions about whether American courts, as presently constituted, can perform the functional role ascribed to them by the most widely accepted normative account of constitutional judicial review: the role of representation reinforcer.<sup>51</sup> When one political party uses its position of control over the legislative and executive branches of government to enact voting requirements that the other major party regards as a ploy to deter its constituents from exercising the franchise, the need for representation-reinforcing review would seem to have reached its apogee.<sup>52</sup> Yet if judges—despite their situational remove from ordinary politics—have partisan prejudices that consistently lead them to side with “their side” in the legislature, it’s hard to see what good can come from judicial review in such cases. We certainly cannot expect judicial review to make the law substantively fairer, or more reasonable, or better aligned with constitutional precepts. Nor can we count on the courts to perform a legitimation function, keeping factions that lose out in the political arena from disavowing the system altogether.<sup>53</sup> If judges answer political process questions as if de facto agents for their political party of choice, what reason is there for losing factions to defer to the judicial determination?

The Justices’ challenge, then, is to craft a decision in *Crawford* (1) that does not look *Bush v. Gore* redux, with the Court splitting 5 to 4 along partisan-ideological lines in a case concerning the partisan balance of power

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<sup>49</sup> E.g., Caldeira & Gibson, *supra* note 47.

<sup>50</sup> See, e.g., Robert Barnes, *Partisan Fissures over Voter ID*, WASH. POST, Dec. 25, 2007, at A1. My impression is that in reportage on election law decisions, it is increasingly common to note judges’ political party affiliations.

<sup>51</sup> Among commentators, there is broad acceptance that electorally unaccountable judges may legitimately override legislative majorities so as to prevent the incumbent regime from entrenching itself in power. Even so stalwart a judicial review skeptic as Jeremy Waldron has accepted this judicial role in principle. See Jeremy P. Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, \_\_ (2006). Intervention to protect the legitimacy and accountability of representative government lies at the core of the case for judicial review.

<sup>52</sup> Cf. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, \_\_ (1997).

<sup>53</sup> Cf. CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT* (1960) (arguing that this legitimation function is the U.S. Supreme Court’s principal service).

in the elected branches of government; (2) that establishes constraining doctrinal rules that will be applied consistently by lower judges in pending and future voter participation cases; and, to the extent feasible, (3) that is anchored to the Constitution and maintains continuity or the appearance of continuity with the Court's prior decisions.<sup>54</sup>

This challenge will not be easily met. For one, voter participation claims present legal questions as to which a judge's ideological and jurisprudential commitments are very likely to dovetail with the electoral interest of his or her appointing President's political party.<sup>55</sup> Liberal Justices will tend to believe that the Constitution, as glossed by the Warren Court,<sup>56</sup> is a charter for popular self-government, under which elected officials must be accountable to the entire adult citizen population. On this view, any voting requirement that substantially limits or skews electoral participation by the voting-age citizenry is constitutionally suspect.

By contrast, many conservative Justices will see the generic right to vote as an illicit, a-textual "right" that exists only because the Warren Court made it up.<sup>57</sup> The conservative will point out that although the Constitution by its terms bars discrimination with respect to voting on the basis of race, sex, age (for citizens over 18), and, for purposes of federal elections, failure to pay a tax, the Constitution also expressly authorizes the states to set "qualifications" for electors in state and congressional elections. The natural implication is that the states have substantial discretion to limit the franchise to those citizens most likely to exercise it in a considered, responsible manner, so long as the franchise-limiting enactment does not discriminate on the expressly forbidden grounds.

This position was firmly rejected in *Harper v. Virginia State Board of Elections*<sup>58</sup> and *Kramer v. Union Free School District No. 15*.<sup>59</sup> But jurists who see *Harper* and *Kramer* as interpretively illegitimate may want to read them narrowly, so as to give the states some room to set voter qualifications *sub silentio*. Such a jurist might well see Indiana's requirement that voters show current, state-issued photographic identification as an ideal *sub silentio* qualification. The State's requirement could serve to limit the franchise, de facto, to those citizens who either (1) are full-fledged participants in the modern, formal economy (and as such almost surely

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<sup>54</sup> Cf. Edward B. Foley, Crawford v. Marion County Election Board: *Voter ID, 5-4? If So, So What?*, 7 ELECTION L.J. \_\_ (forthcoming 2007).

<sup>55</sup> *Id.*

<sup>56</sup> [E.g., Reynolds, Harper, Kramer]

<sup>57</sup> [allow that some conservatives, e.g., McConnell, would recognize right to vote grounded in guarantee clause]

<sup>58</sup> 383 U.S. 663 (1966).

<sup>59</sup> 395 U.S. 621 (1969).

possess a driver's license or passport), or (2) care enough about voting to incur the cost and inconvenience of obtaining a driver's license or passport for this purpose. The costs will be greatest for citizens who do not already possess an official copy of their birth certificate, and, the conservative might argue, this is precisely as it should be. Citizens who lack access to their birth certificates probably lead chaotic, irregular lives, and such citizens cannot be trusted with the franchise.

If I am right about these basic differences in normative outlook, it will not be easy for the liberal and conservative wings of the Court to reach agreement on a doctrinal approach to the voter ID cases. The situation is further complicated by certain peculiar features of the Indiana law, which tend to suggest that it was enacted, as Judge Evans put it, "to discourage election-day turnout by certain folks believed to skew Democratic"; and the extremely sparse record concerning the effects of Indiana's ID requirement on voter participation.

As to the first point, the Indiana law was adopted by a straight party-line vote of the legislature, and signed into law by a Republican governor. Partisanship in enactment may not, without more, bespeak an illicit purpose to exclude voters affiliated with the other party, but more there is. The Indiana law targets a problem—in-person voter fraud—of which there is precious little evidence, and which is difficult to engineer in a coordinated fashion.<sup>60</sup> The law attacks its nominal target by establishing what appears to be the most restrictive voter identification protocol in the Nation.<sup>61</sup> And the statute features a rather punitive accommodation for indigent voters who are unable to obtain qualifying ID without payment of a fee (likely Democrats, given their socio-economic status). Voters who show up at the polls without qualifying ID may cast a provisional ballot if they swear out an affidavit stating that they are eligible to vote at the precinct in question.<sup>62</sup> This ballot will be counted if, by the second Monday following the election, the voter appears at the county election board or county clerk of court and produces qualifying ID or avers that he has a religious objection to being photographed or is indigent and unable to obtain ID without payment of a fee.<sup>63</sup> If the State had really meant to accommodate such voters, it could

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<sup>60</sup> Brief of Brennan Center for Justice; Demos: A Network for Ideas and Action; Lorraine C. Minnite; Project Vote; and People for the American Way Foundation, *Crawford v. Marion County Election Bd.*, \_\_ U.S. \_\_ (Nos. 07-21 & 07-25).

<sup>61</sup> Brief of Amicus Curiae Christopher S. Elmendorf & Daniel P. Tokaji in Support of Petitioners at 30-32, *Crawford v. Marion County Election Bd.*, \_\_ U.S. \_\_ (Nos. 07-21 & 07-25) (hereinafter "Elmendorf & Tokaji Brief").

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<sup>63</sup> Ind. Code §§ 3-11.7-5-1, 3-11.7-5-2.5. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 787 (S.D. Ind. 2006). It may also be possible for citizens without qualifying ID to vote before Election Day at the county clerk's office and verify their provisional ballot at the

have made the indigency/religious objector affidavit available at the polling place.<sup>64</sup> As it stands, the indigency proviso seems well designed to deter low-income citizens from casting ballots while saving the exclusionary enactment from judicial invalidation on the ground that it operates as a poll tax.<sup>65</sup>

Although the circumstantial evidence of exclusionary motive is impressive, the evidence that the Indiana law will have substantial exclusionary effects is thin. The plaintiffs were unable come forward with even a single example of an actual voter for whom the ID requirement represented a serious hardship.<sup>66</sup> The plaintiffs relied heavily on an empirical study that addresses differences across demographic groups in rates of possession of photo ID issued by the Indiana Bureau of Motor Vehicles. But this study was deemed unreliable by the district court and Seventh Circuit.<sup>67</sup>

Not in the record but presented to the Supreme Court through a political scientists' brief<sup>68</sup> are a few recent, unpublished studies concerning rates of possession of qualifying ID and the effects of ID requirements on voter turnout. These studies suggest that the challenged requirements may well have nontrivial effects on turnout by certain groups of voters, especially low-income and elderly voters, but the data are far from conclusive.

The circumstantial evidence of exclusionary motives, in tandem with the studies described in the political scientists' brief, makes it quite unlikely that the liberal Justices will be willing to give the Indiana ID requirement a free pass. It is equally unlikely that the conservative justices will be game to impugn the motives of Republican lawmakers. (Even the liberals may be reluctant to decide *Crawford* on motive grounds. It is bad enough that the courts have split along partisan lines in evaluating whether photo ID requirements excessively burden the right to vote. It would be that much worse if these split decisions turned overtly on whether the legislature acted for impermissible partisan reasons.)

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same time. See Brief of State Respondents at 58-59, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (Nos. 07-21 & 07-25).

<sup>64</sup> [FN re practices of other states]

<sup>65</sup> [check timing of enactment vis-à-vis CC/Ga. I]

<sup>66</sup> [cite CA7 opinion. discuss Dem Reply Brief re: procedural posture—but dispute this, b/c (A) some elections had been held (see district court opinion), and (B) plaintiffs could have identified voters for whom obtaining ID *would* have been a hardship (cf. possibilities described in brief)]

<sup>67</sup> [cites]

<sup>68</sup> Brief of Political and Social Scientists, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (Nos. 07-21 & 07-25).

So where is the room for compromise? At first glance, it's not clear that there is any. Conservatives jurists will see the Indiana enactment as a reasonable exercise of the State's constitutionally conferred responsibility for regulating the time, place, and manner of elections,<sup>69</sup> or as an effort to establish indirectly a modest, sensible, competence-based voter qualification. Liberal jurists will see the law as exclusionary and unnecessary. One can imagine the Justices bridging their divide (with one or two liberals voting with the conservatives, or vice versa) if there were powerful evidence establishing that the law has trivial or major effects on voter participation, or that impersonation fraud is or is not a widespread problem. But the extent of impersonation fraud, like the turnout effect of the ID requirement, is unknown.<sup>70</sup>

Under the circumstances, the easiest ground for compromise lies in the *Gonzales* model. The Court would hold that Indiana's ID requirement is constitutional on its face but subject to as-applied challenge in future cases. The next Part explains this model for adjudicating voter participation cases, and why it likely to appeal to the Justices (especially Justice Kennedy).

## II. THE ABORTION SOLUTION TO VOTER ID

In *Gonzales v. Carhart*,<sup>71</sup> the Court per Justice Kennedy rejected a facial challenge to the federal government's ban on a particularly gruesome abortion procedure ("intact dilation and extraction"). The plaintiffs, relying on the Court's recent abortion jurisprudence, had argued that any pre-viability abortion restriction was unduly burdensome on its face absent an exception for the health of the mother. The Court disagreed. Emphasizing both the availability of alternatives to the banned procedure and the lack of medical consensus regarding the relatively safety of the banned and permitted abortion procedures, the Court held that "the proper means to consider exceptions [to the ban] is by as-applied challenge" "in a discrete case."<sup>72</sup> The majority seemed to think that the factual specificity of as-applied challenges would help the courts to isolate particular contexts in which the lack of a health exception would expose women to "significant health risks."<sup>73</sup> By adjudicating piecemeal the claims of individual women or tightly defined classes of women, the courts could create whatever

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<sup>69</sup> See U.S. CONST. art. 1 § 2.

<sup>70</sup> As Judge Posner observed, impersonation fraud may well be hard to detect (if voter rolls are inflated), so the lack of reported instances of impersonation fraud does not necessarily mean that it is vanishingly rare. Crawford, 472 F.3d at \_\_\_.

<sup>71</sup> 127 S. Ct. 1610 (2007).

<sup>72</sup> *Id.* at 1638-39.

<sup>73</sup> *Id.*

exceptions may be necessary to bring the statute into constitutional compliance.

In vehement dissent, Justice Ginsburg accused the *Carhart* majority of disregard for precedent.<sup>74</sup> But the passion of the majority and dissenting opinions in *Carhart* obscures an important point of agreement: both opinions are predicated on the idea that if banning the intact-dilation-and-extraction procedure creates a significant health risk for even one woman, that woman is entitled to an exemption.<sup>75</sup> Stated differently, the fact of such a risk would render the statute unconstitutional (or at least subject to strict scrutiny) unless its application to that woman may be severed.<sup>76</sup> This shared conviction that a significant health burden on any given woman is enough to invalidate the corresponding pre-viability abortion restriction, at least as to that woman, follows naturally from the supposition that abortion rights are individual rights, and that the main job of the federal courts in constitutional cases is to protect constitutionally enshrined liberties against unjustified intrusions by the state.<sup>77</sup>

The right to vote can be conceived of similarly: as an individual entitlement to cast a valid, correctly counted ballot, free from unnecessary, state-created burdens. This conception of the right finds ample support in the Warren Court's foundational voting right precedents, and has been echoed in any number of opinions since.<sup>78</sup> Applied to Indiana's photo ID

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<sup>74</sup> *Id.* at 1641 (Ginsberg, *J.*, dissenting) (“Today's decision is alarming. It refuses to take *Casey* and *Stenberg* seriously.”).

<sup>75</sup> The dissent states this explicitly. Thus, in discussing the *Casey* plurality's statement that an abortion restriction is unduly burdensome if “in a large fraction of the cases in which [the statute] is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion,” *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 895 (1992), the dissent asserts: “[T]he numerator and denominator are the same: The health exception reaches only those cases where a woman's health is at risk. Perhaps for this reason, in mandating safeguards for women's health, we have never before invoked the ‘large fraction’ test.” *Gonzales*, 127 S.Ct. at 1651 n. 10 (Ginsberg, *J.*, dissenting).

The majority's embrace of the idea that a significant health risk to even one woman is enough to trigger strict scrutiny (and then a remedial exemption) is implicit in Kennedy's admonition that “the proper means to consider exceptions [to the ban] is by as-applied challenge” “in a discrete case.” *Id.* at 1638-39.

<sup>76</sup> Regarding the severability analysis, see *infra* notes 81-86 and accompanying text.

<sup>77</sup> *Cf.* Matthew C. Adler, *Rights Against Rules: The Moral Structure of American Constitutional Law*, 97 MICH. L. REV. 1, 39-40 (1998) (describing the “official” view of constitutional rights as personal rights, and the connection between this conception of rights as the privileged status of as-applied adjudication).

<sup>78</sup> The Warren Court called the right to vote a personal right (even in the context of malapportionment litigation) in order to avoid the conclusion that constitutional voting rights claims were nonjusticiable because concerned with injuries to the “republican” character of the polity as a whole. *Compare* *Colegrove v. Green*, 328 U.S. 549 (1946), with *Baker v. Carr*, 369 U.S. 186 (1962), *Lucas v. Forty-Fourth Gen. Assembly of Colo.*, 377 U.S. 713

requirement, the *Carhart* model would go something like this. Because the right to vote, like the right to an abortion, is an individual right, the “severity” of a regulatory restriction on the exercise of the franchise must be assessed from the point of view of individual voters. (Recall that the threshold, scrutiny-level-determining inquiry under *Burdick* concerns burden severity.) Voting regulations are presumptively unconstitutional as applied to any voter or discrete class of voters for whom compliance would entail severe hardships due to personal circumstances for which the voter cannot be faulted, such as a medical condition, if compliance would not be difficult for others. (The showing of differential hardship is necessary in voting but not abortion cases because voting claims must be founded upon the equal protection clause whereas the abortion right is protected by

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(1964), and *Reynolds v. Sims*, 377 U.S. 533 (1964). See generally Heather K. Gerken, *The Costs and Causes of Minimalism in Voting Cases: Baker v. Carr and Its Progeny*, 80 N.C. L. REV. 1411 (2002).

An individualistic sensibility about the right to vote is also apparent from the rhetoric in *Rosario v. Rockefeller*, 410 U.S. 752 (1973), and *Kusper v. Pontikes*, 414 U.S. 51 (1973), where the Court stressed the plaintiff-voter’s “fault” or lack thereof in deciding what level of scrutiny to apply to advance enrollment requirements for voting in primary elections. See Elmendorf, *Structuring*, *supra* note 2, at 353-57 (describing this rhetorical emphasis, but suggesting that the true basis for the line drawn in these decisions probably lay elsewhere).

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

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

It should be noted that there is also ample doctrinal support for the position that the nominal status of the right to vote as an individual right is incomplete, and that the Court’s interventions in this area have been designed to protect representational interests. See *infra* TAN \_\_.

substantive due process.<sup>79</sup>) If this showing has been made, the statute as written can be applied to the plaintiff voters only if it passes strict scrutiny.<sup>80</sup>

If the strict scrutiny test of justification is not met, the next step is to ask, per *Ayotte v. Planned Parenthood of Northern New England*,<sup>81</sup> whether the application of the statute to the plaintiff voter or class of voters can be severed, or whether the crafting of an appropriate exception would be contrary to legislative intent or would entail impermissible judicial “rewriting [of] state law.”<sup>82</sup> To keep the judicial role from becoming too disruptive, the courts could rebuttably presume that the enacting state legislature would prefer to see an overboard voter ID requirement trimmed at the margins (with judge-made exceptions for those voters for whom compliance would be an undue burden), rather than jettisoned altogether.<sup>83</sup> One might worry that this presumption would improperly displace the state’s own severability principles, but *Ayotte* manifestly contemplates a federal common law of severability.<sup>84</sup> With the presumption in place, the

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<sup>79</sup> The Supreme Court has indicated that the Constitution does not create a substantive entitlement to vote for any office, *see, e.g., Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8 (1982) (rejecting claim that election must be used to fill legislative vacancy); rather, what the Constitution guarantees is that once an office is made elective, the franchise will be distributed equally, *see, e.g., Harris v. McRae*, 448 U.S. 297, 322 n. 25 (1980) (“Although the Constitution . . . does not confer the right to vote in state elections, . . . the Equal Protection Clause . . . confers upon a qualified voter a substantive right to participate in the electoral process equally with other qualified voters”).

<sup>80</sup> For the severely burdened voter, the challenged regulatory condition on the exercise of the franchise is tantamount to a categorical exclusion. *Cf. Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626-27 (explaining that strict scrutiny must be applied to statutes that “distribut[e] the franchise” to some citizens while “denying [it] to [other] citizens who are otherwise qualified by residence and age”).

<sup>81</sup> 546 U.S. 320 (2006).

<sup>82</sup> *Id.* at 329. Per *Ayotte*, a federal court, “[a]fter finding an application or portion of a statute unconstitutional,” should design a remedy guided by these principles: First, the court should “nullify [no] more of a legislature’s work than is necessary.” *Id.* at 329. Second, the court should “restrain [itself] from rewriting state law to conform it to constitutional requirements even as [the court] strive[s] to salvage it.” *Id.* Continuing, *Ayotte* suggests that “narrow” remedies are particularly appropriate where “background constitutional rules” have been “clearly . . . articulated.” *Id.* at 329-30. By contrast, where the “constitutional context” is “murky,” or “where line-drawing is inherently complex,” judicial efforts to “salvage” a constitutionally problematic statute generally entail “a far more serious invasion of the legislative domain than [the courts] ought to undertake.” *Id.* Finally, before severing a statutory provision or application, the court must ask: “Would the legislature have preferred what is left of its statute to no statute at all?” *Id.* at 330.

<sup>83</sup> *Cf. SG’s Brief, supra* note 15, at 16 (suggesting narrow remedies that might be awarded in an as-applied challenge by homeless voters to Indiana’s photo ID requirement).

<sup>84</sup> The *Ayotte* Court prescribed a generic approach to severability even though the abortion restrictions at issue were creatures of New Hampshire law. Many courts and commentators have thought severability to be a matter of statutory construction—and hence of state law if the challenged restrictions are found in a state statute. *See, e.g., Michael C.*

standard remedy in a successful as-applied challenge to a voter ID requirement would be an order directing election officials to count provisional ballots cast by the plaintiff or members of the plaintiff class.<sup>85</sup> (The federal Help America Vote Act entitles persons who believe they are eligible to vote but whose ineligible is questioned by pollworkers to cast a provisional ballot.<sup>86</sup>)

State election administrators who wish to avoid unnecessary post-election litigation would probably respond to such a holding by setting up alternative, low-cost methods for members of the plaintiff class to verify their identity at the polling place in future elections,<sup>87</sup> as well as regularized procedures for counting these voters' provisional ballots.

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The *Gonzales* model of voting rights is likely to have powerful appeal for Justice Kennedy, and not merely because it rests upon an opinion he authored in a recent, high profile case. Over the course of his tenure on the Court, Kennedy has made it very clear that he sees the protection of fundamental individual liberties as the Court's foremost responsibility,<sup>88</sup> and that he sees the right to vote on equal terms with others as among those basic liberties.

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Dorf, *Facial Challenges to State and Federal Statutes*, 46 STAN. L. REV. 235, 283-87 (1994); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321 (2000); *Wash. State Republican Party v. Wash.*, 460 F.3d 1108 (9th Cir. 2006). But the *Ayotte* Court, citing nothing but federal cases, never so much as hinted that New Hampshire's severability doctrine ought to come into play. *See* 546 U.S. at 329-30. The severability doctrine stated in *Ayotte* may be said to represent "a generalized version of state severability law." *Cf.* Dorf, *supra*, at 285-86 (explaining what such a standard would look like—and why it would be illegitimate). Legitimate or not, the *Ayotte* standard is in fact reasonably similar to what Dorf reports is the typical approach in most states.

<sup>85</sup> Alternatively, the courts could create narrow state-specific remedies. *Cf.* SG's Brief, *supra* note 15, at 16 ("If, as petitioners content, [the Indiana voter ID requirement] is unconstitutional as applied to a homeless person . . . because he is unable to obtain a BMV-issued ID card . . . , then a narrow[] remedy would be to enjoin BMV from denying an ID on the ground that a person has no address, or to enjoin the [state] from a collecting a search fee for birth certificates in that circumstance.")

<sup>86</sup> For a thorough analysis of the law of provisional voting under HAVA, see Leonard M. Shamson, *Trapped By Precincts? The Help America Vote Act's Provisional Ballots and the Problem of Precincts*, 10 N.Y.U. J. LEGIS. & PUB. POL'Y 133, 158-78 (2006).

<sup>87</sup> For an overview of the voter identification regimes currently in use in the fifty states, see electionline.org, *Voter ID Laws*, <http://www.electionline.org/Default.aspx?tab=364>.

<sup>88</sup> *See generally* Helen J. Knowles, *From A Value to a Right: The Supreme Court's Oh-So-Conscious Move from 'Privacy' to 'Liberty'*, 33 OHIO N.U. L. REV. 595, 607-20 (2007) (surveying Justice Kennedy's "liberties" jurisprudence).

Consider his dissent from the Court's decision to uphold Hawaii's ban on write-in voting in *Burdick v. Takushi*.<sup>89</sup> The majority conceptualized write-in voting as an alternative means of ballot access for independent candidates and third parties. Because Hawaii's principal channels for ballot access were constitutionally adequate, the majority reasoned, the constitutional burden of the write-in voting ban was necessarily minor.<sup>90</sup> Kennedy saw the restriction rather differently: “[f]or those voters affected,” he wrote, the ban operates as a “total” infringement on “the right to vote for the candidate of their choice.”<sup>91</sup> (Compare Kennedy's and Ginsburg's shared understanding in *Gonzales* that the burden of an abortion restriction should be evaluated from the point of view of the woman for whom it matters.<sup>92</sup>) Time and again, Kennedy's choice of phrasing manifests his individualistic take on the nature of the right to vote.<sup>93</sup>

To be sure, Justice Kennedy has also been willing to deploy his nominally individualistic understanding of the right to vote as an indirect means of achieving structural goals that that he's not quite ready to pursue directly. Thus, in *Burdick*, Kennedy opened his dissent by explaining how the structure of Hawaii's ballot access laws made it very difficult for independent candidates to get on the general election ballot, and served to entrench the then-dominant state Democratic Party.<sup>94</sup> Though Kennedy's subsequent analysis of the burden of the write-in ban is highly individualistic, one is left with the impression that his objection to the ban had something to do with the manner in which it solidified the Democrats

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<sup>89</sup> 504 U.S. 428 (1992).

<sup>90</sup> *Id.* at 438-39.

<sup>91</sup> 504 U.S. at 447 (Kennedy, *J.*, dissenting) (emphasis added).

<sup>92</sup> *See supra* TAN \_\_.

<sup>93</sup> *See, e.g., id.* at 446 (“I submit the conclusion [regarding the “character and magnitude” of the burden on constitutionally protected rights] must be that the write-in ban deprives *some voters* of any substantial voice in selecting candidates for the entire range of offices at issue in a particular election.”) (emphasis added); *id.* (“*some voters* cannot vote for the candidate of their choice without a write-in option”) (emphasis added); *id.* (“a write-in ballot permits a voter to effectively exercise *his individual constitutionally protected franchise*”) (quoting *Socialist Labor Party v. Rhodes*, 290 F. Supp. 983, 987 (S.D. Ohio 1968)) (emphasis added); *id.* at 448 (“The majority's analysis ignores *the inevitable and significant burden* a write-in ban imposes upon *some individual voters* by preventing them from exercising their right to vote in a meaningful manner. . . . In my view, a State that bans write-in voting in some or all elections *must justify the burden on individual voters* by putting forth the precise interests that are served by the ban.”) (emphasis added); *id.* (“Hawaii's write-in ban . . . imposes a significant burden *on voters such as petitioner.*”) (emphasis added).

<sup>94</sup> *Id.* at 442-44.

“partisan lockup” of Hawaiian elections.<sup>95</sup> For another example, this time involving statutory voting rights, consider Kennedy’s pivotal opinion in *LULAC v. Perry*,<sup>96</sup> a case involving racial and partisan vote dilution challenges to the infamous mid-decade, “re-redistricting” of Texas’s congressional districts carried out at the behest of the Republican leadership in Congress. After rejecting the plaintiffs’ proposed standards for judging partisan vote dilution claims under the Constitution,<sup>97</sup> Kennedy used Section 2 of the Voting Rights Act to strike down one of the congressional districts that was critical to the Texas Republicans’ partisan scheme. Kennedy found a Section 2 violation not because of a reduction in the total number of Latino “opportunity” districts—that number Texas had held constant—but at least in part because the State had eliminated the plaintiff-voters’ opportunity district *for a bad, partisan reason* (to protect the Republican incumbent from a growing population of minority voters who did not support him).<sup>98</sup> In Kennedy’s hands, a law designed to ensure legislative representation for minority communities was converted into a tool for limiting partisan excesses, excesses that did nothing to reduce the substantive or descriptive representation enjoyed by the protected groups. The apparent supposition behind this alchemy is that Section 2 of the Voting Rights Act, rather than protecting representation for minority communities as such, guarantees instead that in the drawing of legislative districts, *individual* minority voters will not be omitted, without sufficiently good reasons, from compact districts in which their representative of choice could be elected.<sup>99</sup>

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<sup>95</sup> Such is the take on Kennedy’s opinion offered in Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 670-74 (1998).

<sup>96</sup> 126 S. Ct. 2594 (2006).

<sup>97</sup> *Id.* at 2607-12 (Roberts, *J.* dissenting in part).

<sup>98</sup> *Id.* at 2622-23. This was not the only reason Kennedy gave for finding a Section 2 violation—he emphasized as well that the state “took away” a political opportunity that some Latino voters were about to exercise, which “bears the mark of intentional discrimination.” *Id.* at 2622. But this reason is somewhat peculiar, because as the district court found, the plan was obviously partisan in motivation; race came into the picture only because the state did not want its partisan scheme to be struck down on VRA grounds. For an elaboration of the view that Kennedy’s opinion in *LULAC* was driven by hostility to race-minded redistricting, see Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1139-55 (2007).

<sup>99</sup> Kennedy never states this expressly, but it is, I think, the most plausible way of understanding his opinion. The spectrum of “sufficiently good” reasons may well be quite large, but it does not include protecting an incumbent by removing disgruntled voters from her district. *Cf. LULAC*, 126 S. Ct. at 2622-23 (distinguishing incumbency protection achieved by maintaining district boundaries from incumbency protection achieved by rejiggering district boundaries to remove voters who dislike the incumbent).

Just as the Voting Rights Act, in Kennedy's hands, was remade to create an individual right that the courts may deploy as a backdoor limitation on partisan gerrymandering of electoral districts, so too could Kennedy use the *Gonzales* model of constitutional voting rights as an indirect means to limit partisan gerrymanders of the voting public. The thinking here is that those procedural requirements that are most effective for partisan-exclusionary purposes will generally create significant, individuated barriers to voting for persons defined by common circumstances. Over the course of a series of lawsuits brought by narrowly defined voter-classes who face common burdens (e.g., poor citizens who do not possess qualifying ID or an official copy of their birth certificate), the courts could neuter the most egregiously exclusionary procedural requirements without establishing constitutional standards concerned with aggregate patterns of voter participation, or ruling on legislative motive.

The prospect of an indirect but meaningful limitation on partisan manipulation of voter participation could attract some of the liberal Justices to the *Gonzales* model, especially in light of the alternatives.<sup>100</sup> One might think that the liberal Justices would be reluctant to accept the *Gonzales* model of voting rights for fear of legitimating it for abortion. But the liberals need not repudiate Ginsburg's *Gonzales* dissent in order to join a Kennedy opinion in *Crawford* that extends the *Gonzales* model to voting rights. Facial invalidation of abortion restrictions that lack a health exception can be rationalized as an appropriate response to the *existence of a decisionmaker better positioned than the courts* to judge whether use of a banned abortion procedure is necessary to protect the rights-bearer from significant health risks in discrete cases. That decisionmaker is the woman's state-licensed physician. The courts' epistemological limitations arguably warrant making this statutory health exception into a constitutional requirement.<sup>101</sup> And once this constitutional mandate has been established, it can be said that an abortion restriction that lacks a health exception is not a "valid rule," and is therefore invalid as-applied to any abortion provider.<sup>102</sup>

Given the present institutional arrangements that govern U.S. elections, however, there is no decisionmaker or decisionmaking body whose

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<sup>100</sup> For example, a terse opinion upholding the ID requirement as reasonable because comparable to the identity-verification measures used in private life. See *infra* Part IV.A.

<sup>101</sup> Cf. David H. Gans, *Strategic Facial Challenges*, 85 B.U. L. REV. 1333 (2005) (arguing that the Court can and does use facial invalidations strategically, in situations where as-applied challenges are less likely to provide efficient protection for constitutional rights, all things considered).

<sup>102</sup> Cf. Marc E. Isserles, *Overcoming Overbreadth: Facial Challenges and the Valid Rule Requirement*, 48 AM. U. L. REV. 359, 385-456 (1998) (explaining "valid rule facial challenges" and their consistency with *United States v. Salerno*, 481 U.S. 739, 745 (1987), which established the "valid in no set of circumstances" standard for facial challenges).

independence and expertise make it superior to federal judges for dispassionately evaluating whether a contested voting requirement is unduly burdensome vis-à-vis particular members of the electorate. Most of the states have placed supervening responsibility for election administration in a partisan elective office, the Secretary of State.<sup>103</sup> Local election pollworkers tend to be party appointees or barely trained volunteers.<sup>104</sup> Judges wedded to a wholly individualistic model of voting rights thus have no good alternative to deciding for themselves which voters face undue burdens on account of one or another voting requirement. Lacking synoptic rationality, judges may be more likely to get these calls right by making them on a case-by-case basis, rather than by embarking on a single, Herculean judicial proceeding with the goal of assessing the difficulties that the challenged requirements pose for each and every member of the electorate. If these premises are accepted, one can simultaneously adhere to Ginsburg's dissent in *Gonzales* and think that the gist of Kennedy's majority opinion in that case would be correct if the plaintiff were a voter challenging an ID requirement rather than a doctor challenging an abortion restriction backed by criminal penalties against providers.

For liberals, the *Gonzales* model has one further attraction: if adopted generally, the as-applied model of constitutional adjudication may help to slow down the rate at which judges disassemble statutory law under the guise of enforcing the Constitution. At a time when conservatives dominate the federal judiciary, liberal judges who would favor broad holdings and sweeping remedies in voting and other fundamental rights cases may be willing to accede to the *Gonzales* model if conservative judges would accept as-applied/piecemeal adjudication of challenges to Congressional power under the Commerce Clause and the Fourteenth and Fifteenth Amendments.<sup>105</sup>

That liberal Justices could accept the *Gonzales* model for voter participation cases need not render it toxic for the conservatives. For conservatives, the model could be spun as a firm affirmation of the individualistic nature of the right to vote, and of the deep jurisprudential correctness of the majority opinion in *Gonzales*. As well, the model would leave Republican-dominated legislatures with extremely broad leeway to enact new voter ID requirements, subject only to some risk that judges

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<sup>103</sup> For a state-by-state survey, see Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 974-75 (2006).

<sup>104</sup> See *id.* at 977-78.

<sup>105</sup> As Gillian Metzger has observed, liberal and conservative Justices often flip sides on the merits of facial versus as-applied adjudication depending on whether the plaintiff is seeking to vindicate a rights claim or enforce a limitation on congressional power. See Gillian E. Metzger, *Facial Challenges and Federalism*, 105 COLUM. L. REV. 873 (2005).

would later establish that certain narrowly defined classes of citizens who lack qualifying ID may be entitled to have their provisional ballots counted. Such carveouts would not call into doubt the basic legitimacy of Republicans' preferred tool for combating impersonation fraud.

One final point bears mentioning. A Justice might well conclude that the *Gonzales* model not only offers a way for the Justices to bridge their differences temporarily, in the interest of avoiding a 5:4 conservative/liberal split in *Crawford*, but that it will also facilitate the bridging of differences in follow-up cases. It is part of the lore of U.S. legal practice that the experience of adjudicating cases premised on particularistic facts can cleanse a judge of her initial ideological prejudices. This cleansing should be all the more thorough, according to the standard wisdom, if the as-applied model for adjudicating voter participation claims serves to delay judicial rulings on the merits until some years after the enactment of the challenged requirements.<sup>106</sup> With the passage of time, partisan tempers will cool, and judges will find it easier to assess challenged requirements on the basis of the plaintiff's circumstances rather than the partisan lineup of votes behind the requirement's enactment.

Even if the lore is wrong, the aggregate pattern of judicial decisionmaking is likely to appear less relentlessly partisan under as-applied adjudication than if the governing doctrine required judges to make an overall assessment of whether the challenged voting requirement creates an undue burden in the aggregate, or was enacted for illicit partisan purposes. No doubt there would be many cases in which liberal judges deem the burden "severe" and conservatives think it much less significant. But on extreme facts, liberals and conservatives may be expected to agree about burden severity as-applied, even if they are not of one mind about whether the corresponding voter identification regime, viewed in its entirety, is a reasonable restriction on the right to vote.

### III. WHAT'S WRONG WITH THE ABORTION MODEL?

Despite its appeal as a means of bridging the partisan divide and lowering the stakes of voter ID litigation, the *Gonzales* model for adjudicating constitutional voting rights cases has serious downsides. Its adoption would unleash a proliferation of new constitutional attacks on quotidian election administration practices. The courts confronted with these claims would lack anything approaching an objective standard to resolve them. Many of these claims will be of little practical moment for democratic accountability, yet nonetheless embroil the judiciary in conflict over highly partisan laws and disruptive judge-made remedies. Moreover,

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<sup>106</sup> [Toqueville, Bickel]

the *Gonzales* model of voting rights is in considerable tension with the voter participation cases decided at the dawn of the *Storer-Burdick* era, and finds little support in the text or structure of the Constitution.

#### A. An Onslaught of Claims

The Supreme Court has long proceeded on the assumption that “[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases.”<sup>107</sup> The *Gonzales* model threatens this premise. The only way to use the model while maintaining the premise is to set an extremely high bar for what constitutes a “severe” burden on the individual’s right to participate by voting, which would be tantamount to abdicating the role of representation reinforcer. To see why, consider the following hypotheticals:

- A working mother challenges the state’s failure to include “working mothers” among the classes of citizens authorized to vote absentee.<sup>108</sup> The plaintiff alleges that in-person voting is vastly more burdensome for her than it is for the typical citizen, due to her extraordinary child care and employment responsibilities. Just as a woman whose unusual medical condition puts her at special risk from the statutorily authorized abortion procedure must be allowed to use a banned procedure that would be much safer for her, so too, the plaintiff says, must the state allow absentee voting by a citizen whose unusual life circumstances make in-person voting exceptionally difficult. In the alternative, the plaintiff requests a court order moving Election Day to a weekend, or requiring the state to establish “early voting” sites for in-person voting before Election Day.
- A Native American citizen who cannot read English brings suit challenging the state’s failure to print ballots in her native language. There are few members of her language group in the locality in question, so the jurisdiction faces no obligation to provide voting materials in translation pursuant to the Voting Rights Act.<sup>109</sup> Nonetheless, the plaintiff insists that

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<sup>107</sup> *Storer*, 415 U.S. at 730.

<sup>108</sup> *Cf. Griffin v. Roupas*, 385 F.3d 1128 (7th Cir. 2004) (rejecting claim of working mothers).

<sup>109</sup> Under Section 203 of the Voting Rights Act, states and political subdivisions must provide voting materials in translation if the jurisdiction’s voting-age population of Latino,

because the right to vote is an individual right, strict scrutiny must be applied to the state's failure to provide her with a translated ballot, given that voting an English-language ballot is impractical for her and through no fault of her own. (For a variation on this theme, imagine a suit brought by a limited-English-proficiency voter whose language group is not protected by the VRA.)

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

- Imagine that Congress decides to weaken HAVA's protections for voters with disabilities. Congress replaces the current mandate—that states provide “at least one direct recording electronic voting system or other voting system equipped for individuals with disabilities at each polling place”<sup>110</sup>—with a requirement that states do this *or* set up early voting centers, at a distance of no more than 20 miles from one another, with similarly accessible voting machines. A blind voter brings suit, arguing that the nearest early voting center is not accessible to him because it would require a long trip by public transit or a costly cab fare, whereas previously he, like most other voters, was able to vote at a precinct within walking distance of his home.

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Asian American, Native American, or Native Alaskans (of a single language group) is equal to or greater than 10,000 or 5% of the voting age population, and the language minority's illiteracy rate is higher than the national average. *See* 42 U.S.C.A. § 1973aa-1a(b)(2)(A). For a useful overview of the VRA's language-minority protections, see Jocelyn Friedrichs Benson, *!Su Voto Es Su Voz! Incorporating Voters of Limited English Proficiency into American Democracy*, 48 B.C. L. REV. 251, 270-74 (2007).

<sup>110</sup> 42 U.S.C.A. § 15481(a)(3)(C).

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

Common to these scenarios is the following: (1) due to fortuities of her life circumstances and the state’s mandated procedures for voting, the plaintiff-voter must incur substantially greater costs than the average citizen in order to cast a valid, properly counted ballot; (2) the voter is not civically negligent—she cannot reasonably be faulted for the circumstances that make it difficult for her to use the available means of voting; and (3) there is little basis other than the judge’s personal sense of justice upon which to found a determination that the plaintiff’s burden is so much greater than that faced by the typical voter as to warrant classification as “severe”; and (4) the plaintiff’s as-applied claim cannot be vindicated without an intrusive remedy. In granting relief, the courts would be requiring the state to print ballots in new languages; to expand the class of persons entitled to vote absentee; to establish an in-person “early voting” option; to change the date of Election Day; or to purchase and implement costly, new-fangled voting technologies.

It follows that if a “severe burden” on any given voter (relative to the burden faced by the typical voter) is enough to trigger strict scrutiny of the challenged voting requirement, the courts will either need to assume responsibility for micromanaging the details of election administration, or to set an extremely high bar for “severe burden.” The first approach has obvious perils, and the second would be tantamount to abdication. The rate at which voters participate is quite sensitive to the cost of participation—thanks to what Judge Posner termed the “elusive” benefits of participation for the individual voter<sup>111</sup>—so if the courts were to set a high bar for what constitutes a severe burden, exclusion-minded legislators would have ample leeway to keep disfavored segments of the population away from the polls.

It should be apparent, too, that an extension of the *Gonzales* model to voting rights would rest on a dramatic leap of faith concerning the likelihood that particularistic facts will dislodge judges from their ideological habits and enable judicial agreement about the severity of the associated burden. Here and there, appellate courts may be able to craft

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<sup>111</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 951 (7th Cir. 2007). See also Benjamin Highton, *Voter Registration and Turnout in the United States*, 2 PERSP. POL. 507, 508 (2004) (“[A]s a ‘low-benefit, low-cost activity,’ in general, small changes in the cost of voting might have sizable effects on overall turnout rates and influence the turnout of some groups more than others.”).

bright-line rules to settle disputes over burden severity (for example, concerning maximum waiting times at polling stations). But if the substance of the burden test is whether the challenged voting requirement—in conjunction with the plaintiff-voter’s personal circumstances—makes participation substantially burdensome for her, bright-line rules will be few and far between. Given that liberal and conservative judges are likely to approach the burden question with very different normative intuitions, there would remain considerable cause for concern about partisanship or its appearance in judicial decisionmaking. A doctrine that makes scrutiny levels highly dependent on the judge’s own normative intuitions seems to this writer ill advised for an election law domain in which jurisprudential intuitions and partisan interests coincide.

### B. Incongruent Precedents

Although the Supreme Court has yet to squarely face the question of how its severe/lesser burden test is properly applied to voter participation claims, the *Gonzales* model is hard to reconcile with the most pertinent precedents—notwithstanding the nominal status of the right to vote as a “personal” right.<sup>112</sup>

#### 1. *Durational Residency and Advance Registration Requirements: From Dunn to Marston and Burns*

States have long required citizens to be residents for some length of time before they may vote in the state’s elections.<sup>113</sup> In *Dunn v. Blumstein*,<sup>114</sup> the Court applied strict scrutiny to Tennessee’s one-year durational residency requirement because it operated as an absolute bar to the plaintiff’s participation in the upcoming election.<sup>115</sup> This is entirely consistent with the

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<sup>112</sup> I have elsewhere argued that much of the Court’s electoral mechanics case law is best understood as an effort to guard aggregate, structural properties of the electoral system, rather than to ensure that infringements on individual rights of political participation are substantially justified. See Elmendorf, *Structuring*, *supra* note 2. I won’t belabor that argument here. Instead, I’ll offer just a few remarks on three sets of cases that are particular difficult to reconcile with the *Gonzalez* model, notwithstanding their superficially supportive rhetoric.

<sup>113</sup> Steven J. Rosenstone & Raymond E. Wolfinger, *The Effect of Registration Laws on Voter Turnout* 72 AM. POL. SCI. REV. 22, 24 (1978) (“in the early 1960s, 38 states required at least a year’s residence in the state before one could register”).

<sup>114</sup> 405 U.S. 330 (1972).

<sup>115</sup> See *id.* at 336 (“Durational residence requirements completely bar from voting all residents not meeting the fixed durational standards.”), 341 (“the right to vote is absolutely denied”).

*Gonzales* model.<sup>116</sup> The Court allowed that Tennessee had a compelling interest in preventing fraudulent voting by nonresidents.<sup>117</sup> But this did not save the challenged requirement, given that the states were already making do with a congressionally mandated thirty-day cap on residency requirements for presidential elections.<sup>118</sup> If thirty days was long enough for presidential elections, no longer durational residency requirement could be presumed necessary for other elections.

Just two years after *Dunn*, however, the Court upheld a pair of fifty-day advance registration requirements in *Marston v. Lewis*<sup>119</sup> and *Burns v. Fortson*.<sup>120</sup> The Court did so via brief, per curiam opinions, without any discussion of scrutiny levels, and over the fierce objection of dissenting Justices who attacked the Court for disregarding basic tenets of strict scrutiny.<sup>121</sup> The dissenters were right: if the Court had been applying strict

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<sup>116</sup> It is consistent because a law that absolutely bars some citizens from voting while allowing others to participate obviously erects a very “severe” impediment to participation for the former citizens, relative to the costs of participation for the latter.

For a contrary (and mistaken) effort to portray *Dunn* as inconsistent with the *Gonzales* model, see the ACLU’s reply brief in *Crawford*. “The residency requirement in *Dunn*,” the ACLU writes, “was unconstitutional on its face, even though it applied only to a small percentage of the potential electorate.” Reply Brief for Petitioners at 2, n. 1, *Crawford v. Marion County Election Bd.*, \_\_ U.S. \_\_ (No. 07-21). This, says the ACLU, is contrary to the *Salerno* standard for facial challenges, under which a facial challenge will succeed only if there is “no set of circumstances” in which the law may be permissibly applied. *Id.*

The ACLU errs in two important respects. First, it does not acknowledge that *Dunn* was a class action lawsuit brought on behalf of new residents by a new resident, James F. Blumstein, who was prevented from voting in an upcoming election by the durational residency requirement. See *Dunn*, 405 U.S. at 331. Far from being a facial challenge, this is precisely the sort of as-applied challenge by a “discrete” class of voters with a common condition that the *Gonzales* model contemplates. Second, the ACLU mistakenly assumes that under the *Gonzales* model, an as-applied challenge to a voting restriction cannot result in the striking down of that restriction in its entirety (as opposed to exempting the plaintiff-voter or class of voters from the restriction). This is wrong. The finding of a severe burden as applied triggers strict scrutiny, and if the statute fails strict scrutiny, the next step is the *Ayotte* inquiry into severability. If the unconstitutional application is not severable per *Ayotte*, the court must enjoin enforcement of the provision or statute as a whole. (As it happens, the Court in *Dunn* wrapped up its opinion after the strict scrutiny analysis, without discussing remedies.)

<sup>117</sup> 405 U.S. at 345.

<sup>118</sup> 405 U.S. at 345-48.

<sup>119</sup> 410 U.S. 679 (1973).

<sup>120</sup> 410 U.S. 686 (1973).

<sup>121</sup> Also telling is *O’Brien v. Skinner*, 414 U.S. 524 (1974), a contemporaneous decision in which the plurality applied arbitrariness review in holding that a state may not provide absentee ballots to persons incarcerated within their county of residence while denying such ballots to persons incarcerated elsewhere. Three concurring justices (the dissenters in *Marston* and *Burns*) would have reached the same result by applying strict scrutiny. See *id.* at 744-45 (Marshall, *J.*, concurring).

scrutiny, it would have struck down the fifty-day requirements as longer than necessary.<sup>122</sup> Evidently the Court thought that something more than a severe burden on *one* citizen in *one* election was necessary to trigger strict scrutiny, contra the *Gonzales* model for voting rights.

## 2. *Advance Enrollment for Voting in Partisan Primaries: Rosario and Kuser*

*Marston* and *Burns* were shortly followed by a pair of cases concerning advance enrollment requirements for voting in partisan primaries. *Rosario v. Rockefeller*<sup>123</sup> applied lax scrutiny and sustained an eleven month requirement; *Kuser v. Pontikes*<sup>124</sup> struck down a twenty-three month requirement, applying much more stringent review.

Distinguishing *Rosario*, the *Kuser* Court observed: “Unlike the petitioners in *Rosario*, whose disenfranchisement was caused by their own failure to take timely measures to enroll, there was no action that Mrs. Pontikes could have taken to make herself eligible to vote in the 1972 Democratic primary.”<sup>125</sup> (Mrs. Pontikes had voted in the Republican primary during the previous election cycle, and the advance enrollment period exceeded the interval of time between election cycles.) This much is consistent with the individualistic, “reasonable voter” approach to burden characterization. But despite the Court’s attention to whether the named plaintiffs could fairly be faulted for their disenfranchisement, *Rosario* and *Kuser* are not easy to square with the *Gonzales* model.

The problem is this: in *Kuser* and subsequent cases, the Court has treated moderate advance enrollment requirements (like that in *Rosario*) as beyond constitutional reproach.<sup>126</sup> Yet as I have elsewhere observed:

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<sup>122</sup> For a thoughtful treatment of *Marston* and *Burns*, see *Barilla v. Ervin*, 886 F.2d 1514 (9th Cir. 1989), overruled on other grounds by *Simpson v. Lear Astronics Corp.*, 77 F.3d 1170, 1174 (9th Cir. 1996).

<sup>123</sup> 410 U.S. 752 (1973).

<sup>124</sup> 414 U.S. 51 (1973).

<sup>125</sup> *Id.*

<sup>126</sup> See *Clingman v. Beaver*, 544 U.S. 581, 593 (2005) (citing the advance enrollment requirement upheld in *Rosario* as a paradigmatic example of the sort of “ordinary and widespread” barrier to political participation that must not be deemed severe); *Democratic Party of U. S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 135-36 (1981) (suggesting that the different outcomes in *Rosario* and *Kuser* reflected the fact that the long advance period in *Kuser* simply “went too far in interfering with the freedom of the individual voter,” unlike the more moderate advance period in *Rosario*); *Storer v. Brown*, 415 U.S. 724, 731-32 (1974) (suggesting that the import of *Rosario* and *Kuser* is that courts must draw careful, measured lines between permissible voting requirements and those that go too far); *Kuser*, 415 U.S. at 59 (“It is true, of course, that the Court found no constitutional infirmity in the New York delayed-enrollment statute under review in *Rosario*.”).

Every advance enrollment requirement has the effect of absolutely precluding from participation in the upcoming primary those new, bona fide party adherents whose change-of-partisan-heart occurred after the enrollment deadline. A failure to enroll in advance of the deadline is only voluntary for those citizens who knew, prior to the deadline, that they would want to vote in the party primary at issue.<sup>127</sup>

From an individualistic perspective, then, every advance enrollment requirement creates a severe burden on *some* citizen. Yet the Court has never so much as hinted that it would apply strict scrutiny to a modest advance enrollment requirement if only the plaintiff could show that his partisan identity changed after the enrollment deadline. Seen in this light, *Rosario* and *Kusper*'s rhetoric of voter fault merely provided a convenient means of rationalizing decisions whose true basis must lie elsewhere.<sup>128</sup>

### 3. *Storer: Ballot Access for Reasonably Diligent Candidates—More Than Rarely*

*Storer v. Brown*<sup>129</sup> concerned ballot access for independent candidates. The Court held that independent candidates who are “reasonably diligent” have a constitutionally protected interest in appearing on the ballot—as independents, not as “party men.”<sup>130</sup> The extension of the Constitution’s shield only to those candidates who are reasonably diligent is congruent, at least, with an individualistic approach to assessing burdens on voter participation. (The individual has a right to participate, but in order to exercise that right, he must live up to certain civic responsibilities. The unreasonable, dithering candidate or voter may be said to forfeit his right of participation.)

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<sup>127</sup> Elmendorf, *Structuring*, *supra* note 2, at \_\_\_.

<sup>128</sup> *See id.* at 353-57 (suggesting that *Kusper* and *Rosario* are best understood as a judicial effort to strike and enforce a balance between two competing structural values: keeping the candidate selection process responsive to new participants and ideas, and guarding the selection process against opportunistic behavior by voters who do not intend to support the nominee).

<sup>129</sup> 415 U.S. 724 (1974).

<sup>130</sup> *See id.* at 728 (noting that the state must “provide feasible means for other political parties and candidates [not just the two major parties] to appear on the general election ballot”), 742 (asking, as part of the constitutional inquiry, “[C]ould a *reasonably diligent* independent candidate be expected to satisfy the signature requirements . . . ?”) (emphasis added); 745-46 (rejecting State’s argument that the existence of a fair opportunity to qualify for the ballot as the candidate of a third party obviates the constitutional problem that would otherwise result from a barrier to ballot access for independent candidates—because by availing himself of the third-party route to ballot access “the candidate, who is by definition an independent and desires to remain one, must now consider himself a party man, surrendering his independent status”).

But having recognized the reasonably diligent independent candidate's constitutionally protected interest in ballot access, the *Storer* Court set a constitutional standard for judging ballot access regimes that is at odds with an individualistic understanding of constitutional rights. The Court established what amounts to an aggregate-performance standard for ballot access regimes, under which reasonably diligent independent candidates must be able to qualify "more than rarely."<sup>131</sup> Applying this standard, a court's job is to assess how the challenged regime functions over the run of candidates and elections.<sup>132</sup> If the regime passes this test, it would be gross abuse of discretion for a court to grant as-applied relief to a reasonably diligent candidate for whom the ballot access rules, in conjunction with her personal circumstances, put qualifying for the ballot out of reach. That would amount to entering a constitutional remedy in the absence of a constitutional wrong.

Beyond the framework it establishes for adjudicating the ballot-access claims of independent candidates, *Storer's* underlying suppositions about constitutional judicial review of electoral mechanics are hard to square with the *Gonzales* model. The *Storer* Court said judicial review would entail separating "specific provisions . . . that are valid from those that are invidious," by "considering the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."<sup>133</sup> The unit of constitutional analysis was to be a statute or its provisions—keeping in view the full sweep of benefits and costs—rather than a particular application.<sup>134</sup> The Court observed that the states had enacted "most substantial" regulations of "the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates,"<sup>135</sup> yet confidently announced that "[i]t is very unlikely that all or even a large portion of the state election laws would fail to pass muster under our cases."<sup>136</sup> It seems likely, though, that a "most substantial" regulation of the political process will end up making participation difficult

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<sup>131</sup> See *id.* at 741-43; Elmendorf, *Structuring*, *supra* note 2, at 346-48 (explicating the *Storer* standard).

<sup>132</sup> The *Storer* Court also established what I have termed "structural presumptions" to guide this inquiry when the data are murky. See Elmendorf, *Structuring*, *supra* note 2, at 347-48.

<sup>133</sup> 415 U.S. at 730 (quoting *Williams v. Rhodes*, 393 U.S.23, 30 (1968), and *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972)).

<sup>134</sup> Along the same lines, the Indiana Democratic Party's reply brief in *Crawford* correctly notes that balancing under *Burdick* (which updates *Storer*) "is systemic." Reply Brief for Petitioners at 7, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (No. 07-25).

<sup>135</sup> *Id.* at 730.

<sup>136</sup> *Id.*

for *someone*, thus calling the *Storer* Court's basic assumption of permissibility into doubt *if* a single voter or candidate is the proper unit of analysis.

### C. Text

In addition to being at odds with the nearest precedents, the *Gonzales* model for adjudicating constitutional voting rights claims is hard to reconcile with the Constitution's text.

The Constitution speaks to voting in three ways. First, and most obviously, it speaks through the prohibitory voting amendments—the Fifteenth, Nineteenth, Twenty Fourth, and Twenty Sixth—which disallow discrimination with respect to voting on the basis of race, sex, payment of a tax (for purposes of federal elections), and age (for citizens over 18). Given their group-specific reach, these amendments cannot support a generic right to vote, one that could be invoked by any citizen who seeks an exemption from regulatory barriers to electoral participation.

The Constitution also addresses voting in its prescription for the selection of Members of Congress in the Elections Clause of Article I, § 2. Here the document furnishes both a normative ideal against which actual selection mechanisms may be evaluated, and an allocation of regulatory authority with respect to the selection process.<sup>137</sup> The normative ideal is this: congressional representatives are to be “chosen by the people” of their respective states. Not by the people's state legislators, not by a monied or landed aristocracy, but by the people as a whole.

Does this provide a plausible basis for the *Gonzales* model for voting rights? No. “Choice by the people” implies preference aggregation across the multitudes who make up the citizenry of each state. That a voting regulation erects high hurdles to electoral participation by one or another citizen tells us nothing about whether that regulation substantially distorts the aggregation process. (In Part V, I shall have more to say about the meaning of “choice by the people.”)

The third way in which the Constitution speaks to voting is through the Guarantee Clause of Article IV, Section 4, which specifies that “[t]he United States shall guarantee to every State in this Union a Republican Form of

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<sup>137</sup> Regulatory authority with respect to congressional elections is partitioned between the states and Congress. The states and Congress have concurrent jurisdiction over the “time, place, and manner” of such elections, with the national law taking precedence where the two conflict. Only the states may determine who is qualified to be an elector, however, and this authority may only be exercised indirectly, by stipulating the qualifications for voting in elections for the most numerous house of the state legislature. The Constitution defines the national electorate derivatively: to consist of those citizens possessed of the requisite qualifications to vote for the most numerous house of their state's legislature.

Government.”<sup>138</sup> However the Guarantee Clause is best read, it too seems an extremely improbable hook for the *Gonzales* model for voting rights. As the Supreme Court has suggested when holding Guarantee Clause claims nonjusticiable, the Clause seems to be concerned with the overall structure or functioning of state governments, rather than individuated rights.<sup>139</sup>

#### IV. OTHER PATHS

If the Court rejects the extension of *Gonzales* to voting rights, it will be left with a stark choice in *Crawford*: either dodge the question of what showing of effects would establish a “severe” burden, or else bite the bullet, formally acknowledge that the constitutional right to vote derives much of its content from structural desiderata, and articulate an aggregate-effects test for burden severity. The full run of the Court’s election law jurisprudence since *Baker v. Carr* suggests that it would much prefer the first approach.<sup>140</sup> But, as I shall seek to establish here, none of the principal candidates for a dodge disposition is attractive. Because of this, *Crawford* presents an auspicious occasion for revisiting the ostensibly individual and personal nature of the constitutional right to vote.

##### A. Dodge #1: A Conclusory Affirmance

The Court could issue a brief opinion declaring that the Indiana ID requirement is a “reasonable, nondiscriminatory restriction” within the meaning of *Burdick* because (1) photo ID requirements are nowadays an familiar part of identity-sensitive activities in everyday life, and (2) the Indiana voter ID requirement does not facially discriminate among political groups.

This disposition would allow the Court to remain silent on the nature of the right to vote, but it almost surely would split the Court 5:4 along liberal/conservative lines.<sup>141</sup> It would also leave the lower courts facing other voter participation claims bereft of guidance. Voter ID is only the tip of the iceberg. In the post *Bush v. Gore* era, the lower courts have faced and

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<sup>138</sup> U.S. CONST. art. IV § 4.

<sup>139</sup> See, e.g., *Colegrove v. Green*, 328 U.S. 549, 552 (1946) (“The basis for th[is] suit [challenging the apportionment of population among legislative districts] is not a private wrong, but a wrong suffered by Illinois as a polity.”); *Pacific States Telephone & Telegraph Co. v. State of Oregon*, 223 U.S. 118, 149-51 (1912) (distinguishing legislative authority “as to purely political questions” concerning the “framework and political character” of a state government, from judicial authority over “justiciable controversies” involving rights specific to the defendant).

<sup>140</sup> [cf. Gerken, Baker symposium paper; Charles, Democracy & Distortion]

<sup>141</sup> See *supra* TAN \_\_.

continue to face an unprecedented number and variety of voter participation claims, including lawsuits challenging voter registration requirements, the activities of third-party groups that sponsor registration drives, the maintenance of voter rolls, and voting methods and vote-counting technologies, in addition to laws whose nominal purpose is to combat electoral fraud or inadvertent voting by the ineligible.<sup>142</sup>

B. Dodge #2: Substantive Specification of the “Reasonable, Nondiscriminatory” Photo ID Requirement

Professor Edward Foley would have the Court find the Indiana law unconstitutional because it does not include an exemption for voters who “were unable to obtain an ID because of unforeseeable difficulties (for example, delay in receiving a birth certificate from an out-of-state agency).”<sup>143</sup> Foley observes that the law sets up a procedure for two other classes of ID-less voters to validate their provisional ballots post-election (indigents unable to obtain ID without payment of a fee, and persons with a religious objection to being photographed), and then asks, “[I]s it too much to ask the state to open up this process to voters who have other forms of genuine hardship that prevent them from obtaining an ID for purposes of validating their provisional ballots?”<sup>144</sup> Foley thinks not, and believes, or at least hopes, that a supermajority of the Justices could accept this much.<sup>145</sup>

Using the language of *Burdick*, a court drawn to Foley’s proposal could simply declare that a general purpose hardship exception is necessary for a photo ID mandate to constitute a “reasonable, nondiscriminatory restriction” on voter participation.<sup>146</sup>

Foley makes no bones about the fact that his proposed disposition requires the Court to assume the role of de facto super-legislature with

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<sup>142</sup> For a sampling, see Election Law @ Moritz, Major Pending Cases, <http://moritzlaw.osu.edu/electionlaw/litigation/index.php>.

<sup>143</sup> Foley, *supra* note 54, at \_\_.

<sup>144</sup> *Id.* at \_\_.

<sup>145</sup> Foley does not consider the possibility that mandating a hardship exception in the context of a facial challenge would be anathema to the conservative Justices, especially so soon after *Gonzales v. Carhart*.

<sup>146</sup> This holding would depart from the usual approach in the *Burdick* line of cases, which is to defer to the state unless the burden of the challenged requirement is “severe.” But it is certainly open to the Court to strengthen the balancing standard applied to non-severe burdens, and to justify the Foley hardship exception in terms of that standard. Alternatively, one could argue that the hardship exemption is necessary to avoid a severe burden on any one voter—but that presupposes that a severe burden on any one individual is enough to trigger strict scrutiny, which is precisely question I am supposing the Court wants to dodge.

respect to voter ID requirements.<sup>147</sup> The Court would be evaluating the constitutional permissibility of challenged voting requirements on the basis of whether or not the law features a particular substantive provision that the Court deems necessary, as opposed to whether the law was enacted for illicit purposes, has constitutionally troublesome effects, or draws suspect classifications. Legitimate or not, this is imprudent.

For starters, the compromise between the liberal and conservative wings of the Court that Foley envisions would probably be a compromise for one day only. Before long, plaintiffs would be back in court arguing that this or that hardship exemption is unreasonable or discriminatory because it is unnecessarily cumbersome,<sup>148</sup> or because it defines hardship too stringently, or because it vests too much discretion in election officials to pass on whether a particular voter's hardship is severe enough to qualify for the exemption.<sup>149</sup> Even if liberal and conservative Justices were able to agree in the abstract on the requirement of a hardship exemption, there's little reason to think that they would be of like mind about the particulars. Foley's constitutional standard for evaluating these particulars—do they “reasonab[ly] accommodate[e] the interests on both sides”<sup>150</sup>—requires that judges make the very policy determination that has divided liberals and conservatives in the legislative arena.

Foley's solution would also lead to problems in the lower courts. As noted above, constitutional challenges to voter ID requirements are part of a larger wave of voter participation claims. A decree from the Supreme Court on the exemption necessary to make an ID requirement “reasonable and nondiscriminatory” would shed no light on what is necessary, for example, to make regulations of third-party voter registration drives constitutionally permissible.<sup>151</sup> But it would suggest that judges may properly resolve such

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<sup>147</sup> Foley writes, “Voter ID is one topic where unanimous Platonic Guardianship from the Court might not be so bad for our democracy. The topic is mired in strategic partisan disagreement, which prevents state legislatures from developing a reasonable accommodation of the competing interests involved. If the nine members of the Court take it upon themselves to guarantee that voter ID laws will be sensibly respectful of both the costs and benefits of these laws, then the Court could make up for this regrettable defect in the existing legislative process.” Foley, *supra* note 54, at \_\_\_.

<sup>148</sup> *Cf.* Elmendorf & Tokaji Brief, *supra* note 61, at 32 (characterizing the indigency accommodation under the Indiana photo ID law as “peculiar and seemingly punitive”).

<sup>149</sup> *Cf.* ACLU of New Mexico v. Santillanes, No. Civ. 05-1136, 2007 WL 782167, at \*36-37 (D.N.M. Feb. 12, 2007) (enjoining City of Albuquerque voter ID requirement found to vest too much discretion in pollworkers).

<sup>150</sup> Foley, *supra* note 54, at \_\_\_.

<sup>151</sup> *Cf.* ACORN v. Cox, No. 06-1891 (N.D. Ga. Sept. 28, 2006) (order granting preliminary injunction) (invalidating various voter registration regulations); Project Vote v. Blackwell, 455 F. Supp. 2d 694, N.D. Ohio 2006) (preliminarily enjoining registration and training requirements, backed by criminal penalties, for paid participants in voter registration

cases by making free-form pronouncements about what further statutory provisions must be added to this or that regulation of the voting process. Whether or not Foley is right that “unanimous Platonic Guardianship” of this sort from a nine-member, ideological diverse Supreme Court would be healthy for our democracy, most of the guardianship in practice would take place via trial judges acting individually, or three-judge appellate panels composed without regard for ideological balance and using simple-majority voting rules. This is not a happy prospect for anyone worried about judicial partisanship or its appearance in the resolution of conflicts over the ground rules of electoral competition.

These risks might be worth incurring of the benefits of the hardship exception were large enough, but it’s not clear that the exception would be of any practical moment. Would it matter for a lot of voters, or just a few?<sup>152</sup> The record in *Crawford* gives little indication. This is not just a peculiarity of *Crawford*, but to some degree an inevitable concomitant of judicial efforts to define the substantive constitutionality of a class of legislation with reference to the presence or absence of a particular provision (rather than effects or purpose). That undertaking will always require taking shots in the dark—much more so than remedy design in cases where the effects of the challenged law (and alternatives to it) have been demonstrated empirically.<sup>153</sup>

Now, a caveat. Foley’s notion that the courts should undertake to settle the photo ID issue by prescribing substantive content would be much more attractive if the courts could piggyback on the conclusions of a decisionmaking body characterized by ideological diversity, independence from partisan electoral politics, and consensual decisionmaking. In other work, Foley has recommended the formation of bipartisan “shadow courts” that would submit amicus briefs with proposed rulings in post-election

drives); *League of Women Voters of Fla. v. Cobb*, 447 F. Supp. 2d 1314 (S.D. Fla. 2006) (preliminarily enjoining law that fined voter registration groups for late submissions).

<sup>152</sup> Cf. *Debate, Voter ID: What’s At Stake?*, 156 U. PA. L. REV. PENNUMBRA 241, 254 (Closing Statement of Bradley A. Smith) (hypothesizing that the hardship exception would be relevant for very few voters).

<sup>153</sup> One might also doubt whether a court or any other public institution with a deep commitment to precedent should undertake to prescribe with specificity the policies that other governmental regulators must establish. Code-like legal prescriptions inevitably become obsolete thanks to adaptation or evasion by the regulated parties, or the discovery that critical empirical suppositions were unfounded. This is harmless enough when those prescriptions are found in an administrative regulation or statute that can be revised at modest cost. The Supreme Court revisits its holdings only rarely and with great reluctance, however. To keep its holdings from foreclosing the development of new and useful regulations, or the abandonment of pointless ones, it generally behooves the Court to justify its interventions in terms of the purpose or effects of the challenged requirement, rather than the requirement’s content, unless the content rule merely establishes rebuttable presumptions about purpose or effects.

contests where the winner hangs in the balance.<sup>154</sup> A more legislatively oriented advisory body, such as the Election Assistance Commission, might also be able to establish certain minimum features that an ID requirement must have in order to be reasonable.<sup>155</sup> But for purposes of deciding *Crawford*, all this is moot, because the Foley hardship exemption has yet to be embraced by a body so structured as to warrant judicial recognition of its conclusions as presumptively determinative of what is out of bounds.

C. Dodge #3: Vacate and Remand for Balancing or Tailoring Short of Strict Scrutiny

The more modest alternative to Dodge #2 is for the Court to vacate and remand on the theory that the lower courts' review was too deferential even assuming that the plaintiffs failed to establish a "severe" burden. Several law professors, myself included, filed amicus briefs in *Crawford* arguing that the lower courts misunderstood the standard of review for non-severe burdens.<sup>156</sup> This default standard, we argued, does not allow a voting requirement to be upheld unless it is "reasonably necessary to important state interests."<sup>157</sup> "[T]hough less demanding than strict scrutiny," this standard "requires more than hypothetical rationality."<sup>158</sup>

The Court itself seems to be of two minds about the standard of review in non-severe burden cases. On the one hand, the Court's nominal formulation of the test comports with the reasonable necessity standard,<sup>159</sup> and a small number of the Court's interventions in this line of cases can be read as resting on the application of an intermediate standard of review.<sup>160</sup> On the other hand, the Court's recent applications of the default standard have been very lax.<sup>161</sup> The Court's ready resort to conjecture in explaining

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<sup>154</sup> Edward B. Foley, *A Model Court for Contested Elections (Or, the "Field of Dreams" Approach to Election Law Reform)*, ELECTION LAW @ MORITZ, June 19, 2007, <http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=157>.

<sup>155</sup> Cf. Christopher S. Elmendorf, *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L. REV. 1366, 1405-17, 1441-44 (2004) (outlining proposal for advisory electoral reform agency, and critiquing structure of EAC).

<sup>156</sup> See Elmendorf & Tokaji Brief, *supra* note 61, Hasen Brief, *supra* note 31.

<sup>157</sup> Elmendorf & Tokaji Brief, *supra* note 61, at 5-11.

<sup>158</sup> *Id.* at 2-3.

<sup>159</sup> See *id.* at 9-10.

<sup>160</sup> See *id.* at 10-11. Another good example is *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

<sup>161</sup> See, e.g., *Clingman v. Beaver*, 544 U.S. 581 (2005); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986).

the “reasonableness” of certain election laws,<sup>162</sup> and its unwillingness to require the states to establish the actual (as opposed to imagined) existence of a problem before attacking it with laws that burden rights of political participation,<sup>163</sup> suggests that the *Burdick* test may not meaningfully differ from rationality review in cases involving “lesser” burdens.<sup>164</sup>

Like the Court, I am of two minds about this standard, but increasingly I think the position I took as an *amicus* was incorrect, and that the Court should hold that the default standard of review is plain vanilla rational basis (unless, per the above, there is a practicable way of tying judicial reasonableness determinations to the collective judgment of another entity, such as a Foleyque shadow court). I make this suggestion not because I believe it the fairest reading of the relevant precedents, or because it is the best standard for an ideally impartial judge to apply, but on account of the apparent pattern of judicial partisanship in voter participation cases. In light of this pattern, I do not think it prudent for the Court to endorse a default standard of review that invites the judge to substitute her own view of what is reasonable for that of the legislature. Judicial second-guessing of the legislature’s handiwork should be reserved for a narrow subset of cases in

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<sup>162</sup> See, e.g., *Timmons*, 520 U.S. at 364-65 (sustaining Minnesota’s ban on fusion candidacies on the basis of an imagined parade of horrors—ballots converted into confusing “billboard[s] for political advertising”—without paying any attention to how fusion actually operates in the one state, New York, that allows it).

<sup>163</sup> See, e.g., *Munro*, 479 U.S. at 194-96 (1986).

<sup>164</sup> There is a split in the lower courts that reflects this ambiguity. Some have clearly stated that the standard of review for non-severe burdens is stricter than the ordinary rational basis test. See, e.g., *McLaughlin v. N.C. Bd. of Elec.*, 65 F.3d 1215, 1221 n. 6 (4th Cir. 1995) (stating court’s belief “that a regulation which imposes only moderate burdens could well fail the Anderson balancing test when the interests that it serves are minor, notwithstanding that the regulation is rational,” and disagreeing with Eighth and Eleventh Circuit decisions which the Fourth Circuit construed as applying ordinary rational basis review in such circumstances); *Reform Party of Allegheny County v. Allegheny County Dep’t. of Elec.*, 174 F.3d 305, 314-15 (3d. Cir. 1999) (applying an “intermediate level of scrutiny” and striking down a ban on cross-endorsements by minor parties, the burden of which was judged “not severe” yet “not trivial”); *Cotham v. Garza*, 905 F. Supp. 389 (S.D. Tex. 1995) (striking down law that barred voters from taking into the polling booth any pre-printed materials containing candidate endorsements, despite deeming burden to be “limited, not severe”). Others have unambiguously deployed plain-vanilla rationality review. See, e.g., *Werme v. Merrill*, 84 F.3d 479, 485 (1st Cir. 1996) (“defendants need only show that the enactment of the regulation had a rational basis,” given that the burden at issue is “slight”); *Common Cause/Ga. v. Billups*, --- F.Supp.2d --- (N.D. Ga., Sept. 6, 2007) (“the appropriate inquiry is whether the Photo ID requirement is rationally related to the interest the State seeks to further”). Cf. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 825, 829 (2006) (stating that “the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves,” but relying on the iconic “anything passes” rational basis precedent of *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483 (1955)).

which there are good and readily verified reasons to believe that the balance struck by the lawmaking branches is way off the mark.

D. Dodge #4: Purpose not Effects

As noted above, the Court could strike down the Indiana ID requirement on the ground that the law's true purpose was to change the composition of the voting public for partisan reasons—to serve, really, as an indirect voter qualification rather than as a means of ensuring that only those persons who are qualified to vote do so. The Court could hold that this illicit purpose is enough to invalidate the ID requirement without regard to its effects.<sup>165</sup> But this holding is most improbable, because the conservative Justices will not want to impugn the bona fides of the numerous Republican lawmakers and activists who have joined the photo ID bandwagon, and even the Court's liberal wing may be reluctant to embrace a jurisprudential approach that would foreground the apparent pattern of judicial partisanship in deciding these cases.

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No doubt there are other ways of disposing of *Crawford* without facing the question of whether the “severity” of a voter participation burden should be approached in individualistic or collective terms.<sup>166</sup> I cannot hope to exhaust all the possibilities here. But in light of the manifest shortcomings of the readily available options, and of the lower courts' pressing need for generalizable guidance, the Justices may well be primed for a forthright reconsideration of the nominal status of the right to vote as a “personal” right. Let us turn, then, to my proposal for doing so.

V. A BETTER APPROACH: GROUNDING BURDEN ANALYSIS IN ARTICLE I AND THE SEVENTEENTH AMENDMENT

The balance of this paper sketches an alternative to the *Gonzales* model of voting rights. The essential postulates are these: One, there is a constitutional cost to any voting requirement that causes the political demographics of the voting public—the subset of the citizenry that regularly participates in elections—to depart from the demographic profile of the

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<sup>165</sup> On purpose inquiries within the *Storer-Burdick* framework, see Elmendorf, *Structuring*, *supra* note 2, at 363-76.

<sup>166</sup> For example, the Court might find a way to dispose of the case on standing grounds, *cf.* State Respondents' Brief, *supra* note 63, at 14-19 (arguing that petitioners do not have standing), or punt by saying that it had granted certiorari improvidently. But those outcomes seem unlikely, for the Court's early grant of certiorari in *Crawford* (prior to the emergence of a clear circuit split), suggests that the Justices want to provide lower courts with substantive guidance. See Foley, *supra* note 54, at \_\_\_.

population that is eligible to vote. Second, ordinary voting requirements, defined as those found in a majority of the states, enjoy a strong presumption of permissibility. Any skewing effects that they cause (relative to the level of skew that would obtain were they replaced with the “least skewing” alternatives) are presumed to be justified by important state interests. Third, as the predicate for strict scrutiny, plaintiffs generally must establish that replacing the challenged requirements with ordinary alternatives found in other states would result in a politically substantial reduction in skew. Mere statistical significance is not enough--the magnitude of the effect must be large enough to qualify as “severe.” Fourth, unless and until such a threshold showing has been made, voting requirements that do not facially discriminate among politically identifiable groups shall be presumed to be “reasonable, nondiscriminatory restrictions,” and shall receive only rational basis review.<sup>167</sup> (A qualification: I would authorize the lower courts to entertain arguments for other threshold showings that would trigger strict scrutiny, while cautioning the courts not to adopt any alternatives unless (a) the test is tied to a defensible theory of constitutional harm, and (b) the test is mechanistic enough for even-handed application by judges with dissonant ideological commitments.)

This framework has several virtues. It is constitutionally discernable, comporting with the text of Article I, Section 2 and the Seventeenth Amendment. It provides something of value to liberal and conservative jurists alike, bringing the prospect of compromise into view. It greatly limits judicial intervention in the electoral process while retaining a role for the courts in high-value cases, i.e., where the threats to popular accountability are large. And in time, it should prove reasonably determinate—once the courts settle upon measures of skew and quantitative thresholds for what constitutes a severe skewing effect.

Two potential refinements may also be worth considering. First, the courts might relax the requirement that plaintiffs prove a severe skewing effect if the empirical evidence is inconclusive yet reasonably objective “danger signs” suggest that substantial skew is likely (and likely to be inadequately justified).<sup>168</sup> The danger-signs showing would substitute for the usual empirical showing. Second, the courts might develop procedural definitions of what is a “reasonable, nondiscriminatory” restriction on political participation, to encourage lawmakers to approach political process reform in a measured way and to generate empirical data that could support future judgments about burden severity.

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<sup>167</sup> Of course, it must also be the case that the requirement does not facially discriminate on the grounds prohibited by the 15th, 19th, 24th and 26th Amendments.

<sup>168</sup> The danger-signs approach could be implemented by looking for indicia of a large impact (high constitutional costs), or a substantial and unjustified impact (high costs and low benefits).

I shall take up the components of the proposed framework one at a time, and then turn to likely objections.

#### A. The Proposal

##### 1. *The Representative Participation Norm*

By its terms, the Constitution may “not confer the right of suffrage upon any one,”<sup>169</sup> but as we have seen it does create an entitlement to be *governed* by representatives chosen by and answerable to “the people,” at least at the national level. This in turn requires that elections be structured in certain ways. Voting rights doctrine may be derived accordingly.

What does “choice by the people” entail? Akhil Amar’s work on the Guarantee Clause sheds light on this question.<sup>170</sup> In the Founding, Antebellum, and Reconstruction Eras, the words “the People” were understood to refer to citizens competent for self government.<sup>171</sup> I shall refer to this class of citizens as the *normative electorate*. A republican government was one whose structure was “derived from [these citizens],” and was “legally alterable by a [simple] ‘majority’ of them.”<sup>172</sup> Bones of contention arose not over this principle, but rather over the two associated “denominator problems,” one geographic (was a State or the Nation the relevant whole?),<sup>173</sup> the other demographic (who belongs in the normative electorate?).<sup>174</sup>

It doesn’t follow, of course, that the Guarantee Clause requires legislators to be selected through a simple majority vote of the civically competent class of citizens. All that the Clause requires is that the constitutional structure of government be alterable by such a vote. Yet we can nonetheless infer from the text of Article I, Section 2 and the Seventeenth Amendment that both houses of Congress, at least, are to be chosen by and accountable to a majority of this class of persons.<sup>175</sup> Given

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<sup>169</sup> *Minor v. Happersett*, 88 U.S. 162, 178 (1874).

<sup>170</sup> See Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749 (1994).

<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 749.

<sup>173</sup> *Id.* at 766-68.

<sup>174</sup> *Id.* at 768-73.

<sup>175</sup> One might also go further and infer limitations on the permissible range of qualifications. As Madison wrote in Federalist No. 57:

Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of

the settled understanding of what it meant for a form of government to be chosen by the people, and hence republican, it would be incongruous to read the constitutional text's requirement that Members of Congress be chosen by the people as authorizing anything other than majoritarian choice by those citizens competent for self-government.

It is a familiar fact of U.S. elections that barely half of the people who are eligible to vote actually cast a ballot in Presidential elections, and that participation rates are even lower in elections for other offices.<sup>176</sup> On the theory advanced here, scant turnout has a constitutional cost insofar as the lack of participation distorts the lines of accountability contemplated by Article I and the Seventeenth Amendment. That is, the constitutional cost of a lack of participation depends upon the degree to which the voting public is a *skewed subsample* of the normative electorate. The central question is whether the political demographics of nonparticipants diverge from those of the participants. I shall refer to the ideal condition, in which the distribution of personal interests and public concerns among voters is identical to that among qualified nonvoters, as one of *representative participation*.<sup>177</sup>

The payoff from judicially enforcing the representative participation norm would come in the coin of transparency: the maintenance of a clear, publicly visible distinction between qualifications for membership in the normative electorate, on the one hand, and logistical regulations of the voting process, on the other.<sup>178</sup> States would not be allowed to establish voter qualifications *sub silentio*, under the guise, for example, of establishing fraud-resistant electoral logistics. If a state wants to redefine the class of citizens whom it deems civically competent to participate in

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obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.

Wesberry v. Sanders, 376 U.S. 1, 18 (1964) (quoting The Federalist, No. 57 at 365 (Cooke ed. 1961)). See also AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 64-69 (2005) (describing Founding Era understandings about who would participate in elections for the House of Representatives).

<sup>176</sup> Zoltan Hajnal & Jessica Trounstein, *Where Turnout Matters: The Consequences of Uneven Turnout in City Politics*, 67 J. POL. 515 (2005) ("At best roughly half of eligible voters vote in national contests. At worst, fewer than 10% of adults vote in local elections.") (citing AMY BRIDGES, MORNING GLORIES: MUNICIPAL REFORM IN THE SOUTHWEST (1997); ZOLTAN L. HAJNAL ET AL., MUNICIPAL ELECTIONS IN CALIFORNIA: TURNOUT, TIMING AND COMPETITION (2002)).

<sup>177</sup> [FN re: electoral mobilization as preference shaping, which my rep-participation norm papers over. choice between "max participation" and "rep participation" as proxies for full participation may depend on degree to which one takes seriously the idea of preference shaping mobilization. in my view, it's too contingent to matter much (noise around zero?)]

[might allow for temporal variation, cf. Cox]

<sup>178</sup> Cf. U.S. Term Limits v. Thornton, 514 U.S. 779, 835 (1995) (distinguishing laws that "regulate[] election procedures" from laws that establish "substantive qualification[s]" for candidates who will enjoy access to the ballot).

elections, the state must do so overtly. It must call the corresponding requirement a voter qualification, and face the political and legal fallout.

Until the 1960s, the states had broad legal discretion to set voter qualifications. But in a few short years and essentially by fiat, the Court reduced the permissible qualifications to four: age of majority, residency, citizenship, and non-felon status.<sup>179</sup> It may be objected, then, that judicial enforcement of the representative participation norm would merely add teeth to the Warren Court's interpretively dubious holdings about voter qualifications,<sup>180</sup> while doing little to foster political accountability for the states' decisions about who is competent to participate in elections.<sup>181</sup> I have some sympathy for this position, and I suspect that it will make many conservative judges reluctant to embrace the representative participation norm.

On balance, however, I think enforcement remains advisable if judicially manageable standards can be crafted. Enforcement would

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<sup>179</sup> See *Carrington v. Rash*, 380 U.S. 89 (1965) (striking down exclusion of military members from local elections); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) (holding that wealth-based qualifications are not permissible); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 625 (1969) (striking down interest-based franchise limitation in school board election, while indicating that holding was not meant to cast doubt upon requirement that voters “(1) be citizens of the United States, (2) be bona fide residents of the school district, and (3) be at least 21 years of age”); *Cipriano v. Houma*, 395 U.S. 701 (1969) (striking down franchise limitation to “property taxpayers” in municipal utility bond referenda); *City of Phoenix v. Kolodziejski*, 399 U.S. 204 (1970) (holding that City may not reserve franchise to property owners for purposes of certain bond referenda); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (applying strict scrutiny to durational residency requirements). Compare *Richardson v. Ramirez*, 418 U.S. 24, 54 (1974) (exempting felon disenfranchisement laws from the *Harper/Kramer/Dunn* line of cases because the “exclusion of felons from the vote has an affirmative sanction in § 2 of the Fourteenth Amendment”).

<sup>180</sup> These holdings are interpretively dubious because they leave the states with essentially no discretion to set competence-based voter qualifications, notwithstanding the language of Article I § 2 and the historical understanding of republican government. (Though this carries us beyond the scope of this paper, it is not my position that voter qualifications not proscribed by the prohibitory amendments should have been given a completely free pass by the Warren Court. I do think, however, that the Court would have been on stronger footing if it had tied its interventions to evolving understandings—as manifested in the states' practices—about the types of qualifications that are consistent with republican government. Cf. *THE FEDERALIST* No. 52, at 326 (James Madison) (Clinton Rossiter ed., 1961) (“The definition of the right of suffrage is very justly regarded as a fundamental article of republican government.”).)

<sup>181</sup> It may be objected that political accountability is meaningless as to questions about who may exercise the franchise—for by definition, the excluded do not vote. But this objection is too easy. There is accountability to the normative understandings of those who do exercise the franchise, and there can be forward looking accountability to those who do not but look to have history on their side. Cf. *AMAR*, *supra* note 175, at \_\_\_ (discussing political pressure for extension of the franchise to women in relation to ratification of the 19th Amendment).

continue to serve a transparency function. It would operate as challenge to the American people: “This is how the Warren Court has interpreted your Constitution, and narrowed the permissible range of voter qualifications. Do you like it, or do you want to go back to the days when there was much more room to squabble over who is competent to vote?” Enforcement would also be a step in the direction of judicial candor. If a majority of the current Court is convinced that the Warren Court grievously erred in restricting the states’ authority to set voter qualifications, the Justices should revisit the judicial doctrine governing voter qualifications, rather than allow state lawmakers to evade both political and judicial accountability by enacting indirect and nontransparent qualifications under the guise of doing something else.

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The argument to this point establishes, at best, that citizens have a constitutionally protected interest in representative electoral participation for purposes of elections for the House of Representatives and the Senate. Yet as a matter of positive law, the “right to vote” now extends as well to state and local elections. Can a “right to a representative electorate” for purposes of state and local elections also be derived from the Constitution’s text?

I believe the answer is “yes” for purposes of the “most numerous branch of the State Legislature,” but not otherwise. Recall that Article I, Section 2 prescribes that “the House of Representatives shall be composed of Members chosen . . . by the People” *and* that “the Electors in each state shall have the Qualifications requisite for the Electors of the most numerous branch of the State Legislature.” For both of these conditions to obtain, it must be the case that the qualifications for voting for the lower house of the state legislature tend to ensure a representative turnout in *congressional* elections.<sup>182</sup> If the lower house of the state legislature is chosen on the same election cycle, this should result in a roughly representative electorate for purposes of that governing body too. I see little textual basis, however, for extending the representative-electorate norm to the upper house of the state legislature or to gubernatorial elections, let alone to local government.<sup>183</sup>

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<sup>182</sup> If the reader still thinks it odd to find in “the People” an implied limitation on qualifications for voting in state legislative elections, I would ask that she or he consider this hypothetical: Imagine what would happen if a U.S. state enacted a “qualification” such that in order to vote for the most numerous branch of its legislature, one had to be a citizen of France. Assuming that these “Electors” proceeded to vote for the state’s representatives in Congress, pursuant to the second clause of the first sentence of Article I, Section 2, it could no longer be said that the House of Representatives had been chosen “by the People of the several States.” The House would have been chosen by the People of most of the States, plus the People of France.

<sup>183</sup> Except insofar as the Guarantee Clause limits the permissible range of voter qualifications. *See supra* note 180.

Yet with a nod to the virtues of *stare decisis*, it may be enough to let bygones be bygones, and allow that the “right to vote” for such bodies, once extended, is now fundamental, and in its content indistinguishable from the right to vote for the most populous house of the state legislature.<sup>184</sup>

## 2. *The Permissibility of Ordinary Voting Requirements*

One might fear that judicial enforcement of the representative participation norm would prove very disruptive, with judges ordering the replacement of many commonplace voting requirements with “least skewing” alternatives. This fear is rooted in two observations. The first concerns the demographics of political participation: elderly, highly educated, and affluent citizens are overrepresented among the voting public, whereas poor people, poorly educated people, young people, and members of certain minority groups vote in disproportionately low numbers relative to their share of the normative electorate.<sup>185</sup> Second, because voting is a “low-benefit, low-cost activity,” “small changes in the cost of voting might have sizable effects on overall turnout rates and influence the turnout of some groups more than others.”<sup>186</sup> Such changes could result from any number of modest regulations whose true purpose is fraud reduction or administrative convenience.

The fear of disruption is probably exaggerated. Political scientists who have studied the distribution of political views among the voting and non-voting publics have generally concluded that the voting public is, in fact, fairly representative of nonvoters.<sup>187</sup> To be sure, there are some research findings to the contrary,<sup>188</sup> but much of the empirical work stands as an antidote to what political scientists Benjamin Highton and Raymond

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<sup>184</sup> See *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 628 (1969). The available evidence indicates that departures from representative participation are much larger at the state and especially the local level, than at the national level. See Hajnal & Trounstine, *supra* note 176.

<sup>185</sup> For a review of the literature, see Arend Lijphart, *Unequal Participation: Democracy's Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997).

<sup>186</sup> Highton, *supra* note 121.

<sup>187</sup> Much of this literature is reviewed in Benjamin Highton & Raymond E. Wolfinger, *The Political Implications of Higher Turnout*, 31 BRIT. J. POL. SCI. 179, 180-86 (2001). See also Jack Citran et al., *What If Everyone Voted? Simulating the Impact of Increased Turnout in Senate Elections*, 47 AM. J. POL. SCI. 75 (2003).

<sup>188</sup> See, e.g., Adam J. Berinsky, *Silent Voices: Social Welfare Policy Opinions and Political Participation in America*, 46 AM. J. POL. SCI. 276 (2002) (finding that nonvoters are more liberal on social welfare policy questions); Hajnal & Trounstine, *supra* note 176 (agreeing that “fears of a skewed electorate leading to biased outcomes are largely unfounded” vis-à-vis national elections, but showing that skew is much more pronounced in low-turnout local elections).

Wolfinger call “the widespread belief ‘that if everybody in this country voted, the Democrats would be in for the next 100 years.’”<sup>189</sup> Moreover, it’s far from clear that removing the remaining barriers to vote participation (such as registration requirements, in-person voting requirements, etc.) would do much to improve the representativeness of the voting public. Reviewing the evidence to date, MIT professor Adam Berinsky argues that recent reforms meant to lower the cost of voting “may have increased turnout slightly but [have] not had the hypothesized partisan effects.”<sup>190</sup> If anything, these reforms have increased the socioeconomic bias of the electorate, boosting the frequency with which the politically engaged participate in elections but doing little to draw in the marginalized.<sup>191</sup> For nonparticipants, Berinsky hypothesizes, the predominant barrier to participating is not the “direct cost[] of registration and getting to the ballot box,” but rather the “cognitive cost[] of becoming engaged with and informed about the political world.”<sup>192</sup>

That said, the Justices may be understandably reluctant to constitutionalize a norm that even arguably casts doubt upon typical voting requirements—especially if there is room to argue about how deviations from the norm are best measured;<sup>193</sup> and especially if the conventional wisdom has it that compliance with the norm would put “the Democrats . . . in for the next 100 years.” Indeed, it is conceivable that judicial recognition of the norm would prompt plaintiffs to seek radical remedies for failures of representativeness, given the meager-to-nonexistent gains from recent progressive reforms. (For example, plaintiffs might argue that the norm

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<sup>189</sup> Highton & Wolfinger, *supra* note 187, at 179 (quoting John Kenneth Galbraith, Interview, CAL. MONTHLY, Feb. 1986, at 11).

<sup>190</sup> Adam J. Berinsky, *The Perverse Consequences of Electoral Reform in the United States*, 33 AM. POL. RES. 471, 472 (2005).

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* at 472. See also Highton, *Voter Registration*, *supra* note 111 (reviewing empirical literature and arguing that “there are minimal partisan implications of contemporary registration laws and that registration reform has probably reached its limits of enhancing turnout). This is not to say that there are no electoral mechanics reforms that could increase the representativeness of the voting public. Cf. Raymond E. Wolfinger et al., *How Postregistration Laws Affect the Turnout of Citizens Registered to Vote*, 5 STATE POL. & POL’Y Q. 1 (2005 (estimating that the establishment of policies such as mailing voters a sample ballot and information about their polling places, extending the hours that polls are open, and requiring employers to give workers time off to vote, can increase turnout of registered voters by about three percentage points with a disproportionate increase among the young and less well educated).

<sup>193</sup> See *infra* TAN \_\_.

requires that voting be made compulsory if removal of direct barriers to participation is not enough to generate a representative voting public.<sup>194</sup>)

The potentially disruptive force of the representative participation norm could be suitably limited, I think, by establishing a strong presumption that ordinary voting requirements—those found in more than half of the states—are justified by important state interests in fair, effective, and efficient elections.<sup>195</sup> Although needed for pragmatic reasons, this presumption is no mere contrivance. It can be justified in terms of the Constitution and judicial precedent, not just the politics of judicial coalition building.

The Constitution nowhere indicates that the states may *only* pursue the goal of representative participation in regulating the time, place, and manner of congressional elections. Surely it is also permissible for the states to enact laws designed to make voting more convenient or secure, or better informed, or less costly to administer, even if such laws have some incidental adverse effect on the representativeness of the voting public. As the Court has long recognized, the Constitution’s delegation of election administration authority to the states implies that the states have some discretion to make judgments about how best to organize elections.<sup>196</sup>

The Constitution is perhaps best understood as requiring legislators and election administrators to make a good faith effort to honor the representative participation norm while reasonably pursuing other permissible goals. But this is not a standard the courts can administer. The courts need a template with sharper edges, especially when dealing with politically fraught questions about voting requirements, and especially when extending a norm that, if not properly limited, may cast doubt upon the constitutionality of a vast range of common practices.<sup>197</sup>

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<sup>194</sup> Cf. Arend Lijphart, *Unequal Participation: Democracy’s Unresolved Dilemma*, 91 AM. POL. SCI. REV. 1 (1997) (recommending that compulsory voting be adopted in the United States to remedy the current pattern of differential participation across demographic groups).

<sup>195</sup> Incidentally, recognition of this presumption would enable a judge who thinks Indiana’s photo ID requirement is unconstitutional to give a firm response to the many critics who have said, “If you strike down this law, then a wide swath of ordinary voting requirements will also be vulnerable.” Cf. SG’s Brief, *supra* note 15, at \_\_ (arguing that the petitioners’ legal argument casts doubt on the permissibility of HAVA’s modest identification requirements for first time voters who register by mail).

<sup>196</sup> See, e.g., *Storer v. Brown*, 415 U.S. 724, 729-30 (1974) (suggesting that Constitution’s delegation to the states of authority to set voter qualifications and regulate the time, place, and manner of congressional elections rules out any judicial doctrine that would “automatically invalidate every substantial restrictions on the right to vote or associate”).

<sup>197</sup> Compare the apportionment of population among legislative districts, which the Court undertook to regulate by pronouncing a good faith requirement, see *Reynolds v. Sims*, 377 U.S. 533, 577 (1964) (“the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable”), which requirement the Court then proceeded to implement

The presumption of permissibility for common voting requirements comprises a portion of the needed template. It is a practical means of implementing the good faith standard.<sup>198</sup> Indeed, if the typical state legislator takes seriously his or her sworn obligation to uphold the Constitution, judicial reliance on this presumption may well result in more correct decisions over the run of cases than if individual judges undertook to assess, case by case, whether common voting requirements actually emerged from “a good faith effort to honor the representative participation norm while reasonably pursuing other goals.” The concurrent wisdom of the several states is likely sounder than the perception of a single federal judge (or a panel of three or nine). And a doctrine that presumes that the states have collective wisdom when it comes to voting requirements would comport very nicely with the Constitution’s scheme for congressional elections—which entrusts the states with initial responsibility for regulating those elections, yet without extending autonomy to each state to do as it sees fit.<sup>199</sup>

This is not to say that the presumption of permissibility for ordinary voting requirements should be irrebuttable. Some electoral regulations may persist simply because they serve incumbents’ interest in re-election, or the dominant political party’s interest in securing its hold on power. But plaintiffs should not be able to overcome the presumption of permissibility for ordinary voting requirements simply by invoking the specter of self-dealing.<sup>200</sup>

Doctrinally, it would not be a big leap to establish a strong presumption of permissibility for voting requirements that are found in most of the states. In the recent case of *Clingman v. Beaver*, the Court remarked that “ordinary

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with fairly hard-edged rules about permissible population deviations, *cf. Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (stating that deviations of less than 10% are presumptively permissible). *See also* [Charles, Democracy, at \_\_\_.]

<sup>198</sup> *Cf.* RICHARD H. FALLON, JR., IMPLEMENTING THE CONSTITUTION \_\_\_ (2001) (explaining role of instrumental judgments in the crafting of constitutional doctrine); Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1 (2004) (reviewing and extending “gap” theories of constitutional adjudication, which hold that judicial rules of decision are not co-extensive with constitutional meaning, but rather arise from pragmatic judgments about how the courts can best give force to constitutional meaning, taking into account their institutional needs and limitations).

<sup>199</sup> The Constitution’s vesting in the states of responsibility for regulating the time, place, and manner of congressional elections—subject to override by Congress—arguably contemplates a process in which the states act as regulators in the first instance and learn from one another, with Congress remaining free to step in if the process of mutual learning among the states breaks down.

<sup>200</sup> At the very least, they should be required to make a substantial showing that the challenged requirements are being maintained in the teeth of considered opinion.

and widespread burdens” on voters should not be deemed “severe.”<sup>201</sup> And the Court has long worked from the premise that “[i]t is very unlikely that . . . a large portion of the state election laws would fail to pass muster under our cases.”<sup>202</sup> The presumption of permissibility for typical voting requirements merely concretizes these ideas.

### 3. *The Trigger for Strict Scrutiny: Severe Departures from Representative Participation*

The most delicate step in implementing the representative participation approach is deciding precisely what the plaintiffs must establish as the factual predicate for strict scrutiny. Based on the argument to this point, one might think strict scrutiny would apply whenever the plaintiff establishes (1) that replacement of the challenged requirements with alternatives of the plaintiffs devising would result in a statistically significant reduction in skew, and (2) that the challenged requirements are not commonplace.<sup>203</sup> The first showing would be necessary to prove skew and, correlatively, the existence of a less skewing remedial alternative; the second would serve to establish that this skewing effect is not presumptively justified.

I would set the bar higher. In my view, plaintiffs should generally be required to further establish (1) that a reduction in skew would obtain if the challenged requirements were replaced not merely with alternatives of the plaintiffs’ choosing, but with commonplace alternatives found in other states; and (2) that this reduction in skew would be politically substantial in magnitude, not merely statistically discernable with a high degree of confidence. The first of these showings ensures that the federal courts will follow the lead of the states in deciding what alternatives to the challenged regulations are reasonably practicable, consistent with the principle that the states, under our Constitution, have primary responsibility for regulating the time, place, and manner of elections.<sup>204</sup> It also cures an anomaly that would occur if plaintiffs only had to prove a substantial reduction in skew vis-à-vis

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<sup>201</sup> *Clingman*, 544 U.S. at 593.

<sup>202</sup> *Storer*, 415 U.S. 724, 730.

<sup>203</sup> *Cf.* Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard That Works*, 82 N.Y.U. L. REV. 1174, 1203-06 (2007) (proposing that the courts should apply strict scrutiny to any voting requirement that has a statistically significant skewing effect on the political demographics of the voting public, though without suggesting a privileged status for commonplace requirements).

<sup>204</sup> *Cf.* *LULAC v. Perry*, 126 S. Ct. 2594, 2607-08 (2006) (opinion of Kennedy, *J.*) (noting that the Constitution’s apportionment of regulatory authority over the time, place, and manner of congressional elections “leaves with the States primary responsibility for apportionment of their federal congressional . . . districts,” and that, “[a]s the Constitution vests redistricting responsibilities foremost in the legislatures of the States and in Congress, a lawful, legislatively enacted plan should be preferable to one drawn by the courts”).

their preferred regulatory alternative. Under the latter approach, a state with an unusual voting requirement whose skewing effect (relative to the plaintiffs' preferred regulatory alternative) was no worse than the skewing effect of an "ordinary and widespread" alternative could well face strict scrutiny—and the likelihood of court-ordered replacement of the challenged requirement with the plaintiffs' preferred alternative—whereas a state that used the "ordinary and widespread" but similarly skewing rule would face lenient judicial review. One may fairly doubt whether the courts should treat these two requirements so differently, absent some further reason to believe that the unusual requirement is much less beneficial than its commonplace counterpart. Experimentation is not a vice.

Let's turn now to the question of magnitude. That plaintiffs should be required to establish a *politically substantial* skewing effect, not merely an effect of statistical significance, seems to follow from the very idea that strict scrutiny is properly reserved for "severe" burdens on voting and associational rights. Some such magnitude requirement would also have pragmatic benefits. It would keep the courts from risking their reputational capital in disputes over voting procedures that have great symbolic value for political partisans, but little practical significance for the functioning of democracy.<sup>205</sup> And it would create room for compromise between liberal and conservative Justices. (Conservative jurists who are reluctant to police the representativeness of the voting public might be brought on board if the governing doctrine is designed to ensure that "skewing effects" claims will prevail only in extreme cases. In this regard, conservatives should take some comfort in the political science research, which tends to show that skewed voter participation rarely affects electoral outcomes.<sup>206</sup>)

It bears emphasis that the threshold political substantiality requirement need not—and probably should not—be implemented by looking directly at whether the challenged voting rules operate to prevent politically identifiable groups of voters from electing their candidates of choice or otherwise achieving adequate legislative representation (on the model of a conventional vote dilution challenge to the design of legislative districts under Section 2 of the Voting Rights Act). Simple quantitative proxies may be used instead. By way of illustration, consider the Court's ballot access and malapportionment jurisprudence. In the ballot access context, the Court has held that petition signature requirements of 5% or less are presumptively permissible, whereas requirement of 10% or more are presumed to result in

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<sup>205</sup> Several commentators have speculated that the partisan warring over photo ID requirements for voting is in fact largely symbolic. [Brad Smith, Dan Lowenstein]

<sup>206</sup> As indicated earlier, the story may be otherwise at the local level. *See* Hajnal & Trounstein, *supra* note 176. *Compare* Citran et al., *supra* note 187 (finding that in elections for the U.S. Senate, nonvoters are generally more Democratic than voters, but that very few outcomes would have changed if the nonvoters had participated)

an excessively low rate of qualification by independent candidates and third parties.<sup>207</sup> In malapportionment cases about state and local legislative bodies, the Court has strongly suggested that inter-district population variations of no more than 10% are presumed to be justified by legitimate state interests.<sup>208</sup> An analogous cutoff could be worked out for voter participation claims.

In addition to choosing a cutoff, the Court will also have to settle upon the proper method of quantifying skew. The nettlesome problem here is how to lump voters into politically identifiable groups for purposes of comparing group-specific levels of participation under the challenged and benchmark voting regimes. The simplest approach—which is admittedly crude in a two-party system—is to sort voters by party affiliation.<sup>209</sup> Another option is to classify voters by socioeconomic status. Either approach could be justified with reference to the Court’s precedents.<sup>210</sup>

For purposes of deciding *Crawford* and establishing a guiding framework for voter participation litigation, however, the Court need not settle upon a measure of skew, or a cutoff that distinguishes “severe” from “lesser” skewing effects. Because the *Crawford* plaintiffs failed to prove in the trial court that the Indiana voter ID requirement would have any statistically significant impact on voter participation, the Supreme Court could uphold the photo ID law in the posture of the present case while allowing that fresh challenges could be brought if further empirical research bears the plaintiffs’ predictions about disparate impact. Ultimately, the Court is likely to make a better decision about the proper measure of skew and the severe/lesser cutoff if it gives the lower courts, the election law bar, and the academic community of lawyers and political scientists a chance to work through these issues—guided by the *Crawford* decision—before the Court undertakes to settle what is the right approach.

#### 4. *Rational Basis as the Default Standard of Review*

As noted above, the Supreme Court’s electoral mechanics jurisprudence is not transparent about the default standard of review (applied to lesser burdens), and the lower courts are split.<sup>211</sup> In the interest of constraining

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<sup>207</sup> Elmendorf, *Structuring*, *supra* note 2, at 345-48.

<sup>208</sup> Compare *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) with *Cox v. Larios* (summarily affirming district court opinion invalidating districting plan that complied with 10% rule, but in which deviations were drawn purely for partisan reasons). The Court has declined to recognize a safe harbor for purposes of federal redistricting. See *Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>209</sup> Independents could be counted as if they comprised a political party.

<sup>210</sup> [explain with reference to Harper, Bullock, Lance, Anderson, etc.]

<sup>211</sup> See *supra* TAN \_\_.

lower court judges and thus limiting the fact or appearance of judicial partisanship, the Court probably should hold that the default standard is rational basis, or at least instruct the lower courts that in cases involving “lesser” burdens, an election law may be deemed unreasonable and/or discriminatory only if there is a substantial consensus to this effect among other disinterested observers.

If my proposed trigger for strict scrutiny does not adequately capture the range of constitutional harms that administrative barriers to voter participation may cause,<sup>212</sup> or if it saddles plaintiffs with an unreasonably onerous burden of proof,<sup>213</sup> these problems should be addressed by creating alternative threshold tests rather than by ratcheting up the default standard of review to an intermediate level that countenances judicial second-guessing of legislative policy judgments. For example, the Court might hold that in the absence of reliable empirical evidence about skew, strict scrutiny will be triggered if reasonably objective “danger signs” suggest that the challenged requirements are likely to have substantial skewing effects (and minimal benefits).<sup>214</sup> Along these lines, Professor Tokaji and I have argued that strict scrutiny may well be appropriate in *Crawford* because of “the Indiana photo ID requirement’s extreme outlier status relative to the practices of other States; the law’s enactment by a substantially party-line vote of the legislature; and its cumbersome procedure for accommodating indigent voters.”<sup>215</sup> There is ample doctrinal support for the danger signs approach, though the Court has not yet characterized its electoral mechanics jurisprudence in these terms.<sup>216</sup> But whether the approach can be cashed out in a sufficiently mechanical way—sufficient to obtain a tolerable degree of consistency in application across liberal and conservative judges—remains to be seen.

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<sup>212</sup> As a doctrinal and historical matter, the right to vote arguably serves both representational and dignitary interests. See Alan Brownstein & Vikram Amar, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998), Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993). My trigger for strict scrutiny is insensitive to the former. With respect to the right to vote, however, I am not sure whether the concept of a dignitary harm can be given judicially manageable meaning, outside of “easy cases” such as express voter qualifications and laws whose discriminatory purposes are widely known and beyond reasonable doubt.

<sup>213</sup> Cf. Elmendorf & Tokaji Brief, *supra* note 61, at 27 (“A doctrine that required plaintiffs to introduce statistical proof of the challenged requirement’s unequal burden would demand too much. Voter turnout is affected by many factors, including the competitiveness of elections, campaign spending, other races on the ticket, the presence of initiative or referendum questions, and more. Disaggregating the effect of a particular requirement on turnout may therefore be impracticable in many cases.”).

<sup>214</sup> See generally Elmendorf, *Structuring*, *supra* note 2.

<sup>215</sup> Elmendorf & Tokaji Brief, *supra* note 61, at 6; see also *id.* at 26-34.

<sup>216</sup> See *id.* at 27-30; Elmendorf, *Structuring*, *supra* note 2, at 335-80.

Another possibility is for the courts to limit the category of “reasonable, nondiscriminatory restrictions” by establishing procedural norms for electoral reform in the face of partisan dissensus. A regulation that was not adopted in the procedurally appropriate way would be deemed per-se unreasonable, and hence unconstitutional. For example, the courts might presume a voting requirement unreasonable if (1) it was enacted substantially along partisan lines,<sup>217</sup> and (2) its burden has been shown to fall disproportionately upon voters affiliated with the dissenting party,<sup>218</sup> unless (3) the requirement includes appropriate sunset and monitoring provisions (somehow defined). The presence of a sunset clause and monitoring provisions would convert an otherwise unreasonable enactment into one that receives the ordinary presumption of permissibility, unless and until the requirement is shown to have not merely an unequal burden, but the requisite skewing effect on voter participation.

The development of such procedural rules for lawmaking in the teeth of partisan disagreement might be justified as a means of protecting public confidence in the fairness of the political process,<sup>219</sup> or as a strategic measure to foster the production of data that will make clear whether the challenged requirement has a severe skewing effect. These predicates for judicial intervention are no doubt controversial, however, as is the very idea that the Court may use constitutional holdings to establish procedural requirements for certain classes of legislation.<sup>220</sup>

### 5. Summary

The Constitution instructs that members of Congress and, by implication, members of the most numerous house of each state’s legislature are to be chosen “by the people” of the several states. “Choice by the people” means simply majority rule by those persons who possess the requisite qualifications to be voters, *i.e.*, the normative electorate. In regulating the time, place, and manner of these elections, the states must make reasonable, good faith efforts to enable participation by a fully

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<sup>217</sup> *E.g.*, with 90% or more of the lawmakers affiliated with one major party voting for it, and 90% or more of the other party’s lawmakers voting against it.

<sup>218</sup> Even if a large skewing effect has not been shown.

<sup>219</sup> *Cf.* *Purcell v. Gonzales*, 127 S.Ct. 5, 7 (2006) (“Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1968) (positing that the right to vote on equal terms with others is fundamental because “[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”).

<sup>220</sup> [Add FN re: Court’s ambivalence about establishing procedural requirements for lawmaking. *Cf.* Coenan, Linde; [Scalia opinion]; *Field v. Clark*.]

representative cross section of the normative electorate. To the extent that logistical regulations of the voting process operate to skew voter participation—causing certain politically identifiable groups to be systematically over- or underrepresented within the voting public, relative to their share of the normative electorate—a constitutional cost is incurred.

If the courts are to enforce the representative-participation norm, however, it will be necessary to create a template for adjudication that is well tethered to the Constitution; that is sufficiently directive to result in even-handed application by judges of varying ideological predilections; and that is acceptable to at least some of the more conservative Justices on the Supreme Court. To this end, I have made the following suggestions:

- The Supreme Court should establish a very strong presumption that the skewing effects of typical voting requirements (those found in more than half of the states), relative to the least skewing alternatives, are justified by important state interests.
- As the predicate for strict scrutiny, the Court should require plaintiffs to establish a politically substantial skewing effect due to the challenged regulations, relative to the level of skew that would obtain if those regulations were replaced with typical counterparts found in other states. How skew is best measured, and how substantial is substantial enough, are questions that, for now, should be left to percolate in the lower courts.
- The Court should establish that rational basis is the default standard of review, which applies whenever plaintiffs fail to make a threshold showing of presumptive unconstitutionality. (Or, at the very least, lower courts should be told that they may not deem a non-severe requirement unreasonable/discriminatory unless there is a substantial consensus of non-judicial opinion to this effect.) However, lower courts should be given leeway to develop alternatives to the severe-skewing-effects threshold test, provided that any such alternative (1) is constitutionally grounded, (2) substantially confines judicial discretion, and (3) does not cast doubt upon the constitutionality of most ordinary voting requirements.

#### B. Answering Objections

Before closing, I want to briefly address a few objections to my proposed approach. The first concerns the role for empirical evidence; the

second goes to the relationship between my proposal and the Guarantee Clause; the third to the implications of the Court's vote dilution jurisprudence.

### 1. *Anti-Empiricism and the Storer-Burdick Jurisprudence*

As I have elsewhere explained at length, one of the defining features of the Supreme Court's *Storer-Burdick* jurisprudence is an apparent reluctance to ground burden characterization, and hence scrutiny levels, on empirical evidence about how the requirements at issue actually affect the political process.<sup>221</sup> The Court sets scrutiny levels mainly "on the basis of relatively simple, formal inquiries into (1) the type of burden created, (2) proxies for impact . . . , and, somewhat more equivocally, legislative purposes."<sup>222</sup> The same inclination toward formalism can be seen in other subfields of the constitutional law of democracy, including the malapportionment cases (consider the rigidity with which the court enforces the one person, one vote requirement, albeit only once every ten years<sup>223</sup>); the campaign finance jurisprudence (consider the contribution/expenditure distinction<sup>224</sup>); and the manner in which the Court undertook to regulate poll taxes and other voter qualifications (with *ipse dixit* declarations of what is and is not permissible<sup>225</sup>).

This preference for formalism in is entirely understandable. It keeps the courts from getting mired in technically complicated questions about measurement. It often yields bright line rules, which may be thought an essential part of any judicially manageable standard for adjudicating the claims of warring political parties and their interest-group allies over the ground rules of political competition.<sup>226</sup> And it allows the Supreme Court to avoid articulating a precise account of the constitutional harms that supposedly warrant judicial intervention in the political process, which is convenient given how little the Constitution says about the law of

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<sup>221</sup> See Elmendorf, *Structuring*, *supra* note 2

<sup>222</sup> *Id.* at 376.

<sup>223</sup> [Cf. Charles, *Democracy & Distortion*]

<sup>224</sup> [FN explanation of how this got off the ground in *Buckley* on the basis of rank conjecture]

<sup>225</sup> See, e.g., *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966) ([add pin cite to "wealth has no relation to voting" passage])

<sup>226</sup> See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1274 (2006).

democracy, and given the conventional understanding that courts should only enforce personal constitutional rights.<sup>227</sup>

I do not think the Court's uneasiness about empirically oriented standards forecloses my proposal, however. The Court's resistance to empirical glosses on the *Burdick* analysis has been most strenuous when plaintiffs have argued that the state should be required to come forward with evidence that the problem it has targeted with ordinary requirements is real and substantial.<sup>228</sup> That, said the Court, "would invariably lead to endless court battles over the sufficiency of the 'evidence,'" and "would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action."<sup>229</sup> My proposal does not constrain the states in this way, and it certainly would not engender a battle of the experts every time a state reforms its voting process in a manner that some litigation-oriented advocates dislike. Expert testimony would only become relevant if there is a case to be made that the challenged requirements have had a politically substantial skewing effect. The states would receive the benefit of the doubt until then.

We live in an age in which many professionals, lawyers and judges included, regularly deal with social scientific research.<sup>230</sup> Such research has become increasingly abundant, and increasingly easy to conduct. Because of this, the anti-empiricism of the *Storer-Burdick* jurisprudence may become increasingly a thing of the past. And to the extent that the Court still wishes to avoid empirical inquiry, the Justices could supplement my proposed empirical threshold test with qualitative, "danger signs" shortcuts, or even a procedural definition of "reasonable, nondiscriminatory" voting reform in the face of partisan disagreement, either of which would reduce the number of cases in which judges must wrestle with social scientific evidence.

## 2. *The Guarantee Clause Objection*

A second objection to my proposal is that it is, in substance, a Guarantee Clause argument, and thus runs counter to the well-settled position that Guarantee Clause claims are nonjusticiable.<sup>231</sup> Technically this objection misses the mark, for my argument turns on the concept of "choice by the people" as expressed in Article I and the Seventeenth Amendment, and I have nowhere suggested that the most numerous house of a state legislature

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<sup>227</sup> Cf. Gerken, *supra* note 78.

<sup>228</sup> See *Munro v. Socialist Workers Party*, 479 U.S. 189, 194-95 (1986).

<sup>229</sup> *Id.*

<sup>230</sup> Cf. IAN AYRES, *SUPER CRUNCHERS: WHY THINKING BY NUMBERS IS THE NEW WAY TO BE SMART* (2007).

<sup>231</sup> I am indebted to Ned Foley for raising this question.

must be accountable to a representative voting public if the state is to enjoy a republican form of government. Then again, my argument may be thought to invite Guarantee Clause claims, in that it gleans a definition of “choice by the people” from a law professor’s argument that, as an historical matter, the Guarantee Clause has well defined and justiciable content.

I have presented what seems to me the most intellectually honest way of grounding the representative participation norm in the Constitution’s text, but for the squeamish there are other ways of reaching the same conclusion. Thus, working from the text and common sense, without any reference to particular historical understandings, one could argue that the lines of accountability contemplated by “choice by the people” are realized only if one of these conditions obtain: (1) all of the people participate in congressional elections, (2) a demographically and politically representative cross section of the people participate in congressional elections, or (3) a skewed subset of the people participate, but the skew is harmless because (i) in casting ballots voters set aside their personal interests and seek only to advance their best understanding of the public interest, and (ii) voters’ errors in discerning the public interest are uncorrelated (such that the true public interest is found in each election through a Condorcet process, independently of which voters participate). Condition (3) may be dismissed on the ground that it supposes a vision of politics wholly inconsistent with modern interest-group pluralism. Limited voter turnout seems equally endemic to contemporary politics, so condition (1) may be ignored. This leaves the representative participation norm as the best hope for approximating the constitutional aspiration of collective decisionmaking in which all qualified citizens participate.

It is also possible to ground the representative participation norm in judicial precedents alone, without recourse to the Constitution proper. Notwithstanding that the right to vote is nominally individual and personal in nature, the Court has a substantial track record of deploying this right to vote to protect representational interests.<sup>232</sup> Representational concerns were featured in *Reynolds v. Sims*, where the Court posited that “in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State’s legislators”,<sup>233</sup> in *Harper v. Virginia State Board of Elections*, where the court pronounced that legitimate “[v]oter qualifications have no

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<sup>232</sup> Demian Ordway has argued that the norm may also be grounded in the Court’s various suggestions that the right to vote is fundamental because preservative of the legitimacy of democratic government. See Ordway, *supra* note 203, at 1203. It is hardly self-evident, however, that public acceptance of the state’s legitimacy requires a representative voting public.

<sup>233</sup> 377 U.S. 533, 565 (1964).

relation to wealth”;<sup>234</sup> in *Kramer v. Union Free School District No. 15*, where the Court reiterated that the right to vote is fundamental because “preservative of other basic civil and political rights”;<sup>235</sup> in *Gordon v. Lance*, where the Court rebuffed a *Reynolds*-based challenge to a supermajority voting rule for bond referendum elections, because “no independently identifiable group or category [of voters] favors bonded indebtedness over other forms of financing”;<sup>236</sup> in *Bullock v. Carter*<sup>237</sup> and *Lubin v. Panish*<sup>238</sup> where the Court struck down filing fees thought to disproportionately impede candidates who would appeal to low-income voters; and in *Anderson v. Celebrezze*, where the Court observed after reviewing these and other cases: “[I]t is especially difficult for the State to justify a restriction that limits political participation by *an identifiable political group* whose members share a particular viewpoint, associational preference, or economic status.”<sup>239</sup>

Taken together, these cases support the hypothesis that a voter who continues to participate notwithstanding a burden that causes many of her natural political allies to drop out of the voting public suffers a constitutional injury, because her ability to cast an effective vote (or, put differently, her ability to engage in collective action for political change<sup>240</sup>) has been harmed by state action that dissuades her political fellow-travelers from participating.<sup>241</sup>

### 3. *The Vote Dilution Objection*

A critic might venture that my proposal is foreclosed by precedent because it is, in substance, a standard for judging partisan vote dilution: an assertedly unconstitutional lack of representation for members of a political

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<sup>234</sup> 383 U.S. 663, 666 (1966)

<sup>235</sup> 395 U.S. 621, 626 (1969) (quoting *Reynolds v. Sims*, 377 U.S. at 562).

<sup>236</sup> 403 U.S. 1, 5 (1971).

<sup>237</sup> 405 U.S. 134 (1972),

<sup>238</sup> 415 U.S. 709 (1974).

<sup>239</sup> 460 U.S. 780, 793 (1983) (emphasis added).

<sup>240</sup> Cf. RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW* \_\_ (2003) (positing that the Supreme Court should protect an “equality right” of citizens to engage in collective action for political change).

<sup>241</sup> Note, then, that damage to the lines of accountability contemplated by Article I and the Seventeenth Amendment need not be the sort of “generalized” injury that precludes standing. Cf. *Lance v. Coffman*, 127 S. Ct. 1194 (2007) (holding that plaintiff-citizens of Colorado did not have standing to challenge order of Colorado Supreme Court as contrary to the Elections Clause of Article I, § 2). Citizens who belong to political groups whose turnout is differentially and adversely affected by a voting requirement would suffer a distinct injury. Cf. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1665, 1724-27 (2001) (presenting theories of standing for vote-dilution claims).

party, as opposed to an assertedly unconstitutional burden on their right to vote. Partisan vote dilution claims are likely nonjusticiable, the critic will say; or, if they are justiciable, the plaintiff must make a showing of discriminatory purpose in addition to extreme discriminatory effects.

At least since *City of Mobile v. Bolden*,<sup>242</sup> the Court has maintained that “vote dilution” and “right to vote” claims are very different beasts.<sup>243</sup> Vote dilution cases have centered on the design of legislative districts; the plaintiff, though free to cast a ballot, alleges that the state has denied him adequate representation by lodging him in a district where members of his group (a cohesive racial bloc, or a political party) are an ineffective, outnumbered political minority, notwithstanding that a different configuration of districts would have enabled him to join forces with other members of his group and elect responsive representatives. Voter participation cases, by contrast, involve burdens on the individual’s fundamental right to participate in the electoral process by casting a valid, properly counted ballot on equal terms with others. Both dilution and participation claims can be brought under the Equal Protection Clause, but the former must be founded on the suspect classification/intentional discrimination prong, whereas the latter may be rooted in the fundamental rights prong. The practical upshot is that to trigger strict scrutiny in a vote dilution claim, plaintiffs must show intentional discrimination on an illicit ground plus a substantial burden on their group’s “representational rights.”<sup>244</sup> By contrast, the conventional threshold for strict scrutiny in an equal protection/fundamental rights claim is whether the right has been granted to some and denied to others.<sup>245</sup>

There are serious questions about whether partisan vote dilution (as opposed to racial vote dilution) claims are even justiciable. In the 2004 decision of *Vieth v. Jubelirer*,<sup>246</sup> four Justices treated partisan vote dilution

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<sup>242</sup> 446 U.S. 55 (1980).

<sup>243</sup> See *id.* at 75-80 (plurality opinion) (expressly rejecting the view, espoused by Justices Marshall and Brennan in dissent, that the fundamental right to vote can support a vote-dilution challenge to at-large elections); *id.* at 83-84 (Stevens, *J.*, concurring in the judgment) (“there is a fundamental distinction between state action that inhibits an individual’s right to vote and state action that affects the political strength of various groups that compete for leadership in a democratically governed community”). Cf. Karlan, *supra* note 212, at 1709-19 (contrasting participation-, aggregation-, and governance-oriented conceptions of voting rights).

<sup>244</sup> The term “representational rights” is from Justice Kennedy’s opinion in *Vieth v. Jubelirer*, 541 U.S. 267, 307-10 (2004). Since *Davis v. Bandemer*, 478 U.S. 109 (1986), every Justice who has recognized partisan vote dilution claims as justiciable has understood proof of discriminatory intent to be a necessary element of the claim. See *id.*; *Vieth, supra*; and *LULAC v. Perry*, 126 S. Ct. 2594 (2006).

<sup>245</sup> [Tribe] [Kramer/Dunn]

<sup>246</sup> 541 U.S. 267 (2004).

claims as political questions, and the fifth, Justice Kennedy, expressed extreme reluctance to entertain such claims absent a clear-cut standard grounded in traditional practices. The extent of his reservations became apparent in *LULAC v. Perry*,<sup>247</sup> when he rejected the plaintiff's proposed per-se rule against mid-decade redistricting—a standard that was both clear-cut and grounded in tradition.

My imagined critic will point out that although the voter ID lawsuits seem at first glance to be voter participation claims, the constitutional injury I have described—damage to the plaintiff's ability to join with like-minded citizens and engage in collective action through voting—is much the same as the injury in a vote dilution challenge to the design of legislative districts.<sup>248</sup> In each case, the citizen and her political allies, though entitled to participate by voting, suffers a representational injury thanks to the mechanics of the electoral process. That the mechanics in one scenario are anti-fraud safeguards and in the other govern the translation of votes into representation is immaterial, my critic will say, so “skewing effects” participation claims must be governed by partisan vote dilution doctrine.

This argument is centrally flawed, however, in that it supposes that the universe of constitutional voting claims consists of two natural kinds, participation and dilution, which are defined by the nature of the voter interest at stake. The Court's constitutional jurisprudence of political rights is not organized in this way. Although the Court has required a showing of discriminatory intent in constitutional vote dilution challenges to the design of equally populous legislative districts, it has protected voters' representational interests vis-à-vis other types of election laws (and other types of challenges to the design of legislative districts) with doctrines that do not require such a showing. These doctrines include: (1) the equal-population mandate for the design of legislative districts;<sup>249</sup> (2) strict scrutiny for laws that restrict the class of persons eligible to vote (what I have termed the normative electorate) on grounds other than citizenship, age, residence, and felon status;<sup>250</sup> (3) strict scrutiny for laws that condition candidates' access to the ballot upon payment of a fee;<sup>251</sup> and (4) the nominal balancing test applied to other restrictions on independent candidates' or third parties' access to the ballot.<sup>252</sup> In developing each of these doctrines, the Court clearly meant to safeguard the instrumental value

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<sup>247</sup> 126 S. Ct. 2594 (2006).

<sup>248</sup> Cf. Gerken, *supra* note 241, at 1676-89 (explaining the conception of injury behind vote dilution claims).

<sup>249</sup> *E.g.*, *Karcher v. Daggett*, 462 U.S. 725 (1983).

<sup>250</sup> *E.g.*, *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969).

<sup>251</sup> *E.g.*, *Lubin v. Panish*, 415 U.S. 709 (1974).

<sup>252</sup> *E.g.*, *Storer v. Brown*, 415 U.S. 724 (1974).

of voting, not merely the voter’s “personal” interest in participating as such.<sup>253</sup>

An effort to assimilate the voter ID claims into the partisan vote dilution jurisprudence would be just as wrongheaded as the effort of the *Crawford* petitioners and various *amici*—including, I would argue, the Department of Justice—to assimilate these cases into the *Harper/Kramer/Dunn* “vote denial” caselaw.<sup>254</sup> To be sure, if one looks only at the plaintiffs’ interests, then a political party’s skewing-effects challenge to a voter ID requirement does bear a close resemblance to a partisan vote dilution claim;<sup>255</sup> likewise, a claim brought by an individual voter whose personal circumstances make it extremely difficult to obtain qualifying ID closely resembles a vote denial claim brought by, for example, a non-property owner in a jurisdiction that conditions voting on ownership of property. But—to repeat the essential point—the *Court’s variegated political rights doctrines turn on much more than the nature of the plaintiff’s interest*. These doctrines emerge from pragmatic, domain- and claim-specific judgments about the risk of institutionally debilitating entanglement in partisan conflict;<sup>256</sup> the need for judicial involvement;<sup>257</sup> the extent to which the values that the court is asked to protect are constitutionally discernable;<sup>258</sup> the feasibility of crafting

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<sup>253</sup> [add explanatory FN]

<sup>254</sup> The *Crawford* petitioners variously advert to the ostensibly individual and personal nature of the right to vote, but the most straightforward and unequivocal effort to assimilate *Crawford* into the vote denial framework is found in one of the amicus briefs. See Brief of Professor Erwin Chemerinsky In Support of Neither Party, *Crawford v. Marion County Election Bd.*, \_\_\_ U.S. \_\_\_ (Nos. 07-21 & 07-25).

The Solicitor General’s argument for the as-applied framework is also, implicitly, an argument for assimilating *Crawford* into the vote denial caselaw, in that a severe burden on one individual (in a proper as applied challenge) would be enough to trigger strict scrutiny and then, presumably, a narrow remedial exemption for that voter. Despite blasting the petitioners for arguing, “with no footing in this Court’s case law,” that “the Voter ID Law must be struck down *in toto* ‘even if only a *single* citizen is deprived completely of her right to vote,’” SG’s Brief, *supra* note 15, at 16-17 (quoting Democrats’ Brief at 33), the SG’s brief utterly fails to come to terms with the fact that under the SG’s preferred approach, this very showing in a proper as-applied challenge would trigger strict scrutiny, and the scope of the resulting remedy could, in principle, be very broad, depending on how the *Ayotte* severability analysis plays out. See *supra* TAN \_\_\_.

<sup>255</sup> They are not quite identical, however. Even setting to one side the voter’s dignitary interest in participating as such, a political party may have a cognizable interest in increasing its vote share even if that does not lead to greater representation, because the party’s larger vote share provides an important basis for public critique of the votes-to-seats translation rules that (in the party’s view) failed to endow the party with a fair proportion of seats.

<sup>256</sup> [cf. Scalia opinion in *Veith*, especially reply to Stevens]

<sup>257</sup> [O’Connor in *Bandemer* re: self-limiting partisan gerrymandering; Scalia in *Vieth* response to Breyer; basic supposition of *Kramer* re: ss for voting]

<sup>258</sup> [Scalia in *Vieth*; *Richardson v. Ramirez*]

doctrines that are amenable to consistent application in the lower courts,<sup>259</sup> the risk of deterring or preventing useful legislative activity,<sup>260</sup> and the options for limiting the generative potential of particular interventions so as not to cast doubt upon popular, time-honored practices.<sup>261</sup>

This is why strict scrutiny can be freely applied in constitutional challenges to *de jure* voter qualifications—laws that restrict the class of citizens to whom elected officials are supposed to be accountable—no matter how few in number the excluded citizens, but not in cases about laws whose nominal purpose is to minimize the risk of fraud or error, or to keep the cost of election administration within reason. Once the Warren Court determined that there was *no* important state interest in limiting the normative electorate on grounds other than age, citizenship, and residence, the Court could apply “fatal in fact” strict scrutiny to any other *de jure* contraction of the normative electorate without worrying about undesirable side effects. By contrast, there are manifestly important state interests in limiting the number of candidates who appear on the ballot, and in preventing electoral fraud. Hence the *Storer/Burdick* framework, which in explicit recognition of the powerful state interests supporting much regulation of mechanics of the electoral process,<sup>262</sup> reserves strict scrutiny for the narrow subset of electoral mechanics cases in which the challenged restriction is so “severe” as to be presumptively unconstitutional. This is why *Burdick*, not *Harper/Kramer/Dunn*, furnishes the proper doctrinal framework for *Crawford*, and why “burden severity” within the meaning of *Burdick* must be fleshed out with reference to the aggregate constitutional costs of the challenged requirement (or to “danger signs” of a large disparity between costs and benefits), rather than the plight of an individual voter or candidate.

This perspective also confirms that the partisan vote dilution precedents do not govern challenges to voter ID and other logistics-of-voting laws that have the effect of “gerrymandering” turnout. The many considerations that weigh against judicial intervention in partisan vote dilution challenges to the design of legislative districts are inapplicable to skewing-effects participation claims. First, vote dilution through the design of legislative districts is self-limiting;<sup>263</sup> skewing turnout through voting requirements is

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<sup>259</sup> [Veith; Kennedy, Souter; *compare* penchant for formalism, *supra*]

<sup>260</sup> [Storer/Clingman, “tying hands of states”; cf. Brownstein re: where presumption of permissibility obtains; ]

<sup>261</sup> [Timmons, and third party “right to success”]

<sup>262</sup> *See* *Burdick*, 504 U.S. 428, 433 (“to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently”).

<sup>263</sup> [Bandemer]

not. (This goes to the need for judicial intervention.) Second, legislative districts must be redrawn once every ten years; voting procedures need not be periodically revisited. (This matters bears on both the potential benefits of judicial intervention and the likelihood of incessant and debilitating entanglement in partisan conflict.) Third, the logical benchmark for determining what is “dilutive” in an attack on the design of legislative districts is proportional representation, and single-member districts with first past the post elections—a time honored and valued American tradition—are ill suited to achieving proportional representation. Hence there is much cause to worry about the generative potential of doctrines that would authorize judicial policing of partisan imbalance in the votes-to-seats translation mechanisms. The representative participation norm, by contrast, does not assault any time-honored traditions.<sup>264</sup>

Fourth, the constitutional harm is more readily discernable skewing effects cases. Think back to “choice by the people” within the meaning of Article I and the Seventeenth Amendment. Once voter qualifications have been set, we know who the people are, and it is obvious enough (in our pluralist age) that voting rules that cause only a skewed subset of the qualified to participate make the resulting “choice” importantly different than a choice by the people. Yet the concept of “choice by the people” says very little about what mechanism of preference aggregation must be used, except perhaps that the mechanism must count each voter’s preferences equally. A huge variety of votes-to-seats translation mechanisms are consistent with this, some of which tend to generate a high degree of proportional representation by ideology (e.g., party-list PR), and some of which do not (e.g., single member districts with first past the post elections).

Finally, the existence (or lack thereof) of manageable standards for judicial intervention may be used to distinguish skewing effects challenges to voting logistics from vote-dilution challenges to the design of legislative districts. A working majority of the Court apparently thinks that manageable standards for the latter class of cases do not exist or have yet to be discovered. But in line with my proposal in Part IV, *supra*, reasonably determinate standards for the former class of cases can be crafted.

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<sup>264</sup> The educated, the affluent, and the elderly have long voted at higher rates than others, but few would say that this is how it should be. If public opinion were otherwise, the Warren Court’s assault on voter qualifications such as the poll tax would have triggered a huge backlash.

## VI. CONCLUSION

It has been said that a preference for as-applied adjudication is the hallmark of a “modest” constitutional court.<sup>265</sup> In a related vein, Rick Hasen has prominently argued that an avowedly structural approach to constitutional adjudication of political rights would embroil the courts in contested questions that are beyond their competence to resolve.<sup>266</sup> This essay calls those conclusions into question. I have tried to show that the Supreme Court’s severe/lesser burden framework for electoral mechanics cases, if meshed with a wholly individualistic conception of voting rights, would require the Court to apply strict scrutiny to a huge gamut of challenges to the administrative minutiae of the voting process. By contrast, a conception of “burden” linked to aggregate patterns of political participation would enable the courts to refrain from second guessing legislative policy judgments in all but the most extreme of circumstances. To be sure, the “representative voting public” norm that I have advanced could be applied in an aggressive manner by an activist court. But suitably limited—with a strong presumption of permissibility for ordinary voting requirements, and with a threshold requirement that plaintiffs demonstrate large, politically substantial effects as the trigger for heightened scrutiny—the norm would not be threatening. Both the norm itself and the appropriate limitations are doctrinally and textually defensible. Accordingly, the pending case of *Crawford v. Marion County Election Board* provides an auspicious occasion for the Supreme Court to revisit the ostensibly individual and personal nature of the constitutional right to vote.

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<sup>265</sup> Edward A. Hartnett, *Modest Hope for a Modest Court: Deference, Facial Challenges, and the Comparative Competence of Courts*, 59 SMU L. REV. 1735 (2006).

<sup>266</sup> HASEN, *supra* note 240, at \_\_\_.

## APPENDIX

The following table summarizes the “votes” to date by lower federal and state court judges in litigation over the constitutionality of photo ID requirements for voting. It is included to convey some sense of the apparent pattern of judicial partisanship. The table includes judicial rulings on motions for preliminary and permanent injunctions, summary judgment, and declarations of unconstitutionality, as well as decisions on appeal from those rulings. However, it excludes rulings by motions’ panels of appellate courts on requests for stays pending a decision on the merits by the appellate tribunal, which in general seem unlikely to be probative of the judge’s view of the merits of the constitutional question.<sup>267</sup>

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

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

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

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<sup>267</sup> With the possible exception of the surprising and unexplained decision of a Ninth Circuit motions panel (comprised of two Democratic appointees, Judges William P. Fletcher and Atsushi Tashima), to enjoin enforcement Arizona’s Proposition 200 pending disposition, after full briefing, of the appeal of the district court’s denial of a preliminary injunction. The motion panel’s decision was vacated by the U.S. Supreme Court in a short per curiam opinion warning against 11th hour injunctions (just before an election) in election law litigation. *See Purcell v. Gonzalez*, 127 S. Ct. 5 (2006).

only 3 times. For Republican judges, the respective numbers are 3 (anti) and 15 (pro).<sup>268</sup>

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Common Cause/Ga. v. Billups (I), 406 F. Supp. 2d 1326 (N.D. Ga. 2005) <sup>269</sup>	Harold L. Murphy	To grant prelim. injunction.	Anti	D	10/8/ 2005
Ind. Dem. Party v. Rokita, 458 F. Supp. 2d 775 (S.D. Ind. 2006) <sup>270</sup>	Sarah Evans Barker	To grant defendants' motion for summary judgment.	Pro	R	4/14/ 2006
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007) <sup>271</sup>	Richard A. Posner	To affirm the district court's grant of summary judgment to defendants	Pro	R	1/4/ 2007
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007)	Dianne Sykes	To affirm the district court's grant of summary judgment to defendants	Pro	R	1/4/ 2007
Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007)	Terrance Evans	To reverse the district court's grant of summary judgment to defendants	Anti	D	1/4/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Frank H. Easterbrook	To deny rehearing en banc of panel decision affirming grant of summary judgment to State.	Pro	R	4/5/ 2007

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<sup>268</sup> These summary statistics are slightly different than what the reader will find if she or he tallies up the votes in the table, because I have excluded votes on the petition for rehearing en banc in *Crawford* cast by the three Seventh Circuit judges who sat on the merits panel. It would be double-counting to treat their rehearing votes as a separate expression of views regarding the constitutionality of Indiana's voter ID requirement.

<sup>269</sup> At issue was the photo ID requirement enacted by the Georgia legislature in 2005.

<sup>270</sup> At issue was the photo ID requirement enacted by the Indiana legislature in 2005.

<sup>271</sup> This case is *Rokita* on appeal sub. nom.; at issue was the photo ID requirement enacted by the Indiana legislature in 2005.

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

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Terrance T. Evans	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	Anti	D	4/5/ 2007
Crawford v. Marion County Election Bd., 484 F.3d 436 (7th Cir. 2007)	Ann Claire Williams	To grant rehearing en banc of panel decision affirming grant of summary judgment to State.	Anti	D	4/5/ 2007
Gonzalez v. Ariz., No. CV 06-1268-PHX-ROS, 2006 WL 3627297 (D. Ariz. 2006) <sup>272</sup>	Roslyn O. Silver	To deny plaintiffs' motions for a preliminary injunction.	<b>Pro</b>	D	9/11/ 2006
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	John T. Noonan	To affirm district court's denial of a preliminary injunction	Pro	R	4/20/ 2007
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	George P. Schiavelli	To affirm district court's denial of a preliminary injunction	Pro	R	4/20/ 2007
Gonzalez v. Ariz., 485 F.3d 1041 (9th Cir. 2007)	Mary M. Schroeder	To affirm district court's denial of a preliminary injunction	<b>Pro</b>	D	4/20/ 2007
Common Cause/Ga. v. Billups (II), 439 F. Supp. 2d 1294 (N.D.Ga. 2006) <sup>273</sup>	Harold M. Murphy	To grant plaintiffs' motion for a preliminary injunction	Anti	D	7/14/ 2006
Common Cause/Ga. v. Billups (II), 504 F. Supp. 2d 1333 (N.D.Ga. 2007) <sup>274</sup>	Harold M. Murphy	To enter judgment for defendants after bench trial.	<b>Pro</b>	D	9/6/ 2007

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<sup>272</sup> At issue were the identification requirements for registration and voting found in Proposition 200, an immigration ballot initiative adopted by the voters in 2004.

<sup>273</sup> At issue was Georgia's revised photo ID requirement for voting, enacted in 2006.

<sup>274</sup> At issue was Georgia's revised photo ID requirement for voting, enacted in 2006.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
ACLU v. Santillanes, 2007 WL 782167 (D. N.M. 2007)	M. Christina Armijo	To grant plaintiffs motion for summary judgment & permanent injunction	Anti	R	2/12/2007
Weinschenk v. State, No. 06AC-CC00587 (Cole Cty. Dist. Ct., Mo. 2006)	Richard G. Callahan	To grant plaintiffs' motion for declaratory judgment and permanently enjoin enforcement of ID requirement	Anti	D	9/14/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Nancy S. Rahmeyer	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Laura D. Stith	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Richard B Teitelman	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Ronnie White	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Michael A. Wolff	To affirm lower court's declaration and permanent injunction.	Anti	D	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Charles B. Blackmar	To affirm lower court's declaration and permanent injunction.	Anti	R	10/16/2006
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)	Stephen N. Lindbaugh	To vacate lower court's decision on ripeness grounds.	? <sup>275</sup>	R	10/16/2006

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<sup>275</sup> Because this was a justiciability holding, I shall refrain from classifying it as “pro” or “anti” photo ID. Cf. Bickel, *The Least*, at \_\_\_ (arguing that courts properly use standing and related doctrines to avoid reaching the merits—and thereby conferring legitimacy on one side or the other—with respect to politically contentious constitutional questions).

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)		To vacate lower court's decision on ripeness grounds.	? <sup>276</sup>	R	10/16/ 2006
Lake v. Perdue, 2006-CV-119207 (Sup. Ct. of Fulton Cty, Ga.) <sup>277</sup>	T. Jackson Bedford, Jr.	To enjoin enforcement of law.	Anti	? <sup>278</sup>	9/22/ 2006
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	? <sup>279</sup>	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	? <sup>280</sup>	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	George Carley	To vacate order below on ground that plaintiffs' lacked standing	? <sup>281</sup>	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	P. Harris Hines	To vacate order below on ground that plaintiffs' lacked standing	? <sup>282</sup>	D	6/22/ 2007

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<sup>276</sup> Because this was a justiciability holding, I shall refrain from classifying it as “pro” or “anti” photo ID. *Cf.* Bickel, *The Least*, at \_\_ (arguing that courts properly use standing and related doctrines to avoid reaching the merits—and thereby conferring legitimacy on one side or the other—with respect to politically contentious constitutional questions).

<sup>277</sup> At issue was Georgia’s revised photo ID requirement for voting, enacted in 2006, challenged here on the ground that ID requirements are qualifications for voting and hence beyond the legislature’s authority to enact under the Georgia constitution.

<sup>278</sup> The presiding judge was selected in a nonpartisan election.

<sup>279</sup> I am skeptical that the Justices’ decision to dismiss this case on standing grounds—where, as the Court pointed out, the “sole remaining plaintiff” acknowledged that she had qualifying ID—reveals anything about the Justices’ view concerning the constitutional permissibility of the photo ID requirement. *Cf.* Bickel, *The Least*, at \_\_ (arguing that courts properly use standing and related doctrines to avoid reaching the merits—and thereby conferring legitimacy on one side or the other—with respect to politically contentious constitutional questions).

<sup>280</sup> *See supra* note 279.

<sup>281</sup> *See supra* note 279.

<sup>282</sup> *See supra* note 279.

CASE	JUDGE	VOTE	PRO/ ANTI	PARTY AFF'L.	DATE
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Leah Sears	To vacate order below on ground that plaintiffs' lacked standing	? <sup>283</sup>	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Hugh Thompson	To vacate order below on ground that plaintiffs' lacked standing	? <sup>284</sup>	D	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Harold Melton	To vacate order below on ground that plaintiffs' lacked standing	? <sup>285</sup>	R	6/22/ 2007
Perdue v. Lake, 2007 WL 1660734 (Ga. 2007)	Robert Benham	To vacate order below on ground that plaintiffs' lacked standing	? <sup>286</sup>	D	6/22/ 2007
<i>In re</i> Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Michael F. Cavanagh	To advise that ID requirement is facially unconstitutional	Anti	D	7/18/ 2007
<i>In re</i> Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Marilyn Kelly	To advise that ID requirement is facially unconstitutional	Anti	D	7/18/ 2007
<i>In re</i> Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, No. 130589 (Mich. 2007).	Robert P. Young, Jr.	To advise that ID requirement is facially constitutional	Pro	R	7/18/ 2007

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<sup>283</sup> See *supra* note 279.

<sup>284</sup> See *supra* note 279.

<sup>285</sup> See *supra* note 279.

<sup>286</sup> See *supra* note 279.

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