

THE NEW VOTE DILUTION

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We may be witnessing the emergence of a new kind of vote dilution claim. In a barrage of lawsuits about the 2020 election, conservative plaintiffs argued that electoral policies that make it easier to vote are unconstitutionally dilutive. Their logic was that (1) these policies enable fraud through their lack of proper safeguards and (2) the resulting fraudulent votes dilute the ballots cast by law-abiding citizens. In this Article, I examine this novel theory of vote dilution through fraud facilitation. I track its progress in the courts, which have mostly treated it as a viable cause of action. Contra these treatments, I maintain that current doctrine doesn't recognize the claim that electoral regulations are dilutive because they enable fraud. However, I tentatively continue, the law should acknowledge this form of vote dilution. Fraudulent votes can dilute valid ones—even though, at present, they rarely do so.

Under my proposed approach, vote dilution through fraud facilitation would be a cognizable but cabined theory. Standing would be limited to voters whose preferred candidates are targeted by ongoing or imminent fraud. Liability would arise only if a measure is both likely to generate widespread fraud and poorly tailored to achieve an important governmental interest. And relief would take the form of additional precautions against fraud, not the rescission of the challenged policy. In combination, these points would yield a mostly toothless cause of action under modern political conditions. Should there ever be a resurgence of fraud, though, the new vote dilution claim would stand ready to thwart it.

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INTRODUCTION

Three times in its modern history, the Supreme Court has recognized a new theory of vote dilution. (Vote dilution means reducing the effectiveness of certain people's votes without actually preventing them from casting ballots.¹) In the 1960s, the Court launched the reap-

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¹ See, e.g., DANIEL HAYS LOWENSTEIN, RICHARD L. HASEN, DANIEL P. TOKAJI & NICHOLAS STEPHANOPOULOS, ELECTION LAW: CASES AND MATERIALS 216 (6th ed. 2017) (defining vote dilution).

portionment revolution when it held that overpopulated districts unconstitutionally dilute their residents' votes.² In the 1970s, the Court authorized minority voters to bring claims when their influence is undercut by certain practices, like district lines that crack or pack them.³ And in the 1980s, the Court endorsed a similar theory of partisan vote dilution, enabling parties to sue when they're victimized by gerrymandered districts.⁴

We may currently be witnessing the emergence of a fourth category of vote dilution claims. In a series of lawsuits about the 2020 election, conservative plaintiffs allied with Donald Trump's campaign contended that states risked diluting people's votes when they loosened their electoral requirements.⁵ This novel vote dilution theory has two sequential steps. First, an overly lax voting rule induces electoral fraud. Second, the resulting fraud cancels out votes that are lawfully cast. Therefore, the overly lax policy is unconstitutional—dilutive of honest citizens' valid votes.

Consider an example from the court opinion that has most carefully analyzed this new claim.⁶ Many Pennsylvania counties decided to set up drop boxes for the 2020 election: unmanned sites where voters could personally return mail-in ballots at a time convenient for them.⁷ The Trump campaign argued that “drop boxes allow for an unacceptable risk of voter fraud” because they permit “an individual [to] return[] the ballots of other people” in violation of state law.⁸ This fraudulent “ballot harvesting,” in turn, allegedly “‘dilute[s]’ the votes of all lawful voters who comply with the Election Code.”⁹ Consequently, according to the Trump campaign, Pennsylvania's “failure to implement a mandatory requirement to ‘man’ drop boxes” renders the unstaffed sites unconstitutional.¹⁰

² See *Reynolds v. Sims*, 377 U.S. 533 (1964) (recognizing a cause of action for malapportionment).

³ See *White v. Regester*, 412 U.S. 755, 765–70 (1973) (recognizing a cause of action for racial vote dilution). Note that racial vote dilution can be accomplished through both at-large electoral systems and single-member districts that inefficiently disperse or concentrate minority voters.

⁴ See *Davis v. Bandemer*, 478 U.S. 109, 118–27 (1986) (recognizing a cause of action for partisan gerrymandering), *overruled by* *Rucho v. Common Cause*, 139 S. Ct. 2484, 2498–502 (2019) (holding that partisan gerrymandering claims are nonjusticiable).

⁵ See Emily Bazelon, *Trump Is Not Doing Well with His Election Lawsuits. Here's a Rundown.*, N.Y. TIMES (Nov. 13, 2020), <https://www.nytimes.com/2020/11/13/us/politics/trump-election-lawsuits.html> (cataloging the Trump campaign's legal challenges).

⁶ *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331 (W.D. Pa. 2020).

⁷ See *id.* at 352–54.

⁸ *Id.* at 359.

⁹ *Id.*

¹⁰ *Id.* at 391.

This theory of *vote dilution through fraud facilitation* may rile some readers. For one thing, no Supreme Court decision explicitly recognizes the cause of action. So the claim may be noncognizable, asserting a constitutional injury that doesn't actually exist. For another, the theory targets jurisdictions that have voluntarily chosen to make it easier for their citizens to vote. These jurisdictions should be commended, some observers may think, not subjected to potential liability for their pro-voting policies. And maybe most importantly, the fraud that's the theory's mechanism of dilution is very rare in modern American politics (at least at any significant scale).¹¹ So, arming the bad actors who usually invoke fraud with another legal weapon may seem unwise.

Despite these critiques, most courts that have confronted claims of vote dilution through fraud facilitation have treated them as legitimate grounds for relief. To be sure, no plaintiff has ultimately *pre-vailed* in this kind of challenge. But most litigants have lost because they lacked standing.¹² Standing, of course, is a derivative concept whose contours depend on the cause of action being advanced.¹³ To even get to the question of standing, there must be a valid legal theory in the first place. Other litigants have failed due to a paucity of evidence that the electoral rules they attacked would, in fact, give rise to much fraud.¹⁴ These evidence-based rulings suggest that, if the link could be corroborated between certain laws and widespread fraud, the laws may well be unconstitutional.

For the most part, then, the judiciary has taken seriously claims of vote dilution through fraud facilitation. What about the academy? So far, no. In July 2020, after the first few of these suits were filed, I wrote a short piece about them for a popular publication.¹⁵ In October 2020, a pair of researchers at the Healthy Elections Project penned a blog post describing some relevant court opinions.¹⁶ A handful of articles

¹¹ See BRENNAN CTR. FOR JUST., *DEBUNKING THE VOTER FRAUD MYTH* (2007), <https://www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth> (finding voter fraud “vanishingly rare”).

¹² The earliest example from the litigation about the 2020 election is *Paher v. Cegavske*, 457 F. Supp. 3d 919, 925–27 (D. Nev. 2020).

¹³ See *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (observing that standing “turns on the nature and source of the claim asserted”).

¹⁴ The earliest example from the litigation about the 2020 election is *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 834–36 (D. Mont. 2020).

¹⁵ See Nicholas Stephanopoulos, *Conservative Groups Sue to Make Pandemic Voting Even Harder*, SLATE (July 6, 2020, 5:19 PM), <https://slate.com/news-and-politics/2020/07/conservative-groups-sue-to-make-pandemic-voting-even-harder.html>.

¹⁶ Alexander Ross Perry & Christopher Meyer, *Mail Voting Litigation in 2020, Part V: Efforts to Halt Vote-by-Mail Expansion*, LAWFARE (Oct. 29, 2020), <https://>

by journalists have also mentioned the nascent vote dilution theory.¹⁷ But, to the best of my knowledge, that's it. To date, no academic work appears even to have noticed the claims that unduly permissive electoral regulations dilute lawful votes, let alone to have studied them in any depth.¹⁸

So that's what I aim to do here: to scrutinize, for the first time, the emerging theory of vote dilution through fraud facilitation. First, I summarize the litigation that has involved this cause of action. It's surprisingly voluminous, including at least twenty-two court opinions in lawsuits from at least thirteen states. Second, I consider whether this claim is already cognizable under current law. Disagreeing with most courts, I argue that it isn't. Specifically, it can't be inferred from Supreme Court dicta about criminal prosecutions for electoral fraud. Third, I nevertheless maintain that courts *should* hold that electoral policies may be unconstitutionally dilutive if they induce significant fraud. Dilution via fraud is different from the forms of dilution that courts have previously recognized, but it's still a threat to the franchise.

Fourth, I address who would have standing to bring this new cause of action. Suitable plaintiffs would be voters whose preferred candidate is targeted by fraud that (1) benefits her opponent and (2) is already occurring or imminent. Fifth, I grapple with how claims of vote dilution through fraud facilitation would be analyzed on the merits. I propose a variant of the sliding-scale scrutiny that applies to burdens on voting, under which the intensity of judicial review would vary based on the likelihood and scale of any fraud. Finally, I turn to how dilutive practices would be remedied. Consistent with their approaches to other types of dilution, courts could simply invalidate dilutive measures and require them to be replaced by nondilutive alternatives.

www.lawfareblog.com/mail-voting-litigation-2020-part-v-efforts-halt-vote-mail-expansion (describing litigation efforts to restrict vote-by-mail in the 2020 election).

¹⁷ See, e.g., Emily Bazelon, *The Trump Campaign Has Filed 16 Lawsuits Contesting the Election*, N.Y. TIMES, Nov. 16, 2020, at A16; Joseph Marks & Tonya Riley, *The Cybersecurity 202: GOP Launches Its Biggest Attack Yet on Mail Voting in California*, WASH. POST (May 26, 2020), <https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2020/05/26/the-cybersecurity-202-gop-launches-its-biggest-attack-yet-on-mail-voting-in-california/5ecc0bd788e0fa6727004619> (describing Republican efforts to restrict mail voting).

¹⁸ An insightful article, written well before the recent suits, did note that, outside of court, “advocates of anti-fraud measures offer the argument that fraud dilutes the votes of legitimate individual voters.” Joseph Fishkin, *Equal Citizenship and the Individual Right to Vote*, 86 IND. L.J. 1289, 1310 (2011); see also James A. Gardner, *The Dignity of Voters—A Dissent*, 64 U. MIAMI L. REV. 435, 454 (2010) (also observing that “it is sometimes claimed that the casting of unlawful votes dilutes the weight or value of votes lawfully cast”).

One more prefatory point. As I've already noted, there's little fraud in contemporary American elections.¹⁹ Most regulations that might be thought to induce fraud also serve a legitimate goal: promoting (nonfraudulent) voter participation. So to *recognize* a theory of vote dilution through fraud facilitation isn't to say—or even to hint—that this theory would often *succeed* in court. Far more likely, in our current historical moment, such suits would fall flat, stymied by the lack of fraud and the robust rationales for many electoral rules.²⁰

I

THE LITIGATION LANDSCAPE

The backdrop for the proliferating claims of vote dilution through fraud facilitation is the coronavirus pandemic that struck the United States in 2020. Voting in person is risky in a pandemic. Voters can be infected by (or infect) other voters, poll workers, poll watchers, or the people they encounter going to or from the polls. To reduce this danger, many states voluntarily chose to make voting easier—in particular, to loosen their restrictions on voting by mail, which can be done without coming across anyone else.²¹ At least thirty states provided some additional voting opportunities in 2020.²² Among other things, they removed excuse requirements for voting by mail, recognized concern about the coronavirus as a valid reason to vote by mail, allowed mail-in ballots to be returned to drop boxes, and sent a mail-in ballot application (or even an actual mail-in ballot) to every active registered voter.²³

This drive to make voting simpler and safer collided with the common conservative view that higher turnout disadvantages Republicans.²⁴ There's a widespread perception among rightwing

¹⁹ See BRENNAN CTR. FOR JUST., *supra* note 11.

²⁰ Or, at least, such suits *should* fall flat, assuming optimistically that judges consider them in good faith and based on actual, proven evidence.

²¹ See Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting amid the Coronavirus Pandemic*, ABC NEWS (Sept. 22, 2020), <https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089> (summarizing these electoral changes).

²² *Id.*

²³ *Id.*

²⁴ In 1980, conservative activist Paul Weyrich famously declared, “I don't want everybody to vote” because “our leverage in the elections quite candidly goes up as the voting populace goes down.” Andy Kroll, *The Plot Against America: The GOP's Plan to Suppress the Vote and Sabotage the Election*, ROLLING STONE (July 16, 2020), <https://www.rollingstone.com/politics/politics-features/trump-campaign-2020-voter-suppression-consent-decree-1028988>. Last year, beyond the comment from President Trump noted below, the Republican speaker of the Georgia House of Representatives warned that an all-mail election would be “extremely devastating to Republicans,” and a Republican congressman from Kentucky asserted that universal mail-in voting would be “the end of

actors that low-propensity voters and nonvoters skew Democratic. These individuals tend to be younger, poorer, less educated, and more racially diverse than the public as a whole.²⁵ These traits are thought to be linked to a preference for Democratic candidates and policies.²⁶ Higher turnout, then, supposedly benefits Democrats by getting more Democratic-leaning marginal voters to cast ballots. As President Trump once remarked, universal mail-in voting would allegedly result in such high “levels of voting” that “you’d never have a Republican elected in this country again.”²⁷

Thanks to the prevalence of this belief about the partisan effects of higher turnout, many conservatives were primed to oppose states’ relaxations of their voting rules. The prevalence of another inaccurate view—that electoral fraud is rampant in the United States—provided conservatives with a nonpartisan objection to these relaxations.²⁸ Rightwing actors have long maintained (with next to no evidence) that Democrats frequently resort to fraud, especially in big cities with substantial minority populations.²⁹ This false claim of fraud usually arises as a justification for measures that make it harder to vote, like photo ID requirements or purges of the voter rolls.³⁰ But the fraud argument works equally well as a critique of pro-voting policies that states voluntarily adopt. These policies will lead to even more abuses

our republic as we know it.” Reid J. Epstein & Stephanie Saul, *Does Vote-by-Mail Favor Democrats? No. It’s a False Argument by Trump.*, N.Y. TIMES (Apr. 10, 2020), <https://www.nytimes.com/2020/04/10/us/politics/vote-by-mail.html>.

²⁵ See KNIGHT FOUND., *THE 100 MILLION PROJECT: THE UNTOLD STORY OF AMERICAN NON-VOTERS* 33–34 (2020) (describing the demographics of voters and nonvoters).

²⁶ See, e.g., *Trends in Party Affiliation Among Demographic Groups*, PEW RSCH. CTR. (Mar. 20, 2018), <https://www.pewresearch.org/politics/2018/03/20/1-trends-in-party-affiliation-among-demographic-groups>; *The Politics of Financial Insecurity*, PEW RSCH. CTR. (Jan. 8, 2015), <https://www.pewresearch.org/politics/2015/01/08/the-politics-of-financial-insecurity-a-democratic-tilt-undercut-by-low-participation>.

²⁷ Gino Spocchia, *Trump Says Republicans Would Never Win Election Again if It Was Easier to Vote*, INDEPENDENT (Mar. 31, 2020), <https://www.independent.co.uk/news/world/americas/us-politics/trump-election-voting-republicans-us-2020-a9437881.html>. Interestingly, the claim that higher turnout disadvantages Republicans appears to be incorrect. Nonvoters aren’t significantly more Democratic than voters. See KNIGHT FOUND., *supra* note 25, at 21, 24–25, 28. And the adoption of universal mail-in voting has minimal partisan consequences. See Daniel M. Thompson, Jennifer A. Wu, Jesse Yoder & Andrew B. Hall, *Universal Vote-by-Mail Has No Impact on Partisan Turnout or Vote Share*, 117 PROC. NAT’L ACAD. SCI. 14052 (2020).

²⁸ For a book-length dismantling of the claim that electoral fraud is common in modern American politics, see LORRAINE C. MINNITE, *THE MYTH OF VOTER FRAUD* (2010).

²⁹ For a book-length example of these false allegations, see JOHN FUND, *STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY* (2008).

³⁰ See *Crawford v. Marion Cnty. Elections Bd.*, 553 U.S. 181, 194–97 (2008) (discussing fraud prevention as a rationale for a photo ID requirement for voting).

and illegality, the argument goes, further undermining the integrity of American elections.

This mix of ingredients—many states easing their voting rules during the pandemic, combined with many conservatives thinking such reforms handicap Republicans and generate fraud—triggered an explosion of litigation in 2020. To be clear, not all this activity involved claims of vote dilution through fraud facilitation. Lawsuits also alleged that states violated constitutional provisions giving state legislatures paramount authority over federal elections,³¹ offended the principle of equal voter treatment recognized in *Bush v. Gore*,³² and breached state law.³³ But the novel cause of action that’s the subject of this Article was at the center of the courtroom drama. In fact, based on my survey of the relevant case law, this claim appears to have been pressed more often than any other in challenges to loosened electoral regulations.

Jim Bopp, the rightwing attorney best known for his attacks on campaign finance laws, launched the first of the new breed of vote dilution suits.³⁴ In March 2020, during the pandemic’s first wave, Nevada decided to send mail-in ballots to all active registered voters for its June primary election.³⁵ This policy choice, according to the plaintiffs, “circumvent[ed] various statutory safeguards designed to protect against voter fraud.”³⁶ “[A]n increase in illegal votes” would therefore occur, “harming [the plaintiffs] as rightful voters by diluting their vote.”³⁷

Claims of vote dilution through fraud facilitation multiplied as the pandemic continued and more states relaxed their electoral rules. The plaintiffs in these cases were all members of the conservative legal ecosystem: individual voters represented by Bopp or other rightwing lawyers,³⁸ state Republican parties,³⁹ the Republican National

³¹ See, e.g., *Carson v. Simon*, 978 F.3d 1051, 1059–60 (8th Cir. 2020) (holding that Minnesota’s Secretary of State likely violated the Electors Clause of Article II by extending the deadline for returning mail-in ballots beyond that specified by Minnesota’s state legislature).

³² 531 U.S. 98, 104–10 (2000); see, e.g., *Bognet v. Sec’y Pa.*, 980 F.3d 336, 360–61 (3d Cir. 2020) (rejecting a *Bush v. Gore*-style challenge to Pennsylvania’s mail-in voting rules on standing grounds).

³³ See, e.g., *State v. Hollins*, 620 S.W.3d 400 (Tex. 2020) (holding that Harris County’s Clerk violated Texas law by proposing to send mail-in ballot applications to all registered voters).

³⁴ See Bazelon, *supra* note 5.

³⁵ *Paher v. Cegavske*, 457 F. Supp. 3d 919, 922–24 (D. Nev. 2020).

³⁶ *Id.* at 924.

³⁷ *Id.* at 926.

³⁸ For another Bopp-led suit, see Verified Complaint for Declaratory and Injunctive Relief, *Lamm v. Bullock*, No. 20-cv-00067 (D. Mont. Sept. 9, 2020).

Committee,⁴⁰ President Trump's reelection campaign,⁴¹ and so on. Most of the suits were filed before the November general election though a few came afterward—and so complained about vote dilution that had already (purportedly) occurred.⁴² The volume of litigation was high enough that it's infeasible to describe all the cases here. The following is thus a partial list of the new vote dilution claims, emphasizing the wide range of measures that have been disputed on this basis.

Georgia: In place of its prior policy allowing a single registrar to reject a mail-in ballot because the voter's signature on the ballot failed to match the signature in the voter's registration record, Georgia adopted a rule that a mail-in ballot could be rejected for this reason only with the consent of two out of three registrars.⁴³ The plaintiffs asserted that, as a result, "invalid absentee votes [would be] cast and tabulated" in numbers that "overwhelmed ballot clerks."⁴⁴ "[T]he 'unlawful' counting of invalidly cast ballots," in turn, would cause the "dilution of lawfully cast ballots."⁴⁵

Illinois: Illinois made election day a holiday for all state workers, on which all government offices would be closed.⁴⁶ "[G]iving state workers, who primarily vote Democrat, the day off on election day," the plaintiffs contended, "creates an army of workers" who "could show up to the polls on election day" and "cast a provisional ballot under someone else's name."⁴⁷ This large-scale voter impersonation fraud would "dilute the Republican vote."⁴⁸

Minnesota: Minnesota decided to count mail-in ballots post-marked by election day if they were received by election officials no later than one week after election day.⁴⁹ "Under [this] policy," according to the plaintiffs, "persons watching the elongated ballot-counting unfolding . . . will face strong incentives to cast a ballot, and

³⁹ See, e.g., *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705 (N.D. Ill. 2020).

⁴⁰ See, e.g., *Complaint, Republican Nat'l Comm. v. Newsom*, No. 20-cv-01055 (E.D. Cal. May 24, 2020).

⁴¹ See, e.g., *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354 (D.N.J. 2020).

⁴² See *King v. Whitmer*, No. 20-13134, 2020 WL 7134198, at *9 (E.D. Mich. Dec. 7, 2020).

⁴³ See *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1317–19 (N.D. Ga. 2020).

⁴⁴ *Id.* at 1322, 1327.

⁴⁵ *Id.* at 1327.

⁴⁶ See *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705, 711 (N.D. Ill. 2020).

⁴⁷ *Id.* at 719 (internal quotation marks omitted).

⁴⁸ *Id.* at 713.

⁴⁹ See *Carson v. Simon*, 494 F. Supp. 3d 589, 592 (D. Minn. 2020), *rev'd on other grounds*, 978 F.3d 1051 (8th Cir. 2020).

those who already cast their ballot will find new incentive to vote again.”⁵⁰ This “counting of absentee ballots received after Election Day will injure [the plaintiffs] by diluting the value of their votes.”⁵¹

Pennsylvania: In addition to setting up drop boxes where mail-in ballots could be returned,⁵² Pennsylvania required poll watchers to be residents of the county where they served.⁵³ In the plaintiffs’ view, this county-residency requirement “limits the ability to find poll watchers, which, in turn, limits the ability for poll watchers to detect fraud and ballot tampering.”⁵⁴ “The resulting fraudulent or destroyed ballots cause the dilution of lawfully cast ballots.”⁵⁵

Virginia: Virginia waived its rule that a mail-in ballot must be signed by a witness for its June primary election.⁵⁶ The plaintiffs insisted that the “witness requirement acts as a vital safeguard against voting fraud.”⁵⁷ “[T]he removal of the witness signature requirement” therefore “risk[ed] the dilution of their vote.”⁵⁸

To reiterate, neither these nor any other claims of vote dilution through fraud facilitation ultimately succeeded. Most of the suits failed due to lack of standing. For a litigant to have standing, under well-established doctrine, her injury must be “concrete and particularized”⁵⁹ and must not be “premised on a speculative chain of possibilities.”⁶⁰ Both of these hurdles proved insurmountable for certain plaintiffs. With respect to particularity, for instance, a Vermont district court that heard a challenge to the state’s adoption of mail-in voting held that “[a] vote cast by fraud . . . has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged.”⁶¹ Accordingly, “[i]f every voter suffers the same incremental dilution of the franchise caused by some third-party’s fraudulent vote, then these voters have experienced a generalized injury.”⁶²

⁵⁰ *Id.* at 602 n.12 (internal quotation marks omitted).

⁵¹ *Id.* at 601.

⁵² *See supra* note 7 and accompanying text.

⁵³ *See* Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 348 (W.D. Pa. 2020).

⁵⁴ *Id.* at 415.

⁵⁵ *Id.*

⁵⁶ *See* League of Women Voters v. Va. State Bd. of Elections, 458 F. Supp. 3d 460, 462–63 (W.D. Va. 2020).

⁵⁷ *Id.* at 464 (internal quotation marks omitted).

⁵⁸ *Id.* at 465.

⁵⁹ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

⁶⁰ *See Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013).

⁶¹ *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020).

⁶² *Id.*; *see also, e.g.*, Donald J. Trump for President, Inc. v. Cegavske, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020) (holding that the “key defect is generality” with respect to the plaintiffs’ alleged injury from Nevada’s adoption of mail-in voting).

With respect to speculativeness, similarly, a Pennsylvania district court that considered several vote dilution claims stressed the “chain of theoretical events” on which the plaintiffs’ harm rested.⁶³ First, the state’s “lack of election safeguards” would have to “create[] a risk of voter fraud or illegal voting.”⁶⁴ Second, “[t]hat risk” would have to “lead to potential fraudsters committing voter fraud or ballot destruction.”⁶⁵ Only then would fraudulent ballots “dilute Plaintiffs’ lawfully cast votes, resulting in a constitutional violation.”⁶⁶ The court continued, “[t]he problem with this theory of harm is that this fraud hasn’t yet occurred.”⁶⁷ The theory is “based solely on a chain of unknown events that may never come to pass.”⁶⁸

While standing was the principal obstacle for the plaintiffs in these cases, some of them lost on the merits. Some courts, that is, ruled that the underlying claims were deficient because they were unsubstantiated by the evidence. A Montana district court, for example, rejected an attack on the state’s mail-in voting system because the “[p]laintiffs have not even attempted to introduce the requisite evidence necessary to prevail.”⁶⁹ The plaintiffs failed to “introduce[] even an ounce of evidence supporting the assertion that Montana’s use of mail ballots will inundate the election with fraud.”⁷⁰ In fact, the plaintiffs “conceded they do not possess any evidence establishing prior incidents of voter fraud in Montana”—including in the state’s June primary election, which employed mail-in voting.⁷¹

Finally (and least frequently), a few courts concluded that claims of vote dilution through fraud facilitation are noncognizable in that they allege no constitutional injury. The Third Circuit, notably, held that “[t]his conceptualization of vote dilution—state actors counting ballots in violation of state election law—is not a concrete harm under the Equal Protection Clause.”⁷² “[I]f dilution of lawfully cast ballots

⁶³ Donald J. Trump for President, Inc. v. Boockvar, 493 F. Supp. 3d 331, 377 (W.D. Pa. 2020).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 378; *see also, e.g.*, Donald J. Trump for President, Inc. v. Way, No. 20-10753, 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020) (finding that the plaintiffs attacking New Jersey’s adoption of mail-in voting lacked standing because their injury “rests on their highly speculative fear that once State officials mail ballots,” significant fraud will ensue).

⁶⁹ Donald J. Trump for President, Inc. v. Bullock, 491 F. Supp. 3d 814, 834 (D. Mont. 2020).

⁷⁰ *Id.*

⁷¹ *Id.*; *see also, e.g.*, Wood v. Raffensperger, 501 F. Supp. 3d 1310, 1327 (N.D. Ga. 2020) (“Even if [the plaintiffs’] claim were cognizable in the equal protection framework, it is not supported by the evidence at this stage.”).

⁷² Bognet v. Sec’y Pa., 980 F.3d 336, 354 (3d Cir. 2020).

by the ‘unlawful’ counting of invalidly cast ballots were a true equal-protection problem,” in this court’s view, “it would transform every violation of state election law . . . into a potential federal equal-protection claim.”⁷³ But “[t]hat is not how the Equal Protection Clause works.”⁷⁴

II

CURRENT RECOGNITION

Under the Third Circuit’s approach, the question of whether current law recognizes a cause of action for vote dilution through fraud facilitation is easy. It doesn’t. But recall that the Third Circuit’s approach is uncommon, and that most courts have disposed of these suits on standing or evidentiary grounds. These dispositions suggest that vote dilution through fraud facilitation *is* a cognizable constitutional claim. Take standing. Whether a plaintiff is injured in a way that entitles her to invoke the jurisdiction of the federal courts “turns on the nature and source of the claim asserted.”⁷⁵ In other words, there’s no such thing as a sufficient or insufficient harm for standing purposes *in the abstract*. Instead, whether a given injury gives rise to standing depends on the cause of action the plaintiff brings: its elements, its underlying logic, the legal provision (constitutional or statutory) from which it stems, and so on.

A fair inference from the rulings finding no standing in the recent vote dilution cases,⁷⁶ then, is that these courts must have first decided that a cognizable claim does exist. That claim’s parameters must have then driven their standing analyses and their eventual determinations that the plaintiffs weren’t sufficiently harmed. To be more specific, in the eyes of these courts, liability for vote dilution through fraud facilitation must be *possible*—but only if the fraud affects some voters more than others and is actually likely to occur. That implicit view of the cause of action would explain why the plaintiffs lacked standing when they were no more disadvantaged by the potential fraud than anyone else or couldn’t prove that any fraud was, in fact, imminent.

Consider, too, the rulings that other litigants failed to corroborate their vote dilution claims with convincing evidence.⁷⁷ As to these dis-

⁷³ *Id.* at 355 (internal quotation marks omitted).

⁷⁴ *Id.*; *see also, e.g., Wood*, 501 F. Supp. 3d at 1326 (“[The plaintiff] does not articulate a cognizable harm that invokes the Equal Protection Clause.”).

⁷⁵ *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *see also, e.g., Gill v. Whitford*, 138 S. Ct. 1916, 1938 (2018) (Kagan, J., concurring) (noting that “standing analysis” is a function of “the essence of the harm alleged”).

⁷⁶ *See supra* notes 61–68 and accompanying text.

⁷⁷ *See supra* notes 69–71 and accompanying text.

positions, the inference that the courts must have thought that a cognizable legal theory exists isn't just reasonable—it's irresistible. After all, these were merits determinations that certain elements of the cause of action weren't satisfied. If the elements *had* been satisfied, the plaintiffs would presumably have prevailed. That the plaintiffs could have won necessarily means that their claims were seen as valid. Invalid claims, of course, could never result in liability.

So most courts have hinted (without quite holding) that allegations of vote dilution through fraud facilitation are recognized by current law. Are these courts correct? I think not. Start with the three theories of vote dilution that the Supreme Court has unequivocally acknowledged: malapportionment, racial vote dilution, and partisan gerrymandering. Malapportionment refers to electoral districts that have unequal populations.⁷⁸ Racial vote dilution means intentionally diminishing the influence of minority citizens, without hindering them from voting, typically by adopting at-large elections or drawing districts in devious ways.⁷⁹ And partisan gerrymandering, though no longer justiciable,⁸⁰ also denotes districts that are designed to crack and pack voters, but due to their partisanship rather than their race.⁸¹

Vote dilution through fraud facilitation plainly isn't equivalent to these existing claims. The existing claims all involve methods of vote aggregation: how votes are tallied and then translated into seats. The claims' common theme is that a jurisdiction has reduced certain voters' power by aggregating their votes in one way (at-large elections, unequally populated districts, gerrymandered districts) instead of in another (districted elections, equipopulous districts, fair districts).⁸² In contrast, vote dilution through fraud facilitation has nothing to do with vote aggregation. It's unrelated to whether elections are held in districts or jurisdiction-wide, or to how many or which people districts happen to contain. This is because the mechanism of vote dilution through fraud facilitation is different from that of the existing theories. Its mechanism is the offset, or negation, or cancellation, of lawfully cast votes by fraudulent ballots. This kind of vote dilution works by changing *which* votes are counted, so that valid and counterfeit ballots alike are included. Unlike the existing

⁷⁸ See, e.g., *Reynolds v. Sims*, 377 U.S. 533 (1964).

⁷⁹ See, e.g., *White v. Regester*, 412 U.S. 755 (1973).

⁸⁰ See *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019).

⁸¹ See *Davis v. Bandemer*, 478 U.S. 109 (1986).

⁸² See, e.g., Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712–16 (1993) (characterizing these vote dilution theories as involving “voting as aggregation”).

theories, it doesn't operate by changing *how* votes are counted and then converted into representation.⁸³

Turn next to currently recognized claims that don't involve vote dilution. The most prominent of these is so-called *Anderson-Burdick* balancing, named for the pair of cases that set the doctrine's structure.⁸⁴ This cause of action is the crucial constitutional sword against measures that make it hard for people to vote. Under the theory, the initial issue is how severely a challenged regulation burdens the right to vote. The degree of judicial scrutiny then varies in tandem with the severity of the burden. So a heavy burden (like outright disenfranchisement) triggers strict scrutiny, a moderate burden (making voting somewhat more difficult) results in intermediate scrutiny, and so on.⁸⁵

Vote dilution through fraud facilitation also diverges from *Anderson-Burdick* balancing. The predicate of an *Anderson-Burdick* challenge is that a policy imposes a *burden* on the franchise. It's the extent of that burden that drives every subsequent stage of the analysis. But the governmental actions that give rise to claims of vote dilution through fraud facilitation don't make voting any harder. To the contrary, they allegedly make voting too *easy*, thus creating opportunities for dishonest operatives to commit fraud. Likewise, the proper remedies under these two theories are polar opposites. A successful *Anderson-Burdick* suit removes an obstacle to voting. Victory in a case of vote dilution through fraud facilitation, on the other hand, erects a voting barrier.⁸⁶ This new barrier, in the theory's parlance, is a safeguard against the fraud that would otherwise occur.⁸⁷

⁸³ In Heather Gerken's useful terminology of stages of election law claims, vote dilution through fraud facilitation is a unique hybrid. It resembles first-generation suits involving voting itself (as opposed to broader aspects of the electoral system). But by operating through vote dilution rather than vote denial, it shares the crucial characteristic of second-generation suits. See Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001); see also, e.g., *Bognet v. Sec'y Pa.*, 980 F.3d 336, 355 (3d Cir. 2020) ("Plaintiffs cannot analogize their [vote dilution through fraud facilitation] claim to gerrymandering cases in which votes were weighted differently.").

⁸⁴ *Burdick v. Takushi*, 504 U.S. 428 (1992); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); see also, e.g., *Democratic Nat'l Comm. v. Wis. State Legis.*, 141 S. Ct. 28, 33 (2020) (Kavanaugh, J., concurring) (referring to "the traditional *Anderson-Burdick* balancing test").

⁸⁵ See, e.g., *Burdick*, 504 U.S. at 433–34 (describing this approach in detail).

⁸⁶ See *infra* Part VI.

⁸⁷ See, e.g., *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 410 (W.D. Pa. 2020) ("*Anderson-Burdick* does not apply neatly to this claim This is because Plaintiffs aren't challenging a specific regulation affecting their right to vote, but are instead challenging the *lack* of a restriction on someone else's right to vote.").

Nor is vote dilution through fraud facilitation the same as the cause of action the Supreme Court recognized in *Bush v. Gore*.⁸⁸ The crux of that claim is that ballots (or voters) are treated *differently*—for instance, that votes are recounted using one standard in some counties but pursuant to a different test in others.⁸⁹ Again, though, vote dilution through fraud facilitation simply has no relation to whether a jurisdiction’s system of election administration is uniform or variable. Uniform or variable, if a jurisdiction’s electoral regulations are too lax, they may be unconstitutional because they enable too much fraud. And uniform or variable, if a jurisdiction’s electoral rules are rigorous enough, they’re valid because they thwart potentially dilutive abuses. Put another way, vote dilution through fraud facilitation is concerned with the *stringency* of a jurisdiction’s electoral policies, not their *variation* from one place to another.⁹⁰

The theory’s proponents might respond that, even if it isn’t identical to any existing claim, it’s implicitly authorized by Supreme Court dicta.⁹¹ The dicta they have in mind come from two of the Court’s landmark one-person, one-vote decisions in the 1960s. In *Gray v. Sanders*, the Court stated that the right to vote “can be protected from the diluting effect of illegal ballots.”⁹² “The right to vote can neither be denied outright,” the Court added in *Reynolds v. Sims*, “nor destroyed by alteration of ballots . . . nor diluted by ballot-box stuffing.”⁹³ Both of these decisions also cited earlier cases in which individuals had been prosecuted under federal criminal laws for various kinds of fraud.⁹⁴

Dicta, though, are just that: nonbinding judicial pronouncements. *These* dicta, additionally, are unlikely to carry much weight with the Roberts Court, which recently declined to extend the 1960s one-

⁸⁸ 531 U.S. 98 (2000).

⁸⁹ That, of course, was the fact pattern in *Bush v. Gore* itself. *See id.* at 105–09.

⁹⁰ A final electoral cause of action, recognized only by the lower courts, is that a jurisdiction has offended the due process value of fundamental fairness by changing the rules of an election after it has already begun. *See, e.g., Roe v. Alabama*, 43 F.3d 574, 581 (11th Cir. 1995). This claim, too, has nothing to do with vote dilution through fraud facilitation, which in no way hinges on *when* precisely an overly lax regulation is adopted. *See, e.g., Bennett v. Yoshina*, 140 F.3d 1218, 1226 (9th Cir. 1998) (observing that, under this due process theory, “[m]ere fraud or mistake will not render an election invalid”).

⁹¹ *See, e.g., Bognet v. Sec’y Pa.*, 980 F.3d 336, 359 (3d Cir. 2020) (noting that the plaintiffs “emphasize [this] language from *Reynolds*”); *Moore v. Circosta*, 494 F. Supp. 3d 289, 310 (M.D.N.C. 2020) (repeatedly quoting the passage from *Gray*).

⁹² 372 U.S. 368, 380 (1963).

⁹³ 377 U.S. 533, 555 (1964).

⁹⁴ *See id.* at 554–55; *Gray*, 372 U.S. at 380.

person, one-vote precedents in other directions.⁹⁵ Even more significantly, when *Gray* and *Reynolds* declared that lawful votes can be diluted by fraudulent ones, they did so in reference to federal criminal statutes.⁹⁶ But no *constitutional* prohibition is implied by the fact that federal *statutes* forbid some activity. That electoral fraud is unlawful doesn't mean that it violates the Equal Protection Clause. Still less does it mean that jurisdictions run afoul of the Fourteenth Amendment when they don't commit fraud themselves, but only enable fraud to be committed by others through their overly permissive regulations.

It's true that one of the federal statutes under which defendants have been convicted for electoral fraud criminalizes interfering with "the free exercise or enjoyment of any right or privilege secured . . . by the Constitution."⁹⁷ For this law to reach electoral fraud, there must be a constitutional right to vote in an election untarnished by fraud.⁹⁸ However, the existence of this right only suggests that governmental officials⁹⁹ can violate the Constitution by miscounting votes, stuffing ballot boxes, and the like. Nothing in the statute, or in the constitutional right it enforces, indicates that jurisdictions transgress the Constitution when their unduly relaxed electoral rules permit third parties to engage in fraud. In other words, the Constitution might bar electoral fraud *itself*. But there's no reason to think, as currently construed, that it condemns the mere *facilitation* of fraud by others.

⁹⁵ See *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019) (rejecting the argument that "if we can adjudicate one-person, one-vote claims, we can also assess partisan gerrymandering claims").

⁹⁶ See, e.g., *Bognet*, 980 F.3d at 359 ("The Court's cases that describe ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes . . .").

⁹⁷ 18 U.S.C. § 241; see, e.g., *Anderson v. United States*, 417 U.S. 211, 213 (1974) (involving an electoral fraud prosecution under this statute); *United States v. Saylor*, 322 U.S. 385, 386 (1944) (same).

⁹⁸ See, e.g., *Anderson*, 417 U.S. at 226 (characterizing this right as that of voters "to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots"); *Saylor*, 322 U.S. at 386 (similarly describing voters' right to "not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified").

⁹⁹ While 18 U.S.C. § 241 applies to any "persons," only governmental officials have been prosecuted under the statute in the cases that have reached the Supreme Court. See *Anderson*, 417 U.S. at 214 (defendants were various "state and county officials"); *Saylor*, 322 U.S. at 386 (defendants were "duly qualified officers of election").

III FUTURE RECOGNITION

Times change, though, and with them views on what the Constitution requires. Answering the descriptive question of whether existing doctrine recognizes vote dilution through fraud facilitation, then, leaves unresolved the normative issue of whether the law *should* deem it a valid cause of action. I think it should, but my judgment is tentative. On the one hand, fraud facilitation is a potentially powerful mechanism of vote dilution—at least as potent, in principle, as dilutive means that are already constitutionally proscribed. On the other, this would be an odd and maybe unnecessary theory subject to abuse by actors whose true motive is something other than fraud prevention.

The basis for authorizing a constitutional claim of vote dilution through fraud facilitation is simply that electoral fraud *is* a way to dilute votes. Remember the definition of vote dilution: an electoral practice that doesn't impede anyone from voting but that does reduce the effectiveness of certain people's votes.¹⁰⁰ This definition applies squarely to electoral fraud. Fraudulent ballots don't disenfranchise. (At least not directly; indirectly, some people might be deterred from voting by rampant fraud.¹⁰¹) But fraudulent ballots do lessen the impact of particular people's lawfully cast votes. Suppose that X valid votes are cast for Candidate X, that Y valid votes are cast for Candidate Y, and that Candidate Y is also the beneficiary of Z illegal votes. Then the X valid votes are diluted—offset, negated, cancelled—by the Z invalid ones. Thanks to the fraud on behalf of Candidate Y, what should have been a vote margin of $X - Y$ for Candidate X instead becomes a difference of $X - Y - Z$.

Under some conditions, moreover, the power of vote dilution via fraud can match or exceed that of dilutive methods already recognized by the courts. Take an at-large electoral system where legislators are elected jurisdiction-wide rather than in districts. With the right voting patterns, this regime can nullify the votes of a minority group. All the ballots cast by the group's members can yield for them no representation at all. By comparison, fraud is capable of eliminating the representation of even a political *majority*. All that's necessary for a countermajoritarian outcome is a winner-take-all election and enough fraudulent votes for the minority to exceed the majority's margin in lawful votes. In this scenario, the majority's votes are diluted to

¹⁰⁰ See *supra* note 1 and accompanying text.

¹⁰¹ See, e.g., *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (speculating that “[v]oter fraud drives honest citizens out of the democratic process”).

nothing—an effect that an at-large electoral system can never produce.¹⁰²

Or consider the districting schemes that are the more familiar forms of vote dilution. Malapportionment underrepresents groups whose members tend to live in overpopulated districts;¹⁰³ similarly, gerrymandering underrepresents groups whose voters are cracked and packed by cleverly drawn districts.¹⁰⁴ When fraud occurs in multiple constituencies, it can lead to equivalent disadvantages for the voters whose lawful ballots are neutralized by fraudulent ones. Say that Party X is victimized, and Party Y is aided, by *Z* percent fraudulent votes in each district in a plan. This fraud causes some of Party X's candidates to lose races they should have won (in districts where their margins in lawful votes are below *Z* percent). The fraud also artificially weakens the electoral position of Party X's prevailing candidates (in districts where their lawful vote margins are above *Z* percent). These burdens plainly parallel those imposed by malapportionment or gerrymandering. Across districts marred by fraud—just as across overpopulated, cracked, or packed districts—the influence of the targeted group is steadily eroded. The mode of representational taxation is different, but the result is the same.

The case for a constitutional claim of vote dilution through fraud facilitation is therefore analogical. The courts already hold that other kinds of vote dilution violate the Equal Protection Clause. The dilutive potential of electoral fraud is comparable to that of malapportionment and gerrymandering. So fraud itself, as well as policies that enable fraud, should be recognized as unconstitutionally dilutive. Or to make the point in doctrinal terms, *Gray* and *Reynolds* were wrong to the extent they suggested that vote dilution through fraud facilitation is a valid theory under current law. But these decisions were right to hint that the theory could easily be endorsed in the future. After all, “[t]he right to vote *can*” be “diluted by ballot-box stuffing,”¹⁰⁵ and so “*can* be protected”—by the courts—“from the diluting effect of illegal ballots.”¹⁰⁶

¹⁰² To the contrary, an at-large electoral system typically *enhances* the power of a political majority, awarding it most or all legislative seats. *See, e.g., Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) (observing that at-large systems often “operate to minimize or cancel out the voting strength of racial or political [minorities]”).

¹⁰³ *See supra* note 78 and accompanying text.

¹⁰⁴ *See supra* notes 79–80 and accompanying text.

¹⁰⁵ *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (emphasis added).

¹⁰⁶ *Gray v. Sanders*, 372 U.S. 368, 380 (1963) (emphasis added). I note that I don't consider other modalities of constitutional interpretation here. The Court's one-person, one-vote decisions focused on democratic theory and precedent, and I follow their lead in my discussion. *See Reynolds*, 377 U.S. at 533.

While I find this analogical argument to be persuasive, I think it's important to grapple with a pair of objections. The first of these is that electoral fraud alone, so not regulations that merely enable it, could be recognized as unconstitutionally dilutive. This approach would entail less (arguably no) disruption of existing doctrine. As noted earlier, a plausible reading of the Supreme Court's fraud prosecution cases is that electoral fraud is already unconstitutional, at least when committed by governmental officials.¹⁰⁷ This approach would also avoid the awkwardness of imposing liability on jurisdictions when they don't actually engage in any fraud themselves. It's odd—maybe unprecedented—to say that jurisdictions are guilty of vote dilution when unrelated third parties are the ones in fact diluting lawfully cast ballots.

This objection has real force, in my view, and helps explain why I only cautiously favor a cause of action for vote dilution through fraud facilitation. A claim about fraud itself, though, isn't a perfect substitute for a claim about the enablement of fraud. Electoral fraud is primarily policed during or after an election. In contrast, fraud facilitation, in the form of overly lax electoral regulations, can be stopped long before voting begins. This is a significant advantage since voting can then take place under secure procedures with little risk of abuse. Relatedly, fraud can be hard to catch, and controversial even when it's caught (since undoing the fraud requires changing the vote count). Strengthening electoral rules so they're less susceptible to fraud, on the other hand, is more straightforward, involving only the revision of particular provisions. It's also less provocative since it doesn't occur in the heat of an election, when the consequences for different candidates are clear to everyone.

As for the fact that vote dilution through fraud facilitation works via the actions of third parties—the lawbreakers who cast the fraudulent ballots—this reliance on others' choices isn't actually distinctive. Both racial vote dilution and partisan gerrymandering also hinge on the expected behavior of private individuals unconnected to the government: voters themselves.¹⁰⁸ Recall the logic of these theories: that the government has selected an electoral arrangement (an at-large election, a devious district map) under which a racial or partisan group will be underrepresented.¹⁰⁹ This underrepresentation doesn't follow directly from the electoral arrangement. It arises, rather, from

¹⁰⁷ See *supra* notes 97–99 and accompanying text.

¹⁰⁸ Malapportionment, however, doesn't rely on voters' expected behavior. A violation is established when districts are sufficiently (and unjustifiably) different in population, no matter how voters then cast their ballots. See *supra* notes 72, 97 and accompanying text.

¹⁰⁹ See *supra* notes 78–81 and accompanying text.

the *combination* of the policy and the intervening judgments of ordinary voters—their independent (albeit predictable) decisions to vote one way instead of another. It's only because members of the same racial or partisan group tend to vote together that their influence can be diluted by an at-large election or a gerrymander.¹¹⁰ If their voting patterns were different, the same electoral arrangement might no longer be dilutive.

So, too, with vote dilution through fraud facilitation. As in the other vote dilution contexts, the government first adopts a policy (an unduly permissive electoral regulation) that doesn't directly dilute anyone's vote. Also as in the other contexts, this policy then becomes dilutive thanks to the actions of third parties (the fraudsters who exploit the regulation's permissiveness). It's not odd or unprecedented, then, for vote dilution liability to attach based partly on the behavior of private individuals. The only twist in the fraud facilitation setting is *whose* behavior makes possible the dilution: bad actors committing fraud rather than ordinary voters casting ballots.

The other objection to the new vote dilution claim stems from America's recent history with false allegations of fraud. Over the last generation or so, conservatives have consistently dissembled about electoral fraud, asserting without evidence that it's widespread, that it's carried out by urban Democrats, that it costs Republicans elections, and so on.¹¹¹ Conservatives have also invoked the specter of fraud, over and over, to justify stricter restrictions on voting.¹¹² This has been their stated rationale for passing these restrictions and then for defending them in court.¹¹³ Given this history, one might reasonably worry that a cause of action for vote dilution through fraud facilitation would be abused. Rightwing actors might launch a host of baseless suits, hoping to quash through litigation pro-voting policies they couldn't block through the legislative process.

This objection is compelling, too, and further contributes to my ambivalence about the new vote dilution claim. However, it should be possible to mitigate the risk of bad faith litigants hijacking the theory by carefully limiting standing, liability, and relief. The balance of this Article explains how this might be done. Under the approach I describe, plaintiffs lacking evidence that an electoral regulation gives

¹¹⁰ See, e.g., Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1851 (1992) (identifying “the polarized voting inquiry as the heart of a vote dilution claim”).

¹¹¹ For a leading example, see generally FUND, *supra* note 29.

¹¹² E.g., Crawford v. Marion Cnty. Elections Bd., 553 U.S. 181, 194–97 (2008).

¹¹³ See *id.*

rise to fraud would have no cognizable injury¹¹⁴ and would lose anyway on the merits.¹¹⁵ Even plaintiffs presenting such evidence (and satisfying all other elements of the cause of action) would be entitled only to targeted relief—not the invalidation of an election or the rejection of lawful ballots.¹¹⁶

Moreover, the litigation about the 2020 election confirms the feasibility of cabining a claim of vote dilution through fraud facilitation.¹¹⁷ Wrongly thinking the theory was already recognized, rightwing actors raised it in suits in more than a dozen states.¹¹⁸ But thanks to the paucity of evidence that the challenged policies were, in fact, susceptible to fraud, every one of these actions failed. Not once did bad faith litigants manage to force a jurisdiction to rescind a pro-voting reform. As discussed above, some courts held that these plaintiffs had no standing.¹¹⁹ Other courts rebuffed them on the merits.¹²⁰ And still other courts concluded (consistent with my view) that no cause of action for vote dilution through fraud facilitation currently exists.¹²¹ In a polarized area, this unbroken wall of opposition is impressive. Liberal and conservative judges, Obama and Trump appointees—they all refused to rule in favor of groundless claims.¹²²

This winless record prompts the question: What's the point of a theory under which no litigant can prevail? There's a contemporary answer and a historical one. Over the last few years, a handful of jurisdictions (including Paterson, New Jersey¹²³ and Bladen County, North Carolina¹²⁴) *have* experienced widespread electoral fraud. It's possible that this fraud was enabled by overly relaxed (and otherwise unjusti-

¹¹⁴ See *infra* Part IV.

¹¹⁵ See *infra* Part V.

¹¹⁶ See *infra* Part VI.

¹¹⁷ This litigation also demonstrates that there are plenty of *other* claims that rightwing actors can hijack. Many of the suits alleging vote dilution through fraud facilitation also raised Elections Clause and Electors Clause issues, variation in treatment in violation of the *Bush v. Gore* principle, breaches of state law, and so on. See *supra* notes 31–33 and accompanying text. So declining to recognize the new vote dilution theory would hardly prevent bad faith litigation based on false insinuations about electoral fraud.

¹¹⁸ See *supra* Part I.

¹¹⁹ See *supra* notes 59–68 and accompanying text.

¹²⁰ See *supra* notes 69–71 and accompanying text.

¹²¹ See *supra* notes 72–74 and accompanying text.

¹²² This record goes a long way to address the concern that ideological judges will manipulate the doctrine to rule in favor of baseless claims. See *supra* note 20. There are plenty of ideological judges currently on the bench, but none of them found for the plaintiffs in the recent vote dilution cases.

¹²³ See *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 360 (D.N.J. 2020) (discussing various reports of alleged electoral fraud).

¹²⁴ See, e.g., Alan Blinder, *Election Fraud in North Carolina Leads to New Charges for Republican Operative*, N.Y. TIMES (July 30, 2019), <https://www.nytimes.com/2019/07/30/us/mccrae-dowless-indictment.html>.

fied) regulations.¹²⁵ It's possible, that is, that some claims of vote dilution through fraud facilitation could succeed in today's America, notwithstanding the defeats of all the suits about the 2020 election.

The historical response is that, while electoral fraud is now rare, it was prevalent in the past (and could flare up again in the future). Think of the Jim Crow South, where before racist whites managed to disenfranchise African Americans altogether, they routinely drowned lawful votes cast by Black citizens in a sea of fraudulent ballots.¹²⁶ Or the big city machines of Tammany Hall's New York or Mayor Daley's Chicago, which famously relied on fraud to maintain their grip on power.¹²⁷ In these and other jurisdictions, largescale fraud did occur and was made possible by lax electoral rules. So in these places, a cause of action for vote dilution through fraud facilitation could have been helpful. It might have prevented some fraud, and resultant vote dilution, by forcing elections to be run more rigorously. And the same is true as we now confront an uncertain future: The new vote dilution claim could be a useful safeguard against any resurgence of the fraud that, at present, is mostly absent.

IV STANDING

Recognition of a novel constitutional theory, though, is only the first step of a longer analytical process. The next stages involve thinking through how the theory would actually work. Who would be sufficiently injured to be an appropriate plaintiff? Assuming a litigant with standing could be found, what would she have to prove in order to prevail? And in the event of victory, what kind of relief would a court order? I tackle standing here, deferring the merits and the remedies of the cause of action, respectively, for the next two Parts.

Standing, as observed earlier, is a derivative concept.¹²⁸ Who is considered to be harmed in the right way to advance a legal claim depends on what exactly that claim is. The nature of vote dilution through fraud facilitation, then, has implications for who a proper plaintiff to allege it would be. To reiterate, the essence of the theory is that certain people's votes risk being diluted by fraudulent ballots that

¹²⁵ In Bladen County, for example, poorly designed procedures apparently made it possible for workers to collect (and then complete) *blank* absentee ballots. *See id.*

¹²⁶ *See, e.g., Ex parte Siebold*, 100 U.S. 371, 382 (1879) (“[F]raud, corruption, and irregularity . . . have frequently prevailed [in recent] . . . elections . . .”).

¹²⁷ *See* Peter H. Argersinger, *New Perspectives on Election Fraud in the Gilded Age*, 100 POL. SCI. Q. 669 (1985) (discussing various instances of electoral fraud in the United States, particularly during the Gilded Age).

¹²⁸ *See supra* notes 13, 75 and accompanying text.

are enabled by an unduly permissive electoral policy.¹²⁹ This logic is relevant both to whose injury is “particularized”¹³⁰ enough and to when this injury isn’t excessively “speculative”¹³¹—particularity and nonspeculativeness being the key aspects of an adequate injury in fact.¹³²

With respect to particularity, the upshot is that the fraud facilitated by a provision must be nonrandom and that the plaintiff must belong to a group disadvantaged by the fraud. Suppose a law gives rise to fraud that’s widespread but lacks any discernible pattern. Some fraudulent ballots are cast on behalf of one party’s candidates, some fraudulent votes are also cast for the other party’s candidates, and no candidate or party is obviously the beneficiary or victim of the illegal activity. In this scenario, no voter can credibly maintain that her vote has been diluted by the fraud. Because the fraud is random, it doesn’t cause any candidate to lose (or win) a race she would otherwise have won (or lost). Nor does the fraud reduce (or increase) the representation of any group relative to the benchmark of a nonfraudulent election. Put differently, fraud can be dilutive only when it’s *targeted* at a particular candidate or organization. In the absence of targeting, no voter can experience the harm of vote dilution.¹³³

Relatedly, say the fraud enabled by a provision does clearly aid Candidate X over Candidate Y. But imagine that the plaintiff is a supporter of Candidate X. Here, too, the plaintiff can’t convincingly argue that her vote has been diluted by the fraud. To the contrary, her vote has been *enhanced* since her preferred candidate has gotten a *boost*: illegal votes padding the candidate’s lawful vote total, leading to better odds of being elected. The point is that targeted fraud yields winners and losers, and only backers of the losers can suffer vote dilution in the form of diminished representation. Those who favor the actors advantaged by the fraud reap undeserved representational gains—the opposite of vote dilution.¹³⁴

¹²⁹ See *supra* Part I.

¹³⁰ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

¹³¹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410 (2013).

¹³² See *Lujan*, 504 U.S. at 560 (defining an adequate injury in fact as one that is “(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical” (internal citations and quotation marks omitted)).

¹³³ See, e.g., Fishkin, *supra* note 18, at 1311 (“No equally populous group gets more or less than its fair share of representation as a result of . . . fraudulent votes as long as they are non-outcome-altering[.]”).

¹³⁴ See, e.g., *id.* at 1312 (“[T]here are other legitimate voters whose votes’ outcome effects are magnified by the fraudulent voter’s vote.”). Of course, in addition to voters supporting a candidate targeted by fraud, the candidate *herself* should have standing. And any injured party (whether a voter or a candidate) should be able to bring suit as soon as the pattern of fraud is sufficiently clear—even if the election hasn’t yet occurred.

This reasoning isn't new to the fraud facilitation context. Rather, it explains who incurs a particularized injury in redistricting cases as well. Take the proposition that no one has standing when the fraud enabled by a provision is random. By the same token, there can be no racial vote dilution when a minority group is no more cracked and packed by district lines than other populations. "Attaching the labels 'packing' and 'fragmenting'" in this situation "does not make the result vote dilution when the minority group enjoys substantial proportionality" in its representation.¹³⁵ Or consider the view that only voters whose preferred candidates or groups are targeted by fraud have standing. Analogously, only voters residing in overpopulated districts can bring one-person, one-vote claims.¹³⁶ Voters in underpopulated districts enjoy *extra* representation and so can't complain about vote dilution through malapportionment.

Most courts have followed these precepts in the recent decisions about the 2020 election. Specifically, they have held that plaintiffs lacked particularized injuries when they failed to specify beneficiaries and victims of the fraud that would supposedly be induced by overly relaxed electoral regulations. A Nevada district court, for example, noted that the Trump campaign "never describe[d] how [its] member voters will be harmed by vote dilution where other voters will not."¹³⁷ "Even if accepted as true," then, the campaign's "pleadings allude[d] to vote dilution that is impermissibly generalized."¹³⁸ Likewise, according to a Georgia district court, an individual voter plaintiff did "not differentiate his alleged injury from any harm felt in precisely the same manner by every Georgia voter."¹³⁹ "This is a textbook generalized grievance," the court concluded.¹⁴⁰

However, at least one court (wrongly in my opinion¹⁴¹) denied standing to an individual voter plaintiff who *did* allege targeted

¹³⁵ *Johnson v. De Grandy*, 512 U.S. 997, 1015–16 (1994). However, this pronouncement applied to the merits of a racial vote dilution claim brought under Section 2 of the Voting Rights Act (not to standing to mount a constitutional racial vote dilution challenge).

¹³⁶ *See, e.g., Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 n.12 (2016) ("[S]tanding in one-person, one-vote cases has rested on plaintiffs' status as voters whose votes were diluted.").

¹³⁷ *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020).

¹³⁸ *Id.*

¹³⁹ *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1322 (N.D. Ga. 2020).

¹⁴⁰ *Id.*; *see also, e.g., League of Women Voters v. Va. State Bd. of Elections*, 458 F. Supp. 3d 460, 465 (W.D. Va. 2020) (observing that the proposed intervenors "do nothing to identify how the removal of the witness signature requirement risks the dilution of their vote in any way that is different from the rest of this state's electorate").

¹⁴¹ At least, wrongly in this respect. The court could (and should) still have denied standing to this plaintiff on the ground that his injury was overly speculative.

fraud.¹⁴² A Wisconsin litigant objecting to a series of policies asserted that “the vote dilution did not affect all Wisconsin voters equally.”¹⁴³ Instead, “it had a negative impact on those who voted for Republican candidates and a positive impact on those who voted for Democratic candidates.”¹⁴⁴ The district court nevertheless ruled that these claims “show no more than a generalized grievance common to any voter.”¹⁴⁵ I disagree. The claims may have been impossible to corroborate (because there wasn’t, in reality, significant fraud bolstering Democrats and handicapping Republicans in Wisconsin). If true, though, the claims would indeed establish an injury particularized to Wisconsin Republicans. Wisconsin *Democrats* wouldn’t be harmed by fraudulent ballots that added to their preferred candidates’ vote tallies.¹⁴⁶ So the supposed vote dilution wasn’t actually “a generalized grievance” that “any voter” (even a Democrat) could raise.¹⁴⁷

The above reference to whether there was significant fraud in Wisconsin, *in reality*, also implicates the second aspect of an adequate injury in fact: nonspeculativeness. To confer standing, a harm must be “actual or imminent,” not “conjectural,” “hypothetical,”¹⁴⁸ or “pre-mised on a speculative chain of possibilities” involving “the decisions of independent actors.”¹⁴⁹ In this context, the relevant injury is vote dilution through fraud facilitated by an unduly permissive electoral regulation. The fraud must therefore be occurring already or highly likely to arise—and soon—based on a jurisdiction’s prior history, the state of its election administration, and the activities of would-be fraudsters. If one has to guess that unsavory characters might exploit electoral rules that aren’t as secure as they could be, then the odds of

¹⁴² While not confronted with plaintiffs making allegations of targeted fraud, other courts hinted that even such plaintiffs wouldn’t have particularized injuries. I think these suggestions are incorrect. *See, e.g.,* *Bognet v. Sec’y Pa.*, 980 F.3d 336, 359 (3d Cir. 2020) (“[A] vote cast by a voter in the so-called ‘favored’ group counts not one bit more than the same vote cast by the ‘disfavored’ group”); *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 387–88 (W.D. Pa. 2020) (“[T]he hypothetical illegal vote cast in Philadelphia dilutes all lawful votes cast in the election anywhere in the Commonwealth by the exact same amount.”).

¹⁴³ *Feehan v. Wis. Elections Comm’n*, No. 20-cv-1771, 2020 WL 7250219, at *9 (E.D. Wis. Dec. 9, 2020).

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ At least, they wouldn’t be harmed in terms of dilution. They would still incur the distinct injury of an election that wasn’t free and fair. *That* injury is, in fact, a generalized grievance.

¹⁴⁷ *Feehan*, 2020 WL 7250219, at *9.

¹⁴⁸ *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

¹⁴⁹ *Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 410, 414 (2013).

the fraud being committed are too uncertain to satisfy the nonspeculativeness requirement.

This need for evidence about the probable behavior of third parties finds a parallel in racial vote dilution doctrine. Remember that racial vote dilution, like vote dilution through fraud facilitation, hinges on how private individuals (that is, voters) will act under a given governmental policy.¹⁵⁰ A plaintiff bringing a racial vote dilution claim can't merely assert that minority voters and nonminority voters will differ in their electoral choices. Rather, the plaintiff has to *prove* racial polarization in voting.¹⁵¹ This is typically done by applying sophisticated empirical techniques to reams of electoral data, thereby demonstrating whether, and to what extent, voting in a jurisdiction is racially polarized.¹⁵² Only when presented with such evidence are judges willing to conclude that racial polarization does exist—and that racial vote dilution is a genuine, as opposed to a conjectural, harm.

Consistent with this discussion, most courts have held that plaintiffs' purported injuries of vote dilution through fraud facilitation were excessively speculative. These verdicts should be unsurprising. Because there's little fraud in modern American politics, there's little risk that an electoral regulation (even an overly lax one) will give rise to much fraud. Litigants' declarations that a good deal of fraud *will* occur, then, aren't just unsupported by the evidence—they're flatly rebutted by the facts. As noted earlier, a Pennsylvania district court analyzed the nonspeculativeness requirement in the most depth.¹⁵³ It found that "none of [the plaintiffs'] evidence [was] tied to individuals using drop boxes, submitting forged mail-in ballots, or being unable to poll watch in another county" (the activities that would allegedly result in fraud).¹⁵⁴ So "there [was] insufficient evidence that the harm [was] certainly impending."¹⁵⁵ An Illinois district court similarly criticized a plaintiff for relying on "Seventh Circuit caselaw and several news articles" to demonstrate a likelihood of fraud.¹⁵⁶ These meager

¹⁵⁰ See *supra* notes 108–10 and accompanying text.

¹⁵¹ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 52–74 (1986) (discussing in detail the racial polarization requirement under Section 2 of the Voting Rights Act). However, this requirement is formally part of the merits analysis, not an antecedent examination of standing. *But see* Christopher S. Elmendorf, *Making Sense of Section 2: Of Biased Votes, Unconstitutional Elections, and Common Law Statutes*, 160 U. PA. L. REV. 377, 380 (2012) (describing the requirement as "in effect, a restrictive common law of statutory standing").

¹⁵² See, e.g., *Thornburg*, 478 U.S. at 52–53 (noting two such techniques, "extreme case analysis and bivariate ecological regression analysis").

¹⁵³ See *supra* notes 6–10, 63–68 and accompanying text.

¹⁵⁴ *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 378 (W.D. Pa. 2020).

¹⁵⁵ *Id.* at 377 (internal quotation marks omitted).

¹⁵⁶ *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705, 713 (N.D. Ill. 2020).

citations “provided no basis for concluding that [the plaintiff’s] harms [were] anything but speculative.”¹⁵⁷

But as with the particularity criterion, there’s at least one recent decision on speculativeness with which I would take issue.¹⁵⁸ A New Jersey district court acknowledged “evidence of massive voter fraud in Paterson during the May 2020 election.”¹⁵⁹ “[A] campaign worker reportedly stole ballots out of mailboxes,” and “authorities discovered nearly 900 votes that were mailed in bulk from three individual mailboxes.”¹⁶⁰ The court nevertheless ruled that the plaintiffs lacked standing to challenge the state’s mail-in voting procedures. “[I]t would still be speculative to find that because there was mail-in ballot fraud in past New Jersey elections, fraud will also occur in the November 2020 General Election.”¹⁶¹ But it wouldn’t be speculative, at least not unduly so. One could reasonably infer that the exact same policies that had enabled “massive voter fraud” in the 2020 primary election would probably do so again in the 2020 general election. If even this sort of surmise is impermissible, then essentially no plaintiff would have standing to attack a regulation before it begins inducing fraud in an ongoing election. But in that case, the cause of action for vote dilution through fraud *facilitation* would disappear. It would collapse into a claim of vote dilution through fraud *itself*.

V

MERITS

Suppose a plaintiff vaults the standing hurdles I just recommended. She has evidence that the electoral fraud enabled by a provision will be nonrandom, targeting a specific candidate. She’s a supporter of that candidate. And she has evidence, too, that the fraud is highly likely to arise soon. What happens next? How should a court analyze the plaintiff’s claim on the merits?

¹⁵⁷ *Id.* at 715; *see also, e.g.*, *Paher v. Cegavske*, No. 20-cv-00243, 2020 WL 2748301, at *4 (D. Nev. May 27, 2020) (“Plaintiffs again fail to more than speculatively connect the specific conduct they challenge . . . and the claimed injury [of vote dilution through fraud facilitation].”).

¹⁵⁸ Other courts have also suggested (wrongly in my view) that plaintiffs could never have standing prior to an election under this theory, no matter what evidence they were able to present. *See, e.g.*, *Boockvar*, 493 F. Supp. 3d at 380 (“[A] plaintiff can have standing to bring a voter-fraud claim, but the proof of injury there is evidence of actual fraud in the election and thus the suit will be brought after the election has occurred.”).

¹⁵⁹ *Donald J. Trump for President, Inc. v. Way*, No. 20-10753, 2020 WL 6204477, at *1 (D.N.J. Oct. 22, 2020) (internal quotation marks omitted).

¹⁶⁰ *Donald J. Trump for President, Inc. v. Way*, 492 F. Supp. 3d 354, 360 (D.N.J. 2020).

¹⁶¹ *Way*, 2020 WL 6204477, at *6.

In the litigation about the 2020 election, courts floated two ideas. One was traditional rational basis review, under which a policy that supposedly facilitates fraud would need some plausible connection to a valid governmental objective. As a Pennsylvania district court reasoned, “where the state imposes no burden on the ‘right to vote’ at all, true rational basis review applies,” requiring only that a challenged regulation “is rationally related to a legitimate governmental interest.”¹⁶² Courts’ other suggestion was *Anderson-Burdick* balancing: varying the degree of judicial scrutiny based on the severity of the voting burden imposed by a provision.¹⁶³ In the words of a Nevada district court, “the *Anderson-Burdick* balancing test . . . is ordinarily applicable to these types of cases,” “where it is alleged that an election law or policy violates the right to vote.”¹⁶⁴

But neither of these proposals seems apt to me. Rational basis review, first, is so deferential to jurisdictions that it would almost always lead to potentially dilutive policies being upheld. In other words, jurisdictions would almost always be able to point to valid goals (promoting voter participation, avoiding the expense of additional voting safeguards, maintaining the coherence of the legislature’s chosen system of election administration) that are advanced at least somewhat by the measures at issue. In that case, though, the existence of a claim of vote dilution through fraud facilitation would make essentially no difference. Nearly all regulations that enable electoral fraud would remain in effect, just as if the theory weren’t recognized.¹⁶⁵

As for *Anderson-Burdick* balancing, I previously explained why it’s inapplicable to this context.¹⁶⁶ The doctrine’s first stage—the basis

¹⁶² *Boockvar*, 493 F. Supp. 3d at 384, 391; see also, e.g., *Republican Party of Pa. v. Cortés*, 218 F. Supp. 3d 396, 408 (E.D. Pa. 2016) (“Where the right to vote is not burdened by a state’s regulation on the election process, however, the state need only provide a rational basis for the statute.”).

¹⁶³ See *supra* notes 84–85 and accompanying text.

¹⁶⁴ *Paher v. Cegavske*, 457 F. Supp. 3d 919, 928 (D. Nev. 2020); see also, e.g., *Boockvar*, 493 F. Supp. 3d at 418–19 (applying *Anderson-Burdick* balancing in the alternative to rational basis review).

¹⁶⁵ Cf. *Vieth v. Jubelirer*, 541 U.S. 267, 279 (2004) (plurality opinion) (objecting to an overly deferential standard for partisan gerrymandering claims on the ground “that its application has almost invariably produced the same result . . . as would have [been] obtained if the question were nonjusticiable,” namely that “[j]udicial intervention has been refused”). An additional problem with rational basis review is that it’s unresponsive to the likelihood and scale of any fraud. Whether fraud is certain or speculative, widespread or scattered, rational basis review proceeds in exactly the same fashion. Still another difficulty is that, in contrast to most other domains, rational basis review is rarely used in election law. See *supra* Part II (discussing a range of election law theories). So if it were employed here, it would render this vote dilution context a doctrinal outlier.

¹⁶⁶ See *supra* notes 86–87 and accompanying text.

for all that follows—requires courts to determine the severity of the burden that a given measure imposes on voting. But laws that allegedly give rise to electoral fraud don't levy *any* additional burden on the franchise. Their hallmark, instead, is that they make voting *easier*—*too* easy, in the eyes of their critics, and thus susceptible to abuse.¹⁶⁷ As a Pennsylvania district court put it, “application of the *Anderson-Burdick* framework here presents something of a ‘square peg, round hole’ dilemma.”¹⁶⁸ This is because plaintiffs attack not “a specific regulation affecting their right to vote” but rather “the *lack* of a restriction on someone else’s right to vote.”¹⁶⁹

But while *Anderson-Burdick* balancing is a poor fit here, a variant of the doctrine could work well. Consider a revised first stage that asks courts to assess the likelihood and magnitude of any electoral fraud that might be facilitated by an overly relaxed policy.¹⁷⁰ This new inquiry would completely replace the existing analysis of the severity of the voting burden imposed by a provision. A high probability of widespread fraud would therefore trigger stringent judicial scrutiny, requiring a compelling governmental purpose to whose achievement the disputed measure is narrowly tailored. In contrast, when a regulation is unlikely to induce any substantial fraud, something akin to rational basis review would ensue. And between these poles, when a rule is somewhat likely to enable a nontrivial amount of fraud, courts would apply the equivalent of intermediate scrutiny.¹⁷¹

Like *Anderson-Burdick* balancing, this approach would link the intensity of judicial review to the potential harm that could occur. The relevant harm would just be electoral fraud, not an impediment to voting. Most often, courts would be able to dispose quickly of cases

¹⁶⁷ As a doctrinal matter, since laws that allegedly facilitate fraud impose no additional voting burden, they would trigger the most deferential possible review—akin to rational basis review—under *Anderson-Burdick*'s sliding scale of scrutiny. See, e.g., *Boockvar*, 493 F. Supp. 3d at 284–85. Accordingly, the above critiques of rational basis review would also apply to *Anderson-Burdick* balancing. See *supra* note 165 and accompanying text.

¹⁶⁸ *Boockvar*, 493 F. Supp. 3d at 393.

¹⁶⁹ *Id.* at 410; see also, e.g., *Cook Cnty. Republican Party v. Pritzker*, 487 F. Supp. 3d 705, 716 (N.D. Ill. 2020) (“[T]he *Anderson-Burdick* framework applies to only laws that *restrict* the right to vote, and thus does not apply to the [challenged policies] because they *expand* that right.”).

¹⁷⁰ Of course, this revised first stage overlaps somewhat with the standing requirements I recommended earlier. See *supra* Part IV. This redundancy is simply a function of the close relationship between standing and the nature of the underlying claim.

¹⁷¹ For examples of other proposals seeking to extend *Anderson-Burdick* balancing to new areas, see generally Nicholas O. Stephanopoulos, *Disparate Impact, Unified Law*, 128 *YALE L.J.* 1566 (2019) (suggesting applying an approach similar to *Anderson-Burdick* to racial vote denial claims under Section 2 of the Voting Rights Act); Daniel P. Tokaji, *Gerrymandering and Association*, 59 *WM. & MARY L. REV.* 2159 (2018) (suggesting applying *Anderson-Burdick* to partisan gerrymandering claims).

that progressed to the merits. In contemporary America, few policies seriously risk stimulating widespread fraud. So few suits would require courts to do more than identify a legitimate governmental interest and confirm that it's plausibly furthered by the challenged provision.¹⁷² On occasion, though, courts would have to ratchet up their scrutiny. Sometimes fraud wouldn't be a chimera invoked by bad faith litigants but rather a real danger with the capacity to swing elections and shift representation. In these rare instances, this approach would require courts to be vigilant, to insist on a vital aim that couldn't be attained in other ways, and usually to strike down the unduly permissive measure.

The approach's other advantage is its recognition that fraud prevention isn't the only objective of an electoral system. *Anderson-Burdick* balancing allows voting to be encumbered as long as the burden is imposed for a good enough reason (with what counts as good enough varying in tandem with the burden's severity). Likewise, this variant of *Anderson-Burdick* balancing would permit fraud to arise as long as a sufficient justification exists for the fraud-facilitating regulation (with sufficiency varying along with the likelihood and magnitude of the fraud). This is a sensible framework, in my view. Just as it would be untenable to nullify any policy that hinders voting, regardless of the policy's benefits,¹⁷³ invalidating any provision that enables fraud would also be highly impractical. Some such measures serve important goals like encouraging greater turnout and conserving jurisdictions' limited resources. An electoral system wouldn't be better off if the law forced it to sacrifice these goals in order to avert fraud (especially a small amount of fraud that was unlikely to materialize anyway).¹⁷⁴ Fortunately, this variant of *Anderson-Burdick* balancing wouldn't compel this unwise choice.

Given the centrality of fraud and *Anderson-Burdick* balancing in this discussion, it's worth elaborating on the different roles of fraud in the original and the amended *Anderson-Burdick* doctrines. In a conventional *Anderson-Burdick* case, fraud can come up only in the second stage of the analysis, where some level of scrutiny is applied to

¹⁷² Cf. *King v. Whitmer*, No. 20-13134, 2020 WL 7134198, at *12-13 (E.D. Mich. Dec. 7, 2020) (rejecting a claim of vote dilution through fraud facilitation due to lack of evidence of fraud); *Wood v. Raffensperger*, 501 F. Supp. 3d 1310, 1327-28 (N.D. Ga. 2020) (same).

¹⁷³ See *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (“[T]o subject every voting regulation to strict scrutiny . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.”).

¹⁷⁴ See, e.g., *Donald J. Trump for President, Inc. v. Bullock*, 491 F. Supp. 3d 814, 835 (D. Mont. 2020) (arguing that it “would cripple our great democratic experiment” if “[i]tligants could simply attack any electoral structure as inviting fraud”).

a regulation that makes it harder to vote.¹⁷⁵ At this second stage, fraud can come up only if the defendant asserts its prevention as a rationale for the provision at issue.¹⁷⁶ If the defendant cites fraud prevention, courts treat it as a compelling governmental interest, weighty enough to justify even severe restrictions on the franchise.¹⁷⁷ Courts also don't insist on much evidence of fraud, especially when a measure is challenged facially.¹⁷⁸ And if the antifraud argument succeeds, the law is upheld.¹⁷⁹

All these points are reversed under my proposed variant of *Anderson-Burdick* balancing. Fraud is only a concern in the first stage of the inquiry, where its likelihood and magnitude must be ascertained. It's the plaintiff who must introduce the subject of fraud by alleging that an electoral policy facilitates too much of it. After the plaintiff makes this allegation, it isn't necessarily deemed compelling. (In fact, the vocabulary of governmental interests is inapplicable to claims about fraud by nongovernmental actors.) Evidence about whether, and to what extent, a regulation enables fraud is absolutely critical. These are the facts that cause judicial review to be stringent, lenient, or something in between. And if the antifraud argument prevails, the consequence is the law's invalidation (or, at least, its subjection to strict scrutiny).

These contrasts shouldn't be surprising. They all result from changing the legal position of fraud—from making it the determinant of the intensity of judicial review instead of a state interest that a jurisdiction can put forward. The contrasts should also reassure observers who dislike how the possibility of fraud has been exploited in conventional *Anderson-Burdick* cases.¹⁸⁰ In these cases, many courts (including the Supreme Court) have sustained measures that hindered voting based on flimsy (or even no) evidence that any fraud was

¹⁷⁵ See, e.g., *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 194–97 (2008) (discussing fraud prevention in the context of the state's interests, not the burden imposed on voting).

¹⁷⁶ See, e.g., *id.* at 191 (emphasizing that “[t]he State has *identified* several state interests that arguably justify [its policy],” including “detering and detecting voter fraud” (emphasis added)).

¹⁷⁷ See, e.g., *id.* at 196 (“There is no question about the legitimacy or importance of the State’s interest in counting only the votes of eligible voters.”).

¹⁷⁸ See, e.g., *id.* at 194 (ruling in Indiana’s favor even though “[t]he record contains no evidence of any [relevant] fraud actually occurring in Indiana at any time in its history”).

¹⁷⁹ See, e.g., *id.* at 204 (leaving in place Indiana’s photo ID requirement for voting).

¹⁸⁰ For one prominent example, see *Frank v. Walker*, 773 F.3d 783, 795 (7th Cir. 2014) (Posner, J., dissenting from denial of rehearing en banc) (“As there is no evidence that voter impersonation [sic] fraud is a problem, how can the fact that a legislature says it’s a problem turn it into one?”).

thereby prevented.¹⁸¹ But under my proposed variant of *Anderson-Burdick* balancing, the absence of evidence of fraud would cut the other way. Plaintiffs unable to establish the imminence of targeted fraud would lack standing. Plaintiffs who made it to the merits would merely trigger highly deferential rational basis review if (as usual) they couldn't prove a high likelihood of widespread fraud due to an overly lax policy. So while fraud prevention would be a doctrinal sword here (not a nearly impenetrable shield), it would be quite a dull blade. Most often, under modern American political conditions, its thrust would easily be repelled.¹⁸²

VI RELIEF

But imagine that a claim of vote dilution through fraud facilitation did succeed. Imagine, that is, that a court found that an unduly permissive regulation would likely give rise to extensive electoral fraud (the first stage of my proposed variant of *Anderson-Burdick* balancing); and that the court further concluded that this regulation was poorly tailored to achieve any important governmental interest (the second stage). In this improbable scenario, what should the court do next? How should it remedy the constitutional violation it identified?

In the lawsuits about the 2020 election, plaintiffs asked for various kinds of relief. Some litigants requested that courts impose additional voting safeguards, which would cause electoral rules that were supposedly overly relaxed to no longer enable fraud.¹⁸³ Other plaintiffs argued that judicial invalidation (rather than amendment) was the right remedy: an order enjoining the purportedly fraud-facilitating provision.¹⁸⁴ Still other litigants demanded more sweeping relief, including the decertification of the 2020 election results¹⁸⁵ and

¹⁸¹ See *supra* notes 177–79 and accompanying text.

¹⁸² Again, I'm assuming here (somewhat hopefully) good faith, evidence-based judging. See *supra* note 20. Ideologically inclined judges who find a serious risk of fraud where none exists could certainly manipulate this cause of action. But the possibility of bad faith application exists for all legal claims.

¹⁸³ See, e.g., *Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (discussing “the security measures that [the plaintiffs] seek,” such as “guards by drop boxes, signature comparison of mail-in ballots, and poll watchers”).

¹⁸⁴ See, e.g., *Paher v. Cegavske*, 457 F. Supp. 3d 919, 924 (D. Nev. 2020) (noting that the plaintiffs “request[ed] declaratory and injunctive relief to prevent the Secretary and county administrators from implementing the [mail-in voting] Plan”).

¹⁸⁵ See, e.g., *Bowyer v. Ducey*, No. CV-20-02321, 2020 WL 7238261, at *1 (D. Ariz. Dec. 9, 2020) (“Plaintiffs contest the election and ask this Court to compel the Governor to decertify these results.” (internal quotation marks omitted)).

even the judicially compelled recertification of the results in favor of the losing candidate (President Trump).¹⁸⁶

Had they been implemented, these more aggressive measures would have been nearly unprecedented. Courts almost never nullify elections or require elections to be rerun, no matter how grave an offense is established.¹⁸⁷ More to the point, these drastic steps would have conflicted with the usual practice in cases involving other forms of vote dilution. In these cases, courts don't try to undo vote dilution that has already occurred. They don't annul past elections in which certain people's votes were undermined by malapportionment or gerrymandering. Nor do they question the validity of laws previously enacted by malapportioned or gerrymandered legislatures.¹⁸⁸

What courts generally *do* in vote dilution cases is as follows: First, they strike down the unlawfully dilutive practice. Second, they give guidance (implicit or explicit) to the elected branches as to what sort of replacement would be permissible. Third, the elected branches have an opportunity to adopt a policy that no longer illegally dilutes anyone's vote. Fourth, if a new provision is passed, courts review it to ensure that it, in fact, remedies the vote dilution. Lastly, if the elected branches are unable or unwilling to act, courts cure the vote dilution themselves. They order relief that isn't dilutive but that *is* otherwise respectful of the elected branches' policy preferences.¹⁸⁹

I think these principles apply to, and should be used in, the context of vote dilution through fraud facilitation. To give a sense of how they might be operationalized, suppose that a court has deemed a measure—say, a policy of leaving mail-in ballots in unmonitored piles at government offices—unconstitutionally dilutive. The court's first step would simply be to invalidate the policy. Additionally, the court would explain in its opinion why the policy enabled fraud (because it

¹⁸⁶ See, e.g., *King v. Whitmer*, No. 20-13134, 2020 WL 7134198, at *5 (E.D. Mich. Dec. 7, 2020) (“Plaintiffs ask the Court to . . . order Defendants to transmit certified election results that state that President Donald Trump is the winner of the election . . .” (internal quotation marks omitted)).

¹⁸⁷ See, e.g., *Hall v. State*, 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998) (rejecting “the proposition that a new election is an appropriate remedy,” even “following massive absentee ballot fraud”).

¹⁸⁸ As the Supreme Court put it in its foundational one-person, one-vote decision, a court should take “appropriate action to insure that no *further* elections are conducted under the invalid plan.” *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) (emphasis added).

¹⁸⁹ See generally G. Michael Parsons, *Justice Denied: Equity, Elections, and Remedial Redistricting Rules*, 19 J.L. Soc'y 229 (2019) (discussing remedial proceedings in redistricting cases with an emphasis on timing concerns); Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 GEO. WASH. L. REV. 1131 (2005) (discussing how courts themselves draw district maps in certain situations).

allowed people to pick up, and send in, multiple mail-in ballots) and what changes to the policy could reduce the risk of fraud (perhaps mailing ballots to registered voters instead of making ballots available for in-person retrieval).

At this point, the elected branches would have the chance to revise the policy as they saw fit. They could implement the court's recommended safeguards, or they could try to prevent fraud in some other way (maybe retaining in-person retrieval but ensuring that only registered voters can pick up only one mail-in ballot each). If the elected branches enacted a new law, and if that new law was no longer unconstitutionally dilutive, then the case would be over. But if the elected branches failed to act, or if their new provision was still unlawful under my proposed variant of *Anderson-Burdick* balancing, then the court would have to fashion its own remedy. Most likely, the court would adopt the precautions that it had earlier suggested would avert fraud and thereby bring an end to the illegal vote dilution.

Note that this approach wouldn't *terminate* policies that make voting easier but also give rise to fraud. Rather, it would mandate these policies' *amendment* (by either the elected branches or the judiciary) so that they continue to facilitate voting but without facilitating as much fraud. This is a major advantage, in my view. It means that jurisdictions that have chosen to promote voter participation couldn't be forced through litigation to abandon this aim. It also means that bad faith plaintiffs whose true objection to pro-voting measures is the higher turnout they cause would be stymied even if they prevailed in court. Victory wouldn't give these litigants what they want: fewer people casting ballots thanks to the rescission of the participation-enhancing policies. Instead, these policies would merely be adjusted, to the extent possible, to impede fraud but not voting.

The extent *possible*, unfortunately, isn't the same as the extent one might *want*. It must be conceded that safeguards instituted to make fraud more difficult to commit could also complicate the voting process for some people. This possibility raises the question: Could remedies imposed under my proposed variant of *Anderson-Burdick* balancing violate the *Anderson-Burdick* doctrine itself? Recall the crux of this doctrine: subjecting practices that hinder voting to judicial scrutiny that varies in tandem with the severity of the hindrance.¹⁹⁰ Relief in a suit alleging vote dilution through fraud facilitation could entail a burden on voting. So would such relief, for this reason, be unlawful?

¹⁹⁰ See *supra* notes 84–85 and accompanying text.

As a general matter, no. In the usual case, any new encumbrance on voting would be quite minor, thus triggering quite deferential judicial review. Consider the remedies I mentioned to the policy of stacking mail-in ballots in unsupervised piles: sending these ballots by mail to registered voters or verifying that each registered voter only retrieves a single ballot. These remedies barely burden the franchise; in fact, they could make it easier for some people (those preferring to avoid a trip to a government office) to vote. The remedies are also well-tailored to preventing the fraud that could ensue from loose piles of mail-in ballots, so they would easily survive the low-level scrutiny that would apply to them. Consequently, under the remedial approach I've outlined, jurisdictions and courts wouldn't be trapped between the new vote dilution theory and traditional *Anderson-Burdick* balancing. It would be a straightforward exercise to order relief that cures the vote dilution without itself violating the right to vote.

The existence of a straightforward option, of course, doesn't guarantee its selection. Jurisdictions and (less likely¹⁹¹) courts could choose to "solve" the problem of vote dilution in far more burdensome ways. For example, they could respond to loose piles of mail-in ballots by requiring mail-in ballots to be witnessed and notarized, or even by eliminating mail-in voting altogether. These kinds of remedies would plainly raise red flags under *Anderson-Burdick* balancing. They would severely hamper voting (at least for some people) while thwarting little more fraud than the precautions noted above. In some cases, then, existing doctrine would operate as a useful constraint on the relief available for vote dilution through fraud facilitation. *Anderson-Burdick* balancing would rule out remedies that significantly and unnecessarily inhibit voting—while still allowing jurisdictions and courts to order all other relief.

CONCLUSION

New election law claims don't arise often. In fact, almost thirty years have gone by since the Supreme Court last recognized a novel constitutional theory involving elections: the cause of action for racial gerrymandering,¹⁹² under which districts are presumptively unlawful if

¹⁹¹ These more burdensome remedies might be unavailable to courts because they wouldn't reflect jurisdictions' policy preferences as manifested in their existing regulations. Cf. *Perry v. Perez*, 565 U.S. 388, 394 (2012) (invalidating a court-drawn remedial plan because it "displac[ed] legitimate state policy judgments with the court's own preferences").

¹⁹² See *Shaw v. Reno*, 509 U.S. 630, 652 (1993) (recognizing this "analytically distinct claim").

race was the predominant reason for their creation.¹⁹³ There's an interesting parallel—as well as an important contrast—between vote dilution through fraud facilitation and the last election law claim to be endorsed by the courts. The similarity is that, just as the new vote dilution theory is sometimes in tension with conventional *Anderson-Burdick* balancing, so can the causes of action for racial gerrymandering and racial vote dilution conflict at times. Jurisdictions have to walk a fine line to avoid both diluting the electoral influence of racial minorities and overly considering race during the redistricting process.¹⁹⁴ Accordingly, it's not unprecedented for the Constitution to pull jurisdictions in different directions when they regulate elections. And it may not even be undesirable. The existence of multiple cognizable claims, seeking to vindicate multiple constitutional values, ensures that jurisdictions don't fixate on a single electoral goal at the expense of competing (and comparably compelling) concerns.

The glaring difference between the theories is that the cause of action for racial gerrymandering was responsive to historical developments. In the early 1990s, many jurisdictions indeed focused on race when they redrew their district maps, designing many more districts in which minority voters could elect their preferred candidates.¹⁹⁵ The new constitutional claim thus had an immediate practical impact, leading to liability in case after case.¹⁹⁶ In contrast, as I have stressed throughout this Article, there's little fraud in modern American elections.¹⁹⁷ So recognizing a theory of vote dilution through fraud facilitation wouldn't have significant consequences at this point in time. Doing so would neither result in much successful litigation nor oblige jurisdictions to make major changes to their electoral regulations. The case for the new vote dilution claim, then, ultimately looks to the past and to the future—not to the present. To the past, when rampant electoral fraud did occur, and could perhaps have been mitigated by an additional legal tool. And to the future, as a fire suppressant in case the embers of fraud, barely smoldering today, ever roar back to life.

¹⁹³ See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (announcing the operative standard).

¹⁹⁴ See generally Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517 (2002) (discussing this tension in detail).

¹⁹⁵ See, e.g., Nicholas O. Stephanopoulos, *Race, Place, and Power*, 68 STAN. L. REV. 1323, 1367–71 (2016) (documenting the rise in minority descriptive representation in the 1990s).

¹⁹⁶ See, e.g., Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229, 233–39 (2019) (discussing the 1990s racial gerrymandering litigation).

¹⁹⁷ Though there is much *talk* of electoral fraud in certain circles. So the claim of vote dilution through fraud facilitation is arguably responsive to historical developments in *rhetoric*, if not reality.