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# Voter Welfare: An Emerging Rule of Reason in Voting Rights Law\*

SAMUEL ISSACHAROFF†

*For the first time in at least a generation, the central focus of voting rights law has returned to the issue of eligibility to cast a ballot and the act of voting itself. Unlike in prior generations, the fights over voting are centrally part of a partisan battle for electoral supremacy and are not organized around perpetuating the historic subordination of minority populations—whatever the localized impact on minorities that the new voting rules may trigger. In the partisan environment, courts face claims of exclusion that only imperfectly map onto constitutional prohibitions of discriminatory intent or statutory protections of minority voting opportunity. Although only some of these challenges arise in jurisdictions that were formerly covered by Section 5 of the Voting Rights Act, the Supreme Court’s ruling in Shelby County further compels a new legal approach to these cases.*

*This Article begins with the observation that, at least thus far, courts have been remarkably sympathetic to these new claims of voter exclusion, even without precise doctrinal categories for assessing them. Courts have fashioned parallel lines of case authority under the Constitution and the Voting Rights Act to shift evidentiary burdens to defendants to justify the need for election law overhaul shown to have an impact on the availability of the franchise. Voting rights law is moving from a rigid per se rule against certain established practices to a contextual assessment of the reason for the challenged practices. The Article presents this evolution as analogous to the emergence of a rule of reason to provide nuance to the overly rigid antitrust laws under the Sherman Act. Any such contextual approach needs an animating principle to guide a flexible judicial standard. In the antitrust context, that was the idea of consumer welfare. The question in the voting rights context is whether a corresponding notion of voter welfare can emerge.*

## I. CONCEPTUALIZING A RULE OF REASON

The resurgence of legal challenge to voter registration and poll access restrictions has placed voting rights law in a quandary. For much of the period since the legal overhaul of the right to vote in the 1960s, expanded access to the ballot was subsumed within the struggle for the minority franchise. Doctrinally, this meant that the central thrust in expanding the franchise fell under the Voting Rights Act (VRA) in general and more particularly under the geographically and historically targeted prohibitions of Section 5 of the Act. That legal approach suffered a double blow with the Supreme Court’s invalidation of the trigger formula for Section 5 coverage in

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*Shelby County*,<sup>1</sup> and then with the transformation of voter access and the accompanying claims of voter fraud into a frontline in partisan struggles across the country.<sup>2</sup>

It is of course possible to lament the passing of a simpler legal regime or to try to force altered realities into the mold of conflicts past. One can examine the number of lawsuits filed in different jurisdictions under Section 2 of the Voting Rights Act,<sup>3</sup> or the extent of racially polarized voting in presidential elections in various parts of the country,<sup>4</sup> or surveys bearing on racial attitudes,<sup>5</sup> or even the number of Google searches that might betray racial animosity.<sup>6</sup> But even if the methodologies of all these inquiries were accepted at face value,<sup>7</sup> there is still the troubling fact that layering proxies on proxies makes the legal issues less clear and increases both judicial reluctance to engage the problem and the accompanying risk of error.

Under Section 2 of the Voting Rights Act, the focus on racially polarized voting

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

2. This is by now well-trod territory. For my own contributions, see Samuel Issacharoff, *Ballot Bedlam*, 64 DUKE L.J. 1363 (2015) [hereinafter Issacharoff, *Ballot Bedlam*]; Samuel Issacharoff, *Beyond the Discrimination Model on Voting*, 127 HARV. L. REV. 95 (2013).

3. Bernard Grofman, *Devising a Sensible Trigger for Section 5 of the Voting Rights Act*, 12 ELECTION L.J. 332, 334–35 (2013); see also Ellen D. Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006, at 183, 185–87 (Ana Henderson ed., 2007) (focusing on the relevant portion of successful claims).

4. Katz, *supra* note 3, 195–97; Ellen Katz, Margaret Aisenbrey, Anna Baldwin, Emma Cheuse & Anna Weisbrodt, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. MICH. J.L. REFORM 643, 655 (2006).

5. Christopher S. Elmendorf & Douglas M. Spencer, *Administering Section 2 of the Voting Rights Act After Shelby County*, 115 COLUM. L. REV. 2143, 2168–85 (2015) (proposing the use of survey data to establish rebuttable presumptions that would better equip Section 2 to fill the post-*Shelby* void); Christopher S. Elmendorf & Douglas M. Spencer, *The Geography of Racial Stereotyping: Evidence and Implications for VRA Preclearance After Shelby County*, 102 CALIF. L. REV. 1123, 1139–60 (2014) (proposing the use of survey data demonstrating negative racial stereotyping and correlating to actual voting behavior as the basis for new Section 5 preclearance criteria, and showing that such criteria largely correspond to the former coverage map). *But see* Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Race, Region, and Vote Choice in the 2008 Election: Implications for the Future of the Voting Rights Act*, 123 HARV. L. REV. 1385, 1413–36 (2010) (relying on survey data to conclude that ideological preferences explained differences in voting patterns among white voters in covered and noncovered states during the 2004 election but that ideology failed to do so during the 2008 election when Obama was the Democratic nominee); Stephen Ansolabehere, Nathaniel Persily & Charles Stewart III, *Regional Differences in Racial Polarization in the 2012 Presidential Election: Implications for the Constitutionality of Section 5 of the Voting Rights Act*, 126 HARV. L. REV. FORUM 205, 215–20 (2013) (showing that racially polarized voting was more pronounced in Section 5 covered states than in noncovered states during the 2012 presidential election).

6. Chris Elmendorf, *Googling the Future of the Voting Rights Act*, JURIST: ACAD. COMMENT. (June 29, 2012, 2:30 PM), <http://www.jurist.org/forum/2012/06/christopher-elmendorf-voting-future.php> [https://perma.cc/7H2G-SZ2Y].

7. *But see, e.g.*, Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 COLUM. L. REV. 1, 9–13 (2008) (critiquing the methodology of the Katz study on Section 2 litigation, Katz et al., *supra* note 4).

had the advantage of being operationally tied in to the dispositive legal issue whether the use of at-large or multimember electoral districts denied minority voters an appropriate chance to elect candidates of choice to office. By contrast, the prevalence of discriminatory survey responses or racially combative internet searches in a particular jurisdiction may inform policy makers as to what should be matters of concern or, more likely, may shape the forms of political competition in those jurisdictions. But is the revealed preference for certain kinds of internet sites tractable enough for courts to use as a guide for how an electoral system should be structured? Would the intriguing potential overlay between the searches conducted from the anonymous privacy of a home computer and the equally anonymous casting of a ballot condemn all election results, or any minority electoral losses? Perhaps. But more likely the increased conceptual gap between voting and proxies for racial views would strain the willingness of courts to ascribe discriminatory motive quite so amply.

Instead of searching for proxies near and far, it is perhaps time to rethink the entire judicial approach to the problem of guaranteeing the basic rights to the franchise. The chief problem is the constricted set of dichotomous choices available to courts under historic legal approaches. Either the voting restriction is defined by race, in purpose or effect, or it is not. If it is, then either constitutionally or statutorily, the question is whether it can withstand withering scrutiny as compelled by extraordinary state objectives, or whether it must fall. For a body of law developed out of responses to decades of formal exclusion of southern blacks under Jim Crow, the centrality of race and the presumption of illegitimacy served well to usher in the voting rights transformations of the past half century.

If we accept that the issues of voter access have spread beyond the South, and if we further accept that the issues of race are intertwined with partisanship and an increasingly polarized political arena, the question is how to approach ballot restrictions that draw on mixed considerations that may be proper under some circumstances, but not others. What happens when we move from the domain of the impermissible under all circumstances to that of the improper under certain circumstances? Put in regulatory terms, what happens when the fixed rules of one era do not correspond to the needs for more nuanced standards? In turn, are there judicial tools available to fill the gap when one statutory regime has ended and a hamstrung Congress is unlikely to step into the breach?

To formalize this inquiry, we can turn to a wildly distinct area of law that was also forged in the simple language of prohibition but had to assume more nuanced characteristics over time. The analogy is to antitrust law and the rigid “per se” prohibitions under Section 1 of the Sherman Act. As with the Voting Rights Act’s focus on discriminatory devices in southern voter-eligibility rules, the Sherman Act also had a clear target. The law was aimed at breaking up the massive trusts that emerged during the industrial transformation of the United States following the Civil War. Its language admitted of no nuance, banning “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade.”<sup>8</sup> The searing prohibitory language together with both criminal and civil enforcement tools allowed the statute broad reach against the sugar, petroleum, and other notorious trusts of its

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8. Sherman Act, 15 U.S.C. § 1 (2012).

day. Further, the breadth of the Act was coupled with broad-scale criminal liability, such that “[e]very person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony.”<sup>9</sup>

But the reach and power of the Sherman Act also led to the need for judicial modification. By its terms, any contract that restrained trade fell under its prohibition. In extreme form, that meant that any futures option, any output contract, any exclusive-dealing arrangement, and perhaps any open terms in a relational contract could be deemed a restraint of trade. No industrial society operates on the basis of an endless stream of spot markets. Firms need to hedge their needs in order to make long-term investments and do so through contractual arrangements that insulate them from the vagaries of the market. Every contract that precommits to future supply or demand necessarily acts as a restraint of trade of the contracting parties and, by extension, of anyone who might seek to contract with them prospectively. If a car owner promises to sell to a purchaser in six months at a fixed price, both buyer and seller have “combined” to “restrain” future trading options. As the Court recognized in *Standard Oil Co. v. United States*, the statutory language standing alone could “embrace every conceivable contract or combination.”<sup>10</sup>

Three leading Supreme Court cases sought to restrain the potential statutory overreach risked by a literal account of the Sherman Act. In both *Standard Oil* and *United States v. American Tobacco Co.*, the Court began to speak of what the latter would term a “reasonable construction” of the statute.<sup>11</sup> Subsequently, in *Chicago Board of Trade v. United States*, the Court expanded its rule-of-reason inquiry to draw upon a broad composite weighing of the amount of competitive harm, the benefits achieved by an agreement, and the purpose behind the agreement.<sup>12</sup> This early balancing inquiry had elements now associated with *Mathews v. Eldridge*<sup>13</sup> due process balancing, or even modern proportionality inquiries in public law, although its early incarnation seemed a laundry list of factors thrown together from numerous specific case situations.

As with any balancing test, the early rule-of-reason cases risked incoherence without some firm grounding in the overall statutory objectives. The allure of a supple balancing test in theory was difficult to manage in practice, yielding “a very open, fact-intensive, and seemingly unstructured inquiry.”<sup>14</sup> I return here to my first guide to antitrust law, then-Professor Robert Bork: “Antitrust policy cannot be made rational until we are able to give a firm answer to one question: What is the point of the law—what are its goals? Everything else follows from the answer we give.”<sup>15</sup> For Bork, and the early Chicago school of antitrust, this meant a substantive commitment to consumer welfare as a means of reining in an otherwise unbounded statutory

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9. *Id.*

10. 221 U.S. 1, 60 (1911).

11. *United States v. Am. Tobacco Co.*, 221 U.S. 106, 178–81 (1911); *Standard Oil*, 221 U.S. at 59–62.

12. 246 U.S. 231, 240–41 (1918).

13. 424 U.S. 319 (1976).

14. Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. CAL. L. REV. 733, 743 (2012).

15. ROBERT H. BORK, *THE ANTITRUST PARADOX* 50 (Free Press 1993).

inquiry. As expressed by the emerging case law, the concern was the protection of consumers, not rival competitors.<sup>16</sup>

A second development in antitrust law is also instructive, this one in the more classic prohibition on conspiracies in restraint of trade. Like prohibitions on overt racial discrimination, an actual conspiracy in restraint of trade remains the heart of the antitrust concern. As market actors become more sophisticated and better counseled, the days of transparent coordination recede, much the same way that state actors are less and less likely to use expressions of overt racial animosity in making official decisions. In order to ferret out impermissible anticompetitive behavior, antitrust law developed what are termed “plus factors” to differentiate suspicious business decisions from strategic managerial judgments that may be either the product of actual conspiratorial activity or just a product of self-interest. For example, outwardly similar conduct could be the result of impermissible coordinated pricing among competitors, or it could be the result of nonconspiratorial conscious parallelism in which firms watch for market signals from industry leaders.<sup>17</sup> The same conduct can result from rational self-interest in markets commanded by one player, as well as from active collusion among rival firms.<sup>18</sup> Indeed, the limited role of plus factors as circumstantial evidence of misbehavior rather than as categorical prohibitions or requirements was key to the Supreme Court allowing a motion to dismiss as a matter of law in *Bell Atlantic Corp. v. Twombly*,<sup>19</sup> a case in which the failure of firms to enter each other’s geographic markets was explicable on rational self-interest grounds, rather than presumptively establishing the fact of collusion.<sup>20</sup>

The first take-away for voting rights purposes from these two developments in antitrust law is the use of evidentiary rules to differentiate the permissible from the impermissible. As antitrust law progressed from the clear cases of major trusts into the fine-grained distinctions in conduct in complex markets, a broad-gauged set of fixed rules yielded to contextual understandings applied as standards. The antitrust standards tried to tease out whether the challenged conduct was reasonable in the rule-of-reason domain or whether it triggered certain warning bells in the per se rule against anticompetitive collusion. The discussion that follows compresses necessarily the difference between the per se rules that are intended to get at conspiratorial intent and the rule-of-reason standards that assess impact on competitive balance

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16. See, e.g., *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (“The antitrust laws . . . were enacted for ‘the protection of *competition*, not *competitors*.’” (emphasis in original) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962))).

17. See Darryl Snider & Irving Scher, *Conscious Parallelism or Conspiracy?*, in 2 ISSUES IN COMPETITION LAW AND POLICY 1143, 1144 (Wayne Dale Collins et al. eds., 2008) (noting that the difference between actual agreement and conscious parallelism remains “the touchstone of whether the pricing behavior constitutes a violation,” notwithstanding “that the resulting loss of consumer welfare is the same” under both forms of behavior). See generally William E. Kovacic, Robert C. Marshall, Leslie M. Marx & Halbert L. White, *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393 (2011).

18. See ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY* 267–68 (2d ed. 2008).

19. 550 U.S. 544 (2007).

20. *Id.* at 552.

regardless of motivation or collusion. These two strands of antitrust law reflect the divide in public law between intentional discrimination and discriminatory effects. But as in public law, the two strands may merge in the evidentiary tools they employ.<sup>21</sup>

Inferential proof has taken hold in antitrust, even where the focus is on conspiracy to monopolize. The more the conduct implicates plus factors—that is, factors that one would not expect to see in properly functioning markets, such as exchanges of price information among rivals or alterations in market prices seemingly not driven by the elasticity of supply and demand<sup>22</sup>—the more confidence courts could have in the supposition that something is amiss and requires some additional explanation. The advantage of this burden shifting inquiry was that it did not have to label any exchange of price information as per se illegal, nor even try to anticipate when such exchanges might be beneficial. Rather, the existence of plus factors raises the burden of justification on the implicated firms to justify their conduct, even where none of the challenged conduct is in and of itself prohibited.

Standards always admit of imprecision. The appeal of the plus-factor approach from antitrust is that it allows the existence of prohibited conduct to be proven inferentially. The presence of anomalous behavior allows suspicion to be raised without direct evidence of conspiratorial activity by allowing the burden of production to shift and requiring the defendant to explain the curious activities. As a result, it is not unlawful to raise prices in the face of declining demand, nor is it necessarily improper to constrict output in the face of raising demand. It is not even unlawful to play golf at the same club and at the same time as the CEO of a rival firm. But an intuition of suspicion begins to emerge. As Adam Smith once noted, “[p]eople of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”<sup>23</sup> The evidentiary pieces mount, and the presence of otherwise unexplained plus factors may serve to condemn conduct that, standing alone, might survive judicial scrutiny.<sup>24</sup>

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21. Thus, for example, following the Court’s decision in *Washington v. Davis*, 426 U.S. 229 (1976), equal protection law required proof of invidious intent as a necessary element of a constitutional violation. In practice, a key issue was the evidence needed for proof of that intent, whether by direct evidence of subjective motivation, *see Pers. Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (noting the lack of evidence that state legislation was enacted “‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”), or by inferential proof that the effects were so manifest as to establish a presumption of intent, *see Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (allowing inferential proof of intent from effects of challenged action, though cautioning that it is only in “rare” cases where “a clear pattern, unexplainable on grounds other than race, emerges” that impact alone is sufficient to establish intent).

22. A compilation of plus factors may be found in RICHARD A. POSNER, *ANTITRUST LAW* 79–93 (2d ed. 2001). *See also* Snider & Scher, *supra* note 17, at 1155–60.

23. 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 144 (Edwin Cannan ed., Univ. of Chi. Press 1976) (1904), *quoted in* *Bell Atlantic v. Twombly*, 550 U.S. 544, 591 (2007) (Stevens, J., dissenting).

24. Along these lines, the Fourth Circuit recently chided the Middle District of North Carolina for not holistically considering a number of plus factors. *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. July 29, 2016) (“In holding that the legislature did not enact the challenged provisions with discriminatory intent, the court seems

A second takeaway from antitrust also emerges. If the rule of reason floundered about without an objective for judicial inquiry, so too might a rule of reason in voting rights law. The strength of a balancing inquiry, removed from rigid *per se* rules, is the flexibility it offers in focusing on context rather than categorical prohibitions. Until the goal of antitrust began to be framed in the language of consumer welfare, the loose factors of rule-of-reason cases looked more like a laundry list of issues that had come up in some case or another than the application of law. The issue for this Article is whether a “voter welfare” paradigm can emerge to lend order to a nascent voting-rights rule of reason.

## II. RULE OF REASON IN APPLICATION

Let’s clearly contextualize the legal challenges of concern. Ohio on the eve of the 2012 presidential elections sought to curtail early voting options.<sup>25</sup> Even with the proposed curtailment, Ohio would have had more early-voting days than most states, and certainly more than my home state of New York, which has none. Can the Ohio law be legally challenged without also declaring New York’s failure to allow early voting to be even more unlawful?<sup>26</sup>

Or consider the proposed limitations on voter registration in North Carolina. Among the reforms was an end to the early registration of seventeen-year-old high school students, which had allowed them to be ready and eligible to vote as soon as they turned eighteen.<sup>27</sup> Can such a restriction be challenged without also challenging

to have missed the forest in carefully surveying the many trees.”).

25. *Supreme Court Allows Ohio Early Voting To Continue*, BBC NEWS (Oct. 16, 2012), <http://www.bbc.com/news/world-us-canada-19971284> [https://perma.cc/NV4F-HURT].

26. Ohio Secretary of State Jon Husted motioned toward such an objective standard in defending the state’s subsequent elimination of “Golden Week,” during which voters had been able to both register and vote on the same day. “Noting that ‘for nearly 200 years, Ohioans voted for only one day,’ Mr. Husted said, ‘If it was constitutional for lawmakers to expand the voting period to 35 days, it must also be constitutional for the same legislative body to amend the time frame to 28 days.’” Richard Pérez-Peña, *Ohio’s Limits on Early Voting Are Discriminatory, Judge Says*, N.Y. TIMES (May 24, 2016), <http://www.nytimes.com/2016/05/25/us/ohios-limits-on-early-voting-are-discriminatory-judge-says.html> [https://perma.cc/AN6R-FKMH]. *But see* Ohio Org. Collaborative v. Husted, No. 2:15-cv-1802, 2016 WL 3248030, at \*39 (S.D. Ohio May 24, 2016) (“[T]he [c]ourt need not identify an objective benchmark against which to assess the burdens imposed by the challenged provisions . . . . Rather, the relevant benchmark is inherently built into § 2 claims and is whether members of the minority have less opportunity than other members of the electorate to participate in the political process and elect representatives of their choice.”), *rev’d sub nom.* Ohio Democratic Party v. Husted, No. 16-3561, 2016 WL 4437605 (6th Cir. Aug. 23, 2016) (“The Constitution does not require *any* opportunities for early voting . . . . [Plaintiffs] insist that Ohio’s prior accommodation—35 days of early voting, which also created a six-day ‘Golden Week’ opportunity for same-day registration and voting—established a federal floor that Ohio may add to but never subtract from. This is an astonishing proposition.”).

27. Anne Blythe, *Elimination of NC Voter Preregistration Program Creates Confusion for DMV and Elections Officials*, CHARLOTTE OBSERVER (July 2, 2014, 8:50 PM), <http://www.charlotteobserver.com/news/politics-government/article9137564.html> [https://perma.cc/79WA-JTFX].



the failure of New York State (home to many of the nation's worst voting laws) to engage in any voter registration outreach at all?

Or consider the current challenges to the imposition of stricter voter identification requirements in Texas.<sup>28</sup> I recently voted in a local referendum on land trust issues in rural Connecticut, where I have a home. (Connecticut permits non-primary homeowners to vote on local matters.)<sup>29</sup> As soon as I entered the polling place, I was asked to produce my driver's license to establish my eligibility to vote, much as if I had entered any office building in midtown Manhattan, not to mention any building affiliated with NYU Law School. If the Texas identification requirement is legally infirm, does this mean that local Connecticut voting practices are also unlawful?

In terms of this article, the question is whether there is a set of contextual factors, plus factors if one will, that can guide a principled judicial inquiry into impermissible restrictions on the franchise. The discussion that follows attempts to trace the emergence of a set of practices in voting rights law that looks like the nascent steps toward the emergence of a voting-rights rule of reason.

To continue the antitrust analogy for one more step, the search is for approaches that do not resemble per se rules of prohibition, largely inherited from a period in which impermissible racial considerations dominated both the *malum in se* and the Court's doctrinal response. Voting rights law was premised on constitutional and statutory concerns that the animating purpose of many franchise regulations was the continued subjugation of minority voters, particularly under the remnants of Jim Crow. The Constitution was used to condemn purposeful arrangements designed to keep black citizens from voting, and the Voting Rights Act of 1965<sup>30</sup> put an end to many subterfuges, such as the imposition of literacy tests as a condition of voting. In particular, the VRA not only banned the use of such restrictive devices but effectively placed the offending jurisdictions under federal oversight by requiring that all further actions taken on voter eligibility be "precleared" by the Department of Justice.

The rigid tests either under the preclearance regime of Section 5 of the VRA or under the Constitution were focused on the threshold considerations of the use of race or the comparative racial impact. Any backstepping in minority voting prospects would prompt withering Department of Justice review under the nonretrogression standard of *Beer v. United States*.<sup>31</sup> Similarly, once it could be established that race commanded official decision making, constitutional strict scrutiny was virtually unyielding. Even outside the domain of race, the Court, in *Anderson v. Celebrezze*,<sup>32</sup> opened the door to a set of potentially unrealistic burdens of justification on administration of the election system, relying on the "fundamental" quality of

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28. See, e.g., Daniel Setiawan, *After Six-Year Fight, Perry Signs Voter ID into Law*, TEX. OBSERVER (May 27, 2011, 4:17 PM), <https://www.texasobserver.org/voter-id-signed-into-law/> [https://perma.cc/56TV-YLFZ].

29. Ashira Pelman Ostrow, Note, *Dual Resident Voting: Traditional Disenfranchisement and Prospects for Change*, 102 COLUM. L. REV. 1954, 1964 (2002).

30. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended in scattered sections of 52 U.S.C.).

31. 425 U.S. 130, 141 (1976) ("[T]he purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise.").

32. 460 U.S. 780 (1983).

electoral participation under the First Amendment to necessitate a showing that proposed restrictions were the least restrictive able to accomplish the state objective.

As occurred in antitrust after the first wave of trust-busting, the prohibitory regime swept too broadly to command effectively in the normal operation of the electoral arena. *Anderson* well illustrates the paradoxical commands in this area of law. At issue was an Ohio filing deadline for presidential candidates that required submission of petition signatures in April of an election year in order to be on the ballot. John Anderson announced his candidacy shortly after the filing deadline, and his petitions were accordingly rejected by the Secretary of State when submitted. The easy part of the case was finding that the ability of a candidate to get on the ballot and the ability of citizens to cast ballots for the candidate of their choice implicated core First Amendment concerns.<sup>33</sup> The difficult part was that every regulation necessarily implicated access to the political process, as formulated by Justice Stevens:

We have recognized that, “as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.” To achieve these necessary objectives, States have enacted comprehensive and sometimes complex election codes. Each provision of these schemes, whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual’s right to vote and his right to associate with others for political ends. Nevertheless, the state’s important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.<sup>34</sup>

This was certainly sensible. However, the Court then crafted a test that brought election regulation perilously close to the generally crushing least-restrictive-means analysis from First Amendment law:

[A 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 make it necessary to burden the plaintiff’s rights.*<sup>35</sup>

The Court then struck down the Ohio filing deadline as insufficiently “precisely drawn” to the state interests in administering its political system, a holding which

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33. *Id.* at 787 (“[T]he state laws place burdens on two different, although overlapping, kinds of rights—the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms.” (quoting *Williams v. Rhodes*, 393 U. S. 23, 30 (1968))).

34. *Id.* at 788 (citation omitted) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

35. *Id.* at 789 (emphasis added).

strongly resembled the least-restrictive-means test that would disable much state administration of elections. Perhaps paradoxically, this last portion of the *Anderson* test was the most sweeping, yet it received little traction as courts realized that a least-restrictive-means analysis would doom an 8 p.m. poll closing hour as compared to 8:15 p.m., 8:15 p.m. as compared to 8:30, and on endlessly. Instead, *Anderson* would come to be domesticated, as we shall see, into an open-textured examination of the totality of the circumstances in what became known as the *Anderson/Burdick* test.<sup>36</sup>

What had previously emerged in the stricter prohibitory days was a curious jurisprudence in which either voting access and other challenged electoral matters failed under exacting scrutiny, or they were held to be administrative and virtually immune from review.<sup>37</sup> States could regulate with little judicial oversight so long as they stayed within the familiar boundaries of generally applicable rules on voter registration, polling-site hours, and the like. Any constitutional scrutiny was fatal, but the domain of constitutional concern was circumscribed. In similar fashion, one person, one vote pushed toward higher and higher levels of mathematical exactitude,<sup>38</sup> except when it categorically did not apply.<sup>39</sup> And either redistricting was so racially coded as to invoke strict scrutiny,<sup>40</sup> or it existed outside the bounds of any meaningful review as partisan manipulation.<sup>41</sup>

Each of these rules of prohibition resembles the per se applications of the core concerns of antitrust law. But such per se prohibitions are too narrow in their scope and too overwhelming in their application to serve a more nuanced set of challenges to the franchise. In what follows, I will address the ways in which courts, and lower courts specifically, have tried to fill the gap in voting-rights law. To return to the question posed by Professor Bork in the antitrust context, to lend coherence to this case law requires asking for a definition of the harm and the aims of the ensuing prohibitions.

#### A. *Setting the Stage*

The Seventh Circuit provides a useful introduction to recent litigation over voter access, specifically challenges to the requirement of state-issued identification for in person voting on Election Day. Both Indiana and Wisconsin in the past few years introduced ID requirements for voting, and both were subject to high-profile litigation. These cases are also illustrative because the reforms were pushed through by

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36. See *Burdick v. Takushi*, 504 U.S. 428 (1992).

37. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 920 (1995) (striking down Congressional redistricting plan drawn along racial lines).

38. See *Cox v. Larios*, 542 U.S. 947, 949 (2004) (mem.) (Stevens, J., concurring); *Karcher v. Daggett*, 426 U.S. 725, 736 (1983). But see *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3 (2012) (per curiam) (accepting state interest in minimizing population transfers between districts, even though improved technology allowed plans with lower population deviations).

39. See *Ball v. James*, 451 U.S. 355, 371 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 730–31 (1973).

40. See *Miller*, 515 U.S. at 920; *Shaw v. Reno*, 509 U.S. 630, 653–55 (1993).

41. E.g., *Easley v. Cromartie*, 532 U.S. 234, 258 (2001); see also, e.g., *Vieth v. Jubelirer*, 541 U.S. 267 (2004); *Davis v. Bandemer*, 478 U.S. 109 (1986).

Republican control of the state, and because both are states that were outside the traditional southern focus of the VRA. Neither Wisconsin nor Indiana were subject to the administrative preclearance requirements of Section 5, meaning that any litigation to thwart these changes would have to take the form of an affirmative challenge under Section 2 of the VRA or a direct challenge under the Constitution. Further, the Indiana litigation went to the U.S. Supreme Court in *Crawford v. Marion County Election Board*,<sup>42</sup> the Court's first encounter with the nascent movement to restrict voter access and in turn became the touchstone for the current round of voting-rights claims.

*Crawford* sets out a familiar equal-protection hurdle for plaintiffs in voter-access challenges. As has become commonplace in recent years, a Republican-controlled state legislature pushed through a series of identification requirements aimed at combatting a claimed risk of vote fraud. Justice Stevens began by acknowledging that the Indiana ID requirements imposed a burden on voters, and went on to further acknowledge that the record was devoid of any evidence of in-person voter impersonation fraud at any point in Indiana history. Nonetheless, the Court held that this was insufficient to make out an equal-protection claim. In order for the statute to be constitutionally objectionable, more was required than just showing that it was burdensome or irrational. Rather, as a facial challenge to the Indiana statute, plaintiffs bore "a heavy burden of persuasion"<sup>43</sup> to show "that the statute imposes 'excessively burdensome requirements' on any class of voters."<sup>44</sup> That in turn required some proof that voters were in fact unable to vote, something that is hard to establish ahead of time and difficult even to show retrospectively if prospective voters are dissuaded from even trying to go to the polling sites. With only six elderly plaintiffs as examples of impact, and with a record bereft of actual inability to vote by others, the Indiana challenge fell flat.

In *Frank v. Walker*, the most recent Wisconsin case, Judge Easterbrook generalized from *Crawford* to adopt an analytic framework taken from disparate impact law.<sup>45</sup> Under such an approach, the predicate for any finding of impropriety in the use of entry-level criteria must be the statistically robust separation of an identifiable group of claimants. It is not enough to isolate an effect without the group-based differentiation. Thus, "any procedural step filters out some potential voters," so if the photo ID has the effect of removing a particular voter, it should only indicate that, standing alone, that voter was "unwilling to invest the necessary time."<sup>46</sup> Under this standard, the evidence did not bear out the disparate impact across groups of voters: "The [district court] judge in Indiana thought, just as the judge in Wisconsin has found, that *some* voters would be unable, as a practical matter, to get photo IDs . . . but could not ascertain how many people were in that category. The trial in Wisconsin produced the same inability to quantify."<sup>47</sup>

By contrast, in her dissent from the denial of rehearing en banc in *Crawford*, Chief Judge Wood devised a test modeled on disparate-treatment law, the identification of

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42. 553 U.S. 181 (2008).

43. *Id.* at 200 (plurality opinion).

44. *Id.* at 202 (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)).

45. 768 F.3d 744, 746 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015).

46. *Id.* at 748–49 (emphasis in original).

47. *Id.* at 748 (emphasis in original).

a pattern of differentiation as evidence of malevolent intent:

[W]hen there is a serious risk that an election law has been passed with the intent of imposing an additional significant burden on the right to vote of a specific group of voters, the court must apply strict scrutiny.

... The law challenged in this case will harm an identifiable and often-marginalized group of voters to some undetermined degree. This court should take significant care, including satisfactorily considering the motives behind such a law, before discounting such an injury.<sup>48</sup>

Under such an approach, a limited showing of suspect motive plus the risk of harm requires a high level of scrutiny as to the true intent of the underlying conduct.

Faced with similar attempts to cabin voter access, these two leading judges attempted to fit exclusion within traditional categories that have been defined largely through the prism of discrimination law, the one turning on the robustness of the statistical proof of group-based harm, the other on a searching inquiry into motive. At the same time, Judge Posner began to point the inquiry in a different direction. After joining the majority in the Seventh Circuit in *Crawford*, Judge Posner had a well-publicized change of heart focused heavily on the limited inquiry offered by the absence of proof of impact from the Indiana statute.<sup>49</sup> By the time of the Wisconsin litigation, however, Posner began offering a rationale for skepticism of such laws grounded not so much in the discrimination against identifiable subgroups of the population but on the limitations on the appropriate competitive accountability of current incumbent political power: “There is only one motivation for imposing burdens on voting that are ostensibly designed to discourage voter-impersonation fraud, if there is no actual danger of such fraud, and that is to discourage voting by persons likely to vote against the party responsible for imposing burdens.”<sup>50</sup>

### *B. A Rule of Reason for Elections*

Two sets of cases provide the backdrop for the rule-of-reason analysis in voting-rights law, one involving statutory claims under Section 2 of the Voting Rights Act, the other constitutional claims. Each involves a challenge to altered rules for the ability to cast a vote, with one dealing with voter identification requirements and the other with the availability of early in-person voting. What unifies them for purposes

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48. *Crawford v. Marion Cnty. Election Bd.*, 484 F.3d 436, 437, 439 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc).

49. Richard L. Hasen, *Why Judge Posner Changed His Mind on Voter ID Laws*, DAILY BEAST (Oct. 23, 2013, 2:35 PM), <http://www.thedailybeast.com/articles/2013/10/23/why-judge-posner-is-right-on-voter-id-laws.html> [<https://perma.cc/KD3T-52VB>].

50. *Frank v. Walker*, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc). Recently, the Western District of Wisconsin has questioned the likely continued vitality of *Crawford* and *Frank*. See *One Wis. Inst., Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222, at \*10 (W.D. Wis. July 29, 2016) (“*Crawford* and *Frank* deserve reappraisal. The court is skeptical that voter ID laws engender confidence in elections, which is one of the important governmental purposes that courts have used to sustain the constitutionality of those laws.”).

here is that both apply doctrines not generally directed at voting practices to craft a nuanced test for the relationship between the stated state objective and the burdens imposed on would-be voters. Together these cases push toward a standard of inquiry more typically associated with constitutional balancing law or, in fact, with the sort of proportionality analysis that has come to dominate German, Canadian, Israeli, South African, and other maturing constitutional analyses.<sup>51</sup>

Each line of cases begins by identifying a threshold burden on the franchise and then shifts the bulk of the judicial inquiry to the state's justification for the burden. Each eschews any rigid ruling that the claim to a particular form of identification or a particular form of early voting is an entitlement. At the same time, each carefully sidesteps any finding of improper purpose or animus on the part of state officials. Rather, each concludes by finding that the state fails to meet a burden of justification for proving that the claimed state objectives are best addressed at the cost of the associated burdens upon prospective voters.

### 1. Crafting a Constitutional Test out of *Anderson/Burdick*

The first doctrinal approach is exemplified by *Obama for America v. Husted (OFA)*,<sup>52</sup> a constitutional challenge to Ohio restrictions on the availability of early voting, restrictions that were adopted on the eve of the 2012 presidential election. After well-documented difficulties with long voting lines in 2004, Ohio had extended early voting opportunities, something that proved particularly popular with black voters who were mobilized in a “souls-to-polls” practice of voting on the Sunday before the election. In the run-up to the presidential election, Ohio shut down early voting on the last weekend of the election cycle, except that military and other voters stationed overseas could submit in-person early voting ballots. The idea that a state office was open to receive ballots from some voters, but would turn others away, was a peculiar attempt to comply with federal military voting statutes and in turn prompted the constitutional challenge.

*Obama for America* was therefore framed to claim that a state could not differentiate in providing early voting access to some but not all voters—especially when, at least anecdotally, there was reason to believe that the removed voter access was particularly popular among black voters. The reduction of early voting did not translate into a denial of a fundamental right, nor did having to vote on election day or on some other early voting date readily equate to a burden on the franchise along the lines of a poll tax. Nonetheless, the line of demarcation of military versus civilians did not trigger easy equal-protection lines of division along familiar categories such as race or national origin. Instead, the entire enterprise smacked of misuse of state authority to attempt to alter election outcomes. The Sixth Circuit adopted a poorly elaborated First Amendment test, known colloquially as the *Burdick/Anderson* test, to nonetheless get at impermissible conduct:

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51. See generally Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 YALE L.J. 3094, 3099 & n.22 (2015).

52. 697 F.3d 423, 434 (6th Cir. 2012). Disclaimer: I worked on this case on behalf of Obama for America.

A court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiffs’ rights.”<sup>53</sup>

What emerges is a limited inquiry to establish that there are appreciable burdens and that the burdens fall on a population lacking means of self-protection in the political arena. The importance of the limited threshold inquiry is to move the burden of production quickly to the claimed state justification.

*OFA* marks a significant step in equal-protection law by not trying to formalize the categories of suspect classes or fundamental rights. Classic equal-protection doctrine focuses on the forbidden uses of race or other classifications to yield a strong set of prohibitions, a per se rule following the antitrust law, by which judicial scrutiny is expected to be “strict in theory, but fatal in fact.”<sup>54</sup> The form of judicial review followed from the motive-based search for invidious intent that characterized so much of the post-*Brown* era. Any search for malevolent intent, if successful, cannot yield other than a categorical prohibition. On the other hand, administrative conduct that neither touches on a suspect classification nor implicates directly a core constitutional right is subject to rational-relation scrutiny, a decidedly deferential standard. The picture is complicated by the rise of intermediate levels of scrutiny and the efforts to differentiate facial from as-applied challenges. But the heart of this form of constitutional analysis has always been the search for formal categories that avoid calibrated judicial judgments, or at least appear to do so.

By contrast, the Sixth Circuit did not fine-tune an analysis of whether the classification of overseas versus in-state voters was suspect, nor did it try to specify the appropriate tier of scrutiny for the novel franchise restriction. Rather than getting bogged down over what level of scrutiny applies, the court found that “we review the claim using the ‘flexible standard’ outlined in” *Burdick* and *Anderson*.<sup>55</sup> Thus, *OFA* begins not with the formal doctrinal step of identifying categories of harm and associated level of judicial scrutiny. Instead, the court moved directly to find that a threshold burden on the franchise would serve as a source of constitutional concern. The curtailment of early voting opportunities and the differentiation between military and nonmilitary voters make voting harder than it had been for the broad mass of nonoverseas, nonmilitary voters to exercise the franchise. That suffices to get the constitutional ball rolling.

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53. *Id.* at 429 (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983))); see also *One Wis. Inst.*, 2016 WL 4059222, at \*3 (“This analysis proceeds under . . . the *Anderson-Burdick* framework, which sets out a three-step analysis. First, I determine the extent of the burden imposed . . . . Second, I evaluate the interest that the state offers to justify that burden. Third, I judge whether the interest justifies the burden.”).

54. See *Fullilove v. Klutznick*, 448 U.S. 448, 519 (1980) (Marshall, J., concurring in judgment).

55. *Obama for Am.*, 697 F.3d at 429.

Yet the effect on the franchise standing alone does not enshrine such early ing either with the character of an unalterable entitlement, nor subject to a non-retrogression analysis as would have been applied were Ohio subject to Section 5 of the VRA. Instead, the fact that the franchise was more burdened than it had been serves to shift the judicial inquiry to the state's justification for the burden. No state is compelled to either provide a minimum amount of process nor forbidden to unwind experiments that have proven unsuccessful or unnecessary. Rather, the inquiry leads quickly to the question of the rationale for the state's action and the means/ends fit. This allowed the court to examine the state's justifications that polling officials were too busy preparing for Election Day to keep early voting hours available the weekend before the election and that only military service members and their family were uniquely burdened by not having voting opportunities on that last weekend. The state failed to discharge its burden of production, with the court finding that "the State has shown no evidence indicating how this election will be more onerous than the numerous other elections that have been successfully administered in Ohio since early voting was put into place in 2005."<sup>56</sup> Further, given the low burden on the state of maintaining early voting, "the State has offered no justification for not providing similarly situated voters those same opportunities" as were being afforded to overseas military and their families.<sup>57</sup> The failure of Ohio to satisfy its burden of establishing the state's substantial interest in the election reforms resulted in the court holding them unconstitutional.

*OFA* and a consistent run of Sixth Circuit cases introduce a distinct electoral mechanism into equal-protection law. Dispensing with formalistic distinctions of tiers of scrutiny and boundaries of classifications, the resulting doctrine is far more pragmatic, asking basically if there is an identifiable burden on the franchise and, if so, whether it is really necessary.<sup>58</sup> These cases formalize the intuition expressed by Judge Posner concerning the deep-rooted impropriety of incumbent authorities using election-eligibility rules to try to sway the outcome of an election.

## 2. Recasting Section 2 of the VRA

Alternatively, courts have been using Section 2 of the Voting Rights Act to yield an inquiry much like that crafted by the Sixth Circuit under the Constitution. The obvious difficulty is that the VRA, like the constitutional test under equal protection, was aimed at a different set of concerns. Section 2 was written to create a non-intent based "results" test to address the dilutive impact of at-large or multimember voting districts on minority electoral prospects. As interpreted by the Supreme Court in

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56. *Id.* at 433.

57. *Id.* at 435.

58. *See* Ohio Org. Collaborative v. Husted, No. 2:15-cv-1802, 2016 WL 5248030, at \*13–22 (S.D. Ohio May 24, 2016) (applying the *OFA* framework to hold unconstitutional the state's elimination of same-day voter registration, which the court found imposed a modest burden on African Americans *that was not justified by the state's interests in preventing voter fraud and reducing costs and administrative burdens*), *rev'd sub nom.* Ohio Democratic Party v. Husted, No. 16-3561, 2016 WL 4437605 (6th Cir. Aug. 23, 2016).



*Thornburg v. Gingles*,<sup>59</sup> the key to Section 2 was the correspondence between racially identifiable patterns of voting and the electoral prospects of minority-supported candidates. Under *Gingles*, historically divergent voting patterns between the races combined with a lack of minority electoral success to demonstrate that ongoing minority exclusion from elective office was the result of discrete structural obstacles, such as at-large elections. Modern voting-rights law assumed that the simple elements of the ability to register and vote—what in the literature is termed first-generation voting-rights issues—had been realized and the battleground had shifted to the prospects for electoral success and realized political power. Neither altered voter registration requirements nor altered rules for the casting of ballots fits the historic voting inquiry of polarized voting, nor could their prospective alteration reliably predict electoral gains or losses for minority-preferred candidates.

As a result, as noted by the Fourth Circuit in *League of Women Voters v. North Carolina*,<sup>60</sup> there is a “paucity” of law under Section 2 of the VRA dealing with voter exclusion. In the covered jurisdictions under Section 5, including North Carolina, this was addressed in the first stages after 1965 and largely remained a secondary issue of implementation thereafter. Section 5 imposed a form of strict liability in which any potential for adverse impact on minority voters was a sufficient basis for refusal of administrative preclearance by the Department of Justice. The Fourth Circuit recognized the interaction between the ability of Section 5 to prune first-generation obstacles and the Section 2 concerns for the second-generation effectiveness of the franchise: “[T]he predominance of vote dilution in Section 2 jurisprudence likely stems from the effectiveness of the now-defunct Section 5 preclearance requirements that stopped would-be vote denial from occurring in covered jurisdictions like large parts of North Carolina.”<sup>61</sup>

But with Section 5 no longer operative after *Shelby County*, there was no difference between the Southern states that were its primary concern and states like Indiana or Wisconsin. When confronted with a package of voter-eligibility reforms, a growing list of putatively antifraud provisions, the Fourth Circuit could rely neither on either the nonretrogression standard of Section 5, nor on the typical vote dilution concern of Section 2. Instead, the Fourth Circuit wrote into the VRA a standard modeled directly on *Husted*’s constitutional interpretation of *Anderson/Burdick*:

First, “the challenged ‘standard, practice, or procedure’ must impose a discriminatory burden on members of a protected class, meaning that members of the protected class ‘have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.’”

Second, that burden “must in part be caused by or linked to ‘social and historical conditions’ that have or currently produce discrimination against members of the protected class.”<sup>62</sup>

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59. 478 U.S. 30, 47–59 (1986).

60. 769 F.3d 224, 239 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1735 (2015).

61. *Id.*

62. *Id.* at 240 (citations omitted) (quoting *Ohio State Conference of NAACP v. Husted*, 728 F.3d 524, 554 (6th Cir. 2014)).

The revised statutory framework is further elaborated in *Veasey v. Abbott*,<sup>63</sup> where a panel of the Fifth Circuit upheld a portion of a lower court's rejection of new voter ID requirements but did so under a judicially crafted application of Section 2 of the Voting Rights Act.<sup>64</sup> In *Veasey*, the Fifth Circuit reviewed a district court decision that struck down the new Texas voter identification requirement under a panoply of conventional civil rights analyses: as intentionally discriminatory, as violative of Section 2 of the VRA, and as unconstitutional for serving as a poll tax. Strikingly, the Fifth Circuit ushered the inquiry away from either discriminatory intent or a categorical right of the plaintiffs. Purposeful discrimination claims poorly fit the complicated partisan intrigue over the right to vote and unnecessarily force the courts to condemn political actors:

We recognize that evaluating motive, particularly the motive of dozens of people, is a difficult enterprise. We recognize the charged nature of accusations of racism, particularly against a legislative body, but we also recognize the sad truth that racism continues to exist in our modern American society despite years of laws designed to eradicate it.<sup>65</sup>

Instead of reaching out to label the political maneuverings in Texas as racist,<sup>66</sup> or indulging a strained analogy to a poll tax, the Fifth Circuit turned to Section 2 of the Voting Rights Act as the source of voter protection. As in North Carolina, the obvious difficulty is that Section 2 was written to address the dilutive impact of at-large voting districts, and the *Gingles* gloss squarely directed judicial inquiry to historical voting patterns to demonstrate ongoing minority exclusion from elective office. Altered voter registration requirements or altered rules for the casting of ballots neither fit the historic voting inquiry of polarized voting nor reliably predict electoral gains or losses for minority-preferred candidates. The court instead hopscotched across the

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63. 796 F.3d 487, 509 (5th Cir. 2015) (using the Senate Report factors of Section 2 to yield an inquiry for denial of the right to vote rather than vote dilution), *aff'd in part, rev'd in part, vacated in part*, 830 F.3d 216 (5th Cir. 2016) (en banc).

64. Although the Fifth Circuit has taken the Texas case en banc, thereby vacating the panel ruling, the panel opinion remains exemplary of an approach that is emerging across courts and across different formal categories of claims. The en banc decision, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016) (en banc), remains largely consistent with the prior panel decision, although there are differences, *see infra* note 66.

65. *Veasey*, 796 F.3d at 499; *see also Veasey*, 830 F.3d at 231 (using nearly identical language).

66. The en banc court demonstrated less reticence in discussing evidence of the legislature's discriminatory intent, holding as the prior panel had that much of the evidence relied on by the district court was infirm but also emphasizing that there existed considerable evidence pointing to discriminatory intent. *See Veasey*, 830 F.3d at 234–42. That included evidence of ameliorative measures that the legislature declined to adopt and of the extraordinary procedural maneuvers used to pass the law, both of which the prior panel had regarded as less weighty. *Compare* 830 F.3d at 236–38, *with* 796 F.3d at 503. The sensitivity surrounding the court's openness to a finding that the legislature harbored discriminatory intent is singled out for critique by the dissents, which accuse the majority of engaging in “perniciously irresponsible racial name-calling” and “encourag[ing] witch hunts for racism.” *Veasey*, 830 F.3d at 281 (Jones, J., concurring in part and dissenting in part); *id.* at 325–26 (Clement, J., dissenting in part).

Senate Report factors from the 1982 amendment to Section 2<sup>67</sup> to focus on (a) proof of a discrete vulnerability of minority voters to being excluded as a result of the changed registration and voting practices and (b) the history and effects of past discrimination to establish the vulnerability of a minority group. The combination of these two, essentially impact plus group status, allows for the burden of justification to shift to the state, in similar fashion to the equal-protection analysis in *Husted*. Once shifted, the burden on the state is to justify the necessity of the proposed restrictions in light of some clear state objective.

As it happens, there is a largely disregarded section of the VRA Senate Report factors that lists a series of additional considerations that would not typically be included in a Section 2 case. One of these turned out to be the generally unworkable examination of the “tenuousness” of the challenged state policy, something that is at best a stand-in for the pretext inquiry at the last stage of the classic *McDonnell Douglas*<sup>68</sup> formulation of burden shifting in a disparate-treatment employment-discrimination claim. “Tenuousness” is neither an element of the plaintiffs’ burden nor a defense to polarized voting yielding minority electoral defeat as formulated by the Supreme Court in *Gingles*. Rather, as with the early rule-of-reason cases that emerged in antitrust, tenuousness was inherited from specific case language, then tacked on to the laundry list of totality-of-the-circumstances factors that made their way into the Senate Report.

But in the emerging voting-rights cases, tenuousness becomes the statutory hook for shifting the inquiry onto the state’s justification for the proposed reform of electoral practices. As Pamela Karlan explains, “[a] policy of pursuing partisan advantage through restricting the right to vote should be held tenuous as a matter of law and should create a strong presumption that a plaintiff who has satisfied the two elements of the emerging framework has established a violation of section 2.”<sup>69</sup> The Fourth Circuit in *League of Women Voters* used this generally peripheral statutory analysis as the capstone of its condemnation of some of the “antifraud” provisions of the state reforms: “Finally, as to the tenuousness of the reasons given for the restrictions, North Carolina asserts goals of electoral integrity and fraud prevention. But nothing in the district court’s portrayal of the facts suggests that those are anything other than merely imaginable.”<sup>70</sup> Similarly, under the *Veasey* panel’s analysis, the failure of the Texas state policy turns neither on the prohibited status of requiring voter identification (hence the failed analogy to a poll tax), nor on the need to corral the complicated motivations into a simple account of state racism. The use of altered procedures with a differential impact on a vulnerable minority demands a burden of justification on the state. Here the proclaimed interest in combatting in personam fraud fails as an evidentiary matter, independent of any claimed positive entitlement to vote without official identification, and without any need to indict the racial

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67. S. REP. NO. 97-417, at 28–29 (1982) (listing factors indicative of a Section 2 violation), as reprinted in 1982 U.S.C.C.A.N. 177, 206–07.

68. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

69. Pamela S. Karlan, *Turnout, Tenuousness, and Getting Results in Section 2 Vote Denial Claims*, 77 OHIO ST. L.J. 763, 786 (2016).

70. *League of Women Voters v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014), cert. denied, 135 S. Ct. 1735 (2015).

motivations of the state. While elements of this inquiry may be found in the legislative history of the VRA, or in its applied case law, the resulting legal test is a breakthrough under the Act.

### III. THE PLUS FACTORS OF THE RIGHT TO VOTE

It is now necessary to take some liberties with the antitrust analogy. As a formal matter, antitrust law remains divided between the *per se* prohibition on combinations in restraint of trade and a rule-of-reason domain for firm activity that may result in a constriction of competition or that may exacerbate a dominant market position. The plus-factor analysis, as a technical matter, applies only to the existence of an agreement in restraint of trade, the classic realm of *per se* prohibitions. In practice, and from the wide-eyed gaze of the non-antitrust specialist, the application of the plus-factor analysis and the rule-of-reason approach share a common-sense intuition that at some point there must be some burden on a defendant to account for its behavior.<sup>71</sup> For purposes of the comparison to voting-rights law, it is that shifting of the burden of justification that informs the analogy.

In both statutory and constitutional contexts, a rise in voting-rights plus factors—suspicious signs that the right to vote has been violated, even if the mechanisms employed are not in themselves illegal—has accompanied the shift away from *per se* prohibitions. An analysis of major circuit-level voting-rights decisions over the last decade reveals a number of doctrinal similarities in how courts have approached challenges to voting-rights laws and policies. The analogy to antitrust comes with a specified set of criteria that are likely to prompt a shifting of the burden of justification to the challenged jurisdiction.

Across the cases, there are both specific factors that trigger court concern and more generalizable patterns that emerge as the most salient plus factors. Specific issues include procedural irregularities in the adoption of voting changes, passage of legislation following other suspicious activity,<sup>72</sup> changes that occur in close proximity to an anticipated close election (especially a presidential election), and one-party

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71. This common-sense intuition is reflected in the case law as well. In *California Dental Ass'n v. FTC*, for example, the Court held that the Ninth Circuit had been wrong to condemn a professional association's prohibition on certain nonprice advertising based on a quick look (an abbreviated form of the rule of reason), finding that the restrictions deserved more sustained scrutiny under the rule of reason given a plausible procompetitive justification for them. 526 U.S. 756 (1999).

The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like "*per se*," "quick look," and "rule of reason" tend to make them appear. We have recognized, for example, that "there is often no bright line separating *per se* from Rule of Reason analysis," since "considerable inquiry into market conditions" may be required before the application of any so-called "*per se*" condemnation is justified.

*Id.* at 779 (italics in original) (quoting *NCAA v. Bd. of Regents*, 468 U.S. 85, 104 n.26 (1984)).

72. See *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) ("Before enacting that law, the legislature requested data on the use, by race, of a number of voting practices. Upon receipt of the race data, the General Assembly enacted legislation that restricted voting and registration in five different ways, all of which disproportionately affected African Americans.").

exclusive control of the election administration process. More generally, there are three factors that integrate elements from the discrimination backdrop of voting rights law with a contemporary focus on the integrity of the electoral process. These broader concerns can be classified as follows:

*A. Impact on a Vulnerable Group*

While courts today typically avoid a finding of direct discrimination,<sup>73</sup> they remain nonetheless attentive to changes in voting rules that place a discernible and vulnerable group demonstrably at risk. Thus, courts highlight as a “plus factor” a demonstration by plaintiffs that (a) they have suffered under an existing voting system in a recent election or (b) their voting patterns in recent elections demonstrate that a new law will adversely affect them. For example, in *Stewart v. Blackwell*, the Sixth Circuit instructed the district court on remand to make findings based on the “voluminous amount of . . . evidence” the plaintiffs produced showing that black voters were far more likely than nonblack voters to reside in “punch-card” counties, where the voting system did not provide notice to a voter that they had “overvoted,” resulting in the discarding of their ballots.<sup>74</sup>

The prospect for future harm as a result of the increased chance that black voters might disqualify their ballots by overvoting provided grounds for further review. And in the early-voting context of *Obama for America v. Husted* and *Ohio State Conference of NAACP v. Husted*, the Sixth Circuit credited the plaintiffs for mustering substantial evidence of the disproportionate use of early voting among disadvantaged groups in past elections.<sup>75</sup> In neither case did the court make a finding either of discriminatory intent or of a diminished prospect for the election of the candidates of choice of minority voters. Rather, the plus factor was the increased *risk* of harm suffered by minority voters. Standing alone, that was not sufficient to establish the plaintiffs’ claims; rather, the inquiry is part of a preliminary determination of whether a burden of production would shift to the defendant.

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73. See *One Wis. Inst., Inc. v. Thomsen*, No. 15-cv-324-jdp, 2016 WL 4059222, at \*20 (W.D. Wis. July 29, 2016) (“[T]he court concludes that plaintiffs have not shown by a preponderance of the evidence that any of these changes in Wisconsin’s voting laws were motivated, even in part, by racial animus.”). But see *N.C. State Conference of the NAACP*, 831 F.3d 204, 238 (“We therefore must conclude that race constituted a but-for cause of SL 2013–381, in violation of the Constitutional and statutory prohibitions on intentional discrimination.”).

74. *Stewart v. Blackwell*, 444 F.3d 843, 878–79 (6th Cir. 2006), *vacated as moot*, 473 F.3d 692 (6th Cir. 2007) (en banc).

75. *Ohio State Conference of NAACP v. Husted*, 768 F.3d 524, 541–42 (6th Cir. 2014) (“Like the plaintiffs in *Obama for America*, Plaintiffs in this case presented ample evidence that African American, lower-income, and homeless voters disproportionately have used in past elections the EIP [early in-person] voting times that Directive 2014–17 and SB 238 eliminated . . .”), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014); *Obama for Am. v. Husted*, 697 F.3d 423, 440 (6th Cir. 2012) (describing studies that evaluated past voting trends and revealed that black voters had disproportionately taken advantage of early voting and would do the same in the upcoming election).

### B. Absence of Demonstrated Need for Change

When a state aims to implement new electoral policies, the burden these policies will create for voters must not outweigh the state's proffered justifications for them under *Anderson/Burdick*. In this way, one "plus factor" for plaintiffs under an equal-protection challenge seems to be evidence of an electoral system that functioned smoothly before the law was passed. For instance, in *Obama for America v. Husted*, the Sixth Circuit dismissed the state's proposal that it would be burdened with an extensive early-voting regime because there was "no evidence that local boards of elections have struggled to cope with early voting in the past."<sup>76</sup> Similarly, in *Northeast Ohio Coalition for the Homeless v. Husted*, a state effort to modify a consent decree on the counting of provisional ballots was rejected based on the state's inability to point to past evidence of dysfunction that it was trying to correct.<sup>77</sup> Most recently, in *One Wisconsin Institute, Inc. v. Thomsen*, the Western District of Wisconsin questioned a voter ID law that purported to combat fraud but disenfranchised real voters.<sup>78</sup>

### C. Historic Evidence of Disregard

The modern law of vote dilution emerges from a poorly specified totality-of-the-factors inquiry into the disadvantaged conditions of minorities in southern jurisdictions. Known historically as the *White/Zimmer* factors,<sup>79</sup> this compendium of evidentiary pieces from various cases looked to a past history of discrimination in education and public services, racial conduct in elections (such as slating of white candidates or racial appeals in campaigns), election devices that magnified majoritarian advantage (e.g., at-large elections or numbered posts), and the lack of minority electoral success. In turn, these case-derived indicia of minority-vote dilution were incorporated into the legislative history of the 1982 amendment of Section 2 of the Voting Rights Act as the Senate Report factors.

As is well chronicled, the clunky *White/Zimmer* inquiry was largely jettisoned in *Thornburg v. Gingles* in favor of a streamlined inquiry into whether polarized voting patterns among blacks and whites were the source of minority electoral frustration.<sup>80</sup> The *White/Zimmer* factors, like their formal inclusion in the Senate Report factors,

76. *Obama for Am.*, 697 F.3d at 434.

77. 696 F.3d 580, 596 (6th Cir. 2012) ("[N]either the State nor amici present evidence that county boards err in remaking wrong-precinct ballots to count only votes in 'up-ballot' races, despite the fact that county boards have followed the practice since the adoption of the consent decree in April 2010.").

78. 2016 WL 4059222, at \*2 ("The Wisconsin experience demonstrates that a preoccupation with mostly phantom election fraud leads to real incidents of disenfranchisement, which undermine rather than enhance confidence in elections, particularly in minority communities. To put it bluntly, Wisconsin's strict version of voter ID law is a cure worse than the disease.").

79. *White v. Regester*, 412 U.S. 755, 766–67 (1973); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305–06 (5th Cir. 1973), *aff'd sub nom. E. Carroll Par. Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

80. See Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1850–53 (1992).

were a compendium of evidentiary conclusions in various voting-rights cases that could not offer a guiding rationale as to why they were included in some cases but not in others or how a relative finding that some but not all factors were found would actually translate into a determination of liability. After *Gingles*, these factors largely receded from judicial inquiry, and Section 2 litigation took the form of a statistical battle over evidence of voting alignments along racial lines and the capacity of single-member districts to provide an opportunity for minority electoral success.

As voter access has returned to the forefront, so too have the older roots of voting-rights law. Particularly in cases that invoke the Voting Rights Act, courts have largely spurned the post-*Gingles* analysis on polarized voting and returned voting-rights law to its original emphasis on historic disadvantage.<sup>81</sup> For instance, although the Fifth Circuit in *Veasey v. Abbott* acknowledged that *Shelby County* had prioritized the consideration of contemporaneous over past discrimination, it devoted a significant portion of its discriminatory-effect discussion to an explication of the “social and historical conditions” disadvantaging the minority group in question.<sup>82</sup> Similarly, in *Ohio State Conference of NAACP v. Husted*, the Sixth Circuit considered the historic as opposed to present voting factors to be “particularly relevant” to a vote-denial claim because of these factors’ focus on historical or current patterns of discrimination as inhibiting the minority’s ability to participate effectively in the political process.<sup>83</sup> Even in more classic vote-dilution cases, courts are increasingly willing to credit evidence of disregard as a leading factor in a fashion not anticipated by *Gingles*. Thus, two Eighth Circuit cases dealing with dilution of Native American votes also highlighted longstanding discrimination against this minority group. The court in *Bone Shirt* acknowledged the argument that the reservation system may make Native Americans more involved in tribal matters than state politics but declared that “[t]he record is clear that South Dakota’s history of discrimination against Native-Americans has limited their ability to succeed in the state political process.”<sup>84</sup> And the opening section of *Cottier* framed the City of Martin as a recent—not merely historical—site of racial tensions between Native Americans and whites.<sup>85</sup>

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81. See *One Wis. Inst.*, 2016 WL 4059222, at \*50 (“[P]laintiffs’ evidence about Wisconsin’s history of discrimination and about the effects of past discrimination that minority groups suffer is relevant to their Voting Rights Act claims.”).

82. *Veasey v. Abbott*, 796 F.3d 487, 509–11 (5th Cir. 2015), *aff’d en banc*, 830 F.3d 216 (5th Cir. 2016) (en banc). The en banc decision reflects the same focus. See *Veasey v. Abbott*, 830 F.3d 216, 256–62 (5th Cir. 2016) (en banc).

83. 768 F.3d 524, 555, 557 (6th Cir. 2014) (“[T]he burdens SB 238 and Directive 2014–17 place on African American voters are in part caused by or linked to ‘social and historical conditions’ that have produced or currently produce discrimination against African Americans in Ohio.”), *vacated*, No. 14-3877, 2014 WL 10384647 (6th Cir. Oct. 1, 2014). The court referred to these as the first, third, fifth, and ninth *Gingles* factors. *Thornburg v. Gingles*, 478 U.S. 30, 36–37 (1986) (listing the circumstances that may be probative of a Section 2 violation); see also *Ohio Org. Collaborative v. Husted*, No. 2:15-cv-1802, 2016 WL 3248030, at \*44 (S.D. Ohio May 24, 2016) (“[T]he [c]ourt agrees with the reasoning in [*Husted I*] and [*Husted III*] and concludes that S.B. 238 interacts with the historical and social conditions facing African Americans in Ohio to reduce their opportunity to participate in Ohio’s political process relative to other groups of voters . . .”).

84. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006).

85. *Cottier v. City of Martin*, 445 F.3d 1113, 1115 (8th Cir. 2006), *vacated*, 604 F.3d 553

## IV. THE MISSING PIECE

If we return to the formulation of Professor Bork, there remains a missing conceptual framework for the development of a coherent rule of reason in voting-rights law. The issue in all of the recent voting-eligibility cases ultimately turns on the problem of manipulation of voting rules by political insiders seeking to control the outcome of subsequent elections. The harm to be avoided, in the classic Blackstonian sense of constructing a rule of legal interpretation,<sup>86</sup> is the capacity for ends-oriented manipulations of the rules by those entrusted with administration of the electoral system. In today's world of hyperpartisanship, that harm is unfortunately driven overwhelmingly by partisan considerations and not by more classic sources of exclusion, such as race or sex.

For voting-rights law, however, assessing improper partisan motivation has proved the third rail of electoral challenges.<sup>87</sup> Whether in the indirect context of challenges to multimember districting in jurisdictions with contested party challenges,<sup>88</sup> or in the direct context of challenges to partisan gerrymandering,<sup>89</sup> courts have steered clear of doctrinal engagements with the question of excessive partisanship.<sup>90</sup> In the current environment, this lends an odd quality to a judicial inquiry that looks to the effects of partisan desires to curtail voter access to the electoral process but leaves an unspoken void around the operational motivation for the challenged alteration of eligibility and voting rules.

No doubt, part of the reason for judicial reluctance to engage improper partisan motivation is concern that, once engaged, doctrinal condemnations of partisan considerations admit of no readily discernible stopping point. There is no natural prescription against the presence of partisanship in politics, unlike the formal rejection of race or wealth as a driving consideration in voter eligibility. Partisans are by

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(8th Cir. 2010) (en banc).

86. This idea was classically formulated as the mischief rule, a canon of construction instructing the judiciary to “make such . . . construction as shall suppress the mischief, and advance the remedy.” Heydon’s Case (1584) 76 Eng. Rep. 637, 638; 3 Co. Rep. 7 a, 7 b. As Blackstone interpreted this rule in the statutory context, the best mode of discerning purpose is “by considering the *reason* and *spirit* of it . . . . For when this reason ceases, the law itself ought likewise to cease with it.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*61 (emphasis in original).

87. See Issacharoff, *Ballot Bedlam*, *supra* note 2, at 1396–1400 (describing how “the overlay between partisan considerations and traditional civil-rights protections has confounded attempts to regulate improper behavior through a simple discrimination model”).

88. See *Whitcomb v. Chavis*, 403 U.S. 124, 149–53 (1971) (characterizing the denial of a dedicated representative to a concentrated black community within a multimember district as “a function of losing elections” and not of impermissible discrimination).

89. See *Vieth v. Jubelirer*, 541 U.S. 267, 281 (2004) (plurality opinion) (denying partisan-gerrymandering claim because of the absence of “judicially discernible and manageable standards for adjudicating” such claims).

90. *But see* N.C. State Conference of the NAACP v. McCrory, 831 F.3d 204, 214 (4th Cir. July 29, 2016) (“Using race as a proxy for party may be an effective way to win an election. But intentionally targeting a particular race’s access to the franchise because its members vote for a particular party, in a predictable manner, constitutes discriminatory purpose.”).



their nature partisan. The structural allocation of authority over election administration is a uniquely American disability in the political arena. The Venice Commission of the Council of Europe, for example, sets out as a categorical rule of election administration in its guidelines on best electoral practices, that an “impartial body must be in charge of applying electoral law.”<sup>91</sup> But once administration becomes intertwined with partisan politics, courts have a difficult time saying at what point partisanship has excessively infected the decision-making process.

Here too there is an odd parallel to yet another area of antitrust law that implicates motive: predatory pricing. As Judge Easterbrook has observed, “You cannot be a sensible business executive without understanding the link among prices, your firm’s success, and other firms’ distress. If courts use the vigorous, nasty pursuit of sales as evidence of a forbidden ‘intent’, they run the risk of penalizing the motive forces of competition.”<sup>92</sup> The tiger rarely changes its stripes, and the “drive to succeed lies at the core of a rivalrous economy. Firms need not like their competitors; they need not cheer them on to success; a desire to extinguish one’s rivals is entirely consistent with, often is the motive behind, competition.”<sup>93</sup> A focus on motive risks mistaking the spirit of the enterprise for the evil to be averted. Per Judge Posner,

Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run.<sup>94</sup>

At bottom, the issue of partisan motive pushes courts to the heart of the peculiar practice of leaving the umpiring to the players. Uniquely among democracies, the United States staffs its election administration by officials either selected in partisan elections or selected by those elected to office in partisan contests. It would be an odd legal constraint to award state authority over elections as part of the spoils of electoral success, then to demand that the duties discharged by that office be free of any partisan taint. Without a bedrock principle of administrative independence from politics for the electoral process overall, courts are left in the bizarre world of trying to define the consequences of too much partisanship without an ability to condemn partisanship as such. This is not a defense of partisan administration of the electoral process, but a recognition of an unfortunate real-world constraint on what judges can do.<sup>95</sup>

The Supreme Court’s one recent engagement with voter access did nothing to help guide the judicial inquiry. In *Crawford*, the Supreme Court allowed that unalloyed

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91. EUROPEAN COMM’N FOR DEMOCRACY THROUGH LAW, CODE OF GOOD PRACTICE IN ELECTORAL MATTERS: GUIDELINES AND EXPLANATORY REPORT 15 (2003).

92. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401–02 (7th Cir. 1989).

93. *Id.* at 1402.

94. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986).

95. For an earlier attempt to challenge partisan administration of redistricting, another unique American practice, see Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593 (2002).

partisanship could condemn state action: “If [partisan] considerations had provided the only justification for a photo identification requirement, we may also assume that [such a law] would suffer the same fate as the poll tax at issue in *Harper [v. Virginia Board of Elections]*.”<sup>96</sup> Such an administrative rule that could be explained in purely partisan terms would be an odd bird, particularly once the Court announced that this would be per se grounds for unconstitutionality. More significantly, the Court rejected the claim that partisan motivations of at least some of the proponents of an Indiana voter-identification law could suffice to condemn an act that had at least some valid, neutral justifications. As expressed by Justice Stevens,

[I]f a nondiscriminatory law is supported by valid neutral justifications, those justifications should not be disregarded simply because partisan interests may have provided one motivation for the votes of individual legislators. The state interests identified as justifications for [the act] are both neutral and sufficiently strong to require us to reject petitioners’ facial attack on the statute. The application of the statute to the vast majority of Indiana voters is amply justified by the valid interest in protecting “the integrity and reliability of the electoral process.”<sup>97</sup>

Both the Seventh and Eleventh Circuits have followed suit by explicitly discounting a consideration of partisanship and referencing the *Crawford* dicta that a nondiscriminatory law with at least some valid, neutral justifications cannot be impugned or disregarded simply because some of its proponents were motivated in part by partisan concerns.<sup>98</sup> The Sixth Circuit in *Obama for America* acknowledged that manipulation of voting rules could allow partisan legislatures to “give extra early voting time to groups that traditionally support the party in power and impose corresponding burdens on the other party’s core constituents.”<sup>99</sup> Conspicuously, however, this did not fit into the court’s reasoning or holding.

Following Professor Bork’s lead in antitrust, the reason for the tremendous influence of Chicago-inspired antitrust theory was that it filled the missing void as to the object of judicial review under either rule of reason or more formal per se law. Bork and many others both in the academy and in the Justice Department took on the small-is-better line of reasoning from Brandeis through Douglas with a simple theory based upon consumer welfare as the governing objective in competition law. All the balancing in the world cannot yield a result if one cannot specify the objective of the balancing test. Whatever the imprecisions and uncertainties in the consumer welfare paradigm in antitrust law, it has the great virtue of providing a metric that tied the

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96. *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 203 (2008) (citing *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966)).

97. *Id.* at 204 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 n.9 (1983)). *But see Crawford v. Marion Cty. Election Bd.*, 484 F.3d 436, 438–39 (7th Cir. 2007) (Wood, J., dissenting from denial of rehearing en banc) (portraying voter identification laws that act to turn away would-be voters as “just as insidious as . . . poll taxes and literacy tests” and questioning the state’s justification where “it appears that no one has ever, in Indiana’s history, been charged with voter fraud”).

98. *Frank v. Walker*, 768 F.3d 744, 755 (7th Cir. 2014), *cert. denied*, 135 S. Ct. 1551 (2015); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1355 (11th Cir. 2009).

99. *Obama for Am. v. Husted*, 697 F.3d 423, 435 (6th Cir. 2012).

objective of antitrust law to the aims of the collusive behavior it was trying to proscribe. An agreement in restraint of competition both had the aim of obtaining monopoly rents from the consuming public and could be measured by the corresponding diminution of consumer welfare. On this very simple take, consumer welfare integrated the harm and the prohibited objectives doctrinally.

By contrast, the new voting-rights rule of reason awaits its integrative doctrinal logic in articulating a theme of voter welfare. Starting from the proposition that the new voting cases stem from a misuse of partisan authority over the administration of elections, the question becomes whether a contextual burden-shifting approach can overcome an inquiry that directs court focus away from the partisan motivations for the challenged ballot restrictions. In effect, courts are searching for the consequences of partisan excess without being able to ferret out the root cause. At some point the oncologist needs to look for the cancerous tumor itself, not simply for the metastatic manifestations.

#### CONCLUSION

Generalizing just a bit, the broader question concerns the prospects of a second-order regulatory regime that seeks to cabin excess without addressing the core improper activity. Two possible analogies emerge from antitrust law.

From its inception, the rule of reason had an ad hoc quality to its assessments of any particular market activity. But its imprecision allowed penetration by the comprehensive account offered by the consumer-welfare approach. Perhaps the seeds of a new approach may be present when Judge Posner speaks of the need for the law to be vigilant against efforts “to discourage voting by persons likely to vote against the party responsible for imposing burdens.”<sup>100</sup> We may term this a “voter welfare” approach in which the democratic welfare of the voters is measured by their collective ability to “throw the rascals out.”<sup>101</sup> Such a voter-welfare approach would resonate in democratic theory with ample support from the Schumpeterian idea that democracy rests on political elites having to compete for popular support and thereby having an incentive to engage, educate, and mobilize the generally passive bulk of the population. We can further embellish the market analogy to antitrust by speaking of political competition as reducing the agency costs associated with unaccountable political leaders, the political order’s equivalent of monopoly rents.

But what if past proves to be prologue and courts continue to shy away from any direct engagement with the misuse of partisan political power? Here there is perhaps an alternative lesson from antitrust law. For decades, regulators and courts have been able to thwart mergers that are deemed to overly concentrate a particular market. Without engaging in debates over the robustness of the Herfindahl-Hirschman index (HHI) and the arcana of antitrust law, there are workable metrics to define when a competitive equilibrium is under threat.<sup>102</sup> For all its apparent precision, the HHI’s

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100. *Frank v. Walker*, 773 F.3d 783, 796 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc).

101. G. BINGHAM POWELL, JR., *ELECTIONS AS INSTRUMENTS OF DEMOCRACY* 47 (2000).

102. *See generally* 4 PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 930 (3d ed. 2009).

10,000-point scale (seemingly so much more scientific than a mere A–F course grading curve) cannot answer a simple question about the optimal number of firms in the market. It simply quantifies the intuition that under certain circumstances there is too much concentration, defined by the Department of Justice as a score over 2500.<sup>103</sup> Where the HHI score is lower, it provides a safe harbor in which concerns of excessive diminution of competition are allayed. Even without a clear conception of the ultimate goal, the HHI provides a serviceable tool for helping us know when we see it. One need not define the platonic ideal of how many firms are necessary to create a perfectly competitive market in order to identify when too few firms pose a threat to market competition.

We should never underestimate the ability of the law to just muddle through. Ultimately, any rule of reason is just an injunction to courts to do the best they can. Unspecified problems, imprecise commands, yet an equitable faith that somehow wrongs may be righted.

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103. *Herfindahl-Hirschman Index*, U.S. DEP'T JUST., <https://www.justice.gov/atr/herfindahl-hirschman-index> [<https://perma.cc/L3QX-YZJ8>] (last updated July 29, 2015),