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HOW TO THINK ABOUT VOTER FRAUD (AND WHY)

CHAD FLANDERS†

> "We underscore that we express no opinion here on the correct disposition, after full briefing and argument, of the appeals from the District Court's September 11 order or on the ultimate resolution of these cases. As we have noted, the facts in these cases are hotly contested."[1]

I. INTRODUCTION

In 2007, debates over voter fraud reached a new level of intensity, where scholars, citizens, courts and legislatures all debated how widespread voter fraud was, and to what extent more aggressive prosecution and new requirements on voting would be necessary to combat the fraud. Controversy swarmed around whether the Department of Justice had too aggressively prosecuted voter fraud, and whether the report of the Electoral Assistance Commission exaggerated the amount of scholarly dissensus.[2] Legislatures passed laws requiring photo identification and proof of citizenship in order to vote, and courts were asked to rule on the constitutionality of these and other measures designed to limit the amount of voter fraud.[3] Seemingly, no

† M.A., Ph.D. University of Chicago, 2004. J.D. Yale Law School, 2007. Law Clerk, Alaska Court System, 2007-08. I am grateful for the conversations I have had with Bruce Ackerman, Heather Gerken, Joey Fishkin, David Pozen, and William Baude throughout the writing of this essay. They will certainly not agree with all of my conclusions. I would also like to thank Marlynn Wei for her support. This essay was written and accepted for publication prior to the Supreme Court's acceptance and granting of the writ of certiorari in Ind. Democratic Party v. Rokita, 128 S Ct. 34, *cert. granted* 76 U.S.L.W. 3122, 76 U.S.L.W. 3154 (U.S. Sep. 25, 2007) (No. 07-25).

1. Purcell v. Gonzalez, 127 S. Ct. 5, 8 (2006) (per curiam).

2. *See, e.g.*, Eric Lipton, *Missouri Prosecutor Says He Was Pushed to Resign*, N.Y. TIMES, May 10, 2007, at A30 ("In one case, Mr. Graves said, the civil rights division had wanted him to sue the State of Missouri for what federal officials thought was its failure to purge voter registration roles of people who had died, changed addresses or left the state."); *see also* Ian Urbina, *U.S. Panel is Said to Alter Finding on Voter Fraud,* N.Y. TIMES, Apr. 11, 2007, at A1 (detailing controversy over report that was said to downplay scholarly consensus on the low levels of voter fraud); David Nather, *Election Board Facing Votes of No Confidence*, CQ WEEKLY, Apr. 23, 2007, http://www.cqpolitics.com/2007/04/from_cq_weekly_election_board.htm (detailing controversy over report that was said to downplay scholarly consensus on the low levels of voter fraud); Greg Gordon, *Campaign Against Alleged Voter Fraud Fuels Political Tempest*, MCCLATCHY NEWSPAPERS, Apr. 19, 2007, *available at* http://www.commondreams.org/archivie/2007/04/19/630 (detailing the Bush administration's campaign against voter fraud).

3. *See, e.g.*, Kristen Mack & Gary Scharrer, *Gallegos' Absence Delays Action on Voter I.D. Bill*, HOUSTON CHRONICLE, May 19, 2007 (updating efforts of Democratic state

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branch of government has been immune from the debate over voter fraud and its implications.

In attempt to frame the debate in a more manageable way, several election-law scholars called for better empirical data on voter fraud. These scholars argue that the best way to resolve the voter fraud debate and to determine whether new laws are necessary to prevent voter fraud is to know to what extent voter fraud is really a problem. Thus, in a leading article on photo identification requirements, Spencer Overton concluded that policymakers should "place a moratorium on photo-identification proposals" until a better understanding of the extent of voter fraud is known.[4] Rick Hasen similarly decried the "empirical vacuum" in which supporters of new laws designed to deter voter fraud have been working.[5] In a concurring opinion in *Purcell v. Gonzalez*,[6] Justice Stevens struck a similar note when he highlighted the importance of the Court's decision "enhanc[ing] the likelihood that [debates over the constitutionality of voter identification requirements] will be resolved correctly on the basis of historical facts rather than speculation."[7] Such statements fit within a larger trend in election law scholarship that urges greater reliance on statistics and study rather than intuition and anecdote.[8]

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senators to block voter identification measure); Andrew Zajac & Tim Jones, *More States Ask Voters to Show* ID, CHI. TRIB., Nov. 6, 2005, at C6 (discussing voter fraud laws in Indiana, Arizona, Florida, and Missouri). Laws have been passed requiring increased documentation in order to vote or to register to vote in Arizona, Georgia, Indiana, Michigan, Missouri, Ohio, and Pennsylvania. Not all of the laws are currently in force. *See generally* PEOPLE FOR THE AMERICAN WAY, THE NEW FACE OF JIM CROW: VOTER SUPPRESSION IN AMERICA: HARSH AND BURDENSOME VOTER ID REQUIREMENTS, http://media.pfaw.org/PDF/Reports/TheNewFaceOfJimCrow.pdf. For cases involving some of these new laws, *see, e.g.,* Purcell v. Gonzalez, 127 S. Ct. 5, 6 (2006) (per curiam) (vacating injunction against new voting identification and registration requirements in Arizona); Gonzalez v. Arizona, 485 F.3d 1041, 1048-49 (9th Cir. 2007) (denying injunction against Arizona voting laws); Crawford v. Marion County Election Bd., 472 F.3d 949, 954 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)) (affirming summary judgment against challengers of voter identification laws); Common Cause/Ga. v. Billups, 439 F. Supp. 2d 1294, 1360 (N.D. G.A. 2006) (upholding injunction against new photo identification laws). For a good overview of the litigation in this area, see Richard L. Hasen, *Courts Need to Keep a Skeptical Eye on New Voter Identification Laws*, ELECTION LAW @ MORITZ, Apr. 24, 2007, http://moritzlaw.osu.edu/electionlaw/comments/articles.php?ID=147.

4. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 681 (2007).

5. Hasen, *supra* note 3.

6. 127 S. Ct. 5, 7, 8 (2006) (per curiam) (Stevens, J., concurring).

7. *Purcell*, 127 S. Ct. at 7, 8 (Stevens, J., concurring).

8. *See* Daniel P. Tokaji, *The Moneyball Approach to Election Reform*, ELECTION LAW @ MORITZ, Oct. 18, 2005, http://moritzlaw.osu.edu/electionlaw/comments/2005/051018.php (stressing the need to use statistics and other objective evidence in debates over election administration); Heather Gerken, *New Style of Election Reform Begins to Emerge*, ROLL CALL, Mar. 27, 2007, *available at* http://www.law.yale.edu/news/4876.htm (advocating a results oriented approach to evaluating election reforms).

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This move, calling for better studies, may be partly strategic; there is, in fact, not much solid evidence that voter fraud is a real problem.[9] Nor is there much *solid* evidence that new photo identification laws would deter a substantial portion of voters.[10] Calling for more studies may be part of a strategy to shift the burden of proof to those who advocate more restrictions on the right to vote.[11] Whatever the motivation, the result has been less attention paid to the normative aspect of voter fraud (call this the "normative vacuum" in election law scholarship). Why exactly is voter fraud bad? Even if voter fraud happened only infrequently, would it still be a serious harm and could this justify attempts to prevent voter fraud? A similar set of questions could be asked from the other side of the voter fraud equation, the side having to do with new restrictions on people's ability to vote. Those who object to additional restrictions (photo identification, etc.) worry that the restrictions will deter many voters from going to the polls. However, if the burden on potential voters is slight, is there a problem in requiring voters to show photo identification before they vote? Is it a serious wrong if additional requirements deter some potential voters from going to the polls? In sum, is voter deterrence such a serious harm that even if photo identification laws deter only a *few* voters, it should be prohibited?

The pronounced lack of attention to the "normative vacuum" has potentially significant implications. Those who worry about voter fraud on the one hand, and voter deterrence on the other hand, may disagree not only about statistics, but also about the relative harmfulness of each. Until there is a better understanding of *why* voter fraud and voter deterrence are bad, studies about the number of incidences of each may be informative but may not necessarily be decisive. People might perceive even a limited amount of fraudulent votes to be enough to justify new measures to reduce fraud. Others may see any

9. *See*, e.g., Eric Rauchway, *The Great Voter-Fraud Myth*, THE NEW REPUBLIC ONLINE, Apr. 4, 2007*, available at* http://hnn.us/roundup/entries/39835.html (suggesting that allegations of voter fraud are exaggerated). For a somewhat dated political science review of the literature, see Fabrice Lehoucq, *Electoral Fraud: Causes, Types, and Consequences*, 6 ANN. REV. POL. SCI. 233 (2003) (stating that "the colorful history of vote fabrication probably exaggerates its role in determining election outcomes").

10. *See* Overton, *supra* note 4, at 657 (providing "policy-makers need better data regarding the impact of photo-identification requirements on participation by legitimate voters").

11. This, in fact, seems to be one of Overton's aims. *See* Overton, *supra* note 4, at 631(urging the gathering and analysis of evidence to avoid a rush to pass voter identification laws); *see also* SPENCER OVERTON, STEALING DEMOCRACY: THE NEW POLITICS OF VOTER SUPPRESSION 152 (2006) ("Proponents of antifraud measures such as photo-ID requirements fail to undertake a serious cost-benefit analysis. . ."); Hasen, *supra* note 3 (arguing that there is little merit in claims that voter fraud is widespread, and believing a call for more studies is an effort to shift the burden of proof).

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risk of voter deterrence as enough to prohibit new restrictions on the right to vote. Only a discussion about the underlying meaning of voting and elections can comprehensively answer such questions about how to address the issues of voter fraud and deterrence. A proper voter fraud debate requires discussion of both numbers and norms.

The aim of this Essay is not to deny that more study is necessary or that more attention should be paid to completed studies. Rather, the aim of this Essay is to make explicit as well as refine the normative theories already present in the voter fraud debate. Part II of this essay continues the argument for explicit normative theorizing in the voter fraud debate. Voter fraud and voter deterrence are notoriously difficult to measure, a point Judge Posner hammered home in his decision in *Crawford*; therefore, we have reason to believe that good studies might be hard to come by in the immediate future, if ever. Normative argument often fills the gaps left by reliable statistics and often influences how we interpret the available statistics. Accordingly, there is reason to believe that the debate over statistics will remain "hotly contested," as the Court stated in *Purcell*, even after subsequent studies are done.[12]

Part III identifies possible state interests in preventing voter fraud. Why, in other words, might the state want to prevent voter fraud? This question is not as easy to answer as it might first appear. Many of the state interests are structural, such as interests in protecting electoral integrity or preventing vote dilution. By saying that these interests are "structural," I mean to indicate that they are not easily captured by simply saying that some individual's rights have been violated. An increasing emphasis on "structures" of democracy has been the hallmark of recent election law scholarship.[13] Part III demonstrates that the Supreme Court in *Purcell* and the United States Court of Appeals for the Seventh Circuit in *Crawford v. Marion County Election Board*[14] are utilizing the language of recent election law scholars in their emphasis on structural concepts such as integrity and dilution. The courts in these opinions are defending a theory of the structure of democracy and the rights of some groups. Both opinions, however, are extremely compressed, and Part III is dedicated to interpreting the two decisions and making explicit the underlying, normative claims.

12. *Purcell*, 127 S. Ct. at 8.

13. *See generally*, SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (3rd ed. 2007) (defending the idea that there is an implicit "law of democracy" in American Constitutional law).

14. 472 F.3d 949 (7th Cir. 2007) (affirming summary judgment against challengers of voter identification law).

Part IV examines an alternative normative framework to the one that is implicitly present in both the *Purcell* and *Crawford* decisions. The alternative framework consists of two major claims. The first claim is that from a legitimacy standpoint, low levels of voter fraud should be treated as indistinguishable from low levels of error in tabulating the final election results—both are noise in the system. Although some noise is tolerable, too much noise in the system could alter the results of the election, thus threatening the election's legitimacy. So, in considering the state's interest in voter fraud, there may be a difference in its interest in preventing some fraud (which is not very great), and its interest in preventing large amounts of fraud (where the state has a significant interest).

Next, Part IV proposes the idea that the right of participation, though perhaps only denied to a few when new voter requirements are put in place, is the most relevant (and serious) harm to analyze in the voter fraud debate. By combining this claim and the conclusion of Part III, Part IV argues that there is an important asymmetry in the balance between the states' interests and the voters' interests in participating in elections. In cases that involve laws aimed at preventing voter fraud, the balance shifts toward the voters' interests. Understanding this balance helps us understand the utility of statistics about voter fraud and voter deterrence—that is, it shows when and where statistics will be useful. At the limit, this Essay suggests that courts might have the tools for evaluating each side's interests that can settle the debate even in the absence of reliable statistics on the amount of voter fraud. The courts in many cases can settle the voter fraud debate by basing their decisions largely on *norms*, in a word, rather than waiting for *numbers*.

II. THE UTILITY OF STATISTICS AND THE SIGNIFICANCE OF NORMS

This Part seeks to defend the idea that it is worth looking at voter fraud as a normative matter, and not merely as a statistical one, that is, one where all that remains to be done is to have better studies conducted and to look at the results. Those who advocate more study are not committed to denying that the normative dimension is important; what is worrisome, however, is that as a result of the focus on more studies the normative dimension is downplayed. The hope in this Part is to show that the normative aspect should not be downplayed, because in addition to its intrinsic interest, the normative aspect is fundamental to resolving the voter fraud debate.[15] The basic claim is

15. I take it that, independently of any reform effort, the meaning of the right to vote is an intrinsically interesting question. Is the right to vote important because of

that our values regarding the meaning of the right to vote will necessarily influence how we look at statistics in this area. If we want to know whether voter fraud is a problem, we not only have to know the magnitude of voter fraud, but also the nature of the harm. So, too, we will have to know how great of a harm it is if some voters are deterred from voting because of additional voting requirements. If the harm in these cases is bad enough, then even a small amount of harm might justify measures against the harm. Therefore this Part suggests that an exclusive focus on the statistical aspect of voter fraud might not only be unwise, but it may even be counterproductive if it does not ultimately deal with why voter fraud is bad or how deterring some people from voting might be a serious wrong.[16]

A. Problems of Undermeasurement: Voter Fraud

There is one simple and general point to be made about statistics when it comes to voter fraud (and many other areas besides), and it is one that affects to what extent statistics will be useful in resolving debates over the prevalence of voter fraud. The point is that good statistics may be hard to come by for some phenomenon (such as voter fraud), and thus the numbers may not accurately reflect how much of that phenomenon is occurring. In some instances we may be justified in taking measures against the occurrence of something even if we do not have good numbers, but we suspect that the numbers we do have are not capturing everything that is out there. This is perhaps easiest to see in the much cited fact that there are very few voter fraud prosecutions.[17] This point was explicitly addressed in the majority opinion in *Crawford v. Marion County Election Board*.[18] Furthermore, some have pointed to the lack of people actually convicted of voter fraud as evidence that voter fraud is not a major problem.[19] But how decisive

what it expresses, of what it does, or something else? *See generally* Pamela S. Karlan, *The Rights to Vote: Some Pessimism about Formalism*, 71 Tex. L. Rev. 1705, 1711-13 (1993) (investigating the various meanings of the right to vote).

16. In making this argument, I am in some ways rehearsing the general complaint against cost-benefit analysis (that it ignores deep questions of value) and applying it to the context of voter fraud. For a good, general argument against cost-benefit analysis, see Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. Chi. Law Rev. 1197 (1997) (criticizing cost benefit analysis as philosophically obtuse).

17. *See* Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 654-55 (2007) (summarizing reports on the lack of prosecutions of voter fraud).

18. 472 F.3d 949, 953 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)) (discussing the argument that "as far as anyone knows, no one in Indiana, and not many people elsewhere, are known to have been prosecuted for impersonating a registered voter").

19. *See* Brief for Brennan Center for Justice at NYU School of Law as Amici Curiae Supporting Appellants, Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with *Ind. Democratic Party*,

is this point? There are many alternative explanations why there are few voter fraud prosecutions. It may be expensive to track down voter fraud, or it may be simply that local governments have not invested much time and money into investigating voter fraud. These facts make it hard to rely on voter fraud prosecutions as good evidence for the nonexistence of voter fraud, because it is perfectly compatible with there being *a lot* of voter fraud, that is, a lot of *unprosecuted* voter fraud.

In fact, Judge Posner's opinion in *Crawford* makes this point at some length, and it is a point which goes to the unreliability of relying on the number of prosecutions when measuring the state's interest in preventing voter fraud. "[T]he absence of prosecutions," Posner writes, "is explained by the endemic underenforcement of minor criminal laws (minor as they appear to the public and prosecutors, at all events) and by the extreme difficulty of apprehending a voter impersonator."[20] Posner then goes into a lengthy and somewhat convoluted explanation of why it would be hard to apprehend a person impersonating another in order to cast an additional vote. Posner explains that even if fraud were detected, there are reasons why the police would be reluctant to step in and make an arrest (*i.e.* it would cause a commotion).[21] Whether Posner's particular explanations are entirely apt seems less to the point than the general claim that it may be there are few cases of voter fraud prosecuted not because there are few cases of voter fraud, but instead because few voter fraud prosecutions are pursued. Furthermore, voter fraud prosecutions may not be pursued because police may not think voter fraud is a big deal, people who monitor polling booths may be ill equipped to spot fraud, or people monitoring polling booths may find out about the fraud too late to do anything about it (Posner's most plausible scenario). Posner makes a closely related point about why there are so few *reports* of voter fraud. This "lacuna," Posner contends, "may reflect nothing more than the vagaries of journalists' and other investigators' choice of scandals to investigate."[22] Consequently, the statistics may reflect something other than the number of voter fraud occurrences.

Therefore, we should not mistake Posner's argument that the state is justified in taking measures against fraud as relying on clear

128 S. Ct. 34) (No. 06-2218), *available at* http://www.brennancenter.org/dynamic/subpages/download_file_36780.pdf (citing lack of concrete evidence on widespread voter fraud).

20. *Crawford*, 472 F.3d at 953.

21. *Id.* at 953-54.

22. *Id.* at 953.

numbers that there *is* fraud.[23] Although Posner does cite some statistics to this effect (whose significance has been questioned by some), he is making a broader and different argument.[24] He is making an argument that the state can take measures against voter fraud *in spite of* the indeterminacy of the numbers. He makes, in this instance, a revealing analogy to preventing littering—which I will return to again in the normative sections of this essay.[25] "One response" to voter fraud, Posner writes, "which has a parallel to littering, another crime the perpetrators of which are almost impossible to catch, would be to impose a very severe criminal penalty for voting fraud. Another, however, is to take preventative action, as Indiana has done by requiring a photo ID."[26] In other words, Posner says that the lack of clear numbers dictates one of two responses. The state can either impose a very high penalty for voter fraud, in an effort to deter those who would commit fraud (and who would be hard to detect), just as it might impose a very high fine for littering. Or, the state can pass laws such as the one that Indiana passed, requiring voters show photo identification before they can vote. Again, the state is justified in doing this, not because it is *certain* that fraud is a problem, but that the state *suspects* fraud, and the state has reason also to suspect that fraud would be hard to measure. This is not an argument based directly on statistics, so the lack of clear proof is not dispositive against it.[27]

B. Problems of Undermeasurement: Voter Deterrence

It is interesting, given Posner's extensive explanation of how the numbers may be misleading in the case of detecting voter fraud, that he does not offer the same courtesy to those who claim that new requirements—such as the one Indiana passed—would deter voters who lacked the appropriate identification. In fact, Posner is positively mocking the plaintiffs in the case. "[T]here is something remarkable," Posner comments, "about the plaintiffs considered as a whole. There is not a single plaintiff who intends not to vote because of the new

23. *See* Bob Bauer, *Voting Fraud and the Offense of Littering in the Jurisprudence of Richard Posner*, More Soft Money Hard Law, May 3, 2007, *available at* http://www.moresoftmoneyhardlaw.com/moresoftmoneyhardlaw/updates/voting_rights_act_redistricting_issues.html?AID=989 (rehearsing Posner's argument).

24. *See* Richard Hasen, *The Extremely Weak Evidence of Voter Fraud in Crawford, the Indiana Voter ID Case*, Election Law, May 2, 2007, *available at* http://electionlaw blog.org/archives/008378.html (challenging the credibility of the statistics that Posner uses).

25. *See infra* Part IV. A, B.

26. *Crawford*, 472 F.3d at 953.

27. Bauer is helpful on this point. *See generally* Bauer, *supra* note 23 (defending Posner's argument in *Crawford*).

law—that is, who would vote were it not for the law."[28] Posner takes the fact that none of the plaintiffs would be deterred from voting as good evidence that few people in general would be deterred from voting if the new Indiana law were passed. Indeed, Posner proceeds straight from this consideration of the plaintiffs into a discussion of the merits. Because none of the plaintiffs would have been deterred, the harm of passing the law is slight, that is, not of a sufficient magnitude to cause the new law to be subject to strict scrutiny.[29] With voter fraud, lack of clear numbers was sufficient because the state might suspect that the numbers it had might not indicate the true scope of the problem. However, Posner does not extend the same sort of charity to those who allege that voter *deterrence* might also be a real problem.

But it is not necessary to conclude that the law would harm few people based on the fact that there was an absence of deterred voters from the plaintiff class.[30] At worst, the characterization of the plaintiff class as injured was a strategic blunder (which, however, did not prevent the plaintiffs from having standing to challenge the law).[31] It does not speak in any straightforward way as to the amount of voters who would be deterred from voting, nor should it be taken to be. This is Posner's first problem: he makes a leap from the nature of the plaintiff class to an understanding of the harm. Posner does not see that there may be good reasons, in general, why it might be hard to measure the extent of the harm of a law like Indiana's law requiring photo identification.

It can be hard to tell, absent a major survey, whether people, in the absence of the photo identification requirement, would have voted. There could be many people who are unaware of the identification requirement and do not take the steps to secure proper identification in time to vote in the election. Some people may not bring the right identification to the polls, and thus will simply not be able to vote. There may also be some people who are erroneously turned away from the polls because of a misunderstanding on the part of the poll worker. The point is that we do not know, and it would be hard to tell, how large the class of people is who absent the new law would have voted but do not. For this reason, we might argue in the same way that

28. *Crawford*, 472 F.3d at 951-52.

29. *Id*.

30. It is not, however, a total non-sequitur. Posner might have reasoned that if anyone would have been able to find deterred voters, it would have been those arguing against the laws; however, because they did not find any deterred voters, it follows that there are not many. I thank Dan Kahan for discussion on this point.

31. *Crawford*, 472 F.3d at 951-52 (granting standing to the Democratic Party of Indiana).

Posner argues for the state in his opinion, that we should be very careful in passing any new laws that might burden some people's exercise of the right to vote. Posner seems to be too quick to take the character of the plaintiff class to signify something deep about the magnitude of the harm the law caused. Indeed, we might suspect that his brevity in this matter reflects, not his concern with getting the numbers right, but with an underlying value decision he has made about the *character* of the harms involved. What I have suggested in these past two sections is that *both* sides can make at least a superficially convincing case that the numbers as we have them do not tell the whole story, and so we (state legislatures, Congress) may have to legislate or not in light of other factors.

C. How Norms Influence Statistics

The above two sections have offered an argument as to why it might be hard to find decent voter fraud statistics. I have only given a cursory examination of the argument to that effect, but at least we can see how, intuitively, it may be the case that voter fraud might be hard to detect, and how it might be difficult to measure the true number of voters who would be affected by additional voting restrictions. In this respect, both sides can argue that even though the statistics may point to no problem or a minor problem, we might still have good reason to suspect that the problem is significant. Of course, these types of arguments are open to the objection that, in fact, we can do more studies and better studies, and that these studies will get at the real scope of the problems—and this will then go a long way to settling the voter fraud debate.[32] Thus, the argument in the previous two sections is not decisive, or at least I have not presented it in a form that would make it strong enough to rebut the objection that all we really need are the *right* studies and the right methods. The argument in this and the next section is that even if we did have these additional studies, this might not lead to any real advance in the debate (unless it were found that there was *no* fraud, and there was *no* risk of anyone being deterred from voting; however, even in this event, people may say that we need new laws to avoid the *perception* of fraud, or that laws would be bad because of the *risk* that some people might be deterred).[33] Therefore, I argue that the amount of voter fraud or deterrence will be salient depending on how bad we think fraud or voter deterrence is.

32. This seems to be the burden of Overton's essay.

33. I discuss the issue of perception in more detail later in the essay. *See infra* Part III. C; s*ee also* John Fund, Stealing Elections: How Voter Fraud Threatens Our Democracy 2 (2004) ("Indeed, the level of suspicion [of fraud] has grown so dramatically that it threatens to undermine our political system.").

Our underlying *value* judgments will skew our perception of the problem.[34] Indeed, as I already intimated in my suggestion of Posner's bending over backwards defense of the state's concern for voter fraud, it may already be that we are much more willing to accept statistical evidence insofar as it reinforces our already held values. However, this is not the main argument I want to make.

To better explain the argument I do want to make, I need briefly to rehearse Dan Kahan's recent and powerful argument against risk assessment made especially against Cass Sunstein, for it is Kahan's argument that I will ultimately be using in making my argument about the importance of normative theorizing in thinking about voter fraud.[35] Sunstein's claim, developed over the course of many essays and books, is that people tend to be systematically biased in their perception of the facts.[36] People tend simply not to know or to exaggerate certain risks; in a word, their views about what risks are acceptable and what risks are not acceptable are distorted. Sunstein, in response to this phenomenon, argues that it may be best to let certain expert decisions replace the ordinary, intuitive and biased opinions of people.[37] Or, perhaps less paternalistically, we may need to be more aggressive in informing people about the relative risks certain things pose in order to ensure that people are dealing with correct information when they make certain personal or policy choices over others. To summarize Sunstein's point perhaps rather crudely, people sometimes get carried away by their emotions, which causes them to overesti-

34. *Cf.* Overton, *supra* note 17, at 663 ("Even for those who act in good faith, it may also be difficult to separate empirical data from normative democratic values in assessing and managing the risks of voter fraud and the exclusion of legitimate voters by a photo-identification requirement.").

35. *See* Dan M. Kahan, Paul Slovic, Donald Braman & John Gastil, *Fear of Democracy: A Cultural Evaluation of Sunstein on Risk*, 119 HARV. L. REV. 1071 (2006) [hereinafter Kahan et al., *Fear of Democracy*] (reviewing Cass R. Sunstein, Laws of Fear: Beyond the Precautionary Principle (2005)); *see also* Dan M. Kahan, *Two Conceptions of Emotion in Risk Regulation*, 156 U. PA. L. REV. (forthcoming 2008) [hereinafter Kahan, *Two Conceptions of Emotion*]. For Sunstein's reply, I will be relying especially on Cass R. Sunstein, *Misfearing: A Reply*, 119 HARV. L. REV. 1110 (2006) (reply to Kahan et al., *Fear of Democracy, supra*).

36. *See, e.g.,* CASS R. SUNSTEIN, RISK AND REASON (2002) [hereinafter SUNSTEIN, RISK AND REASON] (making the case for "rational risk analysis"); CASS R. SUSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE (2005) [hereinafter SUSTEIN, LAWS OF FEAR] (making the case for "rational risk analysis"). Kristin Shrader-Frechette has written a valuable review of SUNSTEIN, RISK AND REASON, *supra*, to which I am indebted. *See* Kristin Shrader-Freechette, *Risk and Reason*, NOTRE DAME PHILOSOPHICAL REVIEWS, Apr. 9, 2003, http://ndpr.nd/edu/review.cfm?id=1252 (philosophical critique of Sunstein's program).

37. SUNSTEIN, RISK AND REASON, *supra* note 36, at 7 (2002) ("Because I will place a high premium on technical expertise and sound science, this book is, in many ways, a plea for a large role for technocrats in the process of reducing risks.").

mate some dangers while underestimating others.[38] The remedy to this, at least for starters, is more and better studies, as well as application of the good studies we do have so that people can be better informed or (at the limit) be protected from their errant emotional reasoning. Sunstein's work, as may be obvious, finds an echo in the recent wave of voter scholarship. People supporting more studies claim that too much of the debate is being done in the dark, and by anecdote. If this is the case, it is no surprise that much of the debate is emotional and acrimonious. We need more facts, which will help calm the debate and possibly even settle it.

One strand of Kahan's rebuttal to Sunstein takes the following form: Risk perception is a function of two things and not one thing.[39] Sunstein focuses on responses to the magnitude of something happening, say, the risk of catching HIV from an infected needle, or the risk of being the victim of gun violence. However, Kahan argues there is another aspect to assessing risk and that is *how bad* the harm is perceived to be.[40] If the harm is perceived to be exceedingly bad, then even a low risk of that harm may mean that you are justified in taking measures to prevent it from happening. What Kahan has done, moreover, is to meticulously show that how people perceive risk is correlated with their values. In other words, people with different values will put a premium on avoiding certain things, and they will perceive the riskiness of certain activities *through* the prism of their values.[41] Now, *contra* Sunstein, Kahan says that this way of perceiving risk "through values" is not a distortion, and is in fact very far from a distortion. Rather, Kahan believes it gets at the very meaningfulness of those risks in people's lives. People value certain things, and people will shape their lives, including what risks they are willing to take, in response to their values. Thus, Kahan does not say that the emotions are distorting perception; rather, he says that those emotions are perceptions of value. For Kahan, Sunstein's examples of skewed risk perception are not "blunders," but rather examples of expressively rational stances towards the world.[42]

38. *Id.* at 1110 ("As a result of various forms of bounding rationality, human beings are prone to what might be called 'misfearing': they fear things that are not dangerous, and they do not fear things that impose serious risks.") (citation omitted).

39. I greatly oversimplify Kahan's argument here.

40. Kahan et al., *Fear of Democracy, supra* note 35, at 1083 (reviewing SUNSTEIN, LAWS OF FEAR, *supra* note 36) ("Individuals selectively credit and dismiss factual claims in a manner that supports their preferred vision of the good society.").

41. *Id.* at 1083.

42. *See* Kahan, *Two Conceptions of Emotion, supra* note 35 ("The cultural evaluator theory views emotions as enabling individuals to perceive what stance toward risks coheres with their values."); s*ee also* Dan M. Kahan, *The Secret Ambition of Cass Sunstein*, (Sept. 10, 2005), http://research.yale.edu/culturalcognition/blog/2005/09/secret-ambition-of-cass-sunstein.html ("The cultural evaluator model shows that political dis-

If we look at cost benefit analysis Kahan's way, then a certain way of framing debates that seem to be about statistics comes into view. What Sunstein assumes, according to Kahan, is that people in general will share values—if this is the case, then numbers will be decisive because people all agree on what risks are bad and are to be avoided. If we all agreed, then we should (if we are rational) adjust our lives to fit what the statistics disclose. However, if Kahan is right, many debates over numbers are in fact debates over values.[43] People will differ as to *how bad* they perceive a certain harm to be, and thus, will assess the risks accordingly. If according to our values, the harm is perceived to be extremely bad then statistics that say that there is a small risk of that harm will not move us; we still have to decide whether we still want to avoid the chance of the risk, however small. Thus, Kahan is claiming that many debates over statistics are really debates over values, covertly carried out. Worse, these are ineffective debates over values because the sides may be assuming that they both share values, and once the statistics are found then an agreement about what to do can be reached. Therefore, we may perhaps be better off starting with the normative debate.[44] This way, we will know what work the statistics are supposed to be doing, rather than expecting them to do work but finding out—because of an underlying disagreement in values—that they will not do this work.

D. The Argument Applied to Voter Fraud

Kahan's point, distilled to its core, is an elaborately detailed and empirically supported version of the familiar claim that risk aversion will be a function both of prevalence of the thing-to-be-avoided plus an

putes about risk, as data-centered and technical as they tend to be, are really best understood as conflicts over culturally partisan visions of the best society.").

43. Kahan et al., *Fear of Democracy*, *supra* note 35, at 1105 ("When expert regulators reject as irrational public assessments of the risks associated with putatively dangers activities . . . they are in fact overriding public *values*. For just as citizens' perceptions of the benefits of these activities express their worldviews, so too do their perceptions of the risks they pose.") (emphasis added). *See also* Shrader-Frechette, *supra* note 36 ("Yet as many quantitative sociologists and psychologists (Riley Dunlap, Gene Rosa, Paul Slovic) have shown, the views diverge not *because of* differences over probabilities, even though laypeople often get their probabilities wrong. Rather, evaluations diverge because frequently the public does not trust government risk estimates; does not believe a risk is 'worth' the benefit; claims a risk imposition is unfair; or does not enjoy rights to full compensation for industry-imposed risks (as in the case of the government-mandated liability limit that excludes citizens' claims for 98 percent of worst-case nuclear-accident losses).").

44. In another article, Kahan argued that this in many cases might not be prudent, and that in fact debates over numbers are a way of deflecting deeper normative disagreements. *See* Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 Harv. L. Rev. 413 (1999) (arguing debates over "deterrence" mask deeper moral disagreements). However, I do not think an argument of this type applies in the case of voter fraud.

assessment of how bad that thing is. If people differ about how bad a thing is then they will disagree at which point something becomes so prevalent that it is worth doing something about. Kahan's real contribution is to provide data that shows that aversion to certain risks is reliably correlated to certain values.[45] He has not (yet) done a study involving perceptions of voter fraud, but we might hazard a guess at what the data might reveal. Those who are worried about the integrity of an election—or even the perception that an election may lack integrity—will tend to see even a low risk of fraud as a very serious harm. In addition, those who see fraud as potentially disenfranchising legitimate voters (either by canceling or diluting legitimate votes) may see even one instance of fraud as a very serious harm. By contrast, those who are worried about electoral participation may see allowing some instances of fraud as possibly worth it—if it means that overall participation will be increased. Those of this persuasion will also see laws designed to make it harder for some people to vote as a very serious harm: this, rather than fraudulent voting, will appear to be something we would want to take steps to avoid happening. So if there is a risk that a photo identification law would mean that some people will not vote, they will see this as a very bad thing even if the numbers are hard to get, and even if the real amount of deterred voting is rather small. Under Kahan's analysis, we can say that how each side perceives the values at stake will affect how they perceive the risks in new laws or in fraud—and how much they are willing to sacrifice to prevent those risks. On the one side, those who are worried about the integrity of elections and avoiding the dilution of legitimate votes will want to take strong measures to deter fraud. On the other side, those worried about voter participation will see new laws as unnecessary and too burdensome if the laws risk deterring voters from voting. If Kahan is right, these value choices will probably remain stable, *even in the face of more and better studies*.

We can already see how Kahan's point might be true in the case of Posner's opinion. As we saw, Posner spent much more time defending the state's assumption that even in the absence of solid numbers, the state could infer the existence of fraud (given that fraud was difficult to detect, etc.). By contrast, Posner spent hardly any time crediting the plaintiffs' assumption that voters would be deterred from voting by the new laws. Perhaps—in a Kahanian vein—we can attribute this to the fact that Posner tends to give deterring voter fraud a greater value. Revealingly, Posner admits to finding the value of the vote itself to be "elusive," which suggests that the fact that some people

45. *See* Kahan, *Two Conceptions of Emotion, supra* note 35 (further studies supporting Kahan's analysis of emotion and value in debates over risk).

might be deterred from voting is less important than the value of securing the integrity of the election results.[46] Even more revealingly, and this is something we will discuss more in Part IV, Posner writes of those who willingly "disfranchise themselves" by choosing not to get photo identification in time to vote.[47] This suggests that Posner views the burden on prospective voters as slight—even vanishingly small, so that to not bother to get identification is not to be prevented or deterred from voting, but to positively *disenfranchise* oneself. Both of these things (the characterization of the benefit of the right to vote as "elusive" and the suggestion that voters who are deterred from voting by identification requirements "disenfranchise" themselves) contain implicit or explicit *normative* judgments. They have to be assessed as such. My point now only is that it is possible, without too much effort, to see these normative judgments as framing Posner's consideration of the statistics, and to what lengths he is willing to go to explain or to explain away some statistics and not others.[48]

This normative framing of statistics is evident not only in Posner's opinion (which roughly tracks the intuitions of those on the "right" side of the voter fraud debate), but also in essays and articles by those who worry about the effects of new restrictions on voting, such as photo identification. Spencer Overton, for example, before he introduces his argument "toward better data on legitimate voters excluded by photo identification," spends several paragraphs indicating the importance of "widespread participation."[49] He does not spend any similar amount of time delineating the values of avoiding fraud (integrity, anti-corruption, etc.) before his discussion of methods to measure voter fraud. Similar to how Posner frames the significance of voters who do not vote because of new requirements as involving voluntary disenfranchisement, Overton goes out of his way to frame the significance of deterring voters as presenting a potential harm to the value of widespread democratic participation. Overton, in assessing the statistics (and arguing for better statistical methods) for those deterred from voting, sets a different baseline than Posner. This baseline is dictated by the importance each puts on avoiding fraud, on the one hand, and ensuring widespread participation on the other. Posner and Overton may be looking at the same statistics, but how they

46. *Crawford*, 472 F.3d at 951.

47. *Id*. at 952.

48. *Cf*. Kahan et al., *Fear of Democracy*, *supra* note 35, at 1083 (stating "culture is *cognitively* prior to facts in the sense that cultural values shape what individuals *believe* the consequences of such policies to be. Individuals selectively credit and dismiss factual claims in a manner that supports their preferred vision of the good society").

49. Overton, *supra* note 17, at 657 (claiming "[w]idespread participation serves four functions.").

frame the statistics dictates the relative weight they give to those statistics. For Posner, deterred voters represent some voters who chose to voluntarily disenfranchise themselves. For Overton, deterred voters represent a risk to the value of widespread democratic participation. Though Posner and Overton may end up agreeing on the numbers, they will certainly disagree on what the numbers *mean*.

Normative argument seems to be unavoidable in voter fraud debates, and it may even be decisive in resolving the debate over voter fraud and measures to prevent fraud. Our deepest values will dictate how we perceive the statistics, what we take the statistics to be showing, and ultimately what measures we think are worth taking to prevent the harms. Of course, it may be possible that good study will show that there is *no* fraud, or that there is *no* real deterrence caused by new requirements. This seems very unlikely, but even still (as I stated above), there may be debate about the perception of fraud or the likelihood of future deterrence. Even here, in the limiting case, statistics might not be decisive. And we should also acknowledge, as I argued at the beginning of this section, that good statistics, for a variety of reasons, will be hard to come by. Thus, I have in fact been presenting a weaker and a stronger thesis in this Part. The weaker thesis is that in the absence of good numbers (and perhaps even good reason to think that correct numbers will be difficult to discern) normative argument will take priority in debates about voter fraud; a priority that sometimes focusing on the need for more and better studies will obscure. The stronger thesis, which I have pressed in the latter half of this Part, is that even with good numbers, our values will still structure how we perceive the salience of those numbers. Thus, the stronger thesis says not only that normative arguments will take a certain priority, but that at the end of the day they are probably doing most of the work in the debate anyway because our values will to an extent (and not irrationally) be resistant to changes in the numbers. Therefore, the only real progress in the voter fraud debate will come from a focus on the values each side holds. It is to an examination of those values that I now turn.

III. VOTER FRAUD AND THE "LAW OF DEMOCRACY"

In this Part and Part IV, I leave the debate over statistics—again, the prevalent mode of talking about voter fraud and voter deterrence—largely behind, and I speak solely in terms of norms. Why is voter fraud bad, if it is? When is it bad? Why is deterring voters from voting bad, if it is? When is it bad? These are the type of questions that, either explicitly or implicitly as I argued in the previous Part, drive much of the debate over voter fraud. It is also in terms of these

values that the courts make their decisions. It is therefore of immense practical importance that we understand the values that the courts say are at stake when deciding the constitutionality of new laws requiring photo identification at polling places, for instance, or showing proof of citizenship to register to vote. In this Part, I give a mostly sympathetic reconstruction of the arguments various courts, in particular the United States Supreme Court and the United States Court of Appeals for the Seventh Circuit, have made in the course of deciding voter fraud cases. What is interesting about these cases is how they intersect with scholarship on what has been called, over the past few years, "the law of democracy."[50] The claim in this field is that the Supreme Court (and other courts derivatively) in deciding election law cases has a certain theory about what democracy is and what it should be.[51] This theory then drives, consciously or unconsciously, the Court's decisions. Importantly, say these scholars, the theory works far above the level of simply securing the individual's right to cast a vote. Rather, the Court makes decisions on the level of the "structure" of democracy, and at the level of individual votes taken together in the aggregate.[52]

What I hope to show in this Part is that the Supreme Court and the Seventh Circuit are speaking the language of these scholars in the law of democracy. The courts are, I think, defending a theory of the structure of democracy and talking in terms broader than simply the individual's right to vote. Of course, the courts do not speak in these terms at length; therefore, we have to reconstruct many of the courts' arguments. But this, perhaps, is the case for law generally. Courts do not always make their theoretical assumptions explicit, and it is left to the task of commentators to do this work: to make the reasoning of judges present to themselves, as it were, and to tease out the larger implications of the judges' positions. So this is what I propose to do in this Part, to show that we can understand the several recent court decisions largely in the terms that the "law of democracy" scholars have given us. The irony is that, although the courts I discuss in this Part reason in these terms, they have been roundly criticized for doing

50. *See* SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS (3rd ed. 2007) (leading casebook on election law as a unified field of study).

51. It is an open question in the field regarding what is meant by "theory" here, and one that deserves extended discussion.

52. *See* Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998) (providing a classic defense of the structural approach to election law). On the dominance of theories of aggregation in voting rights scholarship, see Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. 361 (2007) ("Modern voting rights scholarship agrees on one thing: voting rights are aggregate rights.").

so by those who have done the most to defend and articulate the idea of the "law of democracy." This is perhaps ironic, because the terms the courts use are partly of these scholars own making; the scholars may indeed be in some sense responsible for the courts making a structural turn in their reasoning. So in assessing the courts' arguments, we will have to see precisely where the courts go wrong: whether it is in making this structural turn, or whether it is in making bad structural arguments. This is a task I take up in Part IV. I begin this Part with a very brief review of the recent structural emphasis in election law scholarship, both to see (in this Part) how recent courts have embraced this trend, and also (in the Part IV) to see how courts might be in error in speaking and analyzing the harm of voter fraud in these terms.

A. Electoral Integrity

To see how structural concerns came to dominate the study of election law, consider first taking a narrow view of what election law covers. Let us say, for instance, that it only covered the ability to cast a ballot in an election. Now, this is no small thing in itself, and much of the history of election law can be seen in this light.[53] Certainly, granting former slaves the right to vote is a critical part of election law history, as was the Nineteenth Amendment which granted women the right to vote.[54] In the Twentieth Century, the right to participate in elections was further extended by granting those who were twenty-one years old the right to vote.[55] Additionally in the Twentieth Century, previously supposed gains were re-established by the Voting Rights Act, which sought to remove barriers that prevented African-Americans from voting.[56] So again, the right to cast a ballot, which we might also call the right to participate in an election, is no small right. It is a right, as the late Harvard professor Judith Shklar has argued at length, to be counted a full citizen of America.[57] But it is at the same time a formal right; it is not a right to any share in power. You may vote and your vote may be counted, but you may be in a permanent minority. Worse, there may be no candidates that are

53. Judith N. Shklar, American Citizenship: The Quest for Inclusion 63-104 (1998); *see also* Part III. D.

54. U.S. Const. amend XV, amend XVIV; Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947 (2002) (putting passage of the Nineteenth Amendment in larger historical and normative context).

55. U.S. Const. amend. XXVI.

56. For a reading that emphasizes this aspect of the Civil Rights movement, see Abigail Thernstrom, Whose Votes Count?: Affirmative Action and Minority Voting Rights (1987) (discussing the controversial history of the Voting Rights Act).

57. *See* Shklar, *supra* note 53 (emphasizing the participatory aspect of voting).

even remotely appealing and who might secure your interests. Or the system at other levels may be corrupt. For all of its importance, the right to participate is limited. It is a way through the door, but there may be many other obstacles that can prevent you from getting much further past the door.

Moreover, a focus on the individual's right to participate will tend to obscure the structural issues that are at play in any given election.[58] To expand upon one of the examples in the previous paragraph, there may be obstacles that make it harder for third parties to field a candidate. For instance, they may have problems getting a candidate on the ballot.[59] We can imagine that *everyone* who wants to participate and is eligible to participate does participate in an election. Still, because of structural factors, those people who vote may feel that their vote does not matter, or does not matter as much because of the dominance of the two major political parties. The focus on electoral structure brings out the aspects of election which tend to be lost when we look simply at elections as involving the individual's right to vote. Election law scholars say we have to look past the ability to cast a vote and instead look to the *value* of casting a vote. It is one thing to have the right to vote; it is another thing to have that right to vote be *meaningful* or *effective*. The focus on structure shifts the debate to this second level. Once we have the right to vote, how do we make that vote mean something? How can we make sure that there are candidates who respond to voters' interests? How can we avoid the entrenchment of the two major political parties at the expense of other voices in the process?[60]

Or consider another structural factor which occurs in the context of campaign finance. Again, suppose everyone has the right to vote. Still, there will be disparities—as there manifestly are in our system—about who can really influence the process by donating money to candidates. Therefore, although we may equally have a vote, some may have more influence than others, both in terms of which candidates are able to run (because they are well-funded), as well as in terms of setting candidates' agendas. Those candidates that win will feel obligated to govern in accordance with their donors' interests if the candidates want to receive funding from these donors in the fu-

58. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705 (1993) (noting emphasis on formal aspect of voting ignores other meanings of the right to vote).

59. *See* Chad Flanders, *Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law*, 23 J.L. & POL. 147 (2007) (discussing the barriers to third party access to the political process).

60. *See* Richard H. Pildes, *Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004) (explaining partisan entrenchment).

ture. This has led to a focus—both in the Supreme Court's case law and in scholarly literature—on "corruption" or the "appearance of corruption."[61] But what exactly is corruption? Perhaps most intuitively, corruption might be bad because it involves buying influence. But some have argued that it might be corruption simply to have such vast disparities in electoral power.[62] This might be bad in itself, and it also might be bad because it gives the *appearance* that elections are a matter of money and not of voting power. As Justice Breyer put it, this would be harmful to "the integrity of the electoral process."[63] In telling us what corruption is and why it is bad, the court can move to another level of theorizing—theorizing that takes it beyond merely securing the individual's right to vote and onto speculation about what would be a good system of democracy. Would it be one that simply prevented quid pro quo campaign donations? Would it be one that even prevented the appearance of buying influence? Would it, at the furthest level, demand certain equality in the financial influence voters could exercise over candidates? All of these questions, I think, implicate questions of democratic structure and not merely the individual's right to vote. Or better, they move beyond the formal aspect of the right to vote, and ask instead, in what sort of system will each individual voter's vote be made meaningful and effective?

B. Vote Dilution

If there is one master concept that best exemplifies the shift in focus from an individual's right to participate (his right to cast a ballot) to the individual's right to a meaningful vote (that is, his right to influence the political process) it is the concept of vote dilution. The theory of vote dilution begins with the premise that, for all of its symbolic value, the individual's right to cast a ballot is empty by itself: it is just one vote among many. A vote gets its real value by being aggregated with other votes because it is only in combination with other voters that an individual voter can actually elect a candidate (it is the very rare instance where one vote tips the election).[64] When we look at the value of the right to vote, its value is not simply an individual participatory one, but is also an aggregative one: it gets its value not

61. *See* Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 Geo. Wash. L. Rev. 1036 (2005) (analyzing Supreme Court campaign finance decisions and their use of the idea of "corruption").

62. *Id.* at 1036.

63. Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 401 (2000) (Breyer, J. concurring).

64. *See* Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 Harv. L. Rev. 1663, 1677 (2001) ("The notion of dilution . . . hinges on the assumption that like-minded voters should have a fair chance to coalesce—that is, that an individual's ability to aggregate her vote with others matters in a representative democracy.").

in the solitary act of an individual at the polling place, but in community with other like-minded voters. It is only in this latter way that the vote (according to these scholars) actually means something, because it is only in this way that the vote translates into political power and influence.[65] It follows that the value of the right to vote can be taken from people not only by barring them from casting a vote, but from arranging voters in a way in which they are prevented from aggregating their votes. And it is here that we get to the structural aspect of the aggregative aspect of the right to vote. By putting voters in a certain districting scheme, we can prevent them from aggregating their votes to elect candidates that represent their interests. In other words, we can *dilute* the voting power of a group by splitting that group up and putting the members of the group into separate voting districts.

It was the seminal cases of *Reynolds v. Sims*[66] and then *Baker v. Carr*[67] that brought the concept of vote dilution to the fore in election law. Both cases involved the practice of having unequal numbers of voters in different districts. An urban district, for instance, might have many more thousands of voters in it than a comparatively (geographically) sized rural district. The result of this disparity was that voters in rural districts got more bang for their individual votes—each of their individual votes meant *more*, as the individual vote of the rural voter was able to exercise a greater influence than the individual vote of the urban voter. After being warned of heading into a "political thicket," the Supreme Court eventually found that such disparities in voting power violated the Fourteenth Amendment.[68] Instead of districts that had differently sized voting populations, the Court said that districts from now on had to have *equal* populations. Specifically, this meant that an urban voter could not have *less* influence on the political process than a similarly situated voter in a rural district.[69] All votes had to be of equal weight. Now, it is important to see that although the decision can be cast in terms that make it sound as if the individual's right to vote is merely being vindicated, the reality is in

65. *See id.* at 1677 (noting the importance of the "aggregative" aspect of the right to vote); *see also* Karlan, *supra* note 58, at 1705 (noting the importance of the "aggregative" aspect of the right to vote); LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994) (especially examine Chapter 4 stressing the importance of having a "reasonable chance at representation" and how some election schemes fail to secure this).

66. 377 U.S. 533 (1964).

67. 369 U.S. 186 (1962).

68. Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("We are cautioned about the dangers of entering into political thickets and mathematical quagmires.").

69. *Id*. at 567 ("To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote.").

fact more complex. Prior to *Reynolds*, the original districting scheme prevented urban voters from exercising the same impact as rural voters. Their "group," even though it might have greater numbers than the rural "group," would end up having the same influence: they could only elect one candidate for their district.[70] The redistricting decisions allowed urban voters, as a group, to have the same power as rural voters. In the end, the *Reynolds* line of cases was about the power of a certain group (in this case urban voters) to aggregate their votes more effectively, or as effectively as rural voters.

This point—the point that the original redistricting decisions were not about individual rights *simpliciter*, but about the rights of individuals to aggregate their votes effectively in a group—is easier to see in another major area where redistricting plays a huge role: racial redistricting under the Voting Rights Act.[71] Here we have perhaps the best example of votes having been made less meaningful because of the effects of certain structural factors. In response to the passage of the Voting Rights Act, white legislators began to draw district lines in such a way as to minimize the ability of blacks to come together and elect their favored candidates.[72] Blacks were either spread out across districts making them a minority in many districts, or blacks were all packed into one district so that white majorities could be created in a greater number of districts, or the districting was a combination of these two practices. In any event, the result was that blacks were so spread apart or so packed into a small number of districts that although they could vote—and by hypothesis we could assume that *every* eligible black voter voted—they could never vote in sufficient numbers as to elect a candidate that would reflect their interests. The solution to this was to require racial gerrymandering, to guarantee that not all black votes would be spread out across the state, diluting black political power. Instead, there had to be some 'safe' minority districts, where black voters would be able to aggregate their votes and effectively use their votes to elect a candidate of their choice. Here, a structural problem (barriers to vote aggregation) demanded a

70. The discussion by Guinier is extremely helpful on this point. *See* GUINIER, *supra* note 65, at 125 (discussing "collective interests" in *Reynolds* and *Baker*).

71. The history is outlined in THERNSTROM, *supra* note 56 (discussing development in use of the Voting Rights Act). *See also* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989) (giving a brief history of the Voting Rights Act). Karlan helpfully distinguishes between quantitative and qualitative dilution, a distinction which I put to one side for the purposes of this essay.

72. *See* BERNARD GROFMAN & CHANDLER DAVIDSON, CONTROVERSIES IN MINORITY VOTING 22, 24-25, 27 (1992) (noting that racial gerrymandering was used as a response to the passage of the Voting Rights Act, even though it was common before the act).

structural solution (designing districts that would facilitate vote aggregation of a group).

What is important, and what I want to highlight in the case of vote dilution is that—as these two examples show—having a theory of vote dilution requires having a theory of what *group* you want to favor; that is, it requires having a theory of whose votes you want to successfully aggregate. The individualist rhetoric of the *Reynolds* opinion serves to obscure this point.[73] It suggests that what it is doing is equalizing individual voter power, so that "one man" has only "one vote" and not more than one. But this is not the true and deep meaning of *Reynolds*. Its true and deep meaning was the equalization of the voting power as a group of urban voters relative to rural voters. In the same way, the impact of racial redistricting is to facilitate blacks in their effort to aggregate their group power—so that they can vote together, rather than being split up by creative districting on the part of white legislators. So if we are to talk about vote dilution, this is always relative to some class of people whom we are worried cannot effectively aggregate their votes into a "group" expression. And this requires a theory of which groups matter, or at the least, when it is unfair that a group cannot effectively bring its voices together and have effective political expression. In *Reynolds* and *Baker*, the Court determined that it was unfair that rural voters wielded more political power per person than urban voters. The Voting Rights Act (and its subsequent interpretation) stood for the principle that it was important not merely that blacks vote, but that their votes be made effective. When we move into this type of territory, it becomes clear we need a theory of which groups matter, and what types of aggregation are good for democracy to function. In other words, we have moved into the area of democratic theory, as Justice Thomas forcefully pointed out in his concurring opinion in *Holder v. Hall*.[74] The courts are making choices and assumptions about what a healthy democracy should look like—what groups should have the ability to have their vote count. It is precisely this kind of theorizing, as I discuss in the remainder of this Part, which courts have been doing in several recent voter fraud cases.

73. Gerken, *supra* note 64. Gerken, however, believes that the right can still be understood as an individual right, albeit a right to aggregate one's vote with others.

74. 512 U.S. 874, 892 (1994) (Thomas, J. concurring) (stating "by construing the [Voting Rights] Act to cover potentially dilutive electoral mechanisms, we have immersed the federal courts in a hopeless project of weighing questions of political theory-questions judges must confront to establish a benchmark concept of an 'undiluted' vote").

C. *PURCELL V. GONZALEZ*: SETTING THE STAGE

I begin by considering the Supreme Court's recent and very short opinion in *Purcell v. Gonzalez*.[75] The heart of the opinion, really only a paragraph at the beginning of section two, has drawn criticism from a number of election law scholars as being confused, confusing, and even incoherent.[76] At best, the reasoning has been considered sloppy. Some context supplies a partial excuse for the decision's apparent lack of coherence: it was a decision quickly made and decided in order to allow an election to go ahead as scheduled. We might try to pardon the decision's sloppiness by comparing it to the time-pressured opinion in *Bush v. Gore*.[77] But the opinion, I think, has not been treated as fairly as it should be. True, the reasoning is very compressed—it only hints at arguments and does not spell them out—but again, this is probably true of most of the Court's opinions. All this requires is more work on the part of the interpreter, a task we should welcome, especially given issues as contentious and complicated as voter fraud. We have to try our best to present the arguments that seem to be given in the opinion in their best lights, and *then* assess the arguments. We should not assume that the Court did not really know what it was talking about.

This should be especially the case with *Purcell*, as the Court certainly seems to be trying to speak in the language of the law of democracy. As I see it, the Court is trying to make two claims about the state's interest in voter fraud, both of which bear obvious comparisons to the types of arguments we have been considering in this Part. The first claim is a broad (and admittedly somewhat vague) argument about securing the "integrity" of elections. The second claim is that voter fraud dilutes the votes of legitimate voters. I consider both of these claims in turn; with the second claim, I refer mostly to Judge Posner's opinion in *Crawford v. Marion County Election Board*,[78] which significantly elaborates and expands the argument that is only hinted at in the *Purcell* opinion. The argument in this Part suggests

75. 127 S. Ct. 5 (2006) (per curiam).

76. Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) (per curiam). *See* Richard L. Hasen, *The Untimely Death of Bush v. Gore*, 60 STAN. L. REV. 1, 29 (2007) (referring to the opinion as "troubling"); Pamela S. Karlan, *New Beginnings and Dead Ends in the Law of Democracy*, 68 OHIO ST. L.J. 743 (2007); Alex Keyssar, *"Disenfranchised" When Words Lose Meaning*, THE HUFFINGTON POST, Oct. 22, 2006, *available at* http://www.huffingtonpost.com/alex-keyssar/disenfranchised-when-_b_32241.html; Daniel P. Tokaji, *Leave It to the Lower Courts: On Judicial Intervention in Election Administration*, 68 OHIO ST. L.J. 1065, 1067 (2007) (noting *Purcell* provides a "cautionary lesson" on court intervention into elections).

77. *But cf.* Hasen, *supra* note 76, at 29 (declaring that the Court had not learned the lessons of *Bush v. Gore* in *Purcell*).

78. 472 F.3d 949 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)).

that these two claims—the one about integrity, and the other about dilution—while analytically distinct, might be linked, especially in the *Purcell* decision. In *Purcell*, the worry about electoral integrity ultimately turns out to be a worry about vote dilution.

The substantive issue the Court had to consider in *Purcell* was what the state's interest was in adding new requirements to the right to vote, specifically the state's interest in requiring citizens to present proof of citizenship when registering to vote, and then to present photo identification on the day they cast their vote.[79] Is the state's interest in preventing fraud substantial enough to justify these additional burdens on the individual's right to vote? Although the Court ultimately made a procedural point that allowed the restrictions to go into effect (the lawsuit asked for an injunction against the new restrictions for the 2006 election), it briefly dealt with the substantive issue. And the first interest the Court cited that the state has is an interest in the integrity of the state's elections. Quoting from an earlier case, the Court announced that a state "indisputably has a compelling interest in preserving the integrity of its election process."[80] The Court goes on to give this statement a rather interesting, and somewhat ambiguous cast. The Court reasoned that it is important that voters have "confidence" in the way elections are run, that this is "essential to the functioning of our participatory democracy."[81] The Court then reasoned that the risk of a lack of confidence is that voters will not vote; they will become disillusioned with the process. "Voter fraud," the Court noted, "drives honest citizens out of the democratic process and breeds distrust of our government."[82] It is statements like this that make many think that the Court needs something more than simply its intuition to go on. How many people really are driven out of the process by a lack of confidence in electoral processes?[83] Indeed, it is sentences such as this that might have prompted Justice Stevens' brief opinion in *Purcell* stating that before the Court can truly judge the constitutionality of the measures, the Court needs a better record in order to know whether voter fraud leads some people to become disillusioned and not vote.[84]

I will return to whether we need statistics to decide the harm in Part IV, but first I want to return to another worry scholars initially

79. *Purcell*, 127 S. Ct. at 6.

80. *Id*. at 7 (quoting Eu v. S.F. County Democratic Cent. Comm., 489 U.S. 214, 231 (1989)).

81. *Id.*

82. *Id*.

83. Hasen, *supra* note 76.

84. *Purcell*, 127 S. Ct. at 8 (Stevens, J. concurring) ("Allowing the election to proceed without enjoining the statutory provisions at issue will provide the courts with a better record on which to judge their constitutionality.").

have had about the *Purcell* decision. Even from this short summary of the *Purcell* Court's discussion of the state's interest, we can see another reason (besides its brevity) that scholars have been dissatisfied with the opinion. Scholars are dissatisfied because the opinion seems to cast everything about the state's interest in preventing voter fraud in the *subjective*. The Court does not write, or does not primarily write, of the state's interest in electoral integrity; rather it talks of voter *confidence* in the electoral process and *distrust* of government. It is not so much the fact of fraud, the Court seems to be saying, as the (subjective) perception that fraud might be occurring. Likewise, the Court does not write of direct vote dilution or disenfranchisement; instead, the Court identifies the interest as voters perhaps *fearing* that their vote will be diluted or of voters' *feelings* of disenfranchisement. But many have asked why it is bad merely if voters *feel* as if there is fraud in the system? A first response to this worry might simply be to note that a concern about feelings and perceptions is evident in other areas of election law (and law more generally). We might, for instance, ask a similar question in the context of campaign finance laws: why is it bad that people perceive that the system is dominated by money? The worry about feelings, then, is not so genuinely new or novel. The Court has been confronted with it before.

However, the *Purcell* Court gave reasons why voter fears and feelings might matter in the context of voter fraud, when the Court noted that fraud might "drive[ ] honest citizens out of the democratic process and breed[ ] distrust of our government."[85] These seem to be genuinely bad things, *viz*., people not voting because they feel that their votes are worthless and distrusting the government because they think their votes are not the ones actually electing people. In an almost exactly similar way, we might want to prevent even the appearance of corruption by moneyed interests, because it might drive people from the democratic process, and it might lead people to distrust the government. So in both contexts, we seem to have an independent reason just to heed people's *feelings*. It is no argument simply to say that the law has no interest in promoting right perceptions; confidence in the government is a good thing, and we should not deny that nor deny that the state has an interest in encouraging confidence in the government. We should not disagree with the very notion that the government might have an interest in the feelings and perceptions of its citizens—especially if this will lead to decreased participation.[86]

85. *Id.* at 7.

86. Keyssar seems to deny that feelings and perception may matter, although this may be an artifact of his rhetoric. *See* Keyssar, *supra* note 76 ("In its unsigned opinion, the court justified its decision by claiming that 'voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.' FEEL disenfranchised?

The government can, and should, have this interest which we might call an interest in avoiding the *demoralization* of citizens.[87]

At the same time, and to this extent, those who suspect that feelings might not be the most reliable guide to policy-making have a point. We simply do not want to credit any feelings potential voters might have. They may simply be imagining things. As one lower court put it, perceptions are fickle, they can be manipulated.[88] Although feelings and perceptions are important, as I have insisted, they cannot be given *carte blanche*. Here it seems useful to invoke Robert Post's idea of a "warranted conviction" in the functioning of a democracy.[89] Post says that people have to feel that they are actually creating the laws (or electing the representatives) in a democracy, so feelings matter. But Post goes on to say that those feelings must be warranted, that is, they must be grounded in something besides merely the feelings themselves. There have to be facts and values which support those feelings, because a feeling itself might be nothing more than a prejudice unless it is supported by reasons. Even if we give feelings a presumptive legitimacy, we need to be clear that the presumption of legitimacy can be overridden if the feelings seem to have no deeper ground than themselves. Feelings do not always justify themselves.

There are at least two ways in which feelings can be unsupported. First, we can be mistaken about the facts. Citizens may fear fraud even when there is no fraud. If this is the case, then we certainly should not cater to their erroneous perceptions. If the harm is imaginary, it does not become a state's interest *simply* based on the fact that voters perceive that the harm is really there; that is, the state does not gain an interest in legislating against it. If anything, the state has an interest in combating the false perception, not in catering

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Is that the same as 'being disenfranchised'? So if I might 'feel' disenfranchised, I have a right to make it harder for you to vote? What on earth is going on here?").

87. *See* 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 130 (1991) (developing this idea). The Northern District of Ohio went the furthest in emphasizing the harm of demoralization. *See* League of Women Voters v. Blackwell, 340 F. Supp. 2d 823, 829 (N.D. Ohio 2004) ("Where persons who are eligible to vote lose faith that their ballot will count, they will conclude that voting does not matter. They may decline to exercise the franchise, thereby giving up the most fundamental right of our democracy as completely as if it had been taken from them forcibly."). I am indebted to Joey Fishkin for this reference.

88. Weinschenk v. Missouri, 203 S.W.3d 201, 218 (Mo. 2006) ("While the state does have an interest in combating those perceptions, where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgement.").

89. For a representative use, see Robert Post, *Religion and Freedom of Speech: Portraits of Muhammad*, 14 CONSTELLATIONS 72, 74 (2007) (stating "the practice of self-government requires that a people have the warranted conviction that they are engaged in the process of governing themselves.").

to it. So, this may be another motivation for those who want more and better studies: they want to know whether voters' fear of fraud is something that is based on the facts, or is simply imaginary. But the second way feelings go wrong does not depend on numbers; voters may be afraid of the wrong thing or afraid in a disproportionate way. Suppose that voters feared something that was there, but was actually quite harmless. This would also raise suspicions about whether the state had an interest in catering to that fear, but not because the thing did not exist, but because it was not that harmful in the first place. The first way feelings might err is one that most scholars have been interested in; I have already stated my reasons why I am not sure statistics will be decisive (unless, perhaps, the statistics showed that there was absolutely no fraud and no possibility of fraud).[90] Now, I am more concerned with whether the feelings people might have about voter fraud might be based on some real worries and not just imaginary ones.

D. Structure in *Purcell*: What is Electoral Integrity?

What are some real worries people might have about electoral integrity? Let me begin with two interests: one that I will call the "rule of law" worry, and the other which I will call the worry about "massive fraud." The two interests I am going to discuss in the remainder of this section strike me as real interests, that is, they seem to be interests that the state really has. Also, to the extent that they are real interests, there is also an interest in preventing people from *feeling* that such violations of the state's interests are occurring. In other words, the realness of the interests gives rise to an additional interest of the state—which is to prevent the demoralization of citizens by the *perception* that such interests are being violated. The two interests that I cover in this section are not, however, the Court's major focus, but they nonetheless may work in the background of the Court's opinion, so it will be important to discuss them for this reason. It is also important for the purposes of my Essay, for I am going to argue (in Part IV) that in fact these are the only *legitimate* interests the state has in preventing voter fraud. The focus in *Purcell* is on vote dilution, but it turns out that dilution is not a real state interest, at least when we are considering the incremental vote dilution that is possibly caused by a few fraudulent votes.

90. In this rare event, the perception of fraud would be wholly unwarranted.

1. Violating the rule of law

The first worry the Court might be addressing is the state's interest in upholding and sustaining rule-of-law values. In other words, the state has an interest in the integrity of the election system it has set up, to the extent that it does not want people to violate the law, and thus violate the "integrity" of the election process. We can give this state interest a subjective cast in the following way: if people see others breaking the law by frequently voting, they might come to be disillusioned with the government. Of course, this is a perfectly general interest that the state has—it is at stake when the state passes a law against speeding, or a law against littering (to revert again to Judge Posner's example). In these cases, the fact that people break the law may *also* cause people to lose confidence in the government. The state and the citizens in the state may be harmed simply insofar as people break the law; such law breaking (which voter fraud indisputably is) harms the state because it questions the state's authority, and it represents some people getting an unfair advantage. Consider how although parking in a no-parking zone may not physically *harm* anyone, the state still is justified in prosecuting the person who did it because it is not fair to flout the law like that.[91] The state has set up its laws, and presuming those laws are not unjust and were arrived at through some democratic process, the state has the authority to uphold those laws. I do not think we can doubt that there is an interest here.

Is this the interest the Court is getting at in its argument in *Purcell*? I would think not. The problem is that it seems like too generic a value; in the sentences following the quote from *Eu v. San Francisco County Democratic Central Community*[92] the Court goes on to make specific points about the voters' feelings and the importance of confidence in the electoral process.[93] The Court is not simply talking about the state's interest in preventing the law from being violated—which an interest it has in upholding *every* law, not just in election laws. And when the Court turns to voter perceptions, it is talking about more than simply the perception that the government's law-making authority is being flouted. The harms the Court cites as coming from the violation of election law seem too specially tailored to the election law context to have the harm simply be this generic: an interest that the laws not be broken. Doubtless, this is certainly a state interest,

91. On the idea that fairness requires us to obey the law, see JOHN RAWLS, LEGAL OBLIGATION AND THE DUTY OF FAIR PLAY, LAW AND PHILOSOPHY: A SYMPOSIUM 3 (Sidney Hook ed., 1964).

92. 489 U.S. 214 (1989).

93. *Purcell,* 127 S. Ct. at 7.

even in the election context, but one might think that it is an interest better served simply by more aggressive prosecution of those who break the law, not by proposing new restrictions on the ability to vote—especially since the Court goes on to say that there are values on the other side of the equation, namely, the interest of those who want to vote and who might not because of the new restrictions. Of course, this last point needs an argument, and I will attempt to give it one in the next Part. For the time being, though, the claim is only that the state's interest in preventing people from breaking any laws, while a real value, does not seem to be the value the Court is after. It is after a specific election-based harm that is caused by violating laws having to do with the election of candidates. So I think, if we want to discern the meaning of electoral integrity and the state's interest in upholding the integrity, we will have to find something more tailored to the electoral context. This leads me to a second worry, to which I now turn.

2. Massive Fraud

The second worry that people might have about electoral integrity is the concern that an election without integrity is an election that does not do what an election is ultimately supposed to do, that is, elect the candidate with the most legitimate votes.[94] If there is so much fraud that it is in doubt whether the right candidate won, then there is a real problem with the integrity of the election system. Basically the election system has no integrity because it is not a reliable system of tallying the right votes. It has, instead, become so corrupt that it fails to even be an election. Voters might ask themselves, why did we bother to vote, rather than just holding a lottery and choosing the winner that way? Thus, fraud will clearly compromise the integrity of an election when fraud reaches such a level that it calls into question whether the election has chosen the correct candidate. Note that here there is a role for reliable studies: we need to know when an election has become so corrupt, so permeated by fraud, that it can no longer be counted on to accurately reflect who the winning candidate is (again, the candidate who has the most legitimate votes). But here, statistical analysis plays only a role at the limit, and will not be useful in most cases. We will need studies to say when an election is thoroughly corrupt, thus corrupt on a massive scale, to see if it lacks integrity in the sense discussed herein. We will not need to know if there is some low level of fraud, because even a small amount of fraud will still allow the election to select the legitimate winner. Of course, there will be excep-

94. *See* BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980) (discussing the purposes of voting).

tions; there will be some elections where the final tally is so close that even a low level of fraud could tip the election to the wrong candidate. However, this will generally not be the case.

So here is one case where the perception that there has been massive fraud is bad, because massive fraud *is* bad—it suggests that the election might have gone to the wrong candidate. What could be a better example of an election losing legitimacy than an election that did not even do its job of electing the candidate with the most legitimate votes? The state has a real interest in preventing *this* kind of lack of confidence in the election system, because massive fraud gives people a reason to lose confidence that their votes have really done any work in electing a candidate. It is here that we hit something deep in the idea that an election may be illegitimate because of voter fraud. If fraud means that the election is a sham, then this is a problem—and it is a problem even to the extent that we want to avoid the perception that the election is not a sham. This will only really happen (as I argue in more detail in the next Part) either when there is a lot of fraud, so much fraud that the election is clearly corrupt, or whether the election is so close that even minor fraud might tip the election the wrong way.

But the *Purcell* Court seems to suggest that feelings of illegitimacy may even be caused by minor fraud, and even when minor fraud would not be outcome determinative, because it might be that even one fraudulent vote may make some voters feel that their vote does not really count, or count as fully as it might. This is the perception that the impact of their vote may be *diluted*, and this happens even if there are one or two votes that are cast illegally. It is this worry, I think, that is ultimately at the heart of the Court's analysis—not so much the worry that the election might be completely corrupt, in the sense that the election will not choose the legitimate winner. So we should take care to analyze the idea that voter fraud might be harmful insofar as it dilutes the votes of legitimate voters. For if dilution in the end is the real worry, then the Court's concern about electoral integrity (and about perceptions about electoral integrity) in the context of voter fraud turns out simply to be a concern to protect the value of the right to an undiluted vote. Whether this is a *correct* understanding of the idea of vote dilution, or even an understanding of vote dilution at all, I leave to Part IV. What I am concerned with now is simply trying to understand it, for it seems that this interest is what the Court is most concerned with in its brief discussion of electoral integrity.

E. Structure in *Purcell* and *Crawford*: Vote Dilution

The concern about vote dilution in the context of voter fraud can be stated most directly in this way: People will become disillusioned if they feel that the *impact* of their votes will be diluted by the existence of fraudulent votes. As the Court reasons, "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."[95] In contrast to the worry raised in the previous section, about the existence of massive fraud leading to the wrong result, the worry about vote dilution happens even if one person fraudulently votes. In that case, the worry is that an individual's vote will not have the same impact (will be outweighed) when combined with other legitimate votes because it has been watered down by the existence of fraudulent votes. In other words, the harm of vote dilution does not work the same way as the harm of damaging electoral integrity: vote dilution works in degrees, whereas the possibility of having an election go the wrong way only works if there is enough fraud to make the election outcome different than it might otherwise be. But if one person fraudulently votes against the candidate I have voted for, I might feel that my vote no longer has the same influence—and that is the case even if the opposing, fraudulent vote is the only fraudulent vote that there is. Note how this trades on the idea that votes should not just be counted, but also be meaningful. My vote has less meaning than it would have if only legitimate voters had voted, and for this reason, I might lack confidence in the electoral process: the process is not giving my vote the same weight as it would have if there were no fraud in the system. If this happens repeatedly, I may question the value of voting at all. Unfortunately, the Court's opinion (and this is where it is both at its most interesting and at its weakest) offers no further analysis of whether voters *really* are disenfranchised, only that they might *feel* disenfranchised. What we need to know is whether the feeling has any underlying justification, or instead is nothing more than a feeling. Does voter fraud really result in vote dilution in any meaningful sense?

The Court does not give us any analysis on this point. Instead, the Court only offers a quote from *Reynolds v. Sims*: "The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."[96] This line is important for the Court to quote because it links vote dilution and disenfranchisement. But quoting the line also simply invites the question of whether, even if it is true that we can equate at some level prohibition and dilution, in the case

95. *Purcell*, 127 S. Ct. at 7.
96. *Id*. (quoting *Reynolds*, 377 U.S. at 555).

of fraud votes are debased or diluted in a salient way—the way in which the majority in *Reynolds* felt was salient. We are not given an extensive analysis of the analogy. The Court only categorizes the vote dilution claim as a fear, but does not connect that fear with any justification. But where the *Purcell* Court does not give us much help, Judge Posner in his opinion extends and amplifies the analogy. Posner develops, where the Court does not, the analogy to vote dilution, citing the Court's opinion in *Purcell*, but expanding on it. It is his opinion that offers us the best defense of the idea that voters really might be disenfranchised by voter fraud, and not merely that voter fraud might cause them to harbor doubts that the election as a whole might be illegitimate. Using Posner's opinion in *Crawford*, I want to unpack the claim that voter fraud is a type of vote dilution.

1. "Both sides of the ledger"

Posner begins the substantive part of his opinion with a striking phrase, one that we should be sure we capture the correct meaning of because read one way it can be seriously misleading. Posner writes that applying a strict standard to laws that attempt to regulate the right to vote would be inappropriate in analyzing a case such as the one before the Court in *Crawford*, specifically where a law is passed in order to reduce the incidences of voter fraud. Why? Posner reasons that it is because "the right to vote is on both sides of the ledger."[97] The language of a right being on both sides of the ledger is familiar. It is familiar in the domain of the First Amendment, where the idea is that people's First Amendment rights may be implicated both when the state limits some speech, but also when the state allows some speech which could chill the speech of others (or have some other adverse impact on people's right to speak freely). Breyer has developed this claim most notably on the Court, whereas in academia, Owen Fiss has been most thoughtful in explicating the concept of a right being on both sides of the ledger.[98] Fiss has written about the right to speech being on both sides of the ledger in the context of laws regulating por-

97. Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)).

98. *See, e.g.,* Nixon, 528 U.S. at 400 (Breyer, J, concurring) (stating that First Amendment interests lie on "both sides"); *see also* STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); OWEN M. FISS, THE IRONY OF FREE SPEECH 19 (1996) ("Indeed, one way of describing this situation is simply to say that now speech appears on both sides of the equation, as a value threatened by regulation and a countervalue furthered by it.").

nography. It is helpful to review Fiss' use of "both sides" in the expression context before turning to its use in the voter fraud context.[99]

In what way is the right to free speech on "both sides of the ledger" when dealing with a law against some forms of expression? On the one hand, supposing that the state banned some kinds of extremely explicit pornography, we might say that it is limiting speech. But on the other hand, we might also think that the existence of pornography chills the speech of some women because it makes them believe that their speech is valueless and not worthy of expression. We might conclude that in considering an anti-pornography regulation, free speech is on "both sides of the ledger," because pornographers might have a right to speech, but women also have the right to express themselves without being chilled by violent and objectifying images, or risk having their speech not taken seriously. It is important to see, in unraveling this analogy, that the right to free speech, as Fiss understands it, is not implicated in the same way on both sides of the ledger.

There are two immediately relevant differences. The first is that whereas on the one side the state is limiting the speech by its actions, on the other side the action of others is limiting the speech. The state bans pornography so the pornographers have their speech limited. This is clear enough. However, Fiss also wants to say that by allowing pornography, the state might also be sending the message that women's voices do not matter and are not important. *This* too could represent an abridgement or debasement of the right to free speech, an abridgment that the state does not directly cause (as in the case of a ban on pornography) but one that it permits. The direct cause is simply the voices of others (namely, the pornographers). The second, less obvious difference is that the *kind* of value at stake on each side is different. For the pornographers, the value is simply speech. If there is a ban on pornography, they cannot sell it or promote it, etc. But with the women, who would otherwise be chilled, the free speech value is the ability to participate in a meaningful way. To be sure, women may simply be chilled and not speak, but more deeply, even if they did speak, there is a risk—with the presence of images that make out women to be objects—that others would not take their speech seriously. So Fiss is saying that good communication requires a background of equality, and since pornography hurts equality, it can also hurt speech. Fiss is explicit that this is a structural claim that he is making: he is saying that speech is not just talk, but that it requires a

99. Here I borrow from Fiss' analysis in his book Liberalism Divided, chapter four, "*Freedom and Feminism*." *See* OWEN M. FISS, LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER 67-88 (1996).

certain background structure to make that talk meaningful, to make it part of a democratic conversation.[100] Allowing pornography may permit pornographers to talk, but it may hurt the possibilities of a better and more expansive exchange of viewpoints. Fiss, in other words, is saying that the value of free speech is on both sides of the ledger, but on one side the value is primarily individual, while on the other side it is structural.[101]

2. The interests of legitimate voters

The same logic that applies in the First Amendment context applies when we look at Posner's analysis of the right to vote. On the one side, there is the individual right to vote. This is the participatory right that is implicated when the state puts up new obstacles to the right to vote. The question here is how burdensome is the regulation on the individual's right to vote? Posner offers as an example of this type of regulation, the poll tax—which in *Harper v. Virginia State Board of Elections*[102] was ruled as unjustifiably burdensome on the right to vote. Posner recognizes that a similar question is at play in this case, viz., whether requiring photo identification puts too great of a barrier in front of people who want to vote (Posner thinks clearly not, but we will get to this). On the other side, there is also the value of the right to vote. How? Posner starts by helpfully distinguishing the issue in this case from the issue in the poll tax case: there the issue was whether you could tax people in order to raise money to help pay the cost of elections.[103] Posner says that raising money to help defray costs does not implicate the right to vote in the same way that requiring people to pay a poll tax to vote does. Of course, we might wonder about this: it would certainly not be the case if the state raised money for general revenues from a poll tax. Could they not say that the right to vote was on both sides, because the money actually went towards the proper functioning of elections?

Put this quibble with Posner's analogy to one side. What Posner wants to get at by contrasting the poll tax revenue from efforts to deter voter fraud is that there is a more direct relationship between reducing voter fraud and protecting the right to vote (as opposed to the

100. *See, e.g., id*. Fiss specifically provides:

> Democracy requires that everyone have an equal chance to speak and to be heard. The trafficking provision, aimed as it is at the pornography industry in its most extreme form, should be seen as a friend rather than an enemy of democracy: an effort to establish the preconditions for free and open debate.

Id. at 87.

101. *See* FISS, *supra* note 99 at 31-46 (discussing the role of the state in establishing the preconditions for meaningful conversation, in chapter two, "Why the State?").

102. 383 U.S. 663 (1966).

103. *Crawford*, 472 F.3d at 952.

relationship between raising revenue and the right to vote). Specifically he states that "[t]he purpose of the Indiana law is to reduce voting fraud, and voting fraud impairs the right of legitimate voters to vote by diluting their votes-dilution being recognized to be an impairment of the right to vote."[104] Now, the *wrong* way to read this would be the following: voter fraud impairs the right to vote in the same way that obstructing someone's ability to register or to actually vote impairs the right to vote.[105] This is wrong, and Posner does not say this. Rather, voter fraud works indirectly by *diluting* votes, that is, by decreasing the weight a vote has, not by preventing the vote from being cast altogether. Voter fraud of a sort might prevent the vote from being counted (say if someone destroyed many ballots), but this is not the kind of fraud that is at issue in the *Crawford* or *Purcell* cases. The fraud in these cases results from people voting who are not registered to vote or who lack the proper identification. The fraud occurs through *adding* votes to the total votes cast, not by canceling any one person's vote. And it is other people who are the direct cause of this, not the state (as it would be in the case of a poll tax), although the state can certainly indirectly contribute to this by lax enforcement of voter fraud laws. This is exactly like the first difference we discussed in Fiss' scenario above.

The second difference comes when we notice that the harm is not preventing participation (as it might be in the case of new restrictions on the right to vote) but in causing dilution, and that dilution is a structural harm. It involves an analysis at a level higher than the individual's vote. Dilution does not stop any one individual from voting, indeed, a condition of having your vote diluted is that you actually have voted. Dilution works instead by making the votes of people who have voted less meaningful, much like the speech of pornographers might make the speech of women seem less meaningful. But if this is the case, then we cannot look simply at the right to vote that is implicated by preventing voter fraud as purely an individual right. That is because the right is, in essence, about how one can meaningfully aggregate one's vote with other like-minded individuals. In the same way that the right to speak for women as a group could be hurt, not by direct state prohibition, but by the acts of others (which chills the speech of women), so too can voter fraud hurt the legitimate voters as

104. *Id.*

105. This is the mistake "Publius" falls into. *See* Publius, *Securing the Integrity of American Elections: The Need for Change*, 9 Tex. Rev. L. & Pol. 277, 278 (2005) ("Every vote that is stolen through fraud disenfranchises a voter who has cast a legitimate ballot in the same way that an individual who is eligible to vote is disenfranchised when he is kept out of a poll or is somehow otherwise prevented from casting a ballot."). Publius does not offer any analysis of this point, only assertions.

a group, not by the state directly preventing them from voting, but by the fraudulent acts of individuals. In trying to prevent fraud, we are trying to protect the conditions that would make every legitimate vote a meaningful one and not be watered down by the existence of fraudulent votes. Again, this analysis of the right to vote matches almost exactly with Fiss' analysis of the right to free speech.

What deserves our attention (and here we depart from the Fiss analogy and move more deeply into the voting context) is that the claim of dilution picks out *legitimate voters* as a salient group, explicitly so in both the *Purcell* and *Crawford* opinions.[106] Just as the one person one vote claims picked out urban voters as a meaningful group, and the Voting Rights Act made blacks a relevant interest group, so too does the voting fraud claim say that legitimate voters *as a group* have the right to have their votes not be diluted by the votes of fraudulent voters. It is their votes that are diluted. Legitimate voters share an interest in grouping together their votes. When voters who do not have the right identification vote, they make this grouping less meaningful. Suppose I legitimately vote for the winning candidate, but there is a fraudulent vote for the loser. Although my vote has not been canceled (it is still counted), the weight of my vote is diminished because the margin of victory for the winner is no longer the same. In a similar way, my vote is made less meaningful by a fraudulent vote for the winner when I voted for the losing candidate. Again, my grouping with other legitimate voters-for-the-loser *means* less, compared to the grouping of fraudulent-plus-legitimate voters for the winner. According to this line of thought, stopping fraud is an interest that the class of legitimate voters have as a whole—and notably, it is an interest they have together regardless of if they have voted for different candidates (I return to this shortly). Moreover, it is an interest that can be incrementally affected because each illegitimate vote harms the group of legitimate voters a little more. It makes their vote have less of an impact on the outcome of the election.

It pays to emphasize once more how this is a structural concern, not merely an individual concern (although it might misleadingly be phrased in that way). When additional fraudulent voters vote, my individual vote is not ruined, because it is still counted. Instead, dilution affects how I am able to group my vote with others: *what our vote means collectively*. At the limit, fraudulent voters will overwhelm legitimate voters, thus creating a fraudulent election. The class of legitimate voters (those in the majority and those in the minority alike)

106. *See Purcell*, 127 S. Ct. at 7 ("Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised."); *Crawford*, 472 F.3d at 952 (stating "voting fraud impairs the right of legitimate voters to vote by diluting their votes").

will have been prevented from collectively producing a legitimate election. Now, the group interest here is tricky because it is not a group interest in having a particular candidate elected, as it might be in other contexts; instead, it is an interest in having a legitimate election. Under this line of thought, having a legitimate election is not something we can do individually; instead, it is something we do together *qua* voters who have the right identification and who are legitimately registered to vote. Each time someone fraudulently votes, that interest is impaired by making our legitimate votes have less of an impact on the final election tally. We need to be careful, then, when reading the Court's opinion in *Purcell* when the Court emphasizes the individual voter's fear that the voter may be disenfranchised by vote dilution.[107] The interest is not that the voter's vote will not count, but that it will not count in the same *way*—it will not be part of an election that is completely legitimate. The meaning of the vote for legitimate voters will get garbled by the votes of voters who are not registered or who vote without the proper identification.

Let me conclude this Part by returning in a more general way to the Court's opinion in *Purcell*. I have tried, in a way, to defend the Court from the criticism that the Court is simply defending the state's interest in preventing citizens from having certain *feelings* towards the electoral process—lack of confidence, fear of corruption, feelings of disenfranchisement. I have tried to show that, underneath these feelings, there may be real harms that would prove the feelings warranted. The state would then have an interest, not in correcting those feelings, but in preventing the types of things that would give rise to those feelings. The state has an interest in preventing law-breaking in general; however, this interest seemed too generic to be exactly what the Court was worried about. Nor did it seem that the Court was interested in preventing *massive* fraud, although I cited this as an interest the state may have, the Court would certainly not want it to be the case that the election was so pervaded by fraud that there was a serious concern that the wrong candidate had been elected. But the Court seemed to want a state interest in electoral integrity that fell short of outcome determinative voter fraud—and we found this in the notion of vote dilution. The state had an interest in protecting the weight of legitimate voters' votes from dilution by fraudulent votes. This interest exists prior to the existence of massive voter fraud. By looking at Posner's opinion in *Crawford*, I have tried to show that there at least is a colorable claim to an interest here—an interest that we might think is similar to the interest against dilution that is present in the *Reynolds* and *Baker* opinions, as well as the Voting Rights

107. *Purcell*, 127 S. Ct. at 7.

Act cases. What remains to be seen is whether this interest stands up to scrutiny. I conclude that it does not. The interest of legitimate voters, it turns out, is a much narrower and less defensible one than is present in other cases of vote dilution.

IV. BALANCING VOTER FRAUD AND VOTER DETERRENCE

In the previous Part, I was concerned mostly with the state's interest in passing measures that would restrict access to the right to vote in order to deter voter fraud. I was largely uncritical of that defense, wanting mostly to present it in the strongest form possible, especially where this meant connecting up the analysis in the *Purcell* and *Crawford* opinions with the latest scholarship in election law. I wanted to show that if the Court errs in these cases, it is not for want of speaking a common language with the leading scholarship on the subject; indeed, it speaks in terms of corruption and dilution, terms familiar to anyone who works in the area of election law, where scholars have been trying to hammer out the meaning of these terms over the past two decades. I also did not discuss, except in passing, the interest on the other side of the ledger (as Posner put it); the possible participatory interest in those who might otherwise vote were it not for additional restrictions on the right to vote. In this Part, I try to remedy these two omissions. In the first section, I discuss—by way of an analogy with a case where there are mistakes in tabulating the results of an election—the interest of the state in preventing vote dilution among legitimate voters. I find that this interest is a minor one, except in the rare case where fraud might end up tipping the balance of an election. In the end, there is no real difference between the state's interest in preventing a few miscounts in tabulation, and the state's interest in preventing a few fraudulent votes. Because the interest is small in the former case, it is likewise small in the latter case as well.

In the second and third sections, I defend the interest in voters participating in an election, even at the risk of some fraud. In the second section, I try to distance my analysis from a consideration of whether voter regulations unfairly burden some groups and not others (such as the poor, minorities, or women). I do not think this is the main question—at least it is not the one I am interested in. The key question for me is where we set the baseline for voters. Generally, should the state be worried more about excluding voters who do not have the necessary identification, or about including them? Given the small interest in preventing fraud, I find no good reason for the state not to try to cast its net as wide as possible, that is, to include as many voters as it can, subject to reasonable qualifications. In the third sec-

tion, I back up and assess the reasoning in both the *Purcell* and *Crawford* opinions to see how the courts might have erred. Ironically, their error was precisely in focusing too much on worries about corruption, fraud, and vote dilution and not enough on the more basic right of political participation—that is, the individual's right to vote. To the extent that the courts were following the latest scholarship in the law of democracy, their decisions show the limitations of that type of scholarship, at least in analyzing voter fraud cases. The good news, however, is that the courts are much better suited to apply the value of participation in these cases, a value that speaks against passing additional restrictions on the right to vote, even if these only deter a few voters from voting. This last point goes directly to the question of judicial competence and voter fraud, which I deal with in the final section of this Part.

A. Voter Fraud and Errors in Tabulation

Of the many strands of election scholarship and controversy spawned by *Bush v. Gore*,[108] one of the more prominent strands was election administration.[109] How important was it that everyone not only has the right to vote, some asked, but to have an equal chance to have their vote counted?[110] Several lawsuits were brought against states that had disparities in voter technology—some counties had advanced technology that allowed the votes to be counted even if the marks were not clear or that informed voters if they had not voted in a particular race, while other counties did not.[111] These cases pressed the question, did the result in *Bush* not require that each county have similar standards? But perhaps obscured in the debate over equality was the obvious fact that no voting technology is absolutely perfect. We can try to attain perfection, but will probably fail to reach it (this is why it is more reasonable to go for equality in technology than for perfect technology, should it exist). In other words, there seems to be a tolerable amount of error in tabulating votes that we feel is inevitable, or that we are willing to live with. We do not say that *all* expense should be taken to reduce mistakes in tabulating votes; we say that some expense should be made, and we should aim for equality. How-

108. 531 U.S. 98, 109 (2000).

109. *See, e.g.,* Daniel P. Tokaji, *The Paperless Chase: Electronic Voting and Democratic Values*, 73 Fordham L. Rev. 1711 (2005) (discussing problems in election administration); Daniel P. Tokaji, *Leave it to the Lower Courts: On Judicial Intervention in Election Administration*, 68 Ohio St. L.J. 1065 (2007) (updating his earlier work).

110. *See* Cass R. Sunstein, *The Equal Chance to Have One's Vote Count*, 21 Law & Philosophy 121 (2002) (interpreting *Bush v. Gore*'s equal protection argument).

111. See the discussion of cases in Chad Flanders, Comment, *Bush v. Gore and the Uses of "Limiting,"* 116 Yale L.J. 1159 (2007).

ever, perfection is not required, as long as the standards do not fall radically short of acceptable.

This acceptance shows something significant about the state's interest in the overall integrity of the election. Mistakes in tabulation also implicate the state's interest in having an election process that has integrity. Furthermore, mistakes in tabulation can result in someone's vote going uncounted. From one point of view, this is a clear denial of the right to vote. But it is not likely that a lawsuit brought by someone who had his vote go uncounted—supposing a person could discover such a thing—would get very far.[112] Why? Again, it is because we understand that perfection is not a reasonable standard to expect the state to aspire to. Also, and getting closer to the subject of this Essay, it may be the case that some votes that were not clearly punched will end up getting counted even though the person did not follow the instructions on how to punch the ballot—so in a way, that vote will be illegitimately counted, and it will dilute the votes of those who did cleanly punch their ballot. Yet here as well, I imagine our intuition is that this is acceptable. We do not demand perfection. Sometimes there are just mistakes, and mistakes are a part of life. Not all errors in administration give rise to a cause of action.[113]

However, there is a big difference when mistakes rise to the level of being what I will call (for lack of a better term) *massive* or outcome determinative errors. When there is a massive amount of errors, it calls into question whether the right person has won the election. Suppose that there is so much error that no one can be certain that the election result is a product of the votes cast or of an error in the machinery. Then this rises above the level of a mere mistake that we can live with and suggests that there should be another election. Relatedly, the mistake may reach the level of a serious state interest, even though it is not massive, but because the election is close and the mistake is potentially outcome determinative (this might have been the case in *Bush v. Gore*). But this will likely be rare. Most elections do not turn on margin-of-error numbers and so there is no need to be absolutely sure that there are no mistakes.[114] There is just the continuing interest in preventing *massive* levels of mistakes. For it is here that the state has an indisputable interest in the integrity of the election—and in the most basic way—the state wants to be sure that

112. *See, e.g.,* Gamza v. Aguirre, 619 F.2d 449 (5th Cir. 1980) (denying voters who were the victim of tabulation errors any relief).

113. *But see infra* note 146.

114. *See* Fabrice Lehoucq, *Electoral Fraud: Causes, Types, and Consequences*, 6 ANN. REV. POL. SCI. 233, 251 (2003) ("The colorful history of vote fabrication probably exaggerates its role in determining election outcomes.").

the electoral process has given us the right candidate, i.e., the candidate who received the most votes. An election certainly lacks integrity if it does not fulfill its most basic mission—electing the candidate with the most legitimate votes—however else it might lack integrity

The state's interest in preventing fraud is *almost exactly similar* to the state's interest in preventing mistakes in vote tabulation. Of course, there is one large exception, and that is that voter fraud involves breaking the law. I will consider this difference, but the main point is that insofar as we have an interest in electoral integrity and a legitimate election, that interest is just as much a compromise in that integrity as a tabulation error. Or to put it another way, insofar as the group of legitimate voters *qua* legitimate voters has an interest in elections being run without any mistakes in the count that would affect the weight and value of their vote, that interest is identical in the fraud and mistake cases. So if there is no interest that is seriously damaged by minor error, then there is likewise no interest that is seriously damaged by low level fraud. The trouble comes, I think, in treating "legitimate voters" as a group that can be harmed by incremental dilution. They are not traditionally thought of as sharing an "interest." Again, those who are "legitimate voters" can include voters on *both* sides, those who vote for a candidate and those who vote against a candidate.[115] So it is not as if a candidate of choice—to use the phrase from the Voting Rights Act line of cases—is something that legitimate voters are being denied. The harm is not that one's vote is being given less weight in support of a *candidate*; one's vote is being given less weight in support of the election being legitimate. But if legitimacy is compatible with some low level dilution in the case of error—and there is no reason why minor tabulation error should be seen as compromising the legitimacy of an election—then legitimacy should also be compatible with some low level fraud, that is, so long as the fraud does not tip the balance of an election, which would obviously make the election illegitimate.

To put the point simply, it does not seem to be the case that every single instance of vote dilution caused by additional fraudulent votes makes each voter's vote *less of a part* of a legitimate election. This is

115. We might argue that if a group is as large as the class of legitimate voters is, we cease to have an interest in the group at all and are better off considering it as a "structural value." I am not sure about this. On the one hand, it seems better, for clarity's sake, just to cease calling it dilution when the "dilution" threatens such a large class. It is better to see it based on, as Heather Gerken suggests, "a structural principle regarding the way democracy should function." Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1677, 1726-27 (2001). On the other hand, dilution itself is a structural principle, and it is not clear that the very idea of dilution forbids referring to a group as large and as diverse as "legitimate voters." *Id.* In the end, I am not sure it matters whether we call this a case of vote dilution or not.

compatible with saying that there is a tipping point where vote dilution becomes so bad that the election becomes illegitimate. But the election is not illegitimate before then. My claim, then, is not that legitimate voters cannot be understood as a group, and it is not even that we cannot understand their votes as being diluted. Rather, the problem is that their interest—the legitimacy and the integrity of an election—is not the kind of thing that vote dilution really harms, except in cases where there is so much fraud that it is outcome determinative.

But what about the key difference between fraud and mistake, namely that fraud is breaking the law and mistake is not? We should begin by noting two things about the crime of fraud in the instances of fraud contemplated by the courts in both *Purcell* and *Crawford*. First, the fraud is never the type that *cancels* a vote, that is, makes it the case that a vote is not counted. We are not talking about the type of fraud where many votes are thrown out or destroyed. If we were, then we might have a case where the basic *participatory* interest of the individual was being violated—and on this ground the individual might have a complaint (though again, it is not clear whether he would get relief for this complaint in a way that would allow him to vote again). But here we are talking about votes that are cast *in addition* to the votes that have been cast legitimately. That is, in these cases, those who pass additional restrictions on the right to vote are worried about extra voters (most notably, immigrants) who might fraudulently vote. So the harm in these cases is always one of dilution and not one of cancellation.

This point bears emphasis. Cancellation seems to be a much more direct harm than dilution, especially if—as in this case—the harm of dilution is really quite hard to specify when there are only a few instances of fraud. Further, it is probably not always the case that the fraud perpetrated by illegal voters is always intentional. Some people may be allowed to vote even if they do not have the proper identification. In other words, they may be given a pass by poll workers or by those who are registering them to vote. In cases like these, the line between fraud (on the part of the ineligible voter) and mistake (on the part of the poll worker) becomes fuzzy.

But, to clarify matters, let us just consider the case of intentional voter fraud—where someone deliberately adds his vote to the overall tally, knowing that his vote is illegitimate. What is the harm here? I believe there is harm, but it is only the generic harm of someone breaking the law without necessarily causing a tangible harm to anybody. It is analogous to the case of littering where this does not really appreciably damage the environment; or parking illegally late at night

when no one is around. There is a real harm here: it is a question of fairness to others, as in the question, why should I have to obey the law if he can get away with it? It is also a matter of establishing the authority of the state: we should not let a person get away with breaking the law with impunity. These are the kinds of feelings and concerns we might have when someone votes illegally. And I think there is a perfectly sound remedy to them, and that is to increase the prosecution of individual acts of voter fraud, or to raise the penalty for voter fraud. These especially target the *individual* act of wrongdoing.

Of course, if parking illegally was to become a very large problem, or littering was widespread, more general, prophylactic measures might be necessary; we might have to restrict parking to certain times and certain areas, or we might have to limit people's ability to take food and drink containers past a certain point (for fear that they might discard them). But this is exactly analogous to the case of voting, where if fraud is massive, then we might be justified in passing laws that are broad and which would target the problem in a broad-brush manner. But in elections where there is no reason to suspect that there is massive fraud, measures that go after individual acts of fraud are more likely to be appropriate—because there is no real structural harm when there is low-level fraud.[116]

At this point it might be worth pointing out that we can see how statistics *will* matter in settling the debate on voter fraud. We will want to know if there is massive voter fraud in order to see if the interest in electoral integrity is at stake. And in some (rare) cases, we will want to know whether fraud might have determined the outcome of the election. So statistics will matter, but we should not be misled by studies and statistics to somehow misrepresent the interests on either side of the "ledger." In fact, the interest on the vote dilution side of the ledger is not an interest that is hurt one "diluted" vote at a time; it is only hurt in those circumstances where voter fraud may make the election not one that elects the candidate with the most legitimate votes. So there is still a role for studies; however, it is a modest role. Because once we get a better sense of the interest implicated by voter fraud, and what sorts of steps the state is justified in taking to combat the fraud, we see that studies will only be helpful at the margin. Apart from cases of outcome determinative fraud, the state's interest in preventing fraud is the same as its interest in preventing littering (to this extent, Posner's analogy is apt): it is a generic interest in preventing people from unfairly breaking the law. Posner's analogy is

116. In addition, when we prosecute individual acts of fraud, we do not risk violating the participatory rights of others by adopting broad-based measures that might deter voters from voting.

apt in another way, the decision to spend more resources on preventing fraud, when this fraud falls short of being massive, should be looked at as mainly an administrative question and not as a *rights* question.

B. The Question of Unfair Burdening

Perhaps, however, I have been unfair to Posner's analogy to littering. I concluded, in the last section, that the state's interest in preventing voter fraud was similar to its interest in preventing littering (though certainly one might think the offense of voter fraud is intrinsically worse than littering, still the generic interest in preventing law-breaking is the same). But Posner says that with crimes that are hard to detect or underprosecuted, you can do one of two things: you can increase the penalty, or you can take broad-based measures. Posner, that is, says that the difficulty of detecting fraud underdetermines the options for dealing with the fraud. Posner says this because he feels that the harm that could result from taking a broad-based measure would be rather minimal. Again, he bases this (I think wrongly) on the nature of the plaintiff class. However, the point still holds that in the absence of a convincing harm that might result from a photo identification law, we might say that there is little downside in taking an overly aggressive step to reduce voter fraud. To be sure, the state's interest in preventing minor amounts of voter fraud is small, but it may have a symbolic importance (again, consider the *Purcell* Court's concern for voters' feelings) and if the interest on the other side is quite small, what is the problem?

So we should take up the much deferred question of the interest on the *other* side of the ledger: the interest of the individual voter who would vote but for the photo identification requirement. Posner again frames this interest as quite small—and revealingly, he reasons that voters who do not vote because of the new requirements would be voluntarily disenfranchising themselves.[117] Of course, this is one way to frame it, and Posner is led to frame it this way most likely because he feels that the burden placed by a photo requirement is so minimal. In his opinion, Posner questions how one could function in ordinary life without having a photo identification card. One could not board a plane, let alone get into many buildings (including a federal courtroom) without some form of photo identification.[118] How hard is it to get one, first of all, and even bracketing the relative ease of getting

117. Crawford v. Marion County Election Bd., 472 F.3d 949, 953 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)).

118. *Crawford*, 472 F.3d at 950-51.

photo identification, might it be necessary for other parts of life as well? Why is it only in voting that it becomes suspicious that photo identification is required? If potential voters, *given all this*, do not get photo identification or do not bother to bring it to the polls, then there is not much excuse for them—they have chosen not to vote, they have not had their vote taken away from them. They have voluntarily disenfranchised themselves. It is important to see, then, that Posner not only has a theory of how many voters might be harmed by new requirements but also about the character of that harm. Given Posner's baseline, the right to vote is only modestly implicated on this side of the ledger; those who chose not to vote have themselves, and not the state, to blame.

One of the most common responses to Posner is to say that the problem with voter identification laws is that the burden of seeking out and securing photo identification or proof of citizenship will fall heavily on certain groups—especially minorities, women and the poor. As Judge Diane P. Wood stated pointedly in her dissent to the denial of rehearing *Crawford en banc*, "this court should not ignore this country's history. Unfortunately, voting regulations have been used in the not so-distance past for discriminatory reasons. The law challenged in this case will harm an identifiable and often-marginalized group of voters to some undetermined degree."[119] The popular media reaction to new voter requirements has been even more explicit than Judge Wood's dissent. Such regulations, the charge goes, are obviously racist attempts to prevent minorities, especially black or Hispanic voters, from voting in elections.[120] We might even see such restrictions second coming of the poll tax, another method used to discriminate against and intimidate certain groups of voters. How should we consider such charges? Initially, it may be simply that charity prevents us from ascribing them to the supporters of such voter identification laws. There is at least a colorable argument, the anti-fraud argument, that can be used to defend such laws. In other words, even if racism is the real and sinister motivation behind such laws, racism may not be the only way such laws can be justified. If this is so, then we need to consider the non-racist arguments on their own terms, because these arguments cannot be defeated through speculations (however persuasive) about the bad intentions of the sponsors

119. Crawford v. Marion County Election Bd., 484 F.3d 436, 439 (7th Cir. 2007), *cert. granted*, 128 S. Ct. 33 (2007) (consolidated with Ind. Democratic Party v. Rokita, 128 S. Ct. 34 (2007)) (Wood, J., dissenting).

120. *See, e.g.,* John B. Judis, *Can the GOP Convince Blacks Not to Vote?*, THE NEW REPUBLIC, Nov. 11, 2002 ("The second prong of this year's GOP efforts to suppress the minority vote has been widespread allegations of voter fraud in minority communities.").

of such legislations.[121] With this caveat in mind, let me make two main points about the idea that new voter requirements are suspect because the burden they place falls disproportionately on some groups.

The first point is about the motivation of legislatures who pass such legislation. The standard in these cases is not merely that such laws will have the effect of disproportionately burdening some groups (minorities, the poor) but that the laws passed were *intended* to so burden some groups rather than others. This is a high standard, especially given that (as glossed in the previous paragraph) there is *some* case to be made that voter fraud is a problem. There are questions of proof that dog any search into legislative intent.[122]

But there is actually a deeper problem, which is the reverse of this, it is that we *can* discern legislative intent in the case of these laws, and it is often right there on the surface. The intent is to discriminate, but not necessarily against minorities and women and the poor *qua* minorities, women and the poor, but against voters who would vote Democratic (who happen to be minorities, women, and the poor). Judge Evans, dissenting in the original *Crawford* opinion, made this point in the opening of his dissent. "The Indiana voter photo ID law is a not-too-thinly veiled attempt to discourage election-day turnout by certain folks believed to skew Democratic."[123] The problem with intent—if there is a problem with intent—is not first and foremost a problem with *racist* intent, but probably and more likely with *partisan* intent.[124] This presents a different problem than the problem of racist intent.

Whatever we think about the propriety of passing laws with partisan intent, it seems clear that the wrongness in the case of partisan intent is less than passing a clearly and intentionally racist or sexist law. Partisanship in politics, even in election law politics, is familiar, and it is (to say the least) debatable whether it can or should be wholly eliminated. The Supreme Court's recent split in *Vieth v. Jubiler*[125] shows not only how difficult it is to set standards on what amount of partisanship is permissible in setting rules and regulations for elec-

121. *Cf.* Peter Beinart, *Easy Does It*, THE NEW REPUBLIC, Nov. 8, 2004 (discussing conservative fears of voter fraud as linked to a philosophy that maintains conservatives "don't think higher turnout is necessarily a good thing").

122. *See* Richard L. Hasen, *Bad Legislative Intent*, 2006 WIS. L. REV. 843, 848-49 (declaring "bad legislative intent is sometimes going to be difficult to prove. Legislators will often have an incentive to hide incumbency or party-protecting intent."). In his article, Hasen suggests moving to a test that does not centrally look at intent. *Id.* at 843-95.

123. *Crawford*, 472 F.3d at 954 (Evans, J., dissenting).

124. I am indebted to Joey Fishkin for discussion on this point.

125. 541 U.S. 267 (2004).

tions, but also how difficult it is to identify precisely the wrong of partisanship.[126] This is even clearer in the majority opinion in *Hunt v. Cromartie*,[127] where partisanship is even presented as a possible defense to the charge of racial gerrymandering; it is okay to gerrymander, so long as it was done for political and not racial advantage.[128] I do not, by these short remarks, mean to imply that there is no problem with laws passed with evident partisan attempt, in fact far from it. I merely mean that in the case of these laws, where partisan intent is manifest, it is a much harder thing to prove that such intent is *prima facie* legitimate. Indeed, if we are to stick to the constitutional standards as the current Court has laid them out, partisan intent is not so much a problem as an inevitability, and even a defense.

But put these points—which deal with intent, racist, partisan or otherwise—in the background. The question of intention is at most a secondary one; clearly, the first point we would have to deal with in responding to Posner is *to prove that there is a burden at all*. Posner's claim, after all, is that no one is burdened by these laws, or if there is a burden, it is a reasonable one. A burden that is not a burden is *ipso facto* not a burden that is disproportionally placed on any person or group. It is just not a burden in the first place, which is exactly what Posner is claiming about photo identification laws. What we have, says Posner, are voters who in the face of a perfectly reasonable restriction on the exercise of their right to vote, chose not to vote. They decide, in Posner's colorful recharacterization, to say, "[w]hat the hell," and stay home.[129] In Posner's estimation, they are not burdened. Therefore laws that pass these reasonable requirements are not discriminatory burdens, because they are not burdens at all.

What we need to do is to take a step back. Before we show or presume that the laws are discriminatory, in that they evidence racist, sexist, or partisan intent, we need to show that the laws are in fact burdens. This means abstracting, for the moment, from the question of which *group* the laws burden; it means stepping back and asking, in what ways do these laws burden the right to participation more generally? Only after we show this (if we can show it), can we look to see whether the burden is heavier on some particular groups rather than

126. Vieth v. Jubelirer, 541 U.S. 267, 286 (2004).

127. 526 U.S. 541 (1999).

128. Hunt v. Cromartie, 526 U.S. 541, 551 (1999) (declaring "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact"). Could not an analogous point be made about efforts to reduce voter fraud?

129. *Crawford*, 472 F.3d at 951 ("So some people who have not bothered to obtain a photo ID will not bother to do so just to be allowed to vote, and a few who have a photo ID but forget to bring it to the polling place will say forget it and not vote, rather than go home and get the ID and return to the polling place.").

others, and hence is not merely a burdensome law, but also a discriminatory one. It is this question of establishing the *burden* of new voting requirements, such as photo identification, that occupies me in the next sections of this Part. It leads, I think, quite naturally, into a larger discussion of why participation is a value, that is to say, why participation that is not unreasonably burdensome is a goal we should try to achieve.

C. Setting the Baseline for Voter Deterrence

If we turn from particular groups of voters to voters in general, the problem can be characterized as one of choosing the right baseline: we need to set the baseline against which we measure efforts to make it easier or harder for voters to actually vote. So we might start with the baseline of expecting voters to have photo identification available and ready to present at the polls. With this baseline, a photo identification requirement might not seem all that unreasonable, because our governing expectation is that voters should have their identification ready. But we can imagine a different baseline which says that the state should not require voters to have photo identification. Here, requiring photo identification is presumptively unreasonable, because what we expect of voters is that they only have registered to vote in time for the election, whether or not they bring photo identification with them to their polling places on election day. Deciding whether a certain requirement is unreasonable depends on which baseline we start out with, because that baseline will tell what is reasonable or unreasonable to expect of voters.

How do we go about choosing the right baseline? One way of analyzing this question is to simply look at the costs of not having those additional obstacles. If the argument of the first section was persuasive, then the cost is not very great to the legitimacy of the election if there is *some* fraud of the sort new photo identification laws are designed to prevent. By contrast, if even some voters are deterred from voting because of new regulations we might think that this is something bad, depending on how highly we value widespread participation in an election. Spencer Overton, as I alluded to in the first Part of my Essay, has already defended the value of widespread participation. Indeed, Overton makes a good case that electoral legitimacy consists of having as many people as are eligible (under reasonable qualification standards) vote.[130] So we might say, in this regard, that "electoral integrity lies on both sides of the equation"—though we should add that in fact that each increase in participation does increase incre-

130. Spencer Overton, *Voter Identification*, 105 Mich. L. Rev. 631, 657-58 (2007).

mentally the legitimacy of the election. As I have tried to show, this is not the case with fraud, where only massive fraud (or outcome determinative fraud) should make us question the legitimacy of the election; illegitimacy in terms of vote dilution due to fraud is not scalar, that is, it does not increase as fraud increases.

But as I sketch in the next section, the structural interest—the interest in legitimacy in terms of securing widespread participation—is not the only, and indeed not the primary value that is at stake with new voter identification laws. There is the basic value of individual participation, and it is using this metric that we have to fix the baseline. Should we try and have the greatest participation possible? If we had this as our baseline, it might be too lax, because then we would have no regulations *at all* regarding registration and might simply take it on voters' own honor that they were citizens, of voting age, etc. Certainly the state might have some interest in preventing this, because if we had no restrictions on voting, the risk of massive fraud would be too high. On the other side, we might have a baseline of *no* voter fraud. This, however, has its own problems, not only in terms of the resources it would take, but also in terms of the fear that it might deter many voters and also cause some voters to be rejected accidentally. It seems clear that the baseline should be fixed somewhere in between these two extremes—both so that we would not have just *anyone* voting, nor would we have requirements that were so draconian that the requirements ended up causing a large decrease in turnout. How does a new requirement for photo identification, such as the ones at issue in the *Purcell* and *Crawford* cases, fit along this spectrum? There seem to be at least three types of voters that might have their participation limited or reduced by such a law, only one type, I think, has a truly legitimate complaint—one that we should be concerned about when passing new laws that place new restrictions on the right to vote.

The first group is those identified by the *Purcell* Court. These are those voters who might be accidentally denied the ability to vote based on the misunderstanding of polling place workers.[131] The Court appears to take it as a given that with any new law passed, there will be errors in application and that the state is responsible for these in some sense. However, there are two things we should note about this group. On the one hand, this group is in fact seriously wronged: they have their ability to vote taken away from them by poll workers who

131. Purcell v. Gonzalez, 127 S. Ct. 5, 7 (2006) (per curiam) ("Although the likely effects of Proposition 200 are much debated, the possibility that qualified voters might be turned away from the polls would caution any district judge to give careful consideration to the plaintiffs' challenges.").

mistakenly think that they should not vote. But by hypothesis, these voters *did* have the right identification. Here, the wrong can seem rather serious to the individual voters who suffer this exclusion. They have been blocked from exercising their right to vote even though they were qualified under the new laws and requirements. On the other hand, it is not obvious—and the Court does not really provide much support for its assumption here—that the state really should be responsible for the voter not being able to vote. If the exclusion was *intentional*, then the Court is right that this is a real problem.

We have no reason to think that it is intentional, however. And if the exclusion was merely the result of a poll worker's innocent mistake, then while this is unfortunate, this probably does not represent that serious of a harm. What is surprising in all this is how aggressive the Court seems to be in encouraging widespread participation, so much so that the Court ascribes even the possibility of mistake to the state, as if the state should be responsible for mistakes made in administering a law *in the same way* that it should be worried about discriminatory treatment of voters at polling places. In the end, I think that this ascription of responsibility is a stretch. The state should try to limit the number of people excluded in this way; however, in exactly the same way, the state should try to minimize the number of tabulation errors.

If those who are mistakenly rejected did have all the identification they needed, we might see a group at the other extreme who did not have the new identification and who know that this is needed, but who do not bother to get it. This seems to be the group of people that Posner targeted in the *Crawford* opinion; indeed, he seems to believe that these are the only people who are at stake on the other side of the ledger. These are the people who say "what the hell" and do not bother to take the reasonable steps to get photo identification. Specifically, these are the people that Posner claims have disenfranchised themselves. Do these people have a legitimate complaint that they have been disenfranchised, that they have been denied the right to participate? It seems that this complaint would be weak, at best. Those who choose not to take steps to get the right documents, when they have the time and opportunity, have chosen not to vote. Again, the baseline should not be set so that *everyone* should be able to participate at no cost to them (although perhaps an argument can be made to this effect[132]). The idea is that for these people, the new re-

132. Although one might imagine making voting compulsory, so that the baseline would then be that *all* should participate–because all must. *See* Note, *The Case for Compulsory Voting in the United States*, 121 HARV. L. REV. 591 (2007). I am grateful to Bruce Ackerman for pressing me on this point.

quirements can be complied with at little cost, and yet this group of voters does not comply with them. If we accept this hypothesis for this group of voters, their participatory interest is small. Indeed, they are exercising their right *not* to participate in an election, a right which is guaranteed in all systems where participation in an election is not compulsory.

But there is another group between those who have the identification but poll workers mistakenly deny them the right to vote, and those who do not have the identification and who do not bother to take the reasonable steps necessary to obtain proper identification. That third group consists of those who *reasonably* cannot get the necessary identification and who but for that additional identification are unable to vote. So consider a member of this group who is a citizen, who is registered to vote, but is unable to vote in the next election because the individual either has reasonably been unaware of the new requirements or is aware of the requirements but cannot get the necessary identification in time (due to bureaucratic delays, etc.). We might imagine even that this person is turned away legitimately from the polls and not due to a mistake. But we might still think that this person has been disenfranchised, for this person by hypothesis had all the right underlying qualifications to be able to vote, but simply lacked one piece of identification that had as its function merely to *confirm* the fact that the person was qualified to vote. In Edward Still's nice phrase, this person is an "undocumented citizen"—a citizen who is eligible to vote but for the lack of correct document or documents.[133] Such a person is different, I think, than a member of the class that Judge Posner identified. For his use of the idea that some people voluntarily disenfranchise themselves does not contemplate those who do not wish to be unable to vote, and who are reasonably unaware of the new requirements, or reasonably cannot comply with them (even though, again, they would be qualified but for the missing document). The people in this final group do seem to have a participatory right that is being denied and which the state should consider when it passes new laws that put additional requirements on a person's ability to vote.

Here again, however, we should return to the question that in some form or another has structured this Essay: will it not be important to know *how* many voters will be affected in this way, that is, how many there are of the type that is reasonably justified in not having

133. *See, e.g.,* THE BRENNAN CENTER FOR JUSTICE AT N.Y.U. SCH. OF LAW, CITIZENS WITHOUT PROOF: A SURVEY OF AMERICANS' POSSESSION OF DOCUMENTARY PROOF OF CITIZENSHIP AND PHOTO IDENTIFICATION, VOTING RIGHTS AND ELECTIONS SERIES 3 (2006), http://www.brennancenter.org/dynamic/subpages/download_file_39242.pdf (noting that millions of American citizens lack ready access to "documentary proof of citizenship").

the required photo identification? The answer to this is that, of course, it will be helpful. But we need to remind ourselves of the concerns in Part II. It will be difficult to discover those who are members of the class of voters who *had* the underlying qualifications, but not only did not have the photo identification but could not have reasonably been expected to, given what they knew about the new law and what they were able to do in response to it. Moreover, as I argue in the next section, it is not clear that we will need the statistical information (such as we are able to acquire) if we know what values are at stake on "each side of the ledger." So this points to an additional reason why we might not need statistics; not only may statistics be hard to acquire, once we understand the values at stake, numbers may be *irrelevant*. That is, it could be that understanding the low value in deterring low levels of fraud and the high value we might assign to participation and importantly each person's ability to participate, it may be easy to decide the question about voter fraud. I expand upon why we should rate this value highly in the concluding Parts of my Essay. It is here where I make my main practical contribution, which is that analyzing voter fraud cases simply as matters of individual rights (specifically, the individual right to cast a ballot) should be the preferred way for courts to approach voter fraud. If courts follow this path, courts will largely be spared having to interpret statistics or make theoretical arguments about the proper structure of a democracy.

D. The Value of Participation

In Part II of this Essay, I argued that statistics may not be decisive in voter fraud cases. That is, it may not be enough to say that there are only small amounts of fraud, or few voters are actually deterred from the polls because of new voter registration or identification requirements. We have to look at the values involved on each side. In Part III, I tried to show how courts, in discussing voter fraud, would use terms and concepts from the scholarship surrounding the law of democracy, such as structural values like corruption and vote dilution when talking about the state's interest in regulating the vote. Finally, in this Part, I have argued that when we look at the values involved, there is a strong case to be made against additional restrictions on the right to vote. The upshot of the discussion in this section so far is that we can analyze the voter fraud cases pretty comprehensively without relying on statistics. To be sure, statistics will be helpful, but only at the margins—only when there is fraud (or mistake) to the extent that there is a real question whether the election has resulted in the selection of the person with the most legitimate votes. In

other words, statistics may be important only in rare cases, and in the absence of good statistics, we do not have to use bad statistics, but instead perhaps simply be more clear in our normative argumentation. When we are clear, we see the interest in vote dilution to be rather minimal, and the interest in participation perhaps much larger. Importantly, when an individual is denied his or her right to participate in the vote and this is either deliberate or foreseeable by the state, this is a real harm. Moreover, it is a real harm even if it happens to one person. For that one person, the denial of the right to vote is total. By comparison, if one person's vote is diluted, that is a relatively minor harm for the individual (recall that the goal of an undiluted vote only makes sense when votes are aggregated). In the case of voter fraud, I do not think it is a harm at all, because the relative group that would benefit from being able to aggregate its votes—legitimate voters—only has an overall interest in a legitimate election. But as I have tried to urge, this interest is implicated only in cases of massive fraud. It is the same interest in having no major tabulation errors in an election contest, and this, I have argued, is really no interest at all.

The lesson we can draw from this is that structural concerns should be secondary to the value of participation in the debate over voter fraud. Corruption is an important concern with voter fraud only in cases of massive fraud; or, if we are tying corruption simply with law breaking, then corruption is implicated in voter fraud only in the same way that it is implicated in every instance of law breaking for personal gain. Vote dilution, the concept that both the *Purcell* Court and Judge Posner appeal to, is singularly inapposite here. It is not that they misapply the concept, it is just that the concept needs some group that is inappropriately harmed by that dilution to fix on. The fact of the matter is that we can *always* see vote dilution. Even in a legitimate election, the losers have their votes reduced in impact by the votes of the winners; they are unable to aggregate their votes effectively in some sense because there are not enough voters for the losing candidate to turn the losing candidate into the winning candidate. But "the losing voters" in an election is not a relevant group that we should be concerned about. Nor is there a group called "legitimate voters" that has its interests harmed whenever a fraudulent vote is cast. It does not make real sense to consider *promoting* their interest in a legitimate election, unless this means in the rule of law sense, or in the sense that they should want an election where the outcome is determined by legitimate votes. But in this latter case, their only real concern is avoiding massive voter fraud, not with the incremental harm that is caused by having one's legitimate vote diluted by an illegitimate voter. This I do not think is a real harm at all, at least not in

the way that it might be plausible to say that it is a bad thing each time a minority vote is diluted by racial gerrymandering. Here, it does seem that there is a harm that might be incremental; it may be bad each time we reduce the effectiveness of a minority vote, even if that incremental decrease in effectiveness does not mean that the minority is any less likely to elect a candidate of choice.

In fact, the key value in the voter fraud cases is participation.[134] Participation, simply put, is the value of being able to cast one's own ballot, free from intimidation and unnecessary restrictions and to have that vote counted. Let me briefly make two points to highlight the value of participation and its meaning. The first is that although the right to vote is often pressed by groups (women, blacks, etc.), the right in question is not a right *of* discrete groups. It is not the right of a group collectively to elect its favored candidate or to vote in a bloc. Rather, in the end it is only a right of the individual to cast a ballot. If some coalitions emerge after the vote is cast (for example, most African Americans vote for the Democratic candidate) this is only a contingent result of people individually voting; it is not constitutive of their right to vote. In other words, when considered as a right to participate, groups may start movements in order to have the right to participate, but once this right is granted that right must be taken one person at a time, and does not depend on membership in any group. We do not have the right to cast a ballot *qua* women or blacks or any other group. We have it *qua* American citizens.

The second thing to note is that, from another angle, the right to vote has a value even if one's individual vote is not outcome determinative. From this perspective, one can see voting as perhaps the most significant symbol of citizenship. The fact that blacks and women and those old enough to serve in the military can vote indicates that they are full members of American society. As Bruce Ackerman puts it, "voting is the paradigmatic form of *universal* citizenship."[135] There is no group smaller than this "universal" group that the individual right to participate in an election endorses, except again only contingently, as a result of groups clustering together to favor particular candidates based on their shared interests or identity. Because this value of voting, *viz*., its affirmation of our participation in a common venture, is

134. By invoking participation, I mean to contrast it with the values of aggregation and governance. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism about Formalism*, 71 TEX. L. REV. 1705, 1711-13 (1993) (analyzing various aspects of the right to vote). A full defense of the value of participation is beyond the scope of this essay. For a more complete defense, see JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 63-104 (1998) (emphasizing the participatory aspect of voting). My point here is simply to highlight its centrality in cases of voter fraud.

135. BRUCE ACKERMAN, 1 WE THE PEOPLE 239 (1991).

largely a symbolic and expressive one, it is a value that is generally independent of whether the result of the election is one that we hoped for. So we would mistake the nature of the right to vote if we measured it solely in terms of its impact. Even when we lose, we are still part of the process and not excluded from it. And the benefit here is not "elusive," as Posner somewhat dismissively says, but is in fact quite tangible.[136] We would only hold it as intangible if we thought that the only possible reason we would vote is to get the benefit of having our favored candidate elected. But this is not, at least not entirely, what those who fought for the right to vote were fighting for. They were fighting for the right to participate and influence the process and not to decisively shape the outcome of an election every time. They were fighting for the very real recognition that being able to participate in the political process confers on an individual. To state this point is perhaps obvious, but it is important to be clear about it; it is similar to the point that there is value to playing the game with others, even if one loses.

Of course, on the other side, the state has an interest in securing the right to vote only for those who are qualified to do so. This means that some who want to participate in an election will not be able to do so because they are not citizens, or because they lack the requisite proof of their citizenship. But the state should not set restrictions and requirements in a way that unfairly denies those who have the underlying qualifications the right to vote, that is, to participate. This includes especially the members of the class I discussed in the last section, who are basically undocumented citizens. When they are denied the right to vote, they are disenfranchised, and even though the number of voters in this situation may be small, it is important to see that it is a harm to each and every one of them when their vote is denied. This is not a structural value, either, it is an individual value which is why we can measure it one by one, rather than having to look at voters in the aggregate. We do not, that is, have to see whether their vote would be decisive, or whether it would have greater influence when added to the votes of the other members of the group. Their harm is one that we know is a real harm regardless of whether the vote would have influenced the election one way or the other. This makes it easier to see, not in the sense of being easier to measure (again, statistics in this case will be hard to come by), but by seeing

136. *Cf. Crawford*, 472 F.3d at 951 (stating that "[t]he benefits of voting to the individual voter are elusive (a vote in a political election rarely has any *instrumental* value, since elections for political office at the state or federal level are never decided by just one vote)").

how it is a person who may be harmed by having the person's right to vote denied.

The person is harmed simply by not being able to cast a ballot—not the ability to cast a meaningful or effective ballot, but purely by not being able to cast a ballot. Spencer Overton realizes this early on in his essay on voter fraud, but then stresses later on in his essay how poor and minority votes might be diluted by new restrictions on voter fraud.[137] But by putting so much stress on dilution, I believe Overton is mistaking a more remote harm for the more direct harm. The direct harm is an interference with the right of poor and minority voters to participate. Of course, if they cannot participate, they cannot aggregate their votes with other like-minded citizens. But we should put first things first: the first problem is that laws imposing new restrictions will prevent them from voting, and you cannot aggregate your vote if you cannot vote. Denial of participation affects you irrespective of your class, or your race.

All of this is not to say that structural values are irrelevant. Certainly not. But just in the same way that a focus on individual values can obscure the structural values at stake—we may think that all we need to do is done when we have guaranteed the individual his right to cast a ballot—a focus on structural values may shift our angle of vision away from the individual's right. In fact, it is just that focus that helps us best get a grip on what is at stake in voter fraud cases and how to analyze them. It is not that we need more statistics, or more structural analysis. In fact, it is arguable that this is where both courts went wrong—either in using statistics in a way that obscured the values at stake, or using the wrong level of analysis by looking at how voter fraud might affect the integrity of an election. What we need in these cases is perhaps a more basic level of analysis, one that focuses on the ability to be able to participate in an election which is the most necessary aspect of the right to vote and the most indispensable.

E. A Note on Judicial Competence

The main reason for focusing on participation in cases that test the constitutionality of new voter regulations is that it simply is the salient value. The interest in the state preventing fraud is minor, or better remedied by a focus on increasing prosecutions (which does not have the tradeoff of deterring voters from the polls). But it also pays

137. Overton, *supra* note 130, at 673-74 ("Despite the emphasis on individual responsibility, photo-identification requirements that exclude legitimate voters dilute the political choices of not only those who are unable to produce photo identification but also their allies who do produce a photo-identification card.").

to emphasize that participation considered as a value fits in well with ordinary understandings of judicial competence. Consider first that if we look simply at participation, we are not worried—at least not as much as in the case of vote dilution—about how much participation is being prevented. If we find state action that prevents otherwise qualified voters from voting, that obstructs a citizen's interest in participating, then we have a serious harm, even if there is only one person who is prevented from casting a ballot. A poll tax, for instance, does not become less of a constitutional problem if the poll tax prevents only one person (or some small class of persons) from voting. This is how the value of participation differs from the value of an undiluted vote. Again, looking at dilution means looking at how individuals are able to aggregate their votes as members of a group. It follows that measuring how much a person's vote is diluted will involve seeing to what extent voters are able to join with others in aggregating their votes. Numbers matter here much more than they do in the participation case.

Participation is, by contrast, an individual interest and it is harm *to the individual* each time an additional restriction is placed on an individual's right to vote, past those restrictions that are necessary to prevent massive fraud. And for the voter who does not vote, it is a harm that hits the voter all at once. The voter is not harmed incrementally, as in the case of vote dilution. So we might believe that courts will be better at looking at whether the individual's rights are being burdened, as compared with looking at an individual's right in concert with others (in the case of minority vote dilution, for instance). If we focus on the participation interest, we might be less worried about adding up instances of fraud and instances of deterrence and then comparing them. We might, instead, simply focus on whether the participatory right is being burdened because (again) this matters, even in a single case of a voter who does not vote, who is not able to participate

Relatedly, a focus on participation as an individual interest means that the court does not have to deal directly with questions of democratic structure.[138] Participation, of course, is one element of democracy, and it is a vital one, even a foundational one. So if we are talking about the structure of a functioning democracy, we are going to talk in terms of participation and maximizing participation. But the ideal at least is that once we have secured the conditions of maxi-

138. *Cf.* Guy-Uriel E. Charles, *Democracy and Distortion*, 92 CORNELL L. REV. 601, 604 (2007) (discussing the distinction between "individualists" and "structuralists" in election law). In siding with those Charles terms the "individualists," I hasten to add that it is solely in the case of voter fraud that I find the individualist analysis most persuasive.

mum participation, we can leave the decisions regarding what sort of democratic structure to have to the people.[139] Democracy is in a way radical at its core; it demands that, absent a compelling justification, people make the most of the decisions, even decisions about democratic structure.[140] Again, this is the ideal. It will not always be the case that more participation will yield more democratic outcomes, because there may be systematic problems that prevent participation from yielding reform. Parties may be entrenched, for instance, or there may be racial polarization. We cannot entirely leave matters to participation alone, and sometimes reforms will have to come from above and not from below.[141]

There may be some areas, however, and I think voter fraud is one of them, where participation is really the main value that we need to focus on, and matters of structure can be safely abstracted from. Courts do not need to develop a well-worked out theory of democracy in order to say that participation is essential to democracy. The only real 'structural' interest at stake in voter fraud cases is avoiding an election that is decided by illegitimate votes, an interest that will only be at play in very rare cases. Other than this, the chief role of courts in voter fraud cases is to guard the possibility of participation by the widest number of citizens that is consistent with preventing *massive* levels of fraud. This is not an easy role, but it is certainly a more tractable one than measuring vote dilution, or deciding on the deep meaning of electoral integrity. Additionally, it is a role courts are better suited to fill, as opposed to making larger, structural reforms. Although I think in some areas of law a focus on structure is inevitable and necessary, this is not the case with voter fraud. Therefore, no matter our position on the law of democracy in general, here, in this case, we might rightly settle for a more constrained role for courts.

The current standard for courts in deciding how much the state can burden the right to vote is the "flexible" standard announced in *Burdick v. Takushi*,[142] so let me make some very brief remarks on how my conclusions apply given this standard. On the one hand, the Court said in *Burdick* that the state should not have to submit every proposed change in voting regulations to strict scrutiny. To do so, the

139. I take this to be one of the motivations behind Thomas' concurrence in Holder v. Hall, 512 U.S. 874, 892 (1994) (Thomas, J. concurring).

140. Consider, in this instance, Justice Stevens' claim in Cal. Democratic Party v. Jones, 530 U.S. 567, 598 (2000) (Stevens, J. dissenting), stating "It is not this Court's constitutional function to choose between the competing visions of what makes democracy work." *Cal. Democratic Party*, 530 U.S. at 598 (Stevens, J. dissenting).

141. *See* Chad Flanders, *Deliberative Dilemmas: A Critique of Deliberation Day from the Perspective of Election Law*, 23 J. L. & POL. 147 (2007) (arguing for the proper role of the Supreme Court in election law).

142. 504 U.S. 428 (1992).

Court reasoned, would be to "tie the hands of States seeking to assure that elections are operated equitably and efficiently."[143] But this does not mean, on the other hand, that every regulation that the state proposes gets a free pass so long as it can be plausibly connected to the equitable and efficient running of elections. Rather, the state has to show, and show "precise[ly]," "the extent to which its interests make it necessary to burden the plaintiff's rights."[144] In the above sections, I have tried to demonstrate that the state does have some fairly precise interests at play, *viz*., an interest in not having people disobey the law by engaging in fraud, and also an interest in avoiding an election where the outcome is determined by fraudulent votes. The former interest is a minor and generic one, as well as an interest that is better secured by increasing the penalties for voter fraud.

The second interest is an interest that most obviously comes into play where we suspect that there has been *massive* fraud, fraud that makes it likely that the election has been illegitimate or that may make voters suspect that the wrong candidate has been elected. The interest here *is* real, but it is an open question whether additional regulations (such as requiring photo identification) will really be needed to avoid fraud of this size, or whether such fraud is better deterred in other ways. The state would have to make a pretty good case that its new regulations are designed to prevent (and would prevent) such outcome determinative fraud, rather than just preventing the occasional, random fraudulent vote or two. Courts will have to weigh how persuasively the state has proven the possibility of massive or outcome determinative fraud against the interests of voters who might be prevented from voting. That is, courts will have to see whether the state can demonstrate that it needs new requirements on voting to stop massive fraud, and whether this demonstration is persuasive enough to justify a foreseeable deterrence of some voters from voting.

Accordingly, courts should cast a skeptical eye on regulations that are too broad and aggressive for the problems just identified; such regulations swat flies with a hammer as one dissenting judge in *Crawford* put it.[145] The state's interest is not that great: fraud is only bad and only becomes a *real* problem when it is at the level where it will affect the outcome of an election, thus affecting whether an election can *function* as an election. The interest of participation by voters who have the underlying qualifications to vote but lack the necessary identification, however, is great, and it is one that is at risk every time

143. Burdick v. Takushi, 504 U.S. 428, 433 (1992).

144. *Burdick*, 504 U.S. at 434 (quoting Anderson v. Celebrezze, 460 U.S. 780, 798 (1983); Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14 (1986)).

145. *See Crawford*, 472 F.3d at 954 (Evans, J., dissenting) ("Is it wise to use a sledgehammer to hit either a real or imaginary fly on a glass coffee table? I think not.").

an additional voter is prevented from voting by new and unnecessary regulations. When balanced against the state's interest in preventing fraud and the fear of fraud, the participatory interest should usually win.[146]

V. CONCLUSION

This Essay runs against current election law scholarship in two respects. It has challenged the relevance and usefulness of gathering more data on voter fraud. In addition, it has suggested that the best lens with which to analyze voter fraud and voter deterrence is not structural, but in fact individual. In both of these respects, this Essay might be considered rather ambitious, even overambitious. But in fact, my ambitions have been rather narrow and apply only narrowly. Indeed, I do not claim that my analysis extends beyond the contexts of voter fraud and voter deterrence. Nor do I differ greatly from those who are suspicious of laws mandating new restrictions on the ability to vote; I merely give them an alternative framework within which to conceptualize their no doubt warranted suspicion that such laws are disproportionate to the harms involved.

146. Is it also a bad thing when voter tabulation errors mean that someone's vote is not counted? Yes, and possibly in the same way. When corrections to the voter tabulation can be made at little or no cost, then the legislature is culpable for causing some votes not to be counted, a harm they could have foreseen. In a similar way, a legislature, when enacting unnecessary new voter requirements is likewise culpable for causing some persons to not be able to vote (again, a harm which they could have foreseen). However, one might distinguish the harms in this way: with a tabulation error, no voter gets turned away, nor does the voter know for sure that his or her vote has not been counted. When a voter is turned away because the voter lacks identification, the voter *knows* that its vote will not be counted. I am indebted to David Pozen and Will Baude for discussion on this question.