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Economic Precarity, Race, and Voting Structures

Atiba R. Ellis¹

INTRODUCTION

Recently, the State of Alabama announced it would be closing thirty-one part-time driver's license offices located in rural (and largely minority) areas of the state to close a budget shortfall.² Alabama, a state that has recently adopted "strict" voter identification laws,³ claimed that these closures would not affect availability of the required ID credentials, though advocates argued that these closures would have a substantial impact on the ability to obtain government-issued identification and thus disproportionately affect the ability of poor minority voters to exercise their right to vote.⁴

This dispute is the latest in the broad debates over whether recent judicial and legislative changes create undue difficulties in the exercise of the right to vote. Voter identification laws and other forms of voter regulation occurred in the wake of the Supreme Court of the United States decision in *Crawford v. Marion County Election Board*, which upheld Indiana's voter identification laws against a facial challenge against their constitutionality.⁵ These changes have accelerated in the

¹ Professor of Law, West Virginia University. The author wishes to thank the staff of the *Kentucky Law Journal* for their hospitality during their recent Election Law Symposium. In particular, the author wishes to thank Professor Joshua Douglas and Mr. Mark Roth for their thoughtfulness and accommodation of the author. The author also wishes to acknowledge the support of Dean Gregory Bowman of the West Virginia University College of Law and the Hodges/Bloom Research Fund for support of this research. The author also wishes to extend thanks to Elizabeth Stryker and Benjamin Hogan for excellent research assistance. All errors and omissions remain the author's own. Comments are welcome and may be directed to atiba.ellis@mail.wvu.edu.

² See Press Release, State of Ala. L. Enft Agency, ALEA Reallocates Personnel to District Driver License Offices (Sept. 30, 2015), <http://www.alea.gov/Home/wf?lyerDetail.aspx?ID=2&PK=ea439937-97c5-4ab6-894a-e0e27c6e8d91>.

³ Alabama passed its current voter identification regime in 2011. The National Conference of State Legislatures (NCSL) has defined a "strict" voter identification law as one that requires "voters without acceptable identification [to] vote on a provisional ballot and [to] take additional steps after Election Day for [the ballot] to be counted." See *Voter Identification Requirements / Voter ID Laws*, NAT'L CONF. ST. LEGISLATURES (Aug. 19, 2016), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. NCSL notes, however, that the Alabama voter ID law may arguably not be considered "strict" in that it contains a provision allowing two governmental workers to verify the identity of the voter by affidavit and thus allow the voter to cast a final ballot. *Id.* tbl. 1, n. 2. It is this identification provision (called the "Positively Identify Provision") that is at issue in *Greater Birmingham Ministries v. Alabama*. See Complaint at 78–81, *Greater Birmingham Ministries v. Alabama*, No. 2:15-CV-02193-LSC, 2016 U.S. Dist. LEXIS 18891 (N.D. Ala. Dec. 2, 2015). This will be discussed below in Part IV.

⁴ See Mike Cason, *State to Close 5 Parks, Cut Back Services at Driver License Offices*, AL.COM (Oct. 30, 2015, 1:21 PM), http://www.al.com/news/index.ssf/2015/09/state_announces_to_close_becau.html.

⁵ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 204 (2008).

wake of the Court's decision in *Shelby County v. Holder*, which struck down Section 4(b) of the Voting Rights Act of 1965, and thus rendered ineffective the preclearance provisions of Section 5.⁶

In the wake of *Crawford*⁷ and *Shelby County*,⁸ state legislatures have passed a new wave of voting laws, which have, in particular, elicited lawsuits over how these new laws regulate the way voters authenticate their identification at the polls,⁹ the way voters may access polling places,¹⁰ the time voters may access their vote,¹¹ and other regulatory matters.¹² Proponents of these laws have claimed that such regulations are necessary to protect the integrity of elections and to guard against the threat of voter fraud.¹³ Scholars have observed that the opponents of these laws argue that this expansion of laws related to voting serves to suppress votes, and in particular, the votes of racial minorities, the young, the elderly, and the poor.¹⁴ These new regulations, which I have previously called the "hyper-regulation" of the voting process,¹⁵ occur on the backdrop of generations of express and implicit barriers to enfranchisement, often referred to as first- and second-generation barriers to the right to vote.¹⁶

Laws like poll taxes and felon disenfranchisement laws fall in the first-generation category because they either directly or implicitly target vulnerable groups and were mostly abolished in the wake of the voting rights revolution of the 1960s on the basis of asserting an antidiscrimination norm in the enforcement of

⁶ As Alabama was a covered jurisdiction under Section 5, it would not have been able to implement these closings until the changes were approved by either a federal court or the United States Department of Justice. See *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2631 (2013).

⁷ *Crawford*, 553 U.S. at 181.

⁸ *Shelby Cty.*, 133 S. Ct. at 2612.

⁹ See *Lee v. Va. State Bd. of Elections*, No. 3:15CV357-HEH, 2015 U.S. Dist. LEXIS 118647, at *3 (E.D. Va. Sept. 4, 2015).

¹⁰ See *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 231–32 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015).

¹¹ See *id.*; Complaint at 3–4, *Ohio Org. Collaborative v. Husted*, No. 2:15-CV-01802, 2016 U.S. Dist. LEXIS 85699 (S.D. Ohio May 24, 2015).

¹² *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183, 1187–88 (10th Cir. 2014) (requiring proof of citizenship to register to vote in state elections); *Evenwel v. Perry*, No. A-14-CV-335-LY-CH-MHS, 2014 U.S. Dist. LEXIS 156192, at *4 (W.D. Tex. Nov. 5, 2014) (challenging Texas' re-districting plan under the one-person-one-vote doctrine).

¹³ See Atiba R. Ellis, *The Meme of Voter Fraud*, 63 CATH. L. REV. 879, 903–06 (2014).

¹⁴ See, e.g., Daniel P. Tokaji, *Applying Section 2 to the New Vote Denial*, 50 HARV. C.R.-C.L. L. REV. 439, 482, 489 (2015); L. Darnell Weeden, *The Supreme Court's Rejection of the Rational Basis Standard in Shelby County v. Holder Invites Voter Suppression*, 33 MISS. C. L. REV. 219, 227–29 (2014). See generally Ian Vandewalker & Keith Gunnar Bentele, *Vulnerability in Numbers: Racial Composition of the Electorate, Voter Suppression, and the Voting Rights Act*, 18 HARV. LATINO L. REV. 99 (2015).

¹⁵ See Atiba R. Ellis, *Tiered Personhood and the Excluded Voter*, 90 CHI.-KENT L. REV. 463, 478–85 (2015).

¹⁶ M. Akram Faizer, *Reinforced Polarization: How the Roberts Court's Recent Decision to Invalidate the Voting Rights Act's Coverage Formula Will Exacerbate the Divisions that Bedevil U.S. Society*, 45 CUMB. L. REV. 303, 306, 327 (2015).

the right to vote.¹⁷ Voter identification laws and other laws that diminish the scope of access to the vote fall in the second-generation category because they serve a facially neutral general purpose, yet there is genuine disagreement as to whether their effect is discriminatory by virtue of their mounting cumulative burden.¹⁸ While the distinction between the two generations seems to be both temporal and based on the premise of express targeting of disfavored populations versus a categorization that speaks to facially neutral laws of general applicability that nonetheless have a discriminatory effect, the Alabama DMV closure situation appears to represent a new problem.

Specifically, the Alabama DMV situation represents a concern that states cannot afford such laws and that, as in Alabama's case, the effects of such barriers of access would be shifted to those who can least stand the impact—poor minorities. While the underlying claim of vote suppression is not new, the problem presented by the Alabama situation points to the intersection of systemic economic impact with vote suppression concerns. Arguably, the structures of historic, racially disparate poverty have coincided with the need for austerity that the state claims, putting at risk the right to vote for those poor black Alabamians who are at the intersection of race and class. This would suggest that the Alabama situation is unique in the sense that structural forces outside of voting rights concerns are effectively recalibrating the right to vote.¹⁹

This recalibration has several dimensions.²⁰ This Article explores one of them: the evolution of an underlying utilitarian conception of the right to vote in the federal Constitution, framed as it is expressed in *Crawford*²¹ and *Shelby County*,²² and the impact of that in subsequent lower court decisions. I have argued in the

¹⁷ Felon disenfranchisement laws are the notable exception to this dynamic. For more on this, see Ellis, *supra* note 15, at 478–85.

¹⁸ See *id.*

¹⁹ Legal historian Stuart Chinn has deployed the concept of “recalibration” to argue that “the Supreme Court possesses an institutional interest in promoting stability” that limits radical transformations in the social order and, therefore, will calibrate broad-based reforms to re-entrench the previously existing social order. STUART CHINN, RECALIBRATING REFORM: THE LIMITS OF POLITICAL CHANGE 40–43 (2014). I discuss his work in a broader context of American civil rights equality in Atiba R. Ellis, *Reviving the Dream: Equality and the Democratic Promise in the Post-Civil Rights Era*, 2014 MICH. ST. L. REV. 789 (2014). This is a core premise of the argument that follows, especially in light of the nature of the utilitarianism concerns described in this Article.

²⁰ Because of its multi-dimensional nature and the space constraints of this Article, the analysis here must necessarily be limited to forecasting the groundwork for future work that thinks broadly about the larger extent of the scope and consequences of the recalibration of the right to vote. Such work will use Chinn's term along with an expansive understanding of how the idea of equality of political participation through voting has been “recalibrated” based on racial, economic, political, and other bases. As I argued during the symposium, the right to vote seems to be in a in the midst of a long-term modern recalibration driven by the Supreme Court that itself reinforces the underlying structural concerns (and creates a blindness to structural disenfranchisement concerns). In light of recent political changes and the shift in the majority on the Court itself, this recalibration appears destined to continue for the foreseeable future. I will address these trends in future work.

²¹ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

²² *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

past that this aspect of the recalibration of the right to vote represents deference to state priorities regarding the federal constitutional enforcement of the right, a balancing that effectively prioritizes state interests in administration over voter access, thus leading to excessive and cumulative regulation.²³ This deference is “utilitarian” in the sense that this is premised upon the vindication of larger state interests that would effectively serve the good of the majority—indeed, the greatest number—of voting citizens even if there is a marginal expense to a relative few. This would presumably cause courts considering this kind of problem—of indirect structural disenfranchisement due to policy concerns outside of the election law context—to defer to the state’s interest concerning the diminished availability of opportunities for obtaining the credentials necessary to vote in a “strict” voter identification state due to the more pressing concern of financial exigency.

That such an outcome would be correct within this frame points to both a larger trend in the more general recalibration of the law of voter access as described above and would illustrate a new dimension in the problem of structural disenfranchisement. This recognition points us to a larger concern about the incompleteness and incoherence of this conception of the right to vote, the conception that dominates current precedent. This short Article will examine the evolution of the utilitarian frame, demonstrate how the incoherence of this argument has evolved since *Shelby County*, and then conclude with a preliminary examination of the structural flaw illustrated by the Alabama DMV situation.

This Article will do so in the following manner. Part I will describe the evolution of this utilitarian balancing assumption in the Court’s modern voter access jurisprudence, and show how it has come to shape the internal structural election law concerns. Part II will provide an account of vote suppression claims since *Shelby County*²⁴ to demonstrate the arguable consequences since the shift created by *Crawford*²⁵ and *Shelby County*.²⁶ Part III will then conclude the Article by discussing the Alabama DMV situation. It will analogize this situation to other indirect structural concerns, which in the context of jurisdictions covered by Section 5 of the Voting Rights Act of 1965 were addressed through federal supervisory power. This kind of intervention effectively maintained a balance between individualistic concerns in terms of exercise of the franchise and the utilitarian concerns raised in the context of race-conscious regulation of the franchise, which may effectively ignore marginal individual concerns for state interests in voting or otherwise.

This Article will end with concluding comments that suggest how we may remedy this problem through reconsidering this utilitarian assumption. Such reconsideration may manifest itself through a readjustment of the balance to defer

²³ Atiba R. Ellis, *A Price Too High: Efficiencies, Voter Suppression, and the Redefining of Citizenship*, 43 SW. L. REV. 549 (2014) [hereinafter, Ellis, *Price*]

²⁴ *Id.*

²⁵ *Crawford*, 553 U.S. at 181.

²⁶ *Shelby Cty.*, 133 S. Ct. at 2612.

to voter interests instead of state interests, a revived Section 5 preclearance scheme which would restore the federal government's interpositionary power regarding direct and indirect structural voting rights changes in jurisdictions, like Alabama, where such history and potential for discrimination would be present. While that would address the present situation, such a remedy would be insufficient to deal with the situations where this concern would manifest in other jurisdictions which may not otherwise fall under a revised Section 4(b) preclearance formula or would otherwise be subject to either a Section 2 racial discrimination suit or may fall out of coverage of the Voting Rights Act altogether. Such gaps would suggest instead a modification in the way we consider the right to vote generally through taking seriously, in a voter-friendly way, the concept of disparate impact and forcing the collective to bear the burden of effecting the core promise of the right to vote.

I. THE EVOLUTION OF THE UTILITARIAN FRAME IN RIGHT TO VOTE JURISPRUDENCE

The key premise of this Article's discussion is that voting must be administered in an efficient way that yields the benefit of fairly administered elections to the greatest number of people. While this premise is in and of itself innocuous, this Article builds upon my prior work that argues that this efficiency assumption has come to dominate considerations by the courts of the right to vote in an arguably dangerous way and that it is recalibrating the meaning of citizenship in the United States.²⁷ This efficiency thesis has three components: (1) that there is generally great deference to state authority concerning general election administration that does not implicate constitutional issues; (2) that, within this zone of deference, election law decisions weigh state interests in efficiency with harm to the voter; and that (3) from this frame, incidental voter denials premised on risk are acceptable if outweighed by governmental interests in establishing the regulation.²⁸ This section will explore these three assumptions in turn.

A. Structurally-Established Deference to State Dominance in Right to Vote Regulation.

In recognizing this contemporary deference to state authority, it is important to first acknowledge that the original constitutional design related to the franchise did defer to the states.²⁹ Under the electoral scheme at the time of the founding, the right to vote was largely left to state control. States could determine who was and

²⁷ See Ellis, *Price*, *supra* note 23. This section and the next are based upon research I initially presented in *Price*. However, where *Price* sought to simply look at the *Anderson/Burdick* balancing test critically, this Article extends that reasoning by discussing recent court trends in voting rights litigation.

²⁸ *Id.*

²⁹ See *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2271 (2013) (Alito, J., dissenting) (citing *United States v. Gradwell*, 243 U. S. 376 (1917)).

who was not eligible to vote with little federal constitutional oversight.³⁰ States varied in terms of selecting what qualifications would be sufficient to determine who could vote, but they were largely driven by some determination of whether one possessed sufficient standing within the particular state and local political community to do so. This was often determined by property regulation or other basis for establishing an ownership stake in the community.³¹

This deference to state interests, with only a marginal qualification through federal power in the context of federal elections, shifted after the Civil War. The Reconstruction Amendments both directly and impliedly impacted voting.³² The Fourteenth Amendment required that each state provide all of their citizens with equal access to the “privileges and immunities”³³ of citizenship and “equal protection of the laws.”³⁴

After the Civil War, the Reconstruction Amendments expressly addressed the right to vote. Section 1 of the Fourteenth Amendment guaranteed that “No state shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; . . . nor deny to any person within its jurisdiction the equal protection of the laws.”³⁵ Moreover, Section 2 of the Fourteenth Amendment created a penalty for states that disenfranchised male citizens on any basis “except for participation in rebellion, or other crimes.”³⁶ The Fifteenth

³⁰ The original United States Constitution said little about the right to vote. Specifically, Article I, Section 2 of the Constitution expressly set out that the people could choose their representatives to the House, which was taken to mean by popular election in accordance to the rules set out by each individual state. U.S. CONST. art. I, § 2. Similarly, the Constitution expressly left the process of these elections to state legislatures while reserving a right to qualify such regulations through legislation. U.S. CONST. art I, § 4, cl. 1 (“The times, places and manner of holding elections for Senators and Representatives, shall be prescribed in each state by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators.”); *see also Inter-Tribal Council of Ariz.*, 133 S. Ct. at 2272 (Alito, J., dissenting).

³¹ *See* Atiba R. Ellis, *The Cost of the Vote: Poll Taxes, Voter Identification Laws, and the Price of Democracy*, 86 DENV. U. L. REV. 1023, 1038 (2009) [hereinafter Ellis, *The Cost of the Vote*] (quoting ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 29 (2000)). It is worth observing that this dual federal/state structure created the opportunity for states to regulate their own vote in differing ways. *See* generally KEYSSAR, *supra* note 31, for a history of the range of voting regulations. Also, this does create an opportunity for not only retrogressive innovation (which is the focus of this Article), but also progressive innovation regarding the right to vote. Professor Joshua A. Douglas has consistently made this point in his work. *See, e.g.*, Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, 95, 101 (2014).

³² *See* U.S. CONST. amends. XII, XIV, XV.

³³ U.S. CONST. amend. XIV, § 1.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* § 2. In light of the decision in *Shelby County*, scholars have sought to consider the import of the Fourteenth Amendment in ways separate and apart from the *Anderson/Burdick* balancing test I critique here. Indeed, Franita Tolson has argued that Section 5 of the Fourteenth Amendment as interpreted through the scope of the voting rights penalty provisions of Section 2 offers a vehicle for broad congressional power to enact legislation directed at voting rights enforcement. *See* Franita Tolson, *The Constitutional Structure of Voting Rights Enforcement*, 89 WASH. L. REV. 379 (2014). Similarly,

Amendment ordered that “the right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.”³⁷

These limitations defined the impermissible boundaries of racial discrimination to insure that freed African slaves, who were now citizens by the terms of the Fourteenth Amendment, could participate in the political process. The Court enforced these negative limitations in literal terms, as in *Guinn v. United States*, where the Court struck down racially motivated “grandfather clauses” designed to subject African Americans to literacy tests but exempt whites.³⁸

But where the formal application of the rules did not directly effect the express anti-racial discrimination terms of the amendments, the Court deferred to state laws. The Court made such deference in *Williams v. Mississippi*, when it upheld Mississippi’s poll tax that acted as an exclusionary mechanism against African Americans.³⁹ The Court reasoned that the plaintiff had failed to show any discriminatory administration of the suffrage provisions despite the claim that the poll tax had such an effect, and thus he failed to state a claim under the Equal Protection Clause.⁴⁰ Moreover, the Court in this period deferred to state definitions of voter eligibility that did not implicate the Fifteenth Amendment. This was made clear in *Minor v. Happersett*, in which the Court upheld state provisions that mandated that women would not be allowed the right to vote.⁴¹ Moreover, *Breedlove v. Suttles* confirmed this underlying doctrine of deference to state control unless there was a federal constitutional grounds that defined the particular issue regarding the right to vote.⁴² In *Breedlove*, the Court once again upheld the poll tax and found that the right to vote was not derived from the federal Constitution, but from the individual states, subject only to the constraints on the right to vote imposed by the Constitution.⁴³ On this basis, “a state may condition suffrage as it deems appropriate.”⁴⁴

However, these race-conscious protections of the right to vote only came into useful expression nearly forty years later through a constitutional amendment and the passage of the Voting Rights Act.⁴⁵ The Twenty-Fourth Amendment in 1964

Michael T. Morley has pointed to Section 2 of the Fourteenth Amendment as a source of congressional power to regulate the right to vote under a remedial deterrence approach. See Michael T. Morley, *Remedial Equilibration and the Right to Vote Under Section 2 of the Fourteenth Amendment*, 2015 U. CHI LEGAL F. 279 (2015).

³⁷ U.S. CONST. amend. XV, § 1.

³⁸ See *Guinn v. United States*, 238 U.S. 347, 367–68 (1915).

³⁹ See *Williams v. Mississippi*, 170 U.S. 213, 222–23 (1898).

⁴⁰ *Id.*

⁴¹ See *Minor v. Happersett*, 88 U.S. 162, 177–78 (1875). The Nineteenth Amendment repealed this holding. U.S. CONST. amend. XIX (“The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex.”).

⁴² *Breedlove v. Suttles*, 302 U.S. 277, 283–84 (1937).

⁴³ *Id.* at 283.

⁴⁴ *Id.*

⁴⁵ Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified as amended in scattered sections 52 U.S.C.).

abolished the poll tax in federal elections.⁴⁶ That same year, Congress passed the Civil Rights Act, and in 1965 Congress passed the Voting Rights Act. Both statutes gave the federal government the ability to protect the right to vote of minority citizens.⁴⁷

Indeed, the Voting Rights Act implemented by statute the principles the Fifteenth Amendment was intended to protect.⁴⁸ The Act sets forth a national cause of action for racial discrimination in voting in Section 2,⁴⁹ and, until *Shelby County v. Holder*,⁵⁰ provided for preclearance (or pre-approval) of election laws for jurisdictions that had a history of discrimination in voting and evidence of disparate rates of participation between whites and minorities within that jurisdiction.⁵¹

Additionally, the Court in two important lines of precedent created a layer of federal protection for the right to vote through its own jurisprudence. In a line of cases beginning with *Reynolds v. Sims*, the Court's recognized the doctrine of one person, one vote.⁵² Additionally, in *Harper v. Virginia State Board of Elections*, the Court, in holding that the state poll tax violated the equal protection and due process clauses of the Fourteenth Amendment, deemed the right to vote a fundamental right.⁵³

B. The Evolution of the Anderson-Burdick-Crawford Balancing Test

While direct denials of the right to vote on the basis of race ended, claims regarding election procedures which either implicated aggregates of voters or regulations that did not implicate the Fourteenth or Fifteenth Amendments which tended to nonetheless have an effect of dissuading certain classes of voters from voting evolved. The Court's approach to these claims has been to balance the concerns of the state and of voters where the regulations "protect the integrity and

⁴⁶ U.S. CONST. amend. XXIV, § 1.

⁴⁷ See Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (codified in scattered sections of 42 U.S.C.); Voting Rights Act of 1965, 79 Stat. at 437.

⁴⁸ Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *The Voting Rights Act in Winter: The Death of a Superstatute*, 100 IOWA L. REV. 1389, 1394-1403 (2015) (describing the scope of the Voting Rights Act as remedying the problem of racial discrimination in voting and implementing the command of the Fifteenth Amendment); Gilda R. Daniels, *Racial Redistricting in a Post-Racial World*, 32 *Cardozo L. Rev.* 947, 951-52 (2011) (describing the importance of the Voting Rights Act as a means of combatting racial discrimination in voting).

⁴⁹ Voting Rights Act of 1965 § 2, 79 Stat. at 437 (codified as amended at 52 U.S.C. 10301 (2006)).

⁵⁰ *Shelby Cty v. Holder*, 133 S. Ct. 2612 (2013).

⁵¹ 42 U.S.C. § 1973(c) (West 2016).

⁵² See *Reynolds v. Sims*, 377 U.S. 533, 565-66, 568 (1964). That is, the Court required under the Fourteenth Amendment that election districts be roughly proportional in size (based on the general population of the jurisdiction) so that each individual voter's vote would be of equal weight. This ruling transformed the nature of redistricting in the United States and imposed substantial burdens for state legislatures to conform their districts to meet this constitutional standard. *Id.* at 368. The Court recently reaffirmed this principle in *Evenwel v. Abbott*, 136 S. Ct. 1120 (2016).

⁵³ See *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) (holding that poll taxes in state elections violate the fundamental right to vote); *Reynolds*, 377 U.S. at 670.

reliability of the electoral process itself.”⁵⁴ The Court suggested a balancing test to assess the constitutionality of a challenged election law to be used on a case-by-case basis:

[The Court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests burden the plaintiff’s rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.⁵⁵

The Court first articulated this test in *Anderson v. Celebrezze*, which found for then-presidential candidate John Anderson concerning his argument that an earlier deadline for filing for independent candidates placed disproportionate burdens on such candidates.⁵⁶ The Court applied the test again in *Burdick v. Takushi*, which upheld certain limitations set out in the Hawaiian write-in ballot law that prevented certain voters from casting their ballot preferences.⁵⁷ However, in *Burdick*, the Court evaluated the injury to the claimant’s First and Fourteenth Amendment rights prior to any balancing of the claimant’s rights against the governmental injury.⁵⁸

The Court then followed this balancing approach in *Crawford v. Marion County Election Board*.⁵⁹ There, by a 6-3 majority, the Court upheld the Indiana voter identification law.⁶⁰ Justice Stevens’ “Lead Opinion” applied the *Burdick* test and determined that the state’s interest in enforcing the voter identification law outweighed any impact that the statute would have on potential voters shut out by the law.⁶¹ The Court, on a scant record, credited Indiana’s claim to need the law to maintain election integrity and discredited (for want of evidence) the plaintiffs’ claims that the law would directly disenfranchise voters.⁶² The Scalia opinion, concurring in the result, contended that the law was a reasonable regulation subject to rational basis review, and that the government has a rational basis for the law.⁶³ The dissents argued that there was sufficient evidence of harm to the plaintiffs to

⁵⁴ *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983).

⁵⁵ *Id.* at 789.

⁵⁶ *Id.* at 782–83, 789.

⁵⁷ *Burdick v. Takushi*, 504 U.S. 428, 430, 434 (1992).

⁵⁸ *Id.* at 434.

⁵⁹ *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181 (2008).

⁶⁰ *Id.* at 185, 188–89.

⁶¹ *Id.* at 189–96, 202–03.

⁶² *See id.* at 196–204.

⁶³ *See id.* at 204–09.

justify striking down the law,⁶⁴ and that the nonexistence of voter fraud cases undermined the government's purported justification for the law.⁶⁵ Despite the disagreement over the evidence, *Crawford* represents the Court's latest consensus that this utilitarian balancing between the interests of the voter and the interest of the state is the standard for approaching election regulations.

C. Wholesale Deference and the Risk of Dismissing Harms

Similarly, the wholesale deference to state standards for election regulations generally has come to prominence once again in *Shelby County v. Holder*.⁶⁶ In *Shelby County*, the Court struck down the formula used to determine which jurisdictions should be covered under the Section 5 of the Voting Rights Act, thus disabling that section's preclearance provisions.⁶⁷ The Court did so based upon two major premises. First, the Court argued that each state is due "equal sovereignty," that is each state has power to regulate matters left to the states, including voting, to the same extent as other states.⁶⁸ The second premise of the majority was that "the conditions that originally justified [the preclearance measures that justified differing treatment of states] no longer characterize voting in the covered jurisdictions."⁶⁹ Specifically, Chief Justice Roberts pointed to substantial progress in voter participation and the increase in minority elected officials since the Voting Rights Act was passed,⁷⁰ yet, the majority found that the current coverage formula does not reflect this reality.⁷¹ Because the Court determined the justification of racial disparity no longer exists, the formula and its consequent burdening of some states under Section 5 was no longer warranted.⁷² The dissenting opinion rejected both of these claims: It argued that the majority failed to defer to congressional judgment concerning the constitutional powers it had to prevent racial discrimination in voting under the Fifteenth Amendment, inappropriately invoked the doctrine of "equal sovereignty,"⁷³ and that the factual contentions regarding the

⁶⁴ *Id.* at 217–21 (Souter, J., dissenting); see also *id.* at 237 (Breyer, J., dissenting) (dissenting on the basis that the burdens on the voters are substantial and had not been taken into account by the state).

⁶⁵ *Id.* at 224–30 (Souter, J., dissenting).

⁶⁶ *Shelby Cty. v. Holder*, 133 S. Ct. 2612 (2013).

⁶⁷ See *id.* at 2624.

⁶⁸ *Id.* at 2623–24.

⁶⁹ *Id.* at 2618.

⁷⁰ *Id.* at 2636 (Ginsburg, J., dissenting).

⁷¹ *Id.* at 2627–28 (majority opinion) ("Coverage today is based on decades-old data and eradicated practices. . . . Racial disparity in those numbers was compelling evidence justifying the preclearance remedy and the coverage formula. There is no longer such a disparity.").

⁷² See *id.* at 2631 ("Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions.").

⁷³ *Id.* at 2636–37, 2648–50 (Ginsburg, J., dissenting) (explaining that the principle of equal sovereignty "applies only to the terms upon which States are admitted to the Union, and not to the remedies for local evils which have subsequently appeared") (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 328–29 (1966), *abrogated by Shelby Cty.*, 133 S. Ct. at 2612).

existence of racially discriminatory activities in voting were in error.⁷⁴ *Shelby County* has effectively curtailed the scope of the Voting Rights Act and reinstated to a major degree the deference states had concerning voting regulations.

It is important to note, however, that this deference regarding state administration of elections is counterbalanced by the role that the federal government has in administering elections by virtue of the fact that elections are often for state and federal offices. When it comes to voting for federal elections, and in particular the use of federal forms for voting, standards are defined by federal law and cannot be overridden by state law. The Court so held in *Arizona v. Inter-Tribal Council of Arizona*.⁷⁵ There, the Court invalidated an Arizona law requiring prospective voters to provide documentary proof of citizenship in order to register to vote.⁷⁶ In analyzing the validity of the law, the Court determined that the National Voter Registration Act pre-empted the Arizona statute, as the NVRA had created a federal voter registration form requiring only that the prospective voter sign a statement swearing that he or she is a U.S. citizen.⁷⁷

These decisions demonstrate that the recent efforts of the Court have served to maintain the constitutional boundaries regarding election regulations concerning the separate spheres of the federal government and the state government. Moreover, *Shelby County* demonstrates the receding power of the federal government concerning the ability of the states to control these issues. When these decisions are taken in conjunction with the deference accorded constitutional vote denial claims under *Anderson* and *Burdick*, it would follow that unless some countervailing concern dominates the field, such as race-conscious voting rights policy, and that states may be free to dismiss claims of risk of disenfranchisement. However, this section has also demonstrated that the concerns that do not implicate race directly—whether constitutional or not—have come to be dominated by the utilitarian balance evoked by *Burdick*. These two factors set the stage for examining the post-*Shelby County* legal landscape concerning voter access laws.

II. THE COSTS OF THE UTILITARIAN APPROACH TO VOTING RIGHTS

To this point, this Article has sought to describe the tension between established structural norms concerning the right to vote and the development of assumptions embedded within the more contemporary right to vote context. Specifically, within the context of delegation of powers to implement the right to vote to state governments, the efficiency norm (as defined here) has outweighed the norms of antidiscrimination and increasing political participation, thus creating a tension between these two essential policies concerning the right to vote. This

⁷⁴ *Id.* at 2651–52.

⁷⁵ *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S. Ct. 2247, 2253–54 (2013).

⁷⁶ *See id.* at 2260.

⁷⁷ *Id.*

tension is expressed in contemporary voting rights litigation that addresses the perceived harms created by overly burdensome voting regulations.

I have previously criticized this shift to a state-centric focus in terms of the primacy given to election laws.⁷⁸ This critique was based on the notion that this shift created a blind spot in current law, in as much as it fostered “the inability to appropriately criticize the harm involved in the day-to-day existence of the right to vote.”⁷⁹ It argued that the utilitarian ends being served by modern voting law to the exclusion of concerns for diminishing the individual citizen’s exercise of their voting rights.⁸⁰ In particular, the critique argued that voter identification states focus on fraud prevention to the extent that exclusion of voters on the margins would be acceptable so long as such harm is outweighed by the exclusion of fraudulent voters.⁸¹

In discussing this, I argued that there may exist a presumption among those who arbitrate right-to-vote disputes from the constitutional frame described here that there is a presumption that “the state’s interest in administering elections efficiently outweighs the interest of the voter in having efficient access to the franchise.”⁸² I then noted how, “under the utilitarian approach, it is also true that if something were demonstrated as creating a direct harm to voting rights, [that is, an express violation of the antidiscrimination norm] then the balance would tilt towards supporting those rights.”⁸³ However, absent hard evidence of such direct exclusions, this utilitarian-oriented thought process defaults to an upholding of voter identification laws, and in particular, those laws designed to protect the integrity of elections.⁸⁴

I also argued that this focus creates an inability for the election law structure to address concerns regarding structural disenfranchisement such that the barriers that prevent the marginalized from having the full opportunity to participate go under-analyzed. By allowing an analysis that focuses on the greater good, the utilitarian focus sets in arguable conflict the individual rights of voters who perceived themselves as structurally disenfranchised against the mechanisms that determine the collective good.⁸⁵

This is particularly acute when it comes to the rights of racial minorities within the context of the voting process. Section 5 of the Voting Rights Act served as a limitation on the collective interests within any particular state by forcing those covered jurisdictions to insure that minority interests were not diminished. With

⁷⁸ See generally Ellis, *Price*, *supra* note 23.

⁷⁹ *Id.* at 562.

⁸⁰ *Id.*

⁸¹ *Id.* at 563.

⁸² *Id.* at 564. Indeed, I commented that “[i]n this utilitarian calculus, the greatest risk is that ineligible voters will overwhelm the electoral process and create a result not intended by the majority of eligible voters,” of incidental exclusion of those who cannot bear the burden imposed. *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 558.

⁸⁵ *Id.* at 567.

Shelby County, however, the debate has been reframed as a contest between the individual interests of each state versus the collective interests of the federal government. With the vindication of the individual state interests, the underlying relationship between the individual minority voter and the state that implements her right to vote is open towards allowing the state's interests to trump.⁸⁶

Of course, Section 2 of the Voting Rights Act does nonetheless allow for litigation in these cases to remedy such structural defects, and I have elsewhere conceded that even as I was making such claims that litigation was ongoing. In light of this frame, this Article will now turn to recent voting rights litigation that illustrates these tendencies and limitations.

III. THE UTILITARIAN FRAME IN ACTION: AN ANALYSIS OF THE INFLUENCE OF THE UTILITARIAN FRAME ON RECENT VOTER SUPPRESSION CASES

This conflict between individual and group collective voting rights on the one hand, and the utilitarian claim for more efficient and secure election administration on the other, has presented itself recently in the wake of *Crawford* and *Shelby County*. These claims have most frequently arisen in litigation surrounding not only voter identification, but also reduction in early voting, same-day registration, no-excuse absentee voting, state inaction regarding long wait times, nonviolent felon re-enfranchisement, and proof of citizenship requirements.⁸⁷ Most of this litigation focuses in particular on the disparate impact that the new regulations will have on racial minorities; the poor, and other underrepresented groups. These cases implicate the concerns raised in the prior section regarding individual versus collective interests and the utilitarian balancing at the heart of voter participation litigation.

The Sixth Circuit addressed these concerns in applying a preliminary injunction for voters claiming disenfranchisement. In *Ohio State Conference of the NAACP v. Husted*, the plaintiffs sought to enjoin changes in Ohio's early in-person voting rules.⁸⁸ Plaintiffs sued under the Equal Protection Clause of the Fourteenth

⁸⁶ *Id.* at 566.

⁸⁷ *See, e.g.*, *N.C. Conf. of NAACP v. McCrory*, 831 F.3d 204 (4th Cir. 2016) (finding that North Carolina legislature's implementation of voter identification law, modification of early voting regulations, and modification of extended voter registration provisions violated Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments of the Constitution); *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (holding that Texas's voter identification law violated § 2 of the Voting Rights Act through its discriminatory effects because it imposed significant and disparate burdens on the right to vote, and the provisions failed to correspond to any meaningful interest); *Frank v. Walker*, 819 F.3d 384 (7th Cir. 2016) (holding that plaintiffs who could not obtain qualifying voter identification through reasonable effort were entitled to relief); *Kobach v. U.S. Election Assistance Comm'n*, 772 F.3d 1183 (10th Cir. 2014) (validating action by Executive Director of U.S. Election Assistance Commission to deny adding proof of citizenship requirement to federal voter registration forms in Kansas and Arizona); *Griffin v. Pate*, 884 N.W.2d 182 (Iowa 2016) (upholding Iowa felon disenfranchisement statute and defining delivery of a controlled substance as an infamous crime under Iowa state constitution).

⁸⁸ *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 529 (6th Cir. 2014), *vacated*, 588 Fed. App'x 488 (6th Cir. 2014).

Amendment and the Voting Rights Act.⁸⁹ The Sixth Circuit upheld the district court's analysis finding that African Americans would be disproportionately burdened by changes in early voting rules.⁹⁰ In evaluating the preliminary injunction motion, the Sixth Circuit rejected the contention that rational basis scrutiny applied, or that *Crawford* mandated the law in question be found facially constitutional.⁹¹ The court applied the *Anderson-Burdick* test and found that the burden outweighed the state's interest in preventing fraud, lowering expense, or insuring uniformity in election systems.⁹² The Sixth Circuit believed plaintiffs had demonstrated a likelihood of success on both their Equal Protection and Voting Rights Act claims.⁹³ Moreover, the Sixth Circuit found Section 2's vote denial doctrine applicable to early-voting systems and found that under the totality of the circumstances the plaintiffs had a likelihood of success in winning their Voting Rights Act claim.⁹⁴ In particular, the court focused on the fact that this law would most adversely affect minority voters of low income, and thus met the requirements of a Section 2 violation.⁹⁵ To wit: "[T]he disproportionate burdens SB 238 and Directive 2014-17 place on African Americans, combined with their lower-socioeconomic status in Ohio, operate to give African American voters 'less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'"⁹⁶

While the Sixth Circuit articulated the *Anderson-Burdick* test and the Section 2 test in such a way as to justify an injunction, the Seventh Circuit squarely focused on the utilitarian frame to deny an injunction concerning voting regulations. In *Frank v. Walker*, the Seventh Circuit reversed an injunction against Wisconsin's voter identification law.⁹⁷ Plaintiffs had proceeded under the Equal Protection standard of *Burdick*, as well as under Section 2 of the Voting Rights Act.⁹⁸ The Seventh Circuit upheld the Wisconsin voter ID law on the grounds that the injury the plaintiffs had demonstrated was insufficient to meet either of the constitutional or statutory standards.⁹⁹ In what could be termed a caustic opinion, Judge Easterbrook focused on the court's deference to legislative judgments as to the purpose of photo ID laws (that they provide public confidence in the election process) and the lack of measurable undue depression of turnout due to the law.¹⁰⁰

⁸⁹ *Id.*

⁹⁰ *Id.* at 542.

⁹¹ *Id.* at 542, 544.

⁹² *Id.* at 545-50.

⁹³ *Id.* at 549, 560.

⁹⁴ *Id.* at 550-60.

⁹⁵ *Id.* at 555-59.

⁹⁶ *Id.* at 555 (quoting 42 U.S.C. § 1973(b) (2009)).

⁹⁷ *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

⁹⁸ *See id.* at 751 (In addition to suit under *Crawford*, "plaintiffs also contended, and the district judge found, that the state law violates § 2 of the Voting Rights Act"); *id.* at 754 (rejecting plaintiffs' claims that Act 23 violated Section 2 of the Voting Rights Act and the Fourteenth Amendment).

⁹⁹ *See id.*

¹⁰⁰ *Id.* at 750.

In particular, during his opinion's *Crawford* analysis, Judge Easterbrook authored the following telling passage:

If the public thinks that photo ID makes elections cleaner, then people are more likely to vote or, if they stay home, to place more confidence in the outcomes. These are substantial benefits. One district judge's contrary view is not enough to condemn a state statute as unconstitutional. By contrast, a finding that a photo ID law has significantly reduced the turnout in a particular state would imply that the requirement's additional costs outweigh any benefit in improving confidence in electoral integrity. As we have observed, however, the judge did not find that photo ID laws measurably depress turnout in the states that have been using them.¹⁰¹

As to the Voting Rights Act claim, the Seventh Circuit found that the district court had failed to look at the totality of the circumstances regarding the Wisconsin voting system.¹⁰² It went further to say that such an examination would prove that even though there may be disparate outcomes on the basis of race, such outcomes do not prove that the law substantially disadvantages people of color.¹⁰³

In *League of Women Voters of North Carolina v. North Carolina*, the court addressed the North Carolina General Assembly's substantial transformation the state's election laws.¹⁰⁴ Prior to the enactment of House Bill 589, North Carolina election laws provided for 17 days of early voting.¹⁰⁵ In 2012, "more than 2.5 million people voted during early voting—more than half of all the ballots cast in the election."¹⁰⁶ House Bill 589 reduces the early voting period by a full week.¹⁰⁷ Plaintiffs alleged that minority voters would be disproportionately affected by the reduction of early voting because of the narrowed window for to make alternative arrangements for work, transportation, etc.¹⁰⁸ House Bill 589 also imposed strict voter identification requirements, prohibited local election boards from keeping the polls open on the final Saturday before elections, eliminated same-day voter registration, eliminated pre-registration of sixteen- and seventeen-year-olds in high schools, and barred votes cast in the wrong precinct from being counted at all.¹⁰⁹ Plaintiffs sued under Section 2 of the Voting Rights Act, alleging racial

¹⁰¹ *Id.* at 751.

¹⁰² *Id.* at 754.

¹⁰³ *Id.* at 753, 755.

¹⁰⁴ *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 229 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

¹⁰⁵ See N.C. GEN. STAT. § 163-227.2(b) (LEXIS through Sess. Laws 2016-3, 2016 2nd Extra Sess. 2000).

¹⁰⁶ Complaint at 9, *League of Women Voters of N.C.*, 769 F.3d 224 (Nos. 14-1845, 14-1856, 14-1859).

¹⁰⁷ See 2013 N.C. Sess. Laws 381 § 25.1 (reducing the time period from one that begins the third Thursday before the election to the second Thursday before the election).

¹⁰⁸ Complaint at 17, *League of Women Voters of N.C.*, 769 F.3d 224 (Nos. 14-1845, 14-1856, 14-1859).

¹⁰⁹ See generally 2013 N.C. Sess. Laws 381.

discrimination in the creation of these laws.¹¹⁰ Plaintiffs also sought a preliminary injunction to prevent harm due to the enforcement of these provisions in upcoming elections.¹¹¹

In the *League of Women Voters* opinion, the Fourth Circuit agreed with the Sixth Circuit as to the appropriate standard for vote denial claims under Section 2.¹¹² It in particular acknowledged that there was not a balancing test under Section 2 that would “pit [the state’s] desire for administrative ease against its minority citizens’ right to vote.”¹¹³ Under a standard that looked at the totality of the circumstances to determine discriminatory effect, the Fourth Circuit reversed the district court’s denial of the preliminary injunction regarding same-day registration and prohibition on counting out-of-precinct ballots.¹¹⁴ The district court’s denial of a preliminary injunction was affirmed regarding the reduction of early voting days, the elimination of the discretion of county boards of elections to keep the polls open an additional hour on Election Day in “extraordinary circumstances,” the elimination of pre-registration, and the soft roll-out of voter ID requirements.¹¹⁵ The case was remanded to the district court for further proceedings, and as of this writing, the outcome of the trial is currently pending.

In *Veasey v. Abbott*, the Fifth Circuit Court of Appeals addressed the Texas voter identification law (Senate Bill 14) under Section 2 of the Voting Rights Act.¹¹⁶ The plaintiffs claimed that Texas had passed its voter ID bill with a discriminatory purpose, and argued that the bill would have a discriminatory effect on Latino voters.¹¹⁷ The Fifth Circuit vacated the finding that the bill had been passed with a discriminatory purpose.¹¹⁸ The court applied the test for finding purposeful discriminatory intent as articulated in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*,¹¹⁹ and found that the district court had used the incorrect legal standard and thus could not rely on its findings that the voter identification law had been passed with discriminatory intent since the district court placed undue reliance upon the state’s history of racially discriminatory voting laws.¹²⁰ While it remanded the case after this finding for further proceedings, the Fifth Circuit did hold that the Texas voter ID law had a

¹¹⁰ Complaint at 2, *League of Women Voters of N.C.*, 769 F.3d 224 (Nos. 14-1845, 14-1856, 14-1859).

¹¹¹ *Id.*

¹¹² *League of Women Voters of N.C.*, 769 F.3d at 239.

¹¹³ *Id.*

¹¹⁴ *Id.* at 241, 248.

¹¹⁵ *Id.* at 248.

¹¹⁶ *Veasey v. Abbott*, 796 F.3d 487, 493 (5th Cir. 2015).

¹¹⁷ Complaint at 4, 10, *Veasey*, 796 F.3d at 487 (No. 14-41127).

¹¹⁸ *Veasey*, 796 F.3d at 520.

¹¹⁹ *Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252 (1977). The Arlington Heights test applies to finding proof of a discriminatory racial intent behind a facially neutral law under the equal protection clause. The test is intended to show whether racial discrimination is a ‘substantial’ or ‘motivating’ factor behind enactment of the law. *Id.* at 553–66.

¹²⁰ *Veasey*, 796 F.3d at 498–504.

discriminatory effect, since statistical evidence concerning voters who lacked or were unable to obtain the required forms of identification showed a disproportionate impact on racial minorities.¹²¹

In probably the most recent district court opinion on this issue, the Eastern District of Virginia recently addressed another mixed Fourteenth Amendment and Voting Rights Act claim. In *Lee v. Virginia Board of Elections*¹²² at issue was Virginia's voter identification law, allegations that voting procedures created long lines at the polling place, and other claims.¹²³ The Democratic Party plaintiffs here alleged violations of the Voting Rights Act and the constitutional standards for voting, in as much as the voter identification policy and the long voting lines affected African American and Latino voters.¹²⁴ On a motion to dismiss, the court addressed the voter identification claims and the long lines claims separately.¹²⁵ As to voter ID, the court applied the *Anderson* and *Burdick* standards and characterized the plaintiffs' claims as pleading a mixture of facial and class-based challenges to the Virginia voter ID law, distinguishing the case from *Crawford*.¹²⁶ Additionally, as to the VRA, the Court found sufficient allegations to link the claim to racial discrimination and upheld those claims.¹²⁷ As to the long lines claims, however, the court dismissed the claims as speculative and at most, instead concluding that burdens are uniformly shared by all voters.¹²⁸ To this end, the court stressed the fact that *Shelby County* allowed states "broad powers to determine the conditions under which the right of suffrage may be exercised."¹²⁹

From this partial survey, the lower courts have developed a jurisprudence that has clearly been influenced by the utilitarian frame. Yet, in comparing cases, it appears that the analytical difference revolves around the degree to which the frame created by the *Anderson/Burdick* test is allowed to invade the reasoning under Section 2. For example, the Sixth Circuit rejected claims that *Crawford* ought to allow for, in some cases, mere rational basis review. In *Husted*, the Sixth Circuit's *Crawford* analysis focused on the fact that *Crawford* itself did not expressly require that a burden in voting be on all voters to trigger the *Crawford* balancing.¹³⁰ Thus,

¹²¹ *Id.* at 513. The Fifth Circuit also reversed the judgment on the plaintiffs' poll tax claim under the Twenty-Fourth Amendment and *Harper v. Virginia*. *Id.* at 516. The court found that Senate Bill 14 did not impose a poll tax on voters because it did not impose a *direct* fee on such voters in order to obtain the photo ID. *Id.* at 514–17. I have argued elsewhere, however, that courts ought to take into account not only the direct cost of the voting but the indirect costs of voting in assessing the nature of such claims brought under *Harper*. See Ellis, *The Cost of the Vote*, *supra* note 31, at 1034–36, 1056.

¹²² *Lee v. Va. State Bd. of Elections*, No. 3:15CV357-HEH, 2015 U.S. Dist. LEXIS 118647, at *1 (E.D. Va. Sept. 4, 2015).

¹²³ *Id.* at *4, *9.

¹²⁴ *Id.* at *1.

¹²⁵ *Id.* at *1, *3–*5.

¹²⁶ *Id.* at *7–*8.

¹²⁷ See *id.*

¹²⁸ *Id.* at *8–*9.

¹²⁹ *Id.* at *9 (quoting *Shelby Cty. v. Holder*, 133 S. Ct. 2612, 2623 (2013)).

¹³⁰ *Ohio State Conference of the NAACP v. Husted*, 768 F.3d 524, 543–44 (6th Cir. 2014), *vacated*, 588 Fed. App'x 488 (6th Cir. 2014).

the Sixth Circuit held that “burdens on African American, lower-income, and homeless voters [do] not automatically mean that only rational basis review or standard Equal Protection Clause analysis applies.”¹³¹ The court then went to accept and find persuasive under *Crawford* the statistical evidence provided concerning the burdens of the Ohio law on the vulnerable groups mentioned as weighing in the analytical balance regarding the burdens created by the Ohio law.¹³² This broad interpretation of *Crawford* contrasts with the totality of the circumstances analysis it performed under Section 2 in as much as it focused specifically on the evidence of impact of election regulations on African Americans.

In doing so, the Sixth Circuit effectively blurred the doctrinal lines between the analysis of the Fourteenth Amendment claims under *Crawford* and the Section 2 theory presented by plaintiffs in *Wisconsin* based on the general availability of state issued photo ID. In contrast, the Seventh Circuit relied heavily on the absence of persuasive evidence of impact to suggest that reasonable regulations should not be struck down.¹³³ Judge Easterbrook went to great lengths to distinguish a denial of the right to vote for purposes of a Section 2(a) analysis from the case at bar. He reasoned that only actions by the state that make it “needlessly” difficult to cast a vote are actions which violate the VRA.¹³⁴ He further reasons that Section 2(b) serves as a limiting factor since voting practices are not made illegal by the act due to a mere “disparate impact on minorities.”¹³⁵ *Id.* This analysis further rests on the notion that Section 2 cases have been traditionally vote dilution cases rather than voter qualification cases, and the opinion expressed reticence to extend the totality of the circumstances doctrine to the later kinds of cases.¹³⁶ The opinion goes further to stress that this equal treatment requirement as the key to the analysis.¹³⁷ Indeed, the opinion reasons that this equal treatment view ultimately thwarts the *Wisconsin* plaintiffs’ claim since, at the first step of the Section 2 analysis, the plaintiffs failed to show a discriminatory burden “because in *Wisconsin* everyone has the same opportunity to get a qualifying photo ID.”¹³⁸ It is in this sense that *Frank v. Walker* elides the VRA analysis and the *Crawford* analysis through using this equal opportunity standard as the applicable first step of the analysis, and thus, as a threshold matter, using equal opportunity as a measure without inquiry as to the circumstances proffered by the plaintiffs as to why such equal opportunities might not be truly “equal.”

¹³¹ *Id.* at 544.

¹³² *Id.* at 544–45 (analyzing and finding that burden was significant but not severe appropriate under *Anderson-Burdick* balancing).

¹³³ *Frank v. Walker*, 768 F.3d 744, 745 (7th Cir. 2014), cert. denied, 135 S. Ct. 1551 (2015).

¹³⁴ *Id.* at 752–53.

¹³⁵ *Id.* at 752.

¹³⁶ *Id.* at 753 (relying on the fact that Act 23 “extends to every citizen an equal opportunity to get a photo ID”).

¹³⁷ *Id.* at 754.

¹³⁸ *Id.* at 755.

This contrast between the Sixth Circuit's view and the Seventh Circuit's view illustrates the core conflict regarding the utilitarian balance. In my view, the Sixth Circuit stressed a flexible view that relies on the interests proffered on both sides of the balance to look at the denial. I believe this view eschewed a utilitarian balancing through focusing on the flexibility within the *Crawford* framework. In contrast, I believe the Seventh Circuit relied on deference to Wisconsin's interests and construed the plaintiffs' interest as limited precisely at the point of availability of the photo ID and as a result the Seventh Circuit sent the implicit message is that whatever effective denials of the right to vote are outweighed by the governmental interests.

Ultimately, this suggests that in the context of looking at structural concerns regarding the right to vote, the utilitarian balancing approach will be imbedded in the analysis whether the frame is the constitutional standard for voting or the Voting Rights Act standard concerning antidiscrimination on the basis of race. Presumably the fact of the balancing of the former is one of the totality of facts and circumstances of the latter. As a doctrinal matter, these are intertwined, yet as a matter of whether the legal tests pursue a goal of insuring the greatest amount of access to the franchise by all eligible voters, the exclusion of the voter who might be unduly burdened to meet heightened standards imposed by more rigid voter access laws may become more certain the more courts defer to state justifications without further examination of statistical or historical trends.

IV. ECONOMIC PRECARITY, STRUCTURAL RACISM, AND THE RIGHT TO VOTE: *GREATER BIRMINGHAM MINISTRIES V. ALABAMA*

While we have seen concerns about efficiency raised squarely in our review of recent circuit court litigation over voter access rules, thus illustrating the tension between the antidiscrimination and efficiency norms, the recent case of *Greater Birmingham Ministries v. Alabama*¹³⁹ (and specifically the facts surrounding it) raises a novel variation on the claims brought in *Husted, Walker*, and the other issues previously reviewed. The facts of this case suggest another layer of concern for courts adjudicating these claims—entrenched structures of intersectional oppression¹⁴⁰ that would, by their very nature, transform the considerations in a Section 2 analysis but not a *Crawford* analysis.

¹³⁹ *Greater Birmingham Ministries v. Alabama*, No. 2:15-CV-02193-LSC, 2016 U.S. Dist. LEXIS 18891 (N.D. Ala. Feb. 17, 2016).

¹⁴⁰ By intersectional oppression, I refer to two theories relevant to consideration of voting structures. The first is the theory of intersectionality, which argues that categories of discrimination should not be seen in isolation; instead, discrimination should be examined within its multiple dimensions to understand the separate and overlapping systems of subordination and advantage. See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 (1989) (giving the first law-scholarship related articulation of intersectionality). I have argued elsewhere that such an intersectional approach is necessary to capture the evolving nature of political subordination at the intersection of race and class. See Atiba R. Ellis, *Race, Class, and Structural Discrimination: On*

The *Greater Birmingham Ministries* case came to the fore in early October 2015. This took place when al.com reported that the State of Alabama would be closing 31 driver part-time driver's license offices located in rural areas of the state.¹⁴¹ This was done to close an \$11 million cut in the Alabama Law Enforcement Agency's budget.¹⁴² This is part of a larger set of cutbacks in governmental services due to budget constraints.¹⁴³

John Merrill, Alabama's Secretary of State (and Chief Elections Official) assured the public that that the closings would not affect access to identification cards necessary for voting under Alabama's voter ID law.¹⁴⁴ However, commentators and civil rights activists complained about the risk to the voting rights for rural black Alabama residents.¹⁴⁵ Along with this furor over the DMV closures, civil rights groups sued the state of Alabama in December 2015 under the Voting Rights Act to strike down as discriminatory portions of Alabama's voter identification law.¹⁴⁶ Specifically, plaintiffs seek to force specific guidance or enjoin Alabama's "Positively Identify Provision" of their voter identification law.¹⁴⁷ This provision allows persons who cannot present one of the seven forms of identification required under the statute to nonetheless vote if two election officials are willing to sign affidavits, under penalty of perjury, "positively identifying" the person as a voter on the poll list who is eligible to vote.¹⁴⁸

Plaintiffs Greater Birmingham Ministries and the Alabama Conference of the NAACP sued to declare the voter identification provisions illegal under the

Vulnerability Within the Political Process, 28 J.C.R. & ECON. DEV. 33 (2015) (articulating a view based on "political vulnerability" seen through the lens of race and class to respond to the jurisprudential shift represented by the post *Shelby County* law of vote denial). The second is the idea of structural racism. Although this could be seen as an underlying premise of the Voting Rights Act, structural racism is the view that particular structure have evolved over time to create neutral systems that nonetheless have racially disparate outcomes. *See id.* The constraints of this Article and the tentative nature of this case forbid me from offering an extended discussion of either these facts or these concepts, but they underlie the thinking in this section.

¹⁴¹ Lee Roop, *State Says Closing Driver's License Offices Won't Limit Access to Voter I.D. Cards*, AL.COM (Oct. 2, 2015, 2:03 PM), http://www.al.com/news/index.ssf/2015/09/state_says_closing_driver_lice.html#incart_river_home.

¹⁴² *Id.*

¹⁴³ Cason, *supra* note 4.

¹⁴⁴ Roop, *supra* note 141.

¹⁴⁵ Susan Watson, the Executive Director of the Alabama ACLU, was quoted in the Al.com article saying that "people are right to be worried" about the closures. "It's going to have a huge impact on the ability of people to get a state-issued I.D." Roop, *supra* note 141. Political commentator Kyle Whitmire argued that the closings would necessarily narrow access to the necessary credential of a driver's license (or other ID), and thus created the "certainty" of a "civil rights lawsuit." Kyle Whitmire, Opinion, *Voter ID and Drivers License Office Closures Blackout Alabama's Black Belt*, AL.COM (Oct. 2, 2015, 12:17 PM), http://www.al.com/opinion/index.ssf/2015/09/voter_id_and_drivers_license_o.html. Commentators characterized the locations where the closings would take place as the poorest counties in the state. *Id.*

¹⁴⁶ *See generally* Complaint, *Greater Birmingham Ministries v. Alabama*, 2:15-CV-02193-LSC, 2016 U.S. Dist. LEXIS 18891 (N.D. Ala. Dec. 2, 2015).

¹⁴⁷ *Id.* at 6, 67-68.

¹⁴⁸ ALA. CODE § 17-9-30(e) (LEXIS through Act 2016-16 of the 2016 Reg. Sess.).

Fourteenth and Fifteenth Amendments and Section 2 of the VRA.¹⁴⁹ They also sought a preliminary injunction as to the Positively Identify Provision on the basis that it violates Section 201 of the Voting Rights Act.¹⁵⁰ The State of Alabama argued that this method provides a mechanism by which voters who would otherwise not be able to vote may do so.¹⁵¹ While the case is ongoing as of this writing, and ultimately may serve as another example of the dual litigation problem described in the preceding section, the district court denied plaintiffs' motion for a preliminary injunction on the Positively Identify Provision.¹⁵²

While this is the heart of the suit, it happens against the backdrop of economic precarity noted at the beginning of this paper. The DMV closures that correlated with the legal issues in this lawsuit took place in areas of extreme poverty.¹⁵³ Keesha Gaskins and Sundee Iyer of the Brennan Center for Justice at New York University examined this correlation: "More than 135,000 eligible voters live in these 11 counties. Nearly half of them are black, and the black poverty rate is 41 percent."¹⁵⁴ Gaskins and Iyer use this data in combination with other information to demonstrate the level of burden of access that poor (and largely minority) voters have to the voter identification regime.¹⁵⁵ And this analysis was created well before the closures described in this Article.¹⁵⁶

This economic precarity and its likely effects on the ability to access appropriate voter identification, coupled with Alabama's particular history regarding voting, suggests that a court examining this lawsuit under the "totality of the circumstances" may find the voter identification provisions violate Section 2 of the VRA. Such a finding would be consistent with the majority view of VRA doctrine traced in this paper. Moreover, it would be consistent in thinking about the particular vulnerability that arises from an intersectional analysis of the problems of poverty and race—both in Alabama generally and in the black belt of Alabama in particular—which would leave persons with less than total access to identification cards who thus are dependent on the attestation of two election officials for voting vulnerable to those officials' whim and caprice.

¹⁴⁹ Complaint at 64–67, *Greater Birmingham Ministries*, 2016 U.S. Dist. LEXIS 18891.

¹⁵⁰ *Id.* at 67. Section 201 prohibits denials of the right to vote on the basis that the voter fails to comply with any "test or device" that may serve as a prerequisite to voting. *Greater Birmingham Ministries*, 2016 U.S. Dist. LEXIS 18891, at *25.

¹⁵¹ See *Greater Birmingham Ministries*, 2016 U.S. Dist. LEXIS 18891, at *32.

¹⁵² *Id.* The district court reasoned that the Positively Identify Provision acted as a secondary form of identification rather than a requirement that must be met prior to voting. *Id.* at *27–*28. As such, the district court found that the plaintiffs would not likely succeed under Section 201 of the VRA. *Id.*

¹⁵³ Whitmire, *supra* note 145.

¹⁵⁴ KEESHA GASKINS & SUNDEEP IYER, BRENNAN CTR. FOR JUSTICE, THE CHALLENGE OF OBTAINING VOTER IDENTIFICATION 7 (2012), http://www.brennancenter.org/sites/default/files/legacy/Democracy/VRE/Challenge_of_Obtaining_Voter_ID.pdf.

¹⁵⁵ *Id.* at 14–15.

¹⁵⁶ This analysis was most recently updated in July of 2012, *id.* at i, while this Article was written and will be published in 2016.

However, the central point of this paper is that such considerations may be—and have recently been—dominated by the state-focused utilitarian balance developed through the *Crawford* line of jurisprudence. From this point of view, such a law can be seen as a benefit to voters because they would have, as the state has argued, the net benefits of the voter identification scheme, i.e., the prevention of (speculative claims of) fraud and the efficiencies gained by the government in administering the right to vote. Moreover, the state could argue that these allowances would facilitate voting without added cost. And given the underlying deference to allow states discretion in innovation, and absent explicit discriminatory intent, a persuasive case could be made to the extent that *Crawford*-oriented thinking affects the process of analyzing these claims.

This shows the possibility of different outcomes based upon the conceptual lens that the utilitarian balancing approach has imposed on modern election law thinking. Though *Crawford* is clearly settled law, it should not be applied uncritically or without due regard to its doctrinal limitations, especially within the context of dealing with voting claims related to race. It is this dynamic (and the underlying problem of racialized political vulnerability that drives it) to which lawmakers and judges should be sensitive in adjudicating and legislating about such issues in the foreseeable future.

CONCLUDING THOUGHTS

Ultimately, this Article seeks to point to a multi-layered dynamic of structural interference with the right to vote for those at the margins of the electorate—that is, those who are unable to negotiate the cumulative burdens imposed by the increase in voting regulations and thus face substantial barriers in participating in the franchise. The *Crawford*-dominated reasoning that spurs the utilitarian focus within Fourteenth Amendment election law privileges the interests of the state in administering election laws efficiently (that is, at heightened levels of rigor with the cost of such hyper-regulation shifted to the voters rather than borne by the state). This creates a disincentive for these structures to address concerns regarding structural disenfranchisement that prevent those at the margins from participating. This mode of thinking influences how traditional dual *Crawford* and VRA claims are brought, thus putting the antidiscrimination principle of election law at tension with this efficiency interest. And, as the Alabama voter identification situation suggests, failings in the economic structure directly impacts the election structure itself, thus adding another layer of structural exclusion for those unable to ultimately bear the cost of the vote. In other words, there is a possibility that the *burdens* on the state in administering the right to vote may become a focal point of future *Crawford*-style litigation.

The utilitarian focus sets in arguable conflict the individual rights of voters who perceived themselves as structurally disenfranchised against the mechanisms that determine the collective good. In this light, this Article argues that legislators and

courts should reconsider this underlying dynamic and align the competing principles concerning the right to vote so to maximize participation.

The solutions that are possible are various. Many have argued that a revived Section 5 preclearance scheme which would restore the federal government's interpositional power regarding direct and indirect structural voting rights changes in jurisdictions like Alabama where such history and potential for discrimination would be present. While such ideas would address the present situation, such a remedy would be insufficient to deal with the situations where this concern would manifest in other jurisdictions which may not otherwise fall under a revised Section 4(b) preclearance formula or would otherwise be subject to either a Section 2 racial discrimination suit or may fall out of coverage of the Voting Rights Act altogether. I have argued as a consistent thread in my voting rights scholarship that in a readjustment of the balance to defer to voter interests instead of state interests is necessary antecedent to addressing this problem.¹⁵⁷ But the Alabama voter identification-budget shortfall dilemma suggests that even this presumption should be even more nuanced.

Perhaps the simplest solution is to reconsider how courts addressing these dual claims ought to approach them.¹⁵⁸ As I observed above, the Sixth Circuit, on the evidence presented to it, was clearly open to an intersectional approach by taking into account the factors of poverty, race, and history to show the precarity of minority voters in the electoral process in and of itself, while searching for rigor in analyzing the doctrinally distinct claims. This balancing stands in stark contrast with the approach of the Seventh Circuit, which apparently took as the starting premise the benefits of the choice (and the efficiency values contained therein) of a voter identification law and then summarily rejected the counterarguments thereto. This clearly shows the differences in premises, and suggests that the risk of precarity to minority poor voters (or even poor voters generally) should be the starting point of the analysis (to the extent the evidence allows).

While pointing to the Sixth Circuit as a model of relative doctrinal clarity may be satisfactory, it is only so to a certain extent. What is more important is the ultimate premise espoused in the court's opinion. The Sixth Circuit's opinion comes the closest to an intersectional approach that articulates and weighs the relative dimensions of structural disenfranchisement. This is a necessary step to create an effective frame for analyzing right to vote problems and combat the efficiency interest (and its possible disregard for the effective disenfranchisement of some voters) under either a *Crawford* or a VRA approach. As to the VRA, an intersectional approach remains true to the "totality of the circumstances" model embedded in Section 2. Similar analysis within the *Crawford* model would bring

¹⁵⁷ See, e.g., Ellis, *The Cost of the Vote*, *supra* note 31, at 1066–68 (arguing that the *Crawford* analysis should be reframed to account for the indirect socioeconomic cost of obtaining voting credentials).

¹⁵⁸ This thought comes directly from dialogue at the symposium and the helpful question posed by Daniel P. Tokaji in response to my presentation.

more depth to the “interests of the voter” within that context and recognize that such interests are not necessarily visible in terms of ultimate effects. Ultimately, it is this reformulating of the premises that is necessary to make a more robust right to vote in this era of recalibration of the right to vote.