

# DISENFRACTISEMENT AND THE CONSTITUTION: FINDING A STANDARD THAT WORKS

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*Since the presidential election of 2000, a host of new claims has arisen alleging unlawful denial of the right to vote. Litigants have challenged the use of error-prone voting machines, misleading registration forms, and the highly controversial photo identification requirements for in-person voting. The law protecting the right to vote, however, is in disarray, leaving courts confused and unsure of how to proceed with these challenges. In particular, courts have disagreed sharply over the content of the relevant constitutional standard and how to apply it. Some courts have adopted the standard articulated by the Supreme Court in its 1992 decision, *Burdick v. Takushi*, while others have applied strict scrutiny. This Note criticizes the *Burdick* standard for being incapable of producing consistent results and advocates for a modified version of strict scrutiny motivated by structural concerns inherent in the democratic process.*

## INTRODUCTION

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

—Chief Justice Earl Warren, *Reynolds v. Sims*.<sup>1</sup>

In the 1980s and 1990s, disenfranchisement claims were rare. Courts had long since invalidated poll taxes, literacy tests, and early registration deadlines, and there were simply very few obstacles to the voting booth left to challenge.<sup>2</sup> All this changed, however, with the contested presidential election of 2000. Since then, courts have seen a

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<sup>1</sup> 377 U.S. 533, 561–62 (1963).

<sup>2</sup> See Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES* 121, 122 (Mark E. Rush ed., 1998) (“While there are controversies at the margins of the right to participate—for example, over implementation of the so-called Motor Voter law . . . or over the disenfranchisement of felons . . .—there is widespread doctrinal and popular commitment to the general principle of universal adult citizen suffrage.”).

marked increase in the number of lawsuits claiming that state laws are denying citizens the right to vote.<sup>3</sup> Initially, these lawsuits attempted to confront the systemic problems brought to light by the Florida recount,<sup>4</sup> but increasingly they have been brought in response to reforms enacted by state legislatures. In addressing these challenges, courts have displayed a deep confusion in their understanding of what kind of protection the Constitution affords the right to vote.<sup>5</sup>

This confusion is evident across a broad spectrum of disenfranchisement claims. Claims challenging the constitutionality of photo identification requirements for in-person voters, for example, have split the courts. Georgia and Indiana passed nearly identical laws of this nature<sup>6</sup> only to see two federal courts invalidate one and uphold the other using the same constitutional standard.<sup>7</sup> Courts have not provided any clearer guidance in cases concerning other areas of election administration. In deciding a challenge to the constitutionality of Ohio's vote-counting machines, the Sixth Circuit applied a constitutional standard completely different from the one applied in Indiana and Georgia.<sup>8</sup> Evidently, confusion exists as to both the choice of legal standard and its proper application.

Considering the history of the "right to vote" in American jurisprudence, today's confusion is hardly surprising. While the right to vote appears central to our political system, the Supreme Court has

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<sup>3</sup> See Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 718–23 (2006) (describing recent challenges under Section 2 of Voting Rights Act); ELECTIONLINE.ORG, ELECTION REFORM: WHAT'S CHANGED, WHAT HASN'T AND WHY 2000–2006, at 27 (2006), available at <http://electionline.org/Portals/1/Publications/2006.annual.report.Final.pdf> [hereinafter WHAT'S CHANGED] (describing recent challenges to election laws). For a more detailed description of the types of challenges being brought, see *infra* Part I.B.

<sup>4</sup> For an overview of the recount and commentary on its legal and political repercussions, see generally THE UNFINISHED ELECTION OF 2000 (Jack N. Rakove ed., 2001) and THE LONGEST NIGHT: POLEMICS AND PERSPECTIVES ON ELECTION 2000 (Arthur J. Jacobson & Michel Rosenfeld eds., 2002). For an extensive overview of the challenges brought immediately following the 2000 election, see Robert Crown Law Library, Election 2000 Materials, <http://election2000.stanford.edu> (last visited July 12, 2007).

<sup>5</sup> See *infra* Part I.B.

<sup>6</sup> GA. CODE ANN. § 21-2-417 (2005); IND. CODE § 3-5-2-40.5 (2005).

<sup>7</sup> See Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1366, 1377 (N.D. Ga. 2005) (invalidating photo identification law); Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 845 (S.D. Ind. 2006) (upholding photo identification law), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007).

<sup>8</sup> Stewart v. Blackwell, 444 F.3d 843, 859–62 (6th Cir. 2006) (rejecting *Burdick* standard and applying strict scrutiny). Ohio's subsequent election technology overhaul ultimately persuaded the Sixth Circuit, sitting en banc, to vacate this opinion as moot. Stewart v. Blackwell, 473 F.3d 692, 694 (6th Cir. 2007) (en banc). As evidence of confusion surrounding the appropriate constitutional standard, however, the panel opinion remains relevant.

never held that the Constitution guarantees this freedom per se.<sup>9</sup> Instead, in *Harper v. Virginia Board of Elections*, the Court held only that the Equal Protection Clause requires courts to strictly scrutinize laws that grant the right to vote to some citizens but not to others.<sup>10</sup> While the widespread grant of the franchise ensures that, as a practical matter, almost all adult citizens have a constitutional claim if the state denies them access to the voting booth,<sup>11</sup> the Court's location of the right in the Equal Protection Clause is still important to its understanding. As the Court stated in a subsequent case, the basis for granting protected status to voting is its importance to the integrity of the democratic process.<sup>12</sup> The legitimacy of government action derives from the election of its officials by *all* of the citizens whom they represent. Consequently, the traditional presumption of constitutionality afforded government action for which there exists a "rational basis" does not apply to restrictions on the exercise of the franchise; such actions undermine their own legitimacy and threaten the very structure of our democracy.<sup>13</sup>

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<sup>9</sup> *Bush v. Gore*, 531 U.S. 98, 104 (2000) ("The individual citizen has no federal constitutional right to vote for electors for the President of the United States unless and until the state legislature chooses a statewide election as the means to implement its power to appoint members of the electoral college."); SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS* 72–73 (2d ed. 2002) (noting that Constitution contains little in form of affirmative grant). The only provision of the Constitution approaching a substantive guarantee of suffrage is Article I, Section 2, and even that provision restricts its grant to elections for the House, and then only to citizens who qualify to vote for the state legislature. U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen every second year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.").

<sup>10</sup> 383 U.S. 663, 665 (1966) ("For it is enough to say that once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment.").

<sup>11</sup> The Supreme Court has affirmed a handful of qualifications for voting as being constitutionally permissible. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–40 (1982) (citizenship); *Richardson v. Ramirez*, 418 U.S. 24, 56 (1974) (felon status); *Dunn v. Blumstein*, 405 U.S. 330, 346 (1972) (registration); *Carrington v. Rash*, 380 U.S. 89, 91 (1965) (residency). The Constitution itself also limits the franchise by age. U.S. CONST. amend. XXVI, § 1.

<sup>12</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 626 (1969) ("Any unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.").

<sup>13</sup> *Id.* at 627–28. Many scholars have recently emphasized the importance of the Constitution's "structural concerns" in similar contexts. *See, e.g.*, Michael S. Kang, *The Hydraulics and Politics of Party Regulation*, 91 *IOWA L. REV.* 131, 174–75 (2005) ("[C]ourts adjudicating party regulation cases are, in a sense, engaging in practical management of these political conflicts. An important structural concern is determining how courts can best manage these relationships toward a healthy balance of cooperation and competition."); Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118

This “structural concern” of *Harper* and its progeny was completely absent, however, from the Supreme Court’s decision in *Burdick v. Takushi*<sup>14</sup>—the case recently relied upon by the Georgia and Indiana courts. Instead, *Burdick* emphasized voting as an individually held right and proceeded to evaluate whether that right was burdened by the state law in question.<sup>15</sup> The *Burdick* standard requires courts to conduct a threshold balancing of the challenged law’s burden on voters against the importance of the purported state interest at stake: If the burden is heavy and the state interest slight, the law is reviewed under the often fatal standard of strict scrutiny, while if the burden is slight and the state interest significant, the law is examined under the easily met rational basis standard.<sup>16</sup> The decision gave little guidance, though, as to how such a balancing should be conducted, leaving open a critical issue for lower courts applying the test. Indeed, when the courts applied *Burdick* to photo identification laws, their assessment of the burden imposed on the voter proved to be dispositive: The Georgia court found the burden to be severe, while the Indiana court found it to be slight.<sup>17</sup>

This Note argues that courts addressing today’s wave of disenfranchisement claims should abandon *Burdick* and return to a modified version of *Harper*’s strict scrutiny analysis.<sup>18</sup> The reasons to abandon *Burdick* are threefold. As a matter of authority, the fact that *Burdick* concerned the freedom to cast a write-in ballot—as opposed to the right to cast a vote at all—throws doubt on the claim that the Supreme Court ever intended lower courts to apply the standard to disenfranchisement claims generally. As a practical matter, the lower courts have failed to apply the decision consistently or predictably, and further delineation of the standard is unlikely to produce better results. Finally, as a normative matter, *Burdick* largely ignored the structural concerns deemed so important by *Harper* and its progeny.

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HARV. L. REV. 29, 44 (2004) (“The justification for judicial review in contexts such as malapportionment is to address the structural risk of political self-entrenchment.”).

<sup>14</sup> 504 U.S. 428 (1992).

<sup>15</sup> *Id.* at 434.

<sup>16</sup> *Id.*

<sup>17</sup> See *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005) (“[T]he Photo ID requirement imposes ‘severe’ restrictions on the right to vote.”); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 822 (S.D. Ind. 2006) (“Plaintiffs have not demonstrated that [the photo identification requirement] will impose severe burdens on the rights of voters . . . .”), *aff’d sub nom. Crawford v. Marion County Election Bd.*, 472 F.3d 949, 952 (7th Cir. 2007).

<sup>18</sup> This Note argues only that courts should abandon the *Burdick* standard for disenfranchisement claims. It takes no position on courts’ application of *Burdick* to ballot access cases, the standard’s other focus.

In place of *Burdick*, this Note argues that courts should apply strict scrutiny whenever a challenged law disproportionately disenfranchises people with an identifiable set of political preferences. Such a standard would be consistent with the pre-*Burdick* case law because it incorporates *Harper*'s structural concerns. It also contains none of *Burdick*'s open-ended balancing, thus eliminating that test's problems with consistency of application. Finally, the application of this standard would not undermine the protection of voting as an individual right nor preclude additional constitutional or statutory protections.

Part I of this Note gives a brief summary of the disenfranchisement claims that litigants have brought in the wake of the presidential election of 2000, how the law governing them has produced inconsistent results, and what distinguishes them from other voting rights claims past and present. Part II describes and critiques the evolution of the constitutional standard protecting the right to vote—sometimes called the “participatory right”—beginning with *Harper* and concluding with *Burdick*.<sup>19</sup> Part III evaluates both constitutional and statutory alternatives to *Burdick*, including a more careful application of *Burdick* itself, an application of Section 2 of the Voting Rights Act of 1965 (VRA),<sup>20</sup> and this Note's variation on strict scrutiny. It concludes that a more careful application of *Burdick* still fails to overcome its deficiencies and that Section 2, while perhaps still useful in certain contexts, provides an incomplete solution to the problem. This Note's proposed standard—applying strict scrutiny whenever the disenfranchised group has identifiable political preferences—proves to be the best solution.

## I

### A NEW GENERATION OF DISENFRANCHISEMENT CLAIMS

The presidential election of 2000 spawned a new generation of disenfranchisement claims. This Part describes in greater detail the problems that generated these claims, the specific challenges that litigants have brought, and the inconsistent results that courts have produced. It also distinguishes such challenges from other kinds of voting

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<sup>19</sup> I borrow the term “participatory right” from Pamela Karlan. Professor Karlan used the term to denote the freedom to cast a ballot on Election Day and to have that ballot counted, as well as to distinguish the concept of “voting as participation” from “voting as aggregation” and “voting as governance.” Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709–20 (1993).

<sup>20</sup> Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended in scattered sections of 42 U.S.C.).

rights claims, both historical and contemporary, but defers discussion of the constitutional standards governing them until Part II.

*A. New Problems and the Legislative Response*

In the aftermath of the presidential election of 2000, election officials across the country recognized that Florida's failures, hardly unique, highlighted widespread problems with election administration that affected every state.<sup>21</sup> Nationwide problems included "antiquated and error-prone voting machines; subjective and capricious processes for counting votes; rolls that let unqualified voters vote in some counties and turned away qualified voters in others; [and] confusion in the treatment of overseas military ballots."<sup>22</sup> The root of these problems was no great mystery—the American electoral system had suffered for years from neglect and poor administration. All the presidential election of 2000 did was shine a spotlight on what election officials had known for years.<sup>23</sup>

Legislative efforts at reform targeted two key areas: vote-counting technology and voter fraud. The reasons for targeting the former were obvious. Compared with the newer, easier, and more reliable optical-scan machines, Florida's infamous "butterfly ballot" and punch-card voting system seemed medieval. With its dimpled, hanging, and pregnant chads, the old-style ballot bore the brunt of the blame for the state's controversial recount.<sup>24</sup> Furthermore, thousands of Florida's voters had been mistakenly stricken from registration rolls because they were wrongly thought to have been felons—a problem that could easily have been avoided with an effective statewide computer database.<sup>25</sup> In contrast, voter fraud was not clearly linked to the

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<sup>21</sup> NAT'L COMM'N ON FED. ELECTION REFORM, TO ASSURE PRIDE AND CONFIDENCE IN THE ELECTORAL PROCESS 1 (2001) [hereinafter CARTER-FORD REPORT] (describing how "official after official" admitted that their states would likely have fared even worse than Florida had margin of victory in their states been as narrow as it was there).

<sup>22</sup> *Id.* at 17; see also U.S. COMM'N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION chp. 2 (2001), available at <http://www.usccr.gov/pubs/vote2000/report/main.htm> (describing problems in Florida).

<sup>23</sup> See CARTER-FORD REPORT, *supra* note 21, at 17–18 (citing election officials' and election experts' descriptions of longstanding problems with election administration).

<sup>24</sup> See Henry E. Brady et al., *Law and Data: The Butterfly Ballot Episode*, in THE LONGEST NIGHT, *supra* note 4, at 50, 50–51 (describing legal controversy surrounding butterfly ballots in Florida and "the failure of our voting system to convert people's vote intentions into counted votes").

<sup>25</sup> See Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 WASH. & LEE L. REV. 937, 965–66 (2005) ("The error in part was caused by [a] name-matching program . . . in which nonfelons with names similar to felons were placed on the purge list. It appears that somewhere between 1000 and 8000 eligible voters . . . were removed from the list because they were incorrectly identified as ineligible former Florida felons.").

problems of the 2000 election. The subsequent focus on this area was perhaps the result of a perceived need to improve voter confidence in the system or a concern that even a small amount of fraud could make a difference in elections as close as Florida's.<sup>26</sup>

While various states did enact legislation to address these issues after the 2000 election,<sup>27</sup> the first comprehensive piece of election reform was federal: the Help America Vote Act of 2002 (HAVA).<sup>28</sup> On the issue of vote-counting technology, HAVA required states to employ voting machines by January 1, 2006, that, among other things:

- (1) Permit the voter to verify the votes selected before the ballot is cast;
- (2) Provide the voter the opportunity to change or correct the ballot before it is cast; [and]
- (3) If the voter overvotes for a particular race . . . :
  - (a) Notify the voter that the voter had overvoted;
  - (b) Notify the voter of the effect of overvoting; and
  - (c) Provide the voter an opportunity to correct.<sup>29</sup>

On the issue of voter fraud, HAVA instituted two important reforms. First, it required each state to implement "in a uniform and nondiscriminatory manner, a single . . . centralized . . . [and] computerized statewide voter registration list."<sup>30</sup> Second, it conditioned voting for first-time, mail-in registrants on their providing proof of identification.<sup>31</sup>

Implementation of these requirements by the states has been decidedly uneven. Several states failed to create the requisite statewide databases by the January 1, 2006, deadline, and an estimated sixteen percent of voting systems still use punch-cards or lever machines.<sup>32</sup> Even where new systems satisfying HAVA have been

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<sup>26</sup> See COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS 12, 25 (2005) [hereinafter CARTER-BAKER REPORT] (noting more than 2000 people voted in two states during 2000 elections and discussing voting technology to provide evidence to "assure all participants . . . that the election result accurately reflects the will of the voters").

<sup>27</sup> See Nat'l Conf. of State Legislatures, The States Tackle Election Reform (Mar. 24, 2003), <http://www.ncsl.org/programs/legman/elect/taskfc/TackleElectRef.htm> (documenting 492 election reform bills passed out of 3643 introduced in 2001–2002).

<sup>28</sup> 42 U.S.C. §§ 15301–15545 (Supp. II 2002).

<sup>29</sup> Leonard M. Shambon, *Implementing the Help America Vote Act*, 3 ELECTION L.J. 424, 429 (2004).

<sup>30</sup> § 15483(a)(1)(A). The only states exempted from this requirement are those that do not require registration. § 15483(a)(1)(B). For a detailed summary of this requirement, see Shambon, *supra* note 29, at 430.

<sup>31</sup> § 15483(b). Proof of identification includes the production of a valid photo ID and "a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter . . ." *Id.*

<sup>32</sup> See WHAT'S CHANGED, *supra* note 3, at 6, 11 (noting twenty percent of states did not have compliant voter databases, and providing estimates on voting system usage as percentage of registered voters from research gathered from surveys of state election officials, state election Web sites, and news stories). Conspicuous for dragging its feet, New York

installed, the machines have been plagued by technical problems.<sup>33</sup> In their attempts to combat fraud, however, many states have gone beyond HAVA's identification requirement for first-time, mail-in registrants and have conditioned casting an in-person ballot on presenting some form of photo identification.<sup>34</sup>

### B. *The Ensuing Lawsuits*

States' uneven adoption of vote-counting technology and their enactment of photo ID laws have generated lawsuits by voting rights advocates. In Ohio, such advocates challenged the use of different types of vote-counting machines in different counties,<sup>35</sup> alleging that because machine error rates varied from county to county, the state's system violated both the Constitution and Section 2 of the VRA.<sup>36</sup> Though the district court ruled in favor of the state, the Sixth Circuit reversed, holding Ohio's system unconstitutional.<sup>37</sup> On the Section 2 claim, the court remanded, holding that while the claim could proceed, more fact-finding was necessary.<sup>38</sup>

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has failed even to begin the overhaul of its system. *Id.* at 9. Many of the delays, however, have been due to legitimate concerns about security. *See id.* at 10 (describing paper trail movement led by concerned computer science professors and efforts to ensure integrity of paperless voting systems).

<sup>33</sup> *Id.* at 9.

<sup>34</sup> *Id.* at 13 (reporting that twenty-two states, up from eleven, now require some form of identification at polls).

<sup>35</sup> *Stewart v. Blackwell*, 444 F.3d 843, 846 (6th Cir. 2006). The court noted that Ohio had two types of voting machines:

(1) "Notice" equipment such as Digital Recording Electronic (DRE) and precinct-count optical scan equipment that prevent [sic] overvotes (when a voter votes for more than the permissible number of candidates for a given office) and warn [sic] voters when they are casting undervotes (when a voter does not vote in a particular race or votes for fewer candidates than is permissible for a given office)—together, overvotes and undervotes are referred to as "residual votes"; and (2) "Non-notice" equipment such as punch card and central-count optical scan equipment that do not provide notice of and the opportunity to correct residual votes.

*Id.* at 846–47.

<sup>36</sup> *Id.* at 846, 851. Section 2 of the VRA reads as follows:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a) (2000). Despite its language, Section 2 has been primarily used to challenge at-large voting and gerrymandering schemes. Only recently have litigants begun to bring disenfranchisement claims under Section 2, and the courts have yet to articulate a predictable or manageable standard for the application of Section 2 to such claims. *See infra* Part III.B.

<sup>37</sup> *Stewart*, 444 F.3d at 879–80.

<sup>38</sup> *Id.* at 878–79.

Litigants have pursued registration-related challenges in Ohio, Florida, and Washington. In Ohio, plaintiffs challenged the secretary of state's refusal to count the votes of first-time, mail-in registrants who had failed to provide one of two identification numbers by the time the polls closed on Election Day.<sup>39</sup> In Florida, plaintiffs challenged the invalidation of registration forms on which the registrant had failed to check certain newly added boxes.<sup>40</sup> In Washington, plaintiffs challenged the state's requirement that registrants' names be matched to a Social Security or driver's license number in the state's databases before being permitted to register.<sup>41</sup>

In each case, the plaintiffs pursued different strategies. In the Ohio and Washington cases, *League of Women Voters v. Blackwell* and *Washington Ass'n of Churches v. Reed*, respectively, plaintiffs argued that the state action at issue violated HAVA.<sup>42</sup> The plaintiffs in *Reed* also argued—as did the plaintiffs in the Florida case, *Diaz v. Cobb*—that the state action was an unconstitutional burden on the right to vote.<sup>43</sup> However, only the Washington plaintiffs were successful, obtaining a preliminary injunction on the strength of their HAVA claim.<sup>44</sup> The Ohio court dismissed the HAVA claim in *League of Women Voters*,<sup>45</sup> and all but the constitutional claim met the same fate in *Diaz*. The court in *Diaz*, like the court in *Reed*, refrained from deciding the constitutional claim.<sup>46</sup>

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<sup>39</sup> *League of Women Voters v. Blackwell*, 340 F. Supp. 2d 823, 827–28 (N.D. Ohio 2004). HAVA requires states to provide provisional ballots to voters who have not produced the required proof of identification. *Id.* at 826. Plaintiffs challenged Ohio's requirement that, to have such a ballot counted, voters produce proof of identification, a driver's license number, or the last four digits of their Social Security number before the polls closed. *Id.* at 824–26.

<sup>40</sup> *Diaz v. Cobb (Diaz I)*, 435 F. Supp. 2d 1206, 1208 (S.D. Fla. 2006). Florida's registration forms contained checkboxes next to the following three statements: (1) "Are you a citizen of the United States of America?"; (2) "I affirm I am not a convicted felon, or if I am, my rights relating to voting have been restored."; and (3) "I affirm I have not been adjudicated mentally incapacitated with respect to voting or, if I have, my competency has been restored." Florida Voter Registration Application, <http://election.dos.state.fl.us/regto/vote/webappform.pdf> (last visited Aug. 11, 2007). The state would not process applications for registration if applicants failed to check the "Yes" box next to the first statement or either of the boxes next to the second and third statements.

<sup>41</sup> *Wash. Ass'n of Churches v. Reed*, No. C06-0726RSM, 2006 WL 4604854, at \*1 (W.D. Wash. Aug. 1, 2006) (order granting preliminary injunction).

<sup>42</sup> See *League of Women Voters*, 340 F. Supp. 2d at 831 (rejecting plaintiffs' argument that Ohio's procedures violate HAVA); *Reed*, 2006 WL 4604854, at \*1 (accepting plaintiffs' argument that Washington's procedures violate HAVA).

<sup>43</sup> *Reed*, 2006 WL 4604854, at \*1; *Diaz I*, 435 F. Supp. 2d at 1209.

<sup>44</sup> *Reed*, 2006 WL 4604854, at \*5–\*6.

<sup>45</sup> *League of Women Voters*, 340 F. Supp. 2d at 824.

<sup>46</sup> See *Diaz I*, 435 F. Supp. 2d at 1216–17 (granting defendant's motion for more definite statement on constitutional claims and dismissing VRA claims); *Diaz v. Cobb (Diaz II)*, 475 F. Supp. 2d 1270, 1276–78 (S.D. Fla. 2007) (dismissing all but one constitutional

Voter ID laws have faced legal challenges in six states,<sup>47</sup> but the laws challenged in Indiana and Georgia have special significance because they mandated photo identification. In Indiana, plaintiffs alleged that the law violated the fundamental right to vote, the materiality provision of the VRA, and the state constitution.<sup>48</sup> In Georgia, plaintiffs filed a similar complaint, but also alleged that Georgia's law amounted to an unconstitutional poll tax and violated Section 2 of the VRA.<sup>49</sup> The Indiana court granted summary judgment for the state on all claims.<sup>50</sup> In contrast, the Georgia court issued a preliminary injunction barring enforcement of the law based on plaintiffs' fundamental right and poll tax claims.<sup>51</sup>

A closer examination of how the courts handled the constitutional claims—which were raised in all but one of the above cases—reveals startling confusion and inconsistency. None of the four courts to reach such claims on their merits applied the same standard as one another. The Georgia court was admittedly uncertain about which legal principles controlled, separately applying the standards articulated in both *Burdick* and *Harper*.<sup>52</sup> The result it reached (under both standards) was directly opposed to that reached by the Indiana court, which reached its holding solely through the *Burdick* analysis.<sup>53</sup> Following these decisions, the Sixth Circuit rejected the application of *Burdick* to the vote-counting machine challenges in Ohio, and reached its holding under *Harper*.<sup>54</sup> Finally, the *Diaz* court, in dismissing all but one of the plaintiffs' constitutional claims, cited neither *Burdick* nor *Harper*, relying instead on a handful of other Supreme

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claim); *Reed*, 2006 WL 4604854, at \*5 (refraining from deciding constitutional claims because plaintiffs were successful on others).

<sup>47</sup> See *ACLU v. Santillanes*, No. CIV 05-1136 MCA/WDS, 2007 WL 782167, at \*1 (D.N.M. Feb. 12, 2007); *Weinschenck v. State*, 203 S.W.3d 201, 204 (Mo. 2006); *Gonzalez v. State*, 435 F. Supp. 2d 997, 998 (D. Ariz. 2006); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 782 (S.D. Ind. 2006); *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1366 (N.D. Ga. 2005); *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 411 (E.D. Mich. 2004).

<sup>48</sup> *Rokita*, 458 F. Supp. 2d at 782.

<sup>49</sup> *Billups*, 406 F. Supp. 2d at 1329.

<sup>50</sup> *Rokita*, 458 F. Supp. 2d at 845.

<sup>51</sup> *Billups*, 406 F. Supp. 2d at 1377–78. The Georgia legislature responded to the decision by reenacting the law without the original requirement that voters pay a fee for state-issued IDs—a requirement never present in the Indiana law. See GA. CODE ANN. § 3-5-2-40.5 (2007) (amending original photo identification law). The fate of the current Georgia law remains uncertain.

<sup>52</sup> *Billups*, 406 F. Supp. 2d at 1361–66.

<sup>53</sup> Compare *id.* (invalidating photo identification law under standards set in *Burdick* and *Harper*), with *Rokita*, 458 F. Supp. 2d at 820–25 (upholding photo identification law under *Burdick*).

<sup>54</sup> *Stewart v. Blackwell*, 444 F.3d 843, 868 (6th Cir. 2006).

Court cases to articulate a completely different standard.<sup>55</sup> The precise content of *Harper* and *Burdick* is discussed in Part II below. For now, it is enough to highlight the deep confusion and inconsistency with which the courts have addressed these claims.

### C. *Distinguishing Recent Claims: The New Vote Denial*

One commentator has characterized the claims in the lawsuits described above as “new vote denial” claims in order to set them apart both from earlier disenfranchisement claims—the “first generation” of voting rights litigation—and vote dilution claims.<sup>56</sup> “Vote denial” is essentially simple disenfranchisement:<sup>57</sup> action by the state that either impermissibly bars citizens from voting or fails to count their votes. In contrast, (racial) vote dilution<sup>58</sup> is the suppression of the voting power of racial minorities—achieved originally by using multimember districts and now through gerrymandering districts in ways that unfairly aggregate minority votes. Consequently, the right at stake in vote denial claims is frequently characterized as an *individual* right, often referred to as the “participatory right,” while the right at stake in vote dilution claims is frequently characterized as a *group* right.<sup>59</sup>

Historically, “first generation” voting claims alleged outright vote denial and were almost exclusively concerned with reversing the widespread disenfranchisement of Southern blacks that had existed prior to the 1970s.<sup>60</sup> While litigants bringing such claims won several important victories prior to 1965, the passage that year of the VRA marked

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<sup>55</sup> *Diaz v. Cobb (Diaz II)*, 475 F. Supp. 2d 1270, 1276–77 (S.D. Fla. 2007) (relying on *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and following cases to find that court may question constitutionality only after weighing character and magnitude of asserted injury, identifying interests put forth by State as justification, and evaluating extent to which those interests make it necessary to burden plaintiffs’ rights).

<sup>56</sup> Tokaji, *supra* note 3, at 691–92.

<sup>57</sup> To the extent that vote denial and disenfranchisement could be conceptually distinguishable, the distinction would be in the reason for the denial. One could use the term “disenfranchisement” to denote denials based on personal characteristics (e.g., age, race, felon status) and the term “vote denial” to denote denials based on voter action or failure to act (e.g., poll taxes, literacy tests). This Note, however, does not find this distinction constructive, and therefore uses the terms interchangeably.

<sup>58</sup> Throughout this Note, the phrase “vote dilution” is used to signify “racial vote dilution.” While Section 2 of the VRA prohibits vote dilution, applying the statute reveals the difficulty of defining the concept in concrete terms.

<sup>59</sup> See Karlan, *supra* note 19, at 1713–16 (distinguishing vote dilution claims as validating group rights).

<sup>60</sup> See ISSACHAROFF, KARLAN & PILDES, *supra* note 9, at 672–73 (describing first- and second-generation claims); Karlan, *supra* note 2, at 121–25 (same); Daniel H. Lowenstein, *Race and Representation in the Supreme Court*, in *VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES*, *supra* note 2, at 49, 52–53 (describing purpose of first-generation claims).

a significant tipping point. In fact, the VRA was so effective at enfranchising African Americans that first-generation claims largely disappeared in the years following its passage.<sup>61</sup> What followed for the next thirty years were “second generation” and “third generation” claims concerning the aggregation of voting power.<sup>62</sup> Thus, when contemporary vote denial cases were first brought following the election of 2000, courts had not seen such claims with any frequency for decades.

Recent claims of disenfranchisement have challenged a variety of state election practices. The claims are facially distinct both from vote denial claims brought before 1965 and vote dilution claims brought thereafter; the question remains unresolved whether the differences between the new and the old claims are material from the perspective of the law protecting the participatory right. The next Part examines an important subset of this law: the constitutional claim.

## II

### THE RIGHT TO VOTE AND THE CONSTITUTION

As is evident from Part I, although plaintiffs have advanced a variety of legal theories in recent vote denial cases, the most common by far is the constitutional claim.<sup>63</sup> Equally evident is the deep confusion and inconsistency with which courts have dealt with such claims. This Part seeks to explain this inconsistency, tracing the evolution of the constitutional standard protecting the participatory right from its origin in *Harper v. Virginia Board of Elections*<sup>64</sup> to its current form in *Burdick v. Takushi*.<sup>65</sup> Ultimately, the source of recent confusion is *Burdick*'s standard: an indeterminate balancing test. *Burdick*'s problems stem from the Court's effort to remedy twenty-five years of inconsistent application of *Harper* all at once. Understanding the tension underlying vote denial claims after *Harper*, as well as *Burdick*'s attempt to resolve that tension, is therefore critical to this Note's effort to find a better solution.

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<sup>61</sup> See Karlan, *supra* note 2, at 121–22 (“As we have already seen, the Voting Rights Act made immediate and substantial inroads into the first-generation problem of formal disenfranchisement.”); Lowenstein, *supra* note 60, at 55 (“The immediate and primary purpose of the Voting Rights Act was to ensure the right to vote to blacks in the South, and the Act succeeded spectacularly in accomplishing that goal.”).

<sup>62</sup> See generally Karlan, *supra* note 2 (describing second- and third-generation claims).

<sup>63</sup> Another increasingly common claim is the one alleging a violation of Section 2 of the VRA, a subject addressed *infra* Part III.B.

<sup>64</sup> 383 U.S. 663 (1966).

<sup>65</sup> 504 U.S. 428 (1992).

### A. *The Harper Standard and its Motivation*

The Supreme Court first announced the standard protecting the participatory right in its 1966 decision of *Harper v. Virginia Board of Elections*.<sup>66</sup> In *Harper*, the Court struck down Virginia's poll tax, holding that while the Constitution did not require the government to hold elections for every public office, "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."<sup>67</sup> Although the required fee was usually minimal, the Court found it intolerable that poll taxes could even potentially make the franchise dependent in some way on a voter's wealth.<sup>68</sup>

Though the Court hesitated to give a name to the level of scrutiny it was applying in *Harper*, it made it clear soon thereafter in *Kramer v. Union Free School District*<sup>69</sup> that any limitations on the right to vote would receive strict scrutiny.<sup>70</sup> Thus, for voting requirements to pass constitutional muster, they would have to be narrowly tailored to promote a compelling state interest.<sup>71</sup> The *Kramer* Court also clarified the rationale, left unclear in *Harper*, for applying heightened scrutiny to voting qualifications. In *Harper*, the Court's analysis was sparse, declaring only that voting was "fundamental," and relying on that to justify heightened scrutiny. While *Harper* did invoke voting's importance to the democratic process, the precedent it cited suggests that the Court considered voting an individual right akin to free speech

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<sup>66</sup> 383 U.S. 663 (1966).

<sup>67</sup> *Id.* at 665.

<sup>68</sup> *Id.* at 666 ("Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.").

<sup>69</sup> 395 U.S. 621 (1969).

<sup>70</sup> *See id.* at 627–29 (holding that laws receive strict scrutiny when they deny right to vote for some residents but not for others). In *Kramer*, the challenged New York law restricted the franchise in school district elections to those otherwise eligible voters who also owned (or leased) property within the district or were parents of children enrolled in local public schools. *Id.* at 622.

<sup>71</sup> *Id.* at 627. Note that the strict scrutiny applied in *Harper* and *Kramer* differed from that applied to race classifications because it was triggered by the *context* of the classification rather than the classification itself. Racial classifications receive heightened judicial scrutiny regardless of which right the state threatens with their imposition. Virginia's poll tax and New York's property and parenting conditions received heightened scrutiny not because they classified by wealth or parentage but because they imposed a limitation in the context of voting. Because the right to participate in the democratic process is "fundamental," *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1964), any state action that touches upon it receives heightened scrutiny. For an analysis of the distinction between fundamental rights and suspect classifications in the context of voting rights, see LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1509–11 (2d ed. 1988). *See also* *City of Mobile v. Bolden*, 446 U.S. 55, 112–17 (1980) (Marshall, J., dissenting) (arguing that even race-based infringements on right to vote should be analyzed under framework of fundamental rights rather than as suspect classification).

and procreation.<sup>72</sup> In *Kramer*, however, voting's value as an individual right was subordinated to its value to the democratic process. The Court's justification for applying strict scrutiny flowed directly from the lack of democratic legitimacy inherent in selective disenfranchisement:

[T]he deference usually given to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. . . . The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.<sup>73</sup>

The Court made two important assumptions in *Kramer*. First, it assumed that the authority of elected officials derives from their free and fair election. The legitimacy of their actions, and hence the level of deference that they should be afforded by the courts, depends on the preservation of free and fair elections *over time*. In the temporal

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<sup>72</sup> The closest *Harper* came to endorsing structural concerns was when it quoted *Reynolds* for the proposition that voting is "a fundamental matter in a free and democratic society." *Harper*, 383 U.S. at 667 (quoting *Reynolds*, 377 U.S. at 561–62). The remainder of its discussion, however, exclusively concerned the right to be free from discrimination, frequently comparing Virginia's poll tax to racial discrimination. *Id.* at 668–70. Perhaps most important was the Court's citation to *Skinner v. Oklahoma*, 316 U.S. 535 (1942), another case in which the Court located a substantive right in the Equal Protection Clause. In *Skinner*, the Court struck down a state law providing for the sterilization of persons convicted two or more times of "felonies involving moral turpitude" as being violative of the Equal Protection Clause. *Id.* at 536, 538. A common sense analysis of the sterilization issue might proceed as follows: Procreation is one of the fundamental freedoms necessary for self-actualization and, therefore, any attempt by the state to deprive people of this freedom must be strictly scrutinized. Because there is no right to "self-actualization" in the Constitution, however, the *Skinner* Court cast the justification for heightened scrutiny in terms of equal protection: "The power to sterilize, if exercised . . . [i]n evil or reckless hands . . . can cause races or types which are inimical to the dominant group to wither and disappear." *Id.* at 541. In other words, the great value our society puts on procreation means we will not tolerate the risk of any discrimination by the state in that arena. *Cf.* TRIBE, *supra* note 71, at 1463–64 (arguing protection of fundamental rights may be influenced by fear of possible invidious discrimination if government is allowed to exercise control over these rights). The same argument can be made if voting is a "fundamental freedom." Considering *Harper*'s insistence that voting is "fundamental," this could easily have been the Court's reasoning there. If so, the weakness of the argument becomes apparent as soon as one considers that people attach significantly greater value to having children than they do to voting.

<sup>73</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969).

dimension of this first assumption lies a second assumption: The reason that free and fair elections invest government officials with authority is that the populace retains the ability and prerogative to vote them out. Ultimately, because a democratic government's authority derives from the people, and because voting is the only direct means of ensuring that elected officials act in accordance with the people's wishes, restricting the franchise undermines the people's ability to check the performance of their elected leaders.<sup>74</sup> Without this check, the entire democratic enterprise loses its legitimacy. This Note refers to the concern the Court has shown for the value of this check on political power as the "structural concern."

After *Kramer*, neither the structural concern nor a concern for the value of voting as an individual right played a significant role in the Court's analysis of subsequent cases. The standard that had emerged, strict scrutiny, required only that the challenged law be narrowly tailored to advance a compelling state interest. However, as the next section demonstrates, the Court soon began to doubt that this was always the correct question to be asking. But instead of reexamining the justification for the standard, it ostensibly continued to follow it while effectively deciding cases as it saw fit, thereby creating noticeable inconsistency in the case law.

### B. Applying the Harper Standard

The Court's strict scrutiny standard almost immediately created tension with the states' constitutionally assigned responsibility for administering elections.<sup>75</sup> Because most election laws invariably impose some burden on voters, *Harper* could conceivably have mandated heightened judicial scrutiny of the nation's entire electoral apparatus. Perhaps because the Court recognized that this result would have been undesirable, it fell into a pattern of obfuscation. While claiming that the applicable standard of review was strict scrutiny, the Court sometimes reached results consistent with a far more deferential standard. This inconsistent application of *Harper* left litigants guessing as to what standard the Court would actually apply.

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<sup>74</sup> The question of whether or not every restriction of the franchise undermines the populace's ability to exert this check is considered *infra* Part III.C.1.

<sup>75</sup> State sovereignty has always dictated that elections for state offices be governed entirely by state law, while Article I, Section 4 of the U.S. Constitution grants shared authority to the states for administering federal elections: "The Times, Places and Manner of holding Elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, § 4.

Initially, the Court struck down a variety of voting qualifications under *Harper*'s rubric of strict scrutiny, including property<sup>76</sup> and durational residency requirements.<sup>77</sup> An example of the latter was *Dunn v. Blumstein*, in which the Court struck down Tennessee's one-year residency requirement.<sup>78</sup> While the Court accepted the state's interest in protecting against fraud by transient voters as being compelling, it rejected the argument that such a lengthy residency requirement was narrowly tailored to promote that interest.<sup>79</sup> The Court stated that there were many less burdensome ways of ascertaining whether voters were bona fide residents—the most obvious being the state's registration requirements.<sup>80</sup>

In dicta noting the adequacy of Tennessee's registration requirements, the *Dunn* Court reaffirmed the constitutionality of a thirty-day registration deadline.<sup>81</sup> In his concurrence, Justice Blackmun pounced on this issue, questioning the Court's approach: "But if 30 days pass constitutional muster, what of 35 or 45 or 75?"<sup>82</sup> In other words, if determining the constitutionality of these laws is concededly "a matter of line drawing,"<sup>83</sup> Blackmun wondered whether it makes sense to say that a numerical cutoff—almost always inherently arbitrary—is ever necessary to promote a compelling interest.<sup>84</sup> Implicit in his concurrence is a criticism of applying strict scrutiny to the details of election administration. If such details were to be the subject of challenge, did it really make sense to apply strict scrutiny to them when strict scrutiny was ill-equipped to determine which lines were well drawn and which were not?

Soon after *Dunn*, in *Marston v. Lewis*, the Court appeared to concede this difficulty.<sup>85</sup> In *Marston*, the Court upheld Arizona's fifty-day durational residency requirement and its fifty-day registra-

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<sup>76</sup> *E.g.*, *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969).

<sup>77</sup> *E.g.*, *Dunn v. Blumstein*, 405 U.S. 330, 331, 342, 360 (1972).

<sup>78</sup> *Id.* at 331.

<sup>79</sup> *Id.* at 345.

<sup>80</sup> When a voter registered in Tennessee, the voter was required to swear an oath that he was a bona fide resident. In light of the fact that persons intent on perpetrating fraud could just as easily lie about how long they had lived in Tennessee as they could lie about being a bona fide resident, the durational residency law added nothing to the registration requirement. *Id.* at 346.

<sup>81</sup> *See id.* at 348–49 n.19 (reaffirming decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), that thirty-day period would provide adequate protection for State's interest in preventing fraud while not unduly burdening plaintiffs' rights).

<sup>82</sup> *Id.* at 363 (Blackmun, J., concurring).

<sup>83</sup> *Id.*

<sup>84</sup> For a more general discussion of the problem associated with numbers and line-drawing, see *Hoctor v. United States Department of Agriculture*, 82 F.3d 165, 170–72 (7th Cir. 1996).

<sup>85</sup> 410 U.S. 679 (1973).

tion deadline against constitutional challenge.<sup>86</sup> The majority avoided having to determine which level of scrutiny would apply by agreeing with the state's arguments that the law was an "amply justifiable legislative judgment that 50 days rather than 30 is necessary to promote the State's important interest in accurate voter lists."<sup>87</sup> The absence of any analysis concerning the narrowness of the law's tailoring made clear that the scrutiny used was not strict. In fact, the Court's deference to the legislature's judgment was redolent of rational basis review.<sup>88</sup>

After *Marston*, the Court alternated between applying strict scrutiny and a more deferential standard of review for two decades.<sup>89</sup> Its decisions regarding the constitutionality of using property as a voting qualification are particularly inconsistent.<sup>90</sup> Throughout this period, the Court refused to state a rationale for its choice of standard. Ultimately, as Erwin Chemerinsky has observed, it is unlikely that the inconsistencies present in this line of cases can be easily resolved.<sup>91</sup>

### C. *Burdick and its Application in the Lower Courts*

Twenty-five years after *Harper*, the Court finally articulated a rationale for choosing between strict scrutiny and rational basis review in *Burdick v. Takushi*.<sup>92</sup> *Burdick* represented an important doctrinal shift, moving the Court's focus from structural concerns to the severity

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<sup>86</sup> *Id.* at 679–80.

<sup>87</sup> *Id.* at 681.

<sup>88</sup> The similarity of the Court's analysis in *Marston* to rational basis review rests primarily on its deference to the legislative judgments without more than a cursory examination of the underlying reasons. Compare *id.* at 680 ("[T]he Arizona requirement . . . reflects a state legislative judgment that the period is necessary to achieve the State's legitimate goals."), with *McGowan v. Maryland*, 366 U.S. 420, 425–26 (1961) ("[A law subject to rational basis review] will not be set aside if any state of facts reasonably may be conceived to justify it.").

<sup>89</sup> Compare *City of Phoenix v. Kolodziejcki*, 399 U.S. 204, 205, 213 (1970) (applying *Kramer* and striking law because Court had not "been shown that the 14 States now restricting the franchise have unique problems that make it necessary to limit the vote to property owners") (emphasis added), with *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–70 (1978) (holding that because plaintiffs resided within police jurisdiction of Tuscaloosa but outside city limits, challenged law denying plaintiffs' right to vote in city elections needed only to "bear some rational relationship to a legitimate state purpose").

<sup>90</sup> Compare *Cipriano v. City of Houma*, 395 U.S. 701, 702 (1969) (striking down property qualifications for voting on issuance of municipal bonds), and *Kolodziejcki*, 399 U.S. at 205, 213 (same), with *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 720–33 (1973) (upholding property qualifications for voting on water districts), and *Ball v. James*, 451 U.S. 355, 357–72 (1981) (same).

<sup>91</sup> See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 846–47 (2d ed. 2002) (pointing out inconsistencies in Court's reasoning and concluding that "[d]istinguishing these cases is thus extremely difficult").

<sup>92</sup> 504 U.S. 428 (1992).

of the burden imposed on the voter. In decisions like *Harper* and *Marston*, the Court had focused almost exclusively on the merits of the state's proffered justification, upholding laws where the state action was "amply justified" and striking them down where it was not. In *Burdick*, however, the Court held that:

A court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."<sup>93</sup>

The Court further explained that when a challenged law severely burdened individual rights, strict scrutiny would still apply.<sup>94</sup> If, however, the law imposed only "reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests [would] generally [be] sufficient to justify the restrictions."<sup>95</sup>

The facts of *Burdick* are straightforward. The plaintiff alleged that Hawaii's prohibition of write-in candidates infringed his right to vote because he was not able to vote for his candidate of choice.<sup>96</sup> Applying the standard quoted above, the Court first held that Hawaii's law burdened voters only slightly, primarily affecting those who waited until the last days before the election to choose their candidate.<sup>97</sup> Hawaii also provided several other means by which candidates could access the ballot, including a nonpartisan primary in which candidates who received ten percent of the vote would obtain a spot on the general election ballot.<sup>98</sup> Second, the Court held that because the burden was slight, the State's proffered interest in blocking access to "sore loser" candidates and "avoiding the possibility of unrestrained factionalism" was sufficient to justify the law.<sup>99</sup> Accordingly, Hawaii's ban on write-in candidates was deemed constitutional.<sup>100</sup>

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<sup>93</sup> *Id.* at 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (internal quotation marks omitted).

<sup>96</sup> *Id.* at 430.

<sup>97</sup> *Id.* at 436–37. The Court also emphasized that the essence of the participatory right did not lie in a voter's right to use his vote to make an "expressive" point. Hence, determining the burden on the plaintiff's purported right to vote for any *particular* candidate was not a proper analysis for the Court to undertake. *Id.* at 438.

<sup>98</sup> *Id.* at 436. The other means of obtaining a place on the ballot required that a candidate run as a member of an "established" political party. *Id.* at 435–36.

<sup>99</sup> *Id.* at 439.

<sup>100</sup> *Id.* at 441–42.

While *Burdick* does provide a framework within which courts could determine the appropriate standard of review, it also creates a great deal of indeterminacy. The word “burden” is exceedingly vague when left unqualified, inviting courts to make ad hoc judgments concerning what is “excessive” and what is “reasonable.” Furthermore, while the two steps in *Burdick* purport to be analytically distinct, in reality the initial assessment of the burden infects the later assessment of the state’s justification. In practice, *Burdick* reduces the determination to this initial decision, only exacerbating the existing uncertainty and unpredictability for litigants.<sup>101</sup>

The courts applying *Burdick* to the recent challenges to photo identification requirements in Georgia and Indiana aptly demonstrate the unpredictability of the burden assessment.<sup>102</sup> In the Georgia case, *Common Cause/Ga. v. Billups*,<sup>103</sup> the court turned first to the burden imposed on the plaintiffs.<sup>104</sup> Those who did not already possess a valid photo ID had to obtain one from a Department of Driver Services Office, of which there were only fifty-six to service Georgia’s 159 counties. Most of these offices were located in primarily rural counties that lacked the benefit of public transportation; all of them charged a fee for the ID.<sup>105</sup> Moreover, the law required the production of a birth certificate if the applicant had never possessed an ID before.<sup>106</sup> The court concluded from these facts that the law’s burden on those currently without a photo ID—especially the poor and the elderly—was severe.<sup>107</sup> The court deemed it unnecessary to choose between strict scrutiny and the *Burdick* test because the photo ID law would fail to pass constitutional muster under either.<sup>108</sup> While

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<sup>101</sup> While *Burdick* instructs courts to “weigh” the burden on voters against the state interest, the fact that the burden alone appears to decide the level of scrutiny calls into doubt whether it is actually a “balancing” test. The critique given by this Note nevertheless shares many similarities with critiques of balancing tests more generally. See, e.g., T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–83 (1987) (giving internal critique of balancing tests, including criticism of case-by-case or “ad hoc” balancing); cf. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 393–95 (1974) (critiquing sliding scales under Fourth Amendment).

<sup>102</sup> *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326, 1377 (N.D. Ga. 2005) (finding law unconstitutional); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 845 (S.D. Ind. 2006) (finding law constitutional).

<sup>103</sup> 406 F. Supp. 2d 1326 (N.D. Ga. 2005).

<sup>104</sup> *Id.* at 1362.

<sup>105</sup> Georgia charged twenty dollars for a five-year ID and thirty-five dollars for a ten-year ID. *Id.* at 1339.

<sup>106</sup> *Id.* at 1340.

<sup>107</sup> *Id.* at 1365–66.

<sup>108</sup> The court had “little doubt that the Photo ID requirement fail[ed] the strict scrutiny test . . . .” *Id.* at 1361.

acknowledging that the state's interest in preventing fraud was compelling, the court pointed to the admission by Georgia's own Secretary of State that there was simply no evidence of in-person voter fraud in the state.<sup>109</sup> In fact, the only evidence of voter fraud before the court involved absentee ballots.<sup>110</sup> Because the law did not address this problem at all, it failed the narrow tailoring requirement. Thus, whether proceeding straight to strict scrutiny or arriving there through *Burdick* because the burden was severe, the law was unconstitutional.

In the Indiana case, *Indiana Democratic Party v. Rokita*,<sup>111</sup> the court reached the opposite conclusion on almost every material issue. First, it held that the *Burdick* test governed the plaintiffs' claim.<sup>112</sup> Second, it rejected the plaintiffs' assertion that the Indiana law imposed a severe burden on the right to vote, consequently rejecting the argument that strict scrutiny should be applied.<sup>113</sup> Unlike the court in *Billups*, the court in *Rokita* assigned little weight to the plaintiffs' argument that residents who did not possess a photo ID faced significant hurdles in obtaining one. Instead, the court found that most of those plaintiffs who lacked a photo ID were still able to vote via absentee ballot and therefore were neither denied the opportunity to vote nor significantly burdened by the law.<sup>114</sup> Thus, the State only needed to provide a reasonable justification for the law in order to pass constitutional muster. The court found that it had "no basis to conclude that the General Assembly's legislative judgment in enacting [the photo ID requirement] was grossly awry."<sup>115</sup> The State's asserted interest in combating voter fraud was therefore deemed sufficient to justify the law.

It is possible that *Billups* and *Rokita* can be distinguished on their facts. Throughout its opinion, the court in *Rokita* excoriated plaintiffs' counsel for their sloppy lawyering and insufficient production of evidence.<sup>116</sup> Accordingly, the evidence presented in that case may not have demonstrated that the Indiana law imposed a significant burden

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> 458 F. Supp. 2d 775 (S.D. Ind. 2006).

<sup>112</sup> *Id.* at 821–22.

<sup>113</sup> *Id.* at 825.

<sup>114</sup> *Id.* at 822–23.

<sup>115</sup> *Id.* at 825.

<sup>116</sup> See *id.* at 783 ("Plaintiffs . . . have not introduced evidence of a single, individual Indiana resident who will be unable to vote as a result of [Indiana's voter ID law] . . ."); *id.* at 820 ("Plaintiffs, however, have failed to demonstrate that strict scrutiny of [Indiana's voter ID law] is warranted, primarily because they have totally failed to adduce evidence establishing that any actual voters will be adversely impacted by [the law]."); *id.* at 825 n.75 ("Plaintiffs have saddled the Court with a weakly-conceived lawsuit brought by parties . . . all of whom obviously strongly dislike the challenged law for partisan and/or personal rea-

on voters who had to obtain a photo ID. However, the *Rokita* court's statement that such a burden is irrelevant—because voters can always vote absentee—cannot be reconciled with the *Billups* court's conclusion that “[t]he fact that voters, in theory, may have the alternative of voting an absentee ballot without a Photo ID thus does not relieve the burden on the right to vote caused by the Photo ID requirement.”<sup>117</sup> These contradictory conclusions are based less on facts than on the courts' views of what constitutes a heavy burden. This kind of discretion should not determine the level of scrutiny applied to, let alone the outcome of, such cases.

Even if such discretion were defensible, the *Burdick* test still leaves state legislatures without a clear understanding of which election rules are constitutional and which are not. The Georgia legislature responded to *Billups* by reenacting its voter ID law without the fee for new IDs.<sup>118</sup> It is difficult to determine, however, whether the reenacted law will survive judicial scrutiny, because the *Billups* court never clearly stated which part of the original law offended the Constitution,<sup>119</sup> nor which part created a sufficiently heavy burden to merit strict scrutiny review.

Given these normative concerns, lower courts should be especially wary of applying the *Burdick* standard when it is unclear whether the Supreme Court ever intended *Burdick* to apply to vote denial cases at all. Although the Seventh Circuit assumed that applying *Burdick*'s standard was appropriate when it affirmed *Rokita*,<sup>120</sup> the Sixth Circuit, in resolving the Ohio voting machine case discussed in Part I, did not. In that case, *Stewart v. Blackwell*,<sup>121</sup> the Sixth Circuit distinguished *Burdick*, characterizing *Stewart* as a ballot access case rather than a vote denial case<sup>122</sup> and holding that strict

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sions. As a result, the Court has been repeatedly required to respond to vague hypotheticals and speculation rather than concrete and actual harms.”)

<sup>117</sup> Common Cause/Ga. v. Billups, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005).

<sup>118</sup> See Carlos Campos, *Legislature 2006: Voter ID Bill Clears House*, ATLANTA J.-CONST., Jan. 13, 2006, at D6 (describing how Republican legislature passed new version of voter ID law in which IDs are free).

<sup>119</sup> In addition to holding that the original law was an unconstitutional burden on the right to vote, the court in *Billups* held that the fees charged for the IDs were equivalent to an unconstitutional poll tax. *Billups*, 406 F. Supp. 2d at 1370. While making the IDs free likely eliminates the poll tax concern, it is less clear that doing so eliminates the fundamental right concern. Traveling to obtain these IDs still imposes a burden on voters, but it is unclear how substantial the court might deem it to be.

<sup>120</sup> Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007).

<sup>121</sup> 444 F.3d 843 (6th Cir. 2006).

<sup>122</sup> The court stated:

The dissent's reliance on *Burdick*, therefore, is misplaced. First, in *Burdick*, the plaintiffs' First Amendment rights to ballot access were at issue, not the plaintiffs' right to vote, which is at issue in this case. Second, the dissent's

scrutiny should apply to all vote denial claims.<sup>123</sup> Despite this distinction, the proper scope of the language in *Burdick* will likely continue to confuse lower courts until the Supreme Court resolves the issue.<sup>124</sup>

In summary, the *Burdick* standard has produced a great deal of confusion, inconsistency, and unpredictability when applied to vote denial claims. The plenary discretion granted to courts to decide what constitutes a “severe” or “slight” burden will continue to produce such inconsistency, and the breadth of *Burdick*’s language will tempt courts to continue to apply *Burdick* to different types of vote denial challenges. *Burdick*’s value lies primarily in its transparency, recognizing as it does the tension that has always existed between protecting the participatory right and respecting the states’ Constitutional role in administering elections.<sup>125</sup> But while the *Burdick* standard succeeds in recognizing this tension, it does not succeed in mediating it—at least not for vote denial claims. Confusion and inconsistency in the law protecting the participatory right not only undermine public confidence in the electoral process and hasten the already precipitous decline in participation rates<sup>126</sup> by creating uncertainty and unpredictability, they also undermine the states’ ability to administer elections effectively.

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claim that “federal courts applying the *Burdick* framework have evaluated challenges to various state voting regulations under a rational-basis standard of review” is correct, but misses the point. *Burdick* was about a *candidate*’s access to the ballot; it was not a case that addressed a *voter* being denied an equal chance to have her vote *counted*.

*Id.* at 861 (citations omitted) (internal quotation marks omitted). The *Stewart* court’s location of *Burdick* in the Supreme Court’s First Amendment jurisprudence is particularly significant. To the extent that *Burdick*’s is a true balancing test, it makes more sense as a case decided under the First Amendment, where balancing individual interests against those of the state is far more common. See GEOFFREY R. STONE ET AL., *THE FIRST AMENDMENT* 289–91 (2d ed. 2003) (describing balancing standard for content-neutral restrictions on speech).

<sup>123</sup> The *Stewart* case concerned Ohio’s use of vote-counting machines with different error rates in different counties. In holding that such an arrangement violated the Constitution, the court relied heavily on the Supreme Court’s holding in *Bush v. Gore*, 531 U.S. 98 (2000). See *Stewart*, 444 F.3d at 859–62 (arguing that *Bush* mandated subjecting Ohio practice to strict scrutiny review); see also *supra* notes 36–38 and accompanying text.

<sup>124</sup> The Supreme Court has yet to decide any recent vote denial claim cases. The closest it has come is a brief, per curiam decision reversing an emergency injunction issued by the Ninth Circuit that had barred enforcement of Arizona’s photo ID requirement. *Purcell v. Gonzales*, 127 S. Ct. 5 (2006). The opinion, reversing on procedural grounds without reaching the merits, did not cite to *Burdick* and recognized the *Burdick* tension between the state interest in legitimacy and the participatory right.

<sup>125</sup> See *supra* note 75.

<sup>126</sup> See generally MARTIN P. WATTENBERG, *WHERE HAVE ALL THE VOTERS GONE?* 1–10 (2002) (describing declining participation rates in United States).

## III

PROTECTING THE VOTE: ALTERNATIVES TO *BURDICK*

In light of *Burdick*'s questionable applicability, the inconsistent results it has produced, and its failure to address structural concerns, this Note argues that courts should not apply the *Burdick* standard to vote denial claims. Advocating abandonment, however, prompts an obvious question: If not *Burdick*, then what? This Part evaluates three possible alternatives: (1) an improved *Burdick*; (2) Section 2 of the VRA; and (3) an improved *Harper*. It ultimately concludes that *Burdick*'s problems are insurmountable and that Section 2, though it may be a useful tool in certain circumstances, provides an incomplete solution at best. A modified version of the *Harper* standard proves to be the best option, striking the appropriate balance between the need for a standard that can be applied consistently and the need to account both for individual rights and structural concerns.

A. *Improving Burdick*

While often criticized, balancing tests are common in constitutional law, and there is no reason why they would be ill-suited per se for vote denial claims.<sup>127</sup> Accordingly, the issue is whether it is possible for courts to apply *Burdick*'s balancing test in a way that produces consistent results while striking the right balance between competing constitutional concerns. In the photo ID context, Spencer Overton has argued that the *Burdick* standard would benefit from additional attention to empirical data.<sup>128</sup> A court's assessment of a burden's severity would be invaluable informed by statistics indicating, for instance, how many citizens who would otherwise cast a ballot would not cast one because of the photo ID requirement. Similarly, if the primary state interest in imposing the requirement is to prevent fraud, evaluating that interest would be invaluable informed by statistics indicating the number of fraudulent votes actually cast in

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<sup>127</sup> While this Note does not take a position on the merits of using *Burdick*'s balancing in other areas of election law, it should be noted that the courts have often applied such balancing in cases where candidates have challenged being denied access to the ballot. *See, e.g.,* *Rogers v. Corbett*, 468 F.3d 188, 193–94 (3d Cir. 2006) (applying *Burdick* to signature requirement for minor parties wanting to get their candidate on ballot); *McClure v. Galvin*, 386 F.3d 36, 41 (1st Cir. 2004) (applying *Burdick* to claim that candidate was improperly denied place on ballot as independent because he had recently voted as Democrat); *Wood v. Meadows*, 207 F.3d 708, 710 (4th Cir. 2000) (applying *Burdick* to filing deadline for independent candidates seeking access to ballot).

<sup>128</sup> *See* Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 664–67 (2007) (“Hard data is especially valuable in assessing the burdens of a photo-identification requirement on voters and the state’s interest in preventing fraud.”).

any given election.<sup>129</sup> “Votes,” Overton argues, “provide a metric that allows for costs and benefits to be quantified.”<sup>130</sup> Without such data, judges are (and have been) forced to rely on ungrounded assumptions about, for instance, voter fraud and the difficulty of obtaining a photo ID, which introduces the concern that “personal political ideology rather than law” shapes their holdings.<sup>131</sup> In contrast, using objective data would produce “more reasoned analysis and consistency in decision making.”<sup>132</sup>

While it is difficult to dispute the benefit of using more empirical data when applying the *Burdick* standard, serious doubts remain as to whether such a strategy would cure the standard’s existing problems. First of all, to the extent such data exist, they have thus far resolved little when presented to the courts.<sup>133</sup> The “new vote denial” claims have generated a lot of attention and litigants and amici alike have gone to great lengths to present data in this context.<sup>134</sup> As noted above, unlike the Georgia plaintiffs, the Indiana plaintiffs did not produce convincing empirical evidence, but it is unclear how additional data could reconcile the Indiana court’s conclusion—that absentee balloting renders inconsequential any burden imposed by photo IDs—with the Georgia court’s conclusion—that the existence of absentee balloting is irrelevant to the analysis.<sup>135</sup>

A more serious concern, extending generally to any vote denial claim, is that weighing the burden on the voters against the importance of the state interest involves *normative* judgments, not mere fact-finding. Especially when there is some uncertainty to the facts, evaluating what is a “reasonable” burden on voters is akin to evaluating whether an action is “reasonable” in a negligence claim. Such normative judgments only develop predictability and consistency over time, as judges and juries decide thousands of similar cases. This repetition has not and will not occur in the vote denial context because fewer claims of this nature arise and any given law is challenged (at most) only once in any state.

Even armed with perfect information, *Burdick* balancing requires irreducibly normative judgments. If, for instance, evidence existed

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<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 636.

<sup>131</sup> *Id.* at 666.

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* notes 103–17 and accompanying text.

<sup>134</sup> See, e.g., Brief of Brennan Ctr. for Justice at NYU Sch. of Law as Amicus Curiae Supporting Appellants, *Crawford v. Marion County Election Bd.*, 472 F.3d 949 (7th Cir. 2007) (No. 06-2218), 2006 WL 2023955 (presenting evidence that risk of in-person fraud is minimal).

<sup>135</sup> See *supra* note 117 and accompanying text.

demonstrating that an election law deterred fewer fraudulent votes than legitimate ones, there might be ample cause for the court to find for either side. Proponents of voters' rights would argue that the denial of a legitimate voter should be weighted more heavily than the deterrence of a fraudulent voter. Proponents of the state interest would argue that the integrity of the electoral process is paramount. The *Burdick* test, being fundamentally open-ended, contains no general presumption in favor of one side or the other, no set of factors to be used in the balancing analysis, and no provisions for intermediate findings to narrow the issue. Without such guidance, courts can manipulate additional facts to justify their normative judgments, creating just as much inconsistency as existed before. An improved, empirically informed *Burdick* test, therefore, still fails.

### B. Section 2 and Race-Based Claims

While no one has argued for abandoning the constitutional cause of action for vote denial claims, several advocates and commentators have suggested recourse to Section 2 of the VRA.<sup>136</sup> With language prohibiting any state law that “results in a denial . . . of the right . . . to vote on account of race or color,”<sup>137</sup> Section 2 appears, at least at first blush, to be an ideal tool for vote denial plaintiffs. An examination of its legislative history, however, reveals that Congress was concerned almost exclusively with vote *dilution* rather than vote *denial* claims.<sup>138</sup> Furthermore, a look at the history of lawsuits under Section 2 confirms that such suits have succeeded primarily in challenging at-large elections and redistricting plans for their dilutive effect.<sup>139</sup> Today's vote denial plaintiffs, in pursuing claims under Section 2, are therefore

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<sup>136</sup> See, e.g., Overton, *supra* note 128, at 670–72 (calling for use of statistical evidence to establish violations of Section 2 of VRA); Tokaji, *supra* note 3, at 689–93 (suggesting burden-shifting test similar to those used in Title VII and juror selection cases for claims under Section 2 of VRA). While Section 2 is the only statutory remedy this paper considers, scholars have also begun to advocate recourse to Congress more generally on the theory that litigating under the broad constitutional standard has inherent limitations. See, e.g., Richard H. Pildes, *The Future of Voting Rights Policy: From Anti-Discrimination to the Right to Vote*, 49 How. L.J. 741, 758 (2006) (calling for uniformity “through national legislation, rather than awaiting years of constitutional litigation in which individual state ID requirements are challenged one-by-one”) (citation omitted).

<sup>137</sup> 42 U.S.C. § 1973(a) (2000).

<sup>138</sup> See S. REP. NO. 97-417, at 2 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 179 [hereinafter SENATE REPORT] (stating that purpose of amending Section 2 was to codify pre-*Bolden* vote dilution case).

<sup>139</sup> See Tokaji, *supra* note 3, at 691–92 (noting that, until recently, Section 2 challenges focused mainly on vote dilution practices such as “at-large elections and redistricting plans that keep minorities' voting strength weak”).

dependent on the hope that courts will look back to the statute's text rather than to its legislative and judicial history.

To the extent that litigants continue to pursue remedies for the constitutional violation as their primary cause of action and resort to Section 2 only as an alternative, little harm is likely to result. It would, however, be ill-advised for litigants to make Section 2 the focus of their vote denial claims or to shift legal resources from the constitutional claim to the Section 2 claim. When the underlying problem is unrelated to race, Section 2 will be, at best, useless and, at worst, a detriment. This subpart argues that claims under Section 2 should be discouraged, at least relative to constitutional claims, because they occasionally bring a counterproductive racial focus to cases where race is simply not at issue.<sup>140</sup>

Most notable among those advocating the use of Section 2 is Daniel Tokaji, who recently provided the first comprehensive interpretation of Section 2 in the context of vote denial claims.<sup>141</sup> Tokaji argues that the proper standard for vote denial claims under Section 2 should mimic Title VII's test for employment discrimination.<sup>142</sup> Plaintiffs should bear the burden of proving (1) that the challenged practice is a "but for" cause of racial disparity in voting and (2) that the disparate impact "is traceable to the challenged practice's interaction with social and historical conditions."<sup>143</sup> Applying this test to voter IDs, Tokaji argues that, to succeed on a vote denial claim, it would be sufficient to demonstrate that "discrimination in areas such as employment

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<sup>140</sup> This Note does not take the position that racial discrimination is no longer a concern for election law nor that race-based claims like those brought under Section 2 are no longer useful. The position taken here is simply that the rights of racial minorities, and indeed of all citizens, would frequently be better served in this context by race-neutral constitutional claims. Such a position is not unique to this Note. *See, e.g.,* Pildes, *supra* note 136, at 760 ("The question, then, is whether HAVA's redefinition of the problem from protection of minority voting rights to protection of voting rights as such [is appropriate] . . . . [T]he protection of voting rights—including minority voting rights—would be enhanced, at least in some respects, by such a shift.").

<sup>141</sup> Tokaji, *supra* note 3, at 718–32 (articulating test for vote denial claims under Section 2 and defending it as constitutional). While the history of Section 2 demonstrates that Congress intended to create a cause of action for vote dilution claims, its text clearly also allows for vote denial claims. *Compare* SENATE REPORT, *supra* note 138, at 2 ("The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-*Bolden* vote dilution case, *White v. Regester*."), with Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2000) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . .").

<sup>142</sup> Tokaji, *supra* note 3, at 723.

<sup>143</sup> *Id.* at 724. Tokaji describes his second condition as deriving from a balancing factor listed both in the Senate Report and the leading vote dilution case for Section 2, *Thornburg v. Gingles*, 478 U.S. 30 (1986). Tokaji, *supra* note 3, at 724.

have resulted in fewer blacks having automobiles, or that housing discrimination led to larger numbers of blacks living in urban neighborhoods in which a vehicle, and thus a driver's license, is unnecessary."<sup>144</sup> According to Tokaji, the Georgia and Indiana plaintiffs would ideally have succeeded if they had brought their claims under such a standard because black voters would be less likely to be able to satisfy the photo ID requirement than white voters would be.<sup>145</sup> If plaintiffs are able to prove their case, the burden would then shift to the State to prove that the challenged practice is necessary to achieve a compelling government interest.<sup>146</sup> Tokaji's test is essentially a variant on strict scrutiny.

One problem with applying Tokaji's test to recent vote denial claims is its "social and historical conditions" limitation. As described above, the problems underlying recent claims are largely unrelated to the history of racial discrimination in the electoral process, but instead concern election administration reform brought on by the 2000 presidential election. While Tokaji would likely argue that the mere coincidence of historic racial discrimination and a disparate impact stemming from state legislation should be sufficient to prove a claim under Section 2, the few courts that have entertained such claims have largely rejected this argument.<sup>147</sup>

Two cases from the 1990s illustrate this pattern well: *Smith v. Salt River Project*<sup>148</sup> and *Ortiz v. City of Philadelphia Office of the City Commissioners*.<sup>149</sup> In both cases, circuit courts rejected vote denial claims brought by plaintiffs under Section 2 because there was an insufficient causal nexus between the alleged racial discrimination and the challenged electoral practice. In *Salt River*, the Ninth Circuit

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<sup>144</sup> *Id.* at 724–25.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 726.

<sup>147</sup> The potential exceptions to this statement are *Stewart v. Blackwell*, 444 F.3d 843 (6th Cir. 2006), discussed above, and *Farrakhan v. Washington*, 338 F.3d 1009, 1020 (9th Cir. 2003), both of which refused to dismiss vote denial claims under Section 2. The *Stewart* opinion was vacated as moot after Ohio brought its voting machines into compliance, while *Farrakhan* concerned a challenge to Washington's felon disenfranchisement law. Most of the cases in which courts have entertained vote denial claims under Section 2, in fact, have concerned challenges to felon disenfranchisement laws. See *Hayden v. Pataki*, 449 F.3d 305, 321 (2d Cir. 2006) (en banc) (holding that Section 2 did not apply to felon disenfranchisement); *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc) (same); *Farrakhan*, 338 F.3d at 1020 (holding that Section 2 did apply to felon disenfranchisement claims); *Wesley v. Collins*, 791 F.2d 1255, 1262 (6th Cir. 1986) (holding that Section 2 did not apply to felon disenfranchisement). Since applying Section 2 to felon disenfranchisement laws presents unique problems beyond the scope of this Note, I do not consider these cases in my analysis.

<sup>148</sup> 109 F.3d 586 (9th Cir. 1997).

<sup>149</sup> 28 F.3d 306 (3d Cir. 1994).

refused to strike down an Arizona law conditioning the right to vote for the managing board of a municipal corporation on owning real property in the district overseen by the corporation.<sup>150</sup> The court held that, even assuming that black residents of the district had a lower rate of home ownership than white residents did, that alone was insufficient to demonstrate a racially disparate impact in the electoral process.<sup>151</sup> It stated that “plaintiffs must show a causal connection between the challenged voting practice and [a] prohibited discriminatory result.”<sup>152</sup> Because there was no history of official discrimination in the district, no such causal connection existed.

The *Ortiz* court went even further, recognizing a history of racial discrimination generally but refusing to strike down under Section 2 a law purging many inactive names from the registration rolls because there was no history of racial discrimination in the electoral process specifically.<sup>153</sup> The fact that a disproportionately large number of black and Latino voters was purged from the lists was deemed insufficient to sustain the claim because “there was no evidence of historical voting-related discrimination infringing upon the rights of Latinos or African-Americans to vote.”<sup>154</sup>

*Ortiz* and *Salt River* do more than just reveal the limitations on vote denial claims under Section 2. They also reveal how Section 2 claims can distract litigants’ attention from legitimate underlying problems. Decisions made by the corporation in *Salt River* dramatically affected its residents. Not only did it supply its residents with water, it supplied almost 600,000 of them with electricity.<sup>155</sup> Whether or not residents owned property in the district was irrelevant to whether they had a sizable stake in its decisions.<sup>156</sup> In *Ortiz*, Pennsylvania’s voter purge law purportedly served the state’s interest in protecting against fraud by ridding the rolls of voters who had either stopped voting or had left the district in which they were registered.<sup>157</sup> The predictable drop in voter turnout in midterm elections, however, had repeatedly resulted in massive purges. It is open to

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<sup>150</sup> *Salt River Project*, 109 F.3d at 589.

<sup>151</sup> *Id.* at 595 (“[B]are statistical showing of disproportionate *impact* on a racial minority does not satisfy the § 2 ‘results’ inquiry.”).

<sup>152</sup> *Id.* (quoting *Ortiz*, 28 F.3d at 312).

<sup>153</sup> *Ortiz*, 28 F.3d at 317.

<sup>154</sup> *Id.* at 312.

<sup>155</sup> *Salt River Project*, 109 F.3d at 589.

<sup>156</sup> Admittedly, the court might not have been sympathetic on this issue. The same argument was made as a constitutional claim and was rejected more than twenty-five years earlier. See *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730 (1973) (rejecting argument that *Kramer* required strict scrutiny of denial of franchise to water district residents who were not landowners).

<sup>157</sup> *Ortiz*, 28 F.3d at 317 & n.23.

serious question whether the state should be able to impose upon voters the burden of reregistering when the state itself could assume the burden of determining which inactive voters on the rolls have actually moved or died and which have just chosen not to participate. It is beyond dispute, moreover, that these problems have nothing to do with race. In both cases, therefore, the plaintiffs presented the courts with the wrong questions. The *Ortiz* majority even noted that the dissent, “while charging the purge act with a discriminatory effect, essentially is railing against registration procedures not at issue here.”<sup>158</sup>

Section 2 advocates could perhaps argue that the *Salt River* and *Ortiz* courts simply got it wrong. If Pennsylvania’s law purges black and Latino voters from the rolls at higher rates than white voters, it is a prima facie violation of Section 2. Alternatively, applying Tokaji’s test, there likely was at least enough evidence of past discrimination to shift the burden of proof onto the State, forcing it to defend its law.<sup>159</sup> But even if future litigants assume that the *Salt River* and *Ortiz* courts were wrong, they are still left with a practical problem: It likely will be hard to convince courts like those in *Salt River* and *Ortiz* that they have resolved the Section 2 claim incorrectly when the underlying problems with the laws at issue have nothing to do with race. This problem is particularly acute for the claims described earlier in Part I because, by and large, they target administrative reforms similar to the voter purge law at issue in *Ortiz*.<sup>160</sup> Ultimately, claims under Section 2 will frequently be unhelpful in resolving present-day vote denial claims and could potentially undermine better claims by drawing attention and resources away from them. Accordingly, plaintiffs should use them sparingly and limit them to cases focused on race.

### C. Returning to Strict Scrutiny

Instead of advocating a more careful application of *Burdick* or a misplaced emphasis on race-based disparate impact claims, courts should apply strict scrutiny whenever the challenged law disproportionately disenfranchises groups of people with an identifiable set of political preferences. *Burdick* was the culmination of an unfortunate doctrinal shift away from structural concerns toward concerns for individual rights. Its failure is the product of this shift. Applying strict scrutiny when groups with cohesive political preferences are dispro-

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<sup>158</sup> *Id.* at 317.

<sup>159</sup> Conspicuously, the *Ortiz* court rejected Tokaji’s argument, shared by the *Ortiz* dissenter, that Title VII has an analogue in Section 2, which would require the state to defend its election laws after plaintiffs make out a prima facie case. *Id.* at 316.

<sup>160</sup> See *supra* Part I.B.

portionately disenfranchised reverses the shift, reprioritizing the structural concern. This Section argues that such a reversal is the most desirable solution. In keeping with the Supreme Court's original standard from *Harper*, the proposed standard would emphasize and defend the structural concern without abandoning the concern for individual rights.

### 1. *Defining and Justifying the Standard*

Recall that the Supreme Court's structural concern, as developed in *Harper* and *Kramer*, focused on the political legitimacy of the elected government. That legitimacy depended on the election of government officials in a process open to the *entirety* of their voting-age constituency. Thus, if those officials restricted election participation in any way, they would undermine their own legitimacy and the restrictions would deserve no judicial deference. What the cases following *Harper* and *Kramer* demonstrated, however, was that there were instances of voter disenfranchisement that did not impugn the legitimacy or motivations of governmental action. One example would be a citizen who was unable to vote by virtue of having missed a reasonable registration deadline. The original *Harper* standard of strict scrutiny was therefore overbroad.

In fact, the threat to legitimacy exists only when the disenfranchisement systematically serves the self-interest of the politicians responsible for it. If the disenfranchised group has a random set of political preferences, the enfranchised population can still vote to replace the government officials who caused the disenfranchisement because no single constituency will have been silenced. If, however, the excluded group has political preferences opposed to those of the responsible officials, no such electoral check would exist. Accordingly, the legitimacy of official action is actually threatened only when the disenfranchised group has political preferences opposed to those of the officials in question.<sup>161</sup>

The standard proposed here would prevent such situations from arising. First, plaintiffs challenging state action would have to prove that the action disproportionately denied the franchise to a group of people with an identifiable set of political preferences. In the vast majority of cases, identifiable political preferences would probably be established using a proxy such as membership in a political party or

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<sup>161</sup> The concern articulated here is familiarly known as "entrenchment." See, e.g., Pildes, *supra* note 13, at 43–47 (describing Court's reaction to entrenchment and other structural concerns).

through proof of discernable group voting patterns.<sup>162</sup> Hence, if a given state had a Democrat-controlled legislature but had a population that was split 50% Democratic and 50% Republican, a law that denied the vote to a group whose membership was comprised of 65% registered Republicans would meet this standard's threshold and merit strict scrutiny.<sup>163</sup>

It is worth noting that the fact that the legislature in this hypothetical was Democrat-controlled was irrelevant to the first stage of the analysis under this Note's standard. One can bring a claim irrespective of which party passed the law; this fact, at least from the perspective of the structural concern, serves two purposes. First, a Republican-controlled legislature that acts contrary to its partisan self-interest in this context may not remain Republican-controlled for very long, and there appears to be no good reason for potential plaintiffs to delay suit until such a change occurs. Second, examining the correlation between the party in control of the legislature and the disenfranchised group directly impugns the motives of the governmental actors, precisely the sort of divisive doubting discouraged in related contexts.<sup>164</sup> To the extent that applying strict scrutiny in the way that this Note suggests "smokes out" invidious partisan motives, it does so in a way that causes minimal rancor by focusing on whether a particular political group has been disenfranchised rather than on who has done the disenfranchising.<sup>165</sup>

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<sup>162</sup> Correlating voting patterns with segments of the population is already an essential element of vote dilution claims under Section 2. *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833 (1992) (discussing nature of, and larger political issues underlying, vote dilution claims under Section 2).

<sup>163</sup> Of course, statistical variation would have to be accounted for—a group that was 50.1% registered Republican would likely fall within the margin of error—but such accounting should not render the standard any less manageable.

<sup>164</sup> When Congress amended Section 2 of the VRA, it specifically eliminated any requirement that plaintiffs prove an invidious motive on the part of the government, insisting that such a requirement is "unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities." SENATE REPORT, *supra* note 138, at 36–37.

<sup>165</sup> In the context of racial classifications, courts and scholars alike have advocated application of strict scrutiny to "smoke out" invidious motives. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality) ("[T]he purpose of strict scrutiny is to 'smoke out' illegitimate uses of race . . ."); JOHN HART ELY, *DEMOCRACY AND DISTRUST* 146 (1980) (discussing how heightened scrutiny of suspect classifications like race "turns out to be a way of 'flushing out' unconstitutional motivation"); Elizabeth S. Anderson, *Integration, Affirmative Action, and Strict Scrutiny*, 77 N.Y.U. L. REV. 1195, 1229–30 (2002) (quoting *Croson*, 488 U.S. at 493). While little scholarly work has addressed the merits of applying strict scrutiny to burdens on the right to vote, commentators have long argued that application of the standard to both suspect classifications and fundamental rights should be justified on the "smoking out" theory. *See TRIBE, supra* note 71, at § 16-

Admittedly, the standard proposed by this Note differs from the alternatives—an improved *Burdick* or Section 2 of the VRA—primarily in its threshold determination. *Burdick* would have courts weigh the law's burden on the individual voter against the interest of the state, while Section 2 would have courts assess whether the law had a disparate impact on racial minorities. The critical difference between this Note's standard and the alternatives is in its focus on the structural concerns of the democratic process. When the Supreme Court first articulated the significance to our constitutional framework of the right to vote, it stressed that the legitimacy of legislative and executive action derives from the free and fair elections of public officials.<sup>166</sup> When the political branches deny the vote to any citizen, they undermine their own legitimacy. As this concern is paramount, it should control the constitutional standard.

Beyond vindicating the structural concerns voiced in *Harper* and *Kramer*, the standard proposed in this Note requires none of the normative judgments that doomed *Burdick*'s balancing test to inconsistent application. Even if courts applying *Burdick* counted votes in order to measure the extent of the burden on voters, they would still have to determine the equilibrium point—i.e., the tipping point between an acceptable and unacceptable number of votes denied. This determination would always demand a normative judgment that would be contingent upon what the judge thought was “reasonable.”<sup>167</sup> The proposed standard, however, has a natural equilibrium point: proportionality. As soon as the disenfranchised group contains a disproportionate number of voters affiliated with one political group—accounting for statistical error—strict scrutiny applies.<sup>168</sup> The threshold test is a purely empirical one, determined on the facts without any room for normative judgments that might be inconsistent from judge to judge.

Finally, this standard does not neglect either the concern for individual rights nor respect for state interests. So long as the structural concerns are satisfied, the political process can be used to safeguard individual rights. Furthermore, nothing in this scheme would prevent individuals from challenging particular vote denials as being violative

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12 (arguing that allocation of fundamental rights should be strictly scrutinized because risk of invidious discrimination is great); Paul Brest, Palmer v. Thomson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95, 115 (arguing that courts have scrutinized facially neutral laws when underlying motive was to disenfranchise African Americans).

<sup>166</sup> *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 627–28 (1969).

<sup>167</sup> See *supra* Part III.A.

<sup>168</sup> See *supra* note 162.

of due process as applied specifically to them.<sup>169</sup> As for respecting the state interest, the standard allows for legislatures to experiment and make honest mistakes. Laws that randomly disenfranchise otherwise-deserving voters may constitute bad policy judgments, but they are judgments that the legislature is entrusted to make. If legislators fail to correct their honest mistakes over time, voters can (and will) vote them out of office. If litigants claim that the disenfranchisement is not random, they bear the burden of demonstrating that fact. A failure to demonstrate as much would provide courts with an easy way to dismiss frivolous lawsuits.

Critics might object that the proposed standard would permit state action that disenfranchises large numbers of people as long as the disenfranchised group had political preferences in proportion with the population at large. One response to this objection is that such a law is simply unlikely to exist in the modern age. Since voting is considered so essential to our democracy, even citizens who remain qualified to vote would likely find such a broad disenfranchisement unacceptable.<sup>170</sup> Another counter-argument is that the disenfranchised group might develop a political identity of its own that would itself provide a sufficient basis to mount a challenge.<sup>171</sup>

## 2. *Applying the Standard to Recent Vote Denial Claims*

Any discussion of how this Note's proposed standard could be applied to the cases and claims described in Part I must necessarily be speculative because such analysis would require information about the preferences of the voters disenfranchised by the challenged state action—information that is not available. To this author's knowledge, no litigant has yet presented evidence to a court concerning the political composition of a disenfranchised group. Nevertheless, some discussion of the issues that courts and litigants might face in such cases

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<sup>169</sup> The remedies for such a due process violation would likely vary with the circumstances, but an important alternative would be for the court to award damages rather than injunctive relief. The denial of a right does not always require enjoining government action, and monetary relief for vote denial may be appropriate when neither structural concerns nor improper government motivations are implicated.

<sup>170</sup> Admittedly, one could argue that low turnout rates are evidence of an electorate that would tolerate such a broad disenfranchisement. Such an argument, however, relies on the questionable inference that voters would be indifferent to choosing between not to vote in any given year and permanently losing the right to vote.

<sup>171</sup> The objection might still persist that a smaller, more vulnerable group without identifiable political preferences might remain unprotected under the standard. A response to this objection is that a court might yet invalidate such a law under traditional equal protection principles that protect discrete and insular minorities, *cf.* *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938), but the distant specter of such a unique case ought not determine the governing standard.

will serve to illustrate the standard's utility more fully. This Section considers the application of the proposed standard to challenges to photo ID requirements, registration procedures, and vote-counting machines.

Since their inception, photo ID requirements have been politically charged. In particular, liberals have accused Republican legislatures of intentionally seeking to disenfranchise racial minorities and the poor because those groups traditionally vote for Democrats.<sup>172</sup> The standard proposed by this Note would require litigants to produce evidence bearing on the validity of claims such as these. While it is easy to speculate for political purposes about the voting patterns of such constituencies, party registration lists or statistically demonstrable voting patterns within districts dominated by these groups could actually settle the matter objectively. Moreover, unlike litigants attempting to prove vote denial under Section 2, litigants advancing this Note's constitutional argument need not worry about "social and historical conditions" linking their disenfranchisement to invidious discrimination. Under this Note's standard, "bare statistics"<sup>173</sup> would be sufficient to trigger strict scrutiny.

For vote denial claims challenging various aspects of the registration process, the constitutionality of particular practices would again depend on whether those voters who were denied registration had political preferences out of proportion with the state population. Disenfranchising people for forgetting to provide an identification number<sup>174</sup> or mark a checkbox<sup>175</sup> does not seem at first like something that would disproportionately affect a particular political group; but courts entertaining an allegation that they do would be encouraged, under this Note's standard, to simply look at data. A lower level of

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<sup>172</sup> *Developments in the Law: Voting and Democracy*, 119 HARV. L. REV. 1127, 1144 (2006) ("Of the various electoral procedure laws passed in the fifty states since the 2000 and 2004 presidential elections and those still being debated in state legislatures and local media, few arouse more potent partisan feelings than voter identification laws."); see also Richard L. Hasen, *Carter-Baker Election Reforms Imperiled by its Partisan Voter ID Mandate*, CHRISTIAN SCI. MONITOR, Sept. 22, 2005, at 9 (describing mandatory photo identification at the polls as a "strong partisan position"); Anita Weier, *Assembly OKs Constitutional Change Requiring Photo Identification to Vote: Dems Denounce GOP Measure as a 'Poll Tax'*, CAPITAL TIMES (Madison, WI), Nov. 2, 2005, at 3A (quoting Wisconsin State Representative Dave Travis's response to his legislature's voter ID law: "This body wants to stop Hispanics, African-Americans and other minorities from voting. They want to stop the elderly from voting. They want to stop the young people from voting. Because those are people who don't vote for the majority party." (internal quotation marks omitted)).

<sup>173</sup> *Contra* note 151 (discussing Ninth Circuit's interpretation that bare statistics do not satisfy results inquiry of Section 2 of VRA).

<sup>174</sup> See *supra* note 39 and accompanying text.

<sup>175</sup> See *supra* note 40 and accompanying text.

literacy amongst the poor might account for such failures; thus, if the poor really do vote disproportionately for Democrats, such laws should be found to violate the Constitution. Of course, as the conditions for disenfranchisement approach true randomness, the burden for plaintiffs would become heavier and heavier. Disenfranchising people because the names on their registration forms do not match the names in the state's Social Security or driver's license databases,<sup>176</sup> for example, would seem to depend on factors that would be highly unlikely to correlate with political preference.

The case of vote-counting machines is difficult. Machine errors occur randomly, suggesting that they would not disproportionately disenfranchise any particular political group. However, when machines with different error rates are used in different counties—and the counties with higher rates of votes being undercounted correspond to Democratic or Republican districts—litigants could argue that a disproportionate number of voters from one party or the other are being systemically disenfranchised over time. While the machines may only disenfranchise any one voter or set of voters at random—and in any given year the proportion of disenfranchised voters from each political party may change—party concentration within districts may ensure that, over time, a disproportionate number of voters from a particular group will be disenfranchised. Statistical proof of the effect of such a demographic concentration would form an adequate basis for a constitutional claim to be brought under this Note's standard.

#### CONCLUSION

This Note has advocated replacing one constitutional standard with another. Having generated inconsistent results and confusion, the balancing test of *Burdick v. Takushi* has failed as a viable framework for resolving vote denial claims. In light of the weakness of the arguments for its ongoing applicability to such claims, courts should not feel compelled to continue struggling with it. In *Burdick's* place, they should apply strict scrutiny, the standard that the Supreme Court unambiguously settled on more than forty years ago for cases in which states have allegedly disenfranchised their own citizens.

The courts, however, need not ignore forty years of intervening precedent when applying strict scrutiny in this context. Those intervening cases have demonstrated that strict scrutiny is not *always* the correct standard to apply. This Note argues that courts must first make a threshold determination of whether the challenged state

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<sup>176</sup> See *supra* note 41 and accompanying text.

action disproportionately disenfranchises people with an identifiable set of political preferences. If a state law disproportionately disenfranchises Democrats, Republicans, or Ralph Nader supporters, only then should it receive strict scrutiny.

This Note's standard thus targets cases in which structural concerns are at their apex—when political groups are being disenfranchised. While the value of voting as an individual right and the threat of racial discrimination are important concerns, it is the structure of the democratic process that should predominate. Chief Justice Earl Warren did not call voting the right “preservative of other basic civil and political rights”<sup>177</sup> because people value the act of voting more than they do other freedoms, but rather because history has taught us that free and fair elections are the best way to safeguard all freedoms from government encroachment. The courts have traditionally shouldered the burden of determining the constitutionality of our election laws, and they should continue to do so guided by the ultimate goal of producing free and fair elections.

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<sup>177</sup> *Reynolds v. Sims*, 377 U.S. 533, 562 (1963).