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Joshua A. Douglas
University of Kentucky College of Law, joshuadouglas@uky.edu

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Recommended Citation

Joshua A. Douglas, *The Foundational Importance of Voting: A Response to Professor Flanders*, 66 Okla. L. Rev. 81 (2013).

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Notes/Citation Information
Oklahoma Law Review, Vol. 66, No. 1 (Fall 2013), 81-100

This article is available at UKnowledge: https://uknowledge.uky.edu/law_facpub/297

THE FOUNDATIONAL IMPORTANCE OF PARTICIPATION: A RESPONSE TO PROFESSOR FLANDERS

JOSHUA A. DOUGLAS*

Voting is the foundational concept for our entire democratic structure. We think of voting as a fundamental—the *most* fundamental—right in our democracy. When a group of citizens collectively elects its representatives, it affirms the notion that we govern ourselves by free choice. An individual's right to vote ties that person to our social order, even if that person chooses not to exercise that right. Voting represents the beginning; everything else in our democracy follows the right to vote. Participation is more than just a value. It is a foundational virtue of our democracy.

Professor Chad Flanders, in a thought-provoking contribution to this symposium issue, focuses on a narrower view of voting, minimizing its inherent virtue as an individual right and maximizing the ideal of equality to resolve election disputes.[1] To Professor Flanders, although voting certainly encompasses the notions of self-governance and democratic expression, today's clashes over elections and participation are really about equality. Professor Flanders is a fantastic scholar, but I believe that this view is too constricted.[2] By focusing so much on equality, Professor Flanders gives too short shrift to the power of the foundational importance of voting and democratic participation to resolve our election administration disputes.

Differentiating between protecting an individual's right to vote per se and merely ensuring equality among voters has both theoretical and practical consequences. How should we conceive of and discuss the right to vote and its associated controversies? Does the equality principle answer our questions about how we should run our elections, or should we embrace

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* Assistant Professor of Law, University of Kentucky College of Law. Thanks to Professor Chad Flanders for spurring my thoughts on these ideas and asking me to respond to his excellent article. Thanks also to Professor Ned Foley, Professor Mike Pitts, Professor Michael Solimine, and former Constitutional Court of South Africa Judge Albie Sachs for reviewing an early draft of this paper and providing valuable comments, and to Nathan Klein for excellent research assistance.

1. *See* Chad Flanders, *What Is the Value of Participation?*, 66 OKLA. L. REV. 53 (2013).

2. Indeed, despite our slight divergence on some points, we agree on many aspects of how to analyze issues involving the right to vote. Moreover, Professor Flanders is a colleague and friend whose work I admire greatly.

more foundational concepts in resolving these disputes? The answers to these theoretical questions have pragmatic implications: to what extent should courts require election administrators to avoid voting problems such as long lines, irrespective of whether they produce inequality? In my view, we must not lose sight of voting as the foundational bedrock of our democratic regime. If voting is so important to our continued democracy, then the government should not place unnecessary barriers on the franchise, even if those barriers affect all voters equally. It follows that governments, which administer elections, have an affirmative obligation to remove any unnecessary obstacles so that voting is as easy as practicable for everyone. Put differently, if we believe that everyone should have a voice in our democracy, then we should also eliminate avoidable burdens that might affect all voters. Governments, as the first-line actors in the electoral system, should better protect the individual right to vote by guaranteeing an opportunity to participate for all voters.

This response proceeds in two parts. Part I examines the theoretical underpinning of the right to vote as inherent in citizens in our democracy. This flows from the notion that voting is a foundational concept for our entire democratic regime and, indeed, the most fundamental right individuals enjoy. To be clear, Professor Flanders acknowledges the foundational importance of voting several times, but by emphasizing equality within the "voting wars" I believe he passes over too quickly the foundational concepts embedded within the right to vote. Both developing and long-standing democracies have embraced the individual right to vote as a first principle to their democratic structures and constitutional order; the United States should be no different. Although the equality principle is certainly significant as one component of protection, it does not tell the whole story. Participation is important because it provides the bedrock foundation for everything that follows in a democracy.[3]

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3. The discussion over the emphasis of voting as foundational, and the corresponding values to elevate in resolving election disputes, has its roots in political philosophy. *See generally* RONALD DWORKIN, FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION 24-25 (1996); JOHN RAWLS, A THEORY OF JUSTICE 53 (rev. ed., Harvard Press 1999) (1971). But the deeper philosophical discussion is beyond the scope of both Professor Flanders's article and this response, which consider instead primarily the real-world application of this distinction. That is, although the starting principle for democracy impacts the rules we adopt for our electoral system, the focus of our debate is not chiefly on which philosophy is correct but instead on the soundness of the practical effects for election administration. Moreover, we both agree that voting is a fundamental right and that equal access is important; we differ only in which value we emphasize to decide election controversies.

Part II is more practical, focusing on the implications of understanding participation as a right that encompasses a broader notion than just equality. Professor Flanders asserts that if we are mainly striving for equality, then obstacles to voting are not too concerning unless they affect voters unequally. As one example, he considers the problem of long lines at the polls. He admits that long wait times are bad, but he intimates that they are not a dilemma in themselves requiring an immediate fix so long as the lines are the same for everyone. As I explain in Part II, however, long lines are a significant issue even if everyone must endure the same wait to vote because they deter voting, reduce the vote count, and can even call into question who won a close election. Further, the equality principle counsels in favor of a deferential review of governmental election regulations, but courts should be more vigilant in requiring states to remove unnecessary barriers so that voting is as easy as practicable. With equality as the guiding light, governments might revert to the "least common denominator" in their election administration and do little more than strive for equality. The broader concept of voting and participation as a foundational right places an affirmative duty on governments to create an easy voting process and avoid unreasonable obstacles, even if the barriers impact everyone the same. That is, governments should not lose every election lawsuit, as they have legitimate regulatory concerns and economic limitations, but courts should more strictly review election rules to be consistent with the foundational understanding of the right to vote.

I. Beyond Equality: Voting and Participation as a Foundational Principle for Democracy

Professor Flanders admirably advances the debate on the meaning of "participation" by crafting a typology of values inherent in voting, breaking these values into four parts: legitimacy, expressiveness, information-giving, and equality.[4] I largely agree that voting, as a fundamental right, includes these values.[5] I am not as convinced, however, that equality is the most important virtue in resolving what Professor Hasen has aptly described as "The Voting Wars."[6]

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4. *See* Flanders, *supra* note 1, at 56-62.

5. I am also persuaded, however, that legitimacy and information-giving flow from expression and equality. *See* Michael J. Pitts, P = E² *and Other Thoughts on* What Is the Value of Participation?, 66 OKLA. L. REV. 101 (2013).

6. *See* RICHARD L. HASEN, THE VOTING WARS: FROM FLORIDA 2000 TO THE NEXT ELECTION MELTDOWN (2012).

No one disputes that voting is a fundamental right. The question is what value within the right to vote we should rely upon when resolving election disputes. Professor Flanders gives greater priority to the equality interest in participation, as opposed to a voter's inherent interest in casting a ballot. That is, where they clash, equality for the electorate as a whole seems to trump protecting an individual's right to vote, at least where it comes to election controversies. He states that the issue of equal treatment is the "rub": "When does excluding somebody mean a violation of equal treatment? And when does it not?"[7] But this focus on equality obscures the more *important* component of participation: the foundational aspect of voting as a fundamental right to our democratic structure.

To be fair, Professor Flanders acknowledges several times that voting is "foundational" to a democracy.[8] He also touches upon this ideal through his discussion of legitimacy; citing John Locke, he explains that one reason to vote is to ensure that we achieve "the consent of the governed."[9] Indeed, Professor Flanders asserts that "[n]o regime can be legitimate (we think) if it does not allow the people in some fashion to choose its rules and its rulers."[10]

But the right to vote is not only about ensuring proper consent; it encompasses broader ideals because it is *foundational* to the whole concept of democracy. This foundational aspect of voting makes it a personal right for every citizen living within a democratic regime.[11] Voting is the bedrock

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7. Flanders, *supra* note 1, at 61.

8. *See, e.g., id.* at 56-57, 61, 63.

9. *See id.* at 56 (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 52 (C. B. Macpherson ed., Hackett Publ'g Co. 1980) (1690)).

10. *Id.*

11. Although I discuss the fundamental right to vote in this context in individualistic terms, there is also a strand of election law jurisprudence that understands voting as structural, focusing on the ability of groups to influence the rules and laws under which they are governed. *See, e.g.*, Adam B. Cox, *The Temporal Dimension of Voting Rights*, 93 VA. L. REV. IN BRIEF 41, 41 (2007) ("The right to vote is important, of course, for a variety of individualistic reasons. It may be constitutive of citizenship, central to the inculcation of civic virtue, and so on. But contemporary scholarship begins with the premise that the right to vote is meaningful in large part because it affords groups of persons the opportunity to join their voices to exert force on the political process."). I do not mean explicitly to take a particular position in this debate, as I agree that there is also a structural ideal within our election system. Indeed, the "right to vote" has both "individual" and "structural" components. *See* Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1102 (2005); *see also* Joshua A. Douglas, *Is the Right to Vote Really Fundamental?*, 18 CORNELL J.L. & PUB. POL'Y 143, 176 n.207 (2008).

start of our entire governmental structure. Nothing happens—no one is elected, meaning that no laws are passed—until there is a valid election.[12] Professor Flanders does not necessarily disagree with this sentiment, but by focusing so much on equality he glosses over this threshold principle. Equality in voting is extremely important, but it should not be the end (or even the beginning) of the inquiry. As the Supreme Court long ago declared, in robustly recognizing voting rights under the United States Constitution: "[S]tatutes distributing the franchise constitute the foundation of our representative society."[13] During the 2000 presidential election saga, the Florida Supreme Court similarly explained that "an accurate vote count is one of the essential foundations of our democracy."[14]

Indeed, Professor Flanders tacitly recognizes that the foundational right inherent in participation could resolve some election issues that the equality principle would leave untouched. For example, he acknowledges that focusing on equality opens up the possibility that the government could take away the right to vote for all citizens and not infringe on this value, as everyone would still have equal (albeit zero) access to vote.[15] But, of course, as Professor Flanders admits, a representative democracy will not tolerate total disenfranchisement of its citizens. This reveals why the foundational ideal of voting as an individual right can resolve some of the "voting wars," especially when equality cannot. Perhaps this is just a matter of emphasis; Professor Flanders sees the equality principle doing most of the work, but in my view this glosses over the significance of voting as a first principle for democracy.

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12. Of course, some governmental actors are appointed. But we live in a representative democracy, in which we elect leaders to enact laws under which we will live. Moreover, most appointed officials derive their authority either from a constitution (which is democratically adopted) or an elected body. Thus, elections are the first step in our democratic structure.

13. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 626 (1969). The Court went on to explain that "[a]ny unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* Although this sentence speaks in terms of "discrimination," thus implicating equality, it also stands for the proposition that voting is a foundational concept for our constitutional structure.

14. Palm Beach Cnty. Canvassing Bd. v. Harris, 772 So. 2d 1220, 1238 (Fla. 2000) (per curiam), *vacated sub nom.*, Bush v. Palm Beach Cnty. Canvassing Bd., 531 U.S. 70 (2000) (per curiam).

15. *See* Flanders, *supra* note 1, at 61.

The United States Supreme Court has long declared that voting is "fundamental,"[16] the "essence of a democratic society,"[17] and "preservative of all rights."[18] The United States Constitution's protection of the right to vote is "[u]ndeniabl[e]."[19] In the seminal one person, one vote case of *Reynolds v. Sims*, the Court explained:

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.[20]

Although *Reynolds* was an Equal Protection Clause case, this language suggests that when the United States Supreme Court entered the "political thicket,"[21] it did so under the guise of the foundational significance of voting as the backbone of our democratic structure. An alleged infringement required meticulous scrutiny.[22]

Democracies across the world also embrace a broad concept of voting rights as foundational and use that ideal to resolve voting controversies. South Africa, a young democracy, includes in its constitution an explicit grant of the individual right to vote: "Every adult citizen has the right . . . to vote in elections for any legislative body established in terms of the Constitution, and to do so in secret . . . ."[23] The Constitutional Court of South Africa—the nation's highest court for constitutional issues—expounded upon this concept when it invalidated a felon disenfranchisement law:

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16. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 667, 670 (1966); *cf.* Douglas, *supra* note 11, at 145.

17. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

18. Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

19. *Reynolds*, 377 U.S. at 554.

20. *Id.* at 561-62.

21. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946) (coining this phrase).

22. As discussed below, the Court has since backed off of this lofty language through the *Anderson-Burdick* balancing test. *See infra* Part II.C.

23. S. AFR. CONST. § 19, 1996. This is unlike the United States Constitution, which discusses the right to vote only in the "negative" and does not explicitly confer the right to vote upon its citizens. *See* Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. (forthcoming 2014). Every state constitution, however, includes an explicit grant of the right to vote to the states' citizens. *Id.*

> Universal adult suffrage on a common voters roll is one of the foundational values of our entire constitutional order. The achievement of the franchise has historically been important both for the acquisition of the rights of full and effective citizenship by all South Africans regardless of race, and for the accomplishment of an all-embracing nationhood. The universality of the franchise is important not only for nationhood and democracy. The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts. In a country of great disparities of wealth and power it declares that whoever we are, whether rich or poor, exalted or disgraced, we all belong to the same democratic South African nation; that our destinies are intertwined in a single interactive polity. Rights may not be limited without justification and legislation dealing with the franchise must be interpreted in favour of enfranchisement rather than disenfranchisement.[24]

To be sure, there are echoes of an equality principle within this statement, particularly when the court acknowledges that South Africa has great wealth disparities but that the vote signifies that every citizen is part of the same democracy. This indicates that equality in voting is important. But more significantly, the court explained why the right to vote is foundational to its entire understanding of democracy and why taking that right away for felons was unlawful: the vote is a "badge of dignity and personhood" that is vital to South Africa's governing structure.[25] Voting, as an individual right, underlies the entire formation of South African democracy.

The Canadian Supreme Court, too, recognizes the fundamental and foundational nature of voting as the most important right to its democratic order: "All forms of democratic government are founded upon the right to vote. Without that right, democracy cannot exist. The marking of a ballot is

24. *August v. Electoral Comm'n* 1999 (4) BCLR 363 (CC) at para. 17 (S. Afr.); *see also Minister of Home Affairs v. Nat'l Inst. for Crime Prevention & the Re-integration of Offenders* 2004 (5) BCLR 445 (CC) at para. 47 (S. Afr.) ("[T]he right to vote is foundational to democracy which is a core value of our Constitution. In the light of our history where denial of the right to vote was used to entrench white supremacy and to marginalise the great majority of the people of our country, it is for us a precious right which must be vigilantly respected and protected.").

25. *August*, (4) BCLR 363 at para. 17.

the mark of distinction of citizens of a democracy. It is a proud badge of freedom."[26]

Similarly, the European Court of Human Rights declared that the provision for "free elections" within the Convention on Human Rights[27] is "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law."[28] Contracting States to the Convention are thus obligated to take "positive measures" to provide free elections "as opposed to merely refraining from interference."[29] Accordingly, "the right to vote is not a privilege," and "the presumption in a democratic State must be in favour of inclusion."[30] The right to vote is not absolute, however, because governments must promulgate rules for a smooth election; but "[a]ny departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates."[31] The European Court of Human Rights thus recognized the right to vote as foundational to the very concept of a democracy: a "free election" is essential to legitimizing a government and the laws it passes.[32]

These international courts understand the right to vote as going beyond ensuring equality in the opportunity to participate; they instead require a guarantee of participation and view voting as a fundamental right that is inherent to an individual, as it represents an expression of democratic will and self-governance. This is similar to the expressive value Professor Flanders identifies in voting in the first part of his article.[33] But Professor Flanders then largely abandons the expressive value of participation in favor of equality to decide election disputes. Understanding the right to vote

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26. Haig v. Canada, [1993] 2 S.C.R. 995 (Can.) (Cory, J., concurring); *see also* Sauvé v. Canada (Attorney General), [1993] 2 S.C.R. 438 (Can.) ("The right of all citizens to vote, regardless of virtue or mental ability or other distinguishing features, underpins the legitimacy of Canadian democracy and Parliament's claim to power.").

27. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Feb. 3, 1952 (entered into force May 5, 1954), *available at* http://www.echr.coe.int/Documents/Convention_ENG.pdf.

28. Hirst v. United Kingdom (No. 2), 42 Eur. Ct. H.R. 41, ¶ 58 (2005).

29. *Id.* ¶ 57.

30. *Id.* ¶ 59.

31. *Id.* ¶ 62. As examples of when contracting states may limit voting rights consistent with maintaining the integrity and effectiveness of the election procedure, the court noted that governments may impose a minimum voting age to ensure maturity or a residency requirement to identify those who have a stake in the country holding the election. *Id.*

32. *See id.* ¶ 58.

33. *See* Flanders, *supra* note 1, at 58-59.

as vital to an individual's self-worth within a democracy, however, should lead us to focus on the foundational aspect of participation in resolving the "voting wars." If instead we conceive of voting controversies in the United States as primarily involving equality, then we lag behind these other democracies in recognizing the primacy of voting to the entire democratic structure.

Affirming the ability of the broader, foundational role of participation to resolve election disputes has several corollary effects. First, it impacts the kinds of electoral errors we should correct and the obligation of the government to provide for an open electoral process. Second, this conception implicates the level of scrutiny courts should use when construing a challenge to a voting regulation: the significance of the right to vote counsels toward stricter scrutiny of election laws that impact the individual right to vote.[34] Third, this approach changes the way in which we discuss voting rights. A focus on equality as the main basis for resolving election disputes is very different from an emphasis on voting as the most important, foundational right for our democratic structure.

The foundational nature of voting, as a right inherent to an individual living in a democracy, underpins all that follows. Only when we fully recognize this first principle can we meaningfully understand the kinds of voting problems we must address and the proper role of government in structuring our elections.

II. The Government's Obligation in Regulating the Voting Process

Professor Flanders asserts that the government's role in fostering voting rights is simply to make sure the election process is "good enough."[35] By conceptualizing the value of participation and its associated disputes as mostly involving equality, it follows that providing equal access to everyone is "good enough" so long as the government does not impose "unreasonable obstacles."[36] There is no need for a guarantee of participation for all.[37] This makes sense if one starts from the premise that the value of voting is primarily about equality, as the government's obligation is simply to foster that equality—and nothing more. But if we more fully embrace the

34. *See* Douglas, *supra* note 11, at 176, 186; Douglas, *supra* note 23.

35. *See* Flanders, *supra* note 1, at 75.

36. *See id.* at 70 ("[T]he state does not have an obligation to make it maximally easy for people to vote; it has pragmatic and administrative concerns to tend to. The state just (and this is a big 'just') has to remove unreasonable obstacles to voting. . . . People need only a reasonable opportunity to participate, not a guarantee of participation . . . .").

37. *Id.*

foundational right to vote, then merely providing a reasonable and equal opportunity to participate is not enough. This is because some voters may be left behind in the process—infringing their fundamental right to vote. Instead, there should be a concerted effort to make voting as easy as practicable, consistent with the government's regulatory and administrative needs and economic realities. An "as easy as practicable" standard elevates the importance of guaranteeing voter opportunities for all, while still giving governments some room to regulate elections. Put differently, there *should* be a guarantee of participation for every eligible voter, subject only to the government's justifiable constraints. Courts should therefore strike down election practices that place unnecessary burdens on the right to vote, *even if* the laws have an equal effect on all voters.

This debate has relevance both pragmatically and jurisprudentially. If equality alone answers most voting disputes, and if the government does not have an obligation to make voting as easy as practicable, then the government might revert to the least common denominator; there would be little incentive to improve the voting process. For instance, long lines of voters waiting for several hours might be fine so long as everyone must wait the same length of time. This inquiry also implicates the level of scrutiny courts will apply to voting challenges. Assenting to the equality concept for the value of participation leaves little room for courts to mandate governmental improvement in election processes; embracing the foundational principle of voting aspires to more. This Part considers the practical issue of long lines, courts' responses to the long lines problem, and the broader debate regarding the correct judicial test to scrutinize election law challenges.

A. The Problem of Equally Long Lines

Professor Flanders suggests that long lines by themselves are not a major issue that requires a judicial fix.[38] So long as there are no disparities among districts and precincts in the length of time voters must wait (which, admittedly, is not true in our current system),[39] then the government has no further duty to shorten the wait time to vote. This leads to two concerns.

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38. Professor Flanders agrees that long lines by themselves are an "outrage." *See id.* at 74. But his approach, in my view, does not provide a workable theoretical framework to fix the problem.

39. *See, e.g.*, David Damron & Scott Powers, *Researcher: Long Lines at Polls Caused 49,000 Not to Vote*, ORLANDO SENTINEL (Dec. 29, 2012), http://articles.orlandosentinel.com/2012-12-29/news/os-discouraged-voters-20121229_1_long-lines-higher-turnout-election-day (discussing a study of Florida's 2012 Election Day lines).

First, research shows that long lines are a problem by themselves, even if there is no inequality in who must endure waiting in those lines. Second, from a policy perspective, this approach provides no incentive for the government to improve the voting experience.

Long lines "effectively den[y] millions the right to vote," especially because the "psychological implications of waiting in long lines have a significant impact on the amount of time someone is able to spend in a line waiting to vote."[40] One psychologist has stated that "'waiting in line is often experienced as an obstruction.'"[41] Long lines depress voter turnout: according to testimony from voting expert Professor Stephen Ansolabehere at a Senate Rules Committee hearing on voter registration, during the 2008 election, four percent of registered non-voters did not vote because of long lines at the polls.[42] This equates to about 1.67 million registered voters who were either unable or chose not to vote because of long lines, illustrating the deterrent effect of a long wait time to vote.[43]

Professor Flanders's approach would address this concern only if the lines are unevenly dispersed throughout the country, as this would pose an equality problem.[44] But what if we had equally long lines everywhere? Excessively long lines by themselves are concerning for the right to vote as a foundational concept, regardless of whether some voters suffered longer wait times than others. That is, the deterrent effect of a long line for any particular voter is problematic irrespective of whether every precinct in the country had an equal percentage of people fail to vote because of long lines. The equality rationale, however, would provide no judicial relief in this situation because everyone must endure the same excessively long wait to

40. Boe M. Piras, Note, *Long Lines at the Polls Violate Equal Protection and Require Judicial and Legislative Action*, 6 U. ST. THOMAS L.J. 658, 658, 670 (2009).

41. *Id.* at 670 (quoting Thierry Meyer, *Subjective Importance of Goal and Reactions to Waiting in Line*, 134 J. SOC. PSYCHOL. 819, 820 (1994)).

42. *Voter Registration: Assessing Current Problems: Hearing Before the S. Rules Comm.*, 111th Cong. 15 (2009) (testimony of Stephen Ansolabehere), *available at* http://www.vote.caltech.edu/content/united-states-senate-committee-rules-and-administration (follow hyperlink under "Attachment"). Of those registered non-voters who tried and failed to vote, 8.1% did not vote because of long lines. *Id.* at 20. Three percent of registered non-voters who chose not to go to the polls at all pointed to the potential for long lines as the reason. *Id.*

43. Piras, *supra* note 40, at 660; *see also id.* at 673 ("These statistics are staggering and support the notion that the psychological impact of waiting in lines is real and it deters a substantial number of voters in every election. Not only do long lines have psychological implications for the elections in which they occur, psychological implications of long lines can also have significant lasting effects . . . .").

44. *See* Flanders, *supra* note 1, at 74-75.

vote. This approach fails to recognize that a long line might deny the right to vote for some people who cannot wait, even if all voters are treated the same.

Long lines also could impact the result of a close election. In a study of the 2008 presidential primary in California, 1.89% of voters "reneged," or waited in line but left without voting.[45] The margin of victory in some recent elections has been lower than this rate—suggesting a tangible effect of long lines on close races.[46] Professor Flanders's approach, however, provides few answers to these problems if, hypothetically, the long wait was the same for the entire electoral population. Focusing principally on equality in participation leaves these several million voters without a practical remedy for improving the voting process.[47]

We should address long lines that cause over a million people not to vote, regardless of whether the long line problem is spread across the country evenly. Our democratic system suffers when the system itself precludes people from voting. As one commentator stated, "election officials have an affirmative duty to create an election system that provides an *adequate* and substantially equal opportunity to vote for all voters."[48] An election that effectively excludes over a million voters because of long lines is not adequate, regardless of whether the government has substantially achieved equality in the voting process.

B. Judicial Consideration of the Long Line Problem

Recognizing the government's obligation to provide easy access to the polls also impacts judicial resolution of cases challenging long lines. Four courts have considered explicitly the long lines problem. In two cases, courts found that long lines were a concern, invoking a broader

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45. Douglas M. Spencer & Zachary S. Markovits, *Long Lines at Polling Stations? Observations from an Election Day Field Study*, 9 ELECTION L.J. 3, 15-16 (2010) (reporting observations from thirty polling stations in three counties).

46. *See* Joshua A. Douglas, *Procedural Fairness in Election Contests*, 88 IND. L.J. 1, 18 (2013).

47. Professor Mike Pitts, in his well-written response to Professor Flanders, suggests that Professor Flanders's embrace of an expressive value in voting answers the problem of equally-distributed long lines. *See* Pitts, *supra* note 5, at 106 n.27. That may be so as a theoretical matter, but it is still unclear how the expressive value would work in the practical setting of a lawsuit. Courts, therefore, would have only a murky doctrinal hook with which to handle the issue. Moreover, the focus on the equality ideal masks the efficacy of the expressive value of participation.

48. Piras, *supra* note 40, at 658 (emphasis added).

jurisprudential lens than the equality rationale would allow.[49] The other two cases embraced equality as the focus: in one case, the court found no inequality and therefore provided no remedy for the long lines.[50] The other opinion took issue with long lines, but primarily under an equality rationale.[51] The more restrictive analysis of these latter cases portends judicial sanctioning of greater limits on voting rights.

First, in *Ury v. Santee*, the court invalidated a city election because some qualified voters "were forced to wait unreasonable lengths of time to obtain and cast their ballots . . . as a result of the consolidation of 32 precincts into six precincts."[52] The court found that there had been an "effective deprivation of plaintiffs' right to vote," as the United States Constitution includes a right for citizens to have "a reasonable opportunity to vote in local elections, that is, to be given reasonable access to the voting place, to be able to vote within a reasonable time and in a private and enclosed space."[53] Although the court commented on the inequality between the largest and smallest precincts,[54] the focus of the discussion was on the city's failure "to provide adequate and equal voting facilities for all of the qualified voters who desired to cast their ballot on such date."[55] That is, the court found a violation based on the city's inability to set up an adequate voting process, separate from and in addition to the equality issue.

More recently, just prior to the 2008 presidential election, the United States District Court for the Eastern District of Pennsylvania issued an injunction in *NAACP v. Cortes* requiring any precincts where half of the electronic machines malfunctioned to distribute paper ballots, in part to ward off long lines.[56] The court observed:

> [W]e would be blind to reality if we did not recognize that many individuals have a limited window of opportunity to go to the polls due to their jobs, child care and family responsibilities, or

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49. *See* NAACP State Conference of Pa. v. Cortes, 591 F. Supp. 2d 757, 765-67 (E.D. Pa. 2008); Ury v. Santee, 303 F. Supp. 119, 124 (N.D. Ill. 1969).

50. *See In re* Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999, 2001 SD 62, ¶ 9, 628 N.W.2d 336, 339 & n.2.

51. *See* League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 466 (6th Cir. 2008).

52. 303 F. Supp. at 124.

53. *Id.* at 125-26.

54. *See id.* at 123.

55. *Id.* at 125.

56. NAACP State Conference of Pa. v. Cortes, 591 F. Supp. 2d 757, 765, 767-68 (E.D. Pa. 2008).

> other weighty commitments. Life does not stop on election day. Many must vote early or in the evening if they are to vote at all.[57]

Because "[t]he right to vote is at the foundation of our constitutional form of government" and "all our freedoms depend on it," the court declared unacceptable long lines due to inoperable machines.[58] Although the court stated that delay from broken machines would risk violating the Equal Protection Clause (likely to follow Supreme Court jurisprudence on voting rights), the focus of the analysis was not on equality but instead on the deprivation for "many citizens of their right to vote."[59]

Contrast that analysis with the discussion in a 1999 election contest in South Dakota.[60] The court heard evidence that many voters had to wait between forty-five and ninety minutes to vote, that parking at the polling station was inadequate, and that some voters showed up several times throughout the day but never voted because the lines were too long.[61] The Supreme Court of South Dakota rejected the challenge to the election results (which had a margin of victory of thirty-four votes out of over 3300 ballots cast) because "[m]ere inconvenience or delay in voting is not enough to overturn an election."[62] As there was only one voting location, moreover, there was no plausible equal protection argument: all voters had the potential to endure the same lines, as they all voted at the same place.[63] Although the court did not say so explicitly, its analysis epitomized the equality rationale of participation: so long as everyone's experience is theoretically equal, there is no voting irregularity—even if many people were practically unable to vote because of long lines.

Finally, in *League of Women Voters of Ohio v. Brunner*, the Sixth Circuit held that Ohio's voting mechanics were insufficient, but it did so mostly under the Equal Protection Clause.[64] The court explained that:

> Voters were forced to wait from two to twelve hours to vote because of inadequate allocation of voting machines. Voting

57. *Id.* at 765.

58. *Id.* at 767.

59. *See id.* at 765.

60. *Compare id.*, *with In re* Election Contest as to Watertown Special Referendum Election of Oct. 26, 1999, 2001 SD 62, 628 N.W.2d 336.

61. *In re Election Contest*, ¶ 6, 628 N.W.2d at 338.

62. *See id.* ¶¶ 3, 8, 628 N.W.2d at 338-39.

63. *See id.* ¶¶ 3, 8-9, 628 N.W.2d at 338-39 & n.2.

64. *See* League of Women Voters of Ohio v. Brunner, 548 F.3d 463, 466 (6th Cir. 2008).

> machines were not allocated proportionately to the voting population, causing more severe wait times in some counties than in others. At [at] least one polling place, voting was not completed until 4:00 a.m. on the day following election day. Long wait times caused some voters to leave their polling places without voting in order to attend school, work, or to family responsibilities or because a physical disability prevented them from standing in line.[65]

The court acknowledged the problem of long lines, without tying it specifically to disparities across districts; yet it chastised Ohio's election administration on equal protection grounds.[66] That is, unlike in the other case that found a violation because of the inherent problem in long lines for everyone, the court's focus was instead on whether the long lines produced inequality for some voters as compared to others. This demonstrates that the equality rationale can be a valuable tool in ensuring a fair electoral process. The court, however, never stated whether the long lines themselves were a concern separate from the inequality in the length of lines across the state. This further analysis would have better signaled the foundational importance of the right to vote.

If we countenance solely a limited equality rationale for resolving issues about electoral participation and voter access, then the courts in the South Dakota election contest and the Ohio long lines case were correct. The South Dakota court ruled that there were no voting irregularities, despite the fact that the number of potential voters who did not vote due to long lines exceeded the margin of victory, because there was no inequality in who was forced to wait in the long lines. This election involved a single polling place, so it was impossible to find inequality in how the state treated voters because everyone endured the same lines at the same location.[67] The Sixth Circuit in the Ohio case found problems with Ohio's election system based on equal protection principles, not under due process or another doctrine that would recognize the importance of participation as going beyond equality. But these courts failed to take the next step and consider also whether the election regulations impeded the exercise of voting *qua* voting, separate from whether there was unequal treatment. That is, the courts did

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65. *Id.* at 477-78.

66. *See id.* at 476-78. The court also found a violation of substantive due process but spent very little time on the analysis. *See id.* at 478-79.

67. *See In re Election Contest*, ¶ 8, 628 N.W.2d at 339. The court did not discuss whether the length of the line at the polling place differed throughout the day.

not look beyond equality to determine if the election practices also impeded the right to vote itself as a fundamental right.

If, however, we properly understand participation and its associated conflicts as having broader implications that encompass the foundational right to vote, then these courts were incorrect in their legal analyses. Instead, the approaches in both *Cortes* and *Ury* were better because, separate from whether the wait times were unequal, the courts recognized that long lines deter too many voters from participating in the democratic process. The foundational role the courts placed on voting dictated the interpretive lens through which they resolved these disputes. The courts that provided greater protection for individual voters—a norm we should embrace—went beyond equality and endorsed voting as a foundational and fundamental right.

The equality principle for resolving disputes about participation is too narrow and, therefore, is insufficient. Abandoning equality as an important level of protection is unwarranted, but it should not be the only consideration in fostering voting rights and setting up our electoral system. If we properly recognize the significance of participation in its broader sense, then it follows that the government has an affirmative duty to make voting as easy as practicable to promote that participation, subject to administrative burdens and economic realities. It means that lines that are too long so as actually to deter voting are a problem regardless of whether voters in only some jurisdictions suffer from those lines.

C. The Proper Judicial Test for Infringement of Voting Rights

This debate impacts how courts should approach other election administration cases beyond just the issue of long lines. Current Supreme Court jurisprudence generally adheres to the equality principle, focusing mainly on whether the government is providing equal access to all voters. The United States Constitution does not specifically grant a right to vote, but "once the franchise is granted to the electorate, lines may not be drawn which are inconsistent with the Equal Protection Clause of the Fourteenth Amendment."[68] Under the current *Anderson-Burdick* "severe burden" test, courts ask whether a challenged voting regulation imposes a "severe" burden on a particular group or class of voters.[69] If it does, then the court

68. Harper v. Va. Bd. of Elections, 383 U.S. 663, 665 (1966); *see also* Douglas, *supra* note 23.

69. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) (citing Norman v. Reed, 502 U.S. 279, 289 (1992)); *see also* Anderson v. Celebrezze, 460 U.S. 780, 793 (1983). Professor Justin Levitt has cogently explained how the severe burden test suffers from the

applies strict scrutiny review.[70] If the law does not impose a severe burden—the more typical approach—then the court analyzes the government's election administration under a deferential lower level of scrutiny, balancing the burdens the law does impose against the state's regulatory interests.[71] The Equal Protection Clause thereby both defines the right to vote and delineates its scope. This has a tangible impact on the way courts construe challenges to how the government runs an election, especially because it means that courts will usually sanction the government's election practices.

But understanding the broader implications of participation means that courts should look beyond the current highly-deferential jurisprudence of the Equal Protection Clause—perhaps to due process principles—in reviewing challenges to voting regulations.[72] Courts should embrace heightened review, such as through a wider use of strict scrutiny, when considering election law disputes.[73] Indeed, some lower courts have alluded to invoking more robust protections, particularly by recognizing voters' due process rights. For instance, several federal courts in Ohio expressed concerns about the due process implications of Ohio's law involving provisional ballots.[74] The law prohibited election boards from counting the ballot of a voter who showed up at the correct polling place but went to the

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"denominator problem," in that Supreme Court Justices have varied as to "what is the relevant total population in the case of burdens like excessive lines that are unevenly, though not necessarily discriminatorily, distributed." Justin Levitt, *Long Lines at the Courthouse: Pre-Election Litigation of Election Day Burdens*, 9 ELECTION L.J. 19, 33 (2010) (highlighting the differing approaches from the various opinions in *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008)). For a further discussion of the indeterminacy of the *Anderson-Burdick* test, see Edward B. Foley, *Voting Rules and Constitutional Law*, 81 GEO. WASH. L. REV. (forthcoming 2013).

70. *See Burdick*, 504 U.S. at 433-34.

71. *See id.* at 434 (citing *Anderson*, 460 U.S. at 788); *see also id.* at 433 ("[T]he mere fact that a State's system creates barriers . . . does not of itself compel close scrutiny." (citations omitted) (internal quotation marks omitted)); *Anderson*, 460 U.S. at 788-89.

72. *See* Douglas, *supra* note 23 (explaining the current "severe burden" test and advocating for courts to use strict scrutiny).

73. *See id.*; *see also* Piras, *supra* note 40, at 667 ("[C]ourts must be explicit in affirming that a wait that exceeds two hours strongly indicates a breach in the government officials' duty to provide an election system that does not deprive voters of their fundamental rights and would trigger a strict scrutiny analysis.").

74. *See* Hunter v. Hamilton Cnty. Bd. of Elections, 635 F.3d 219, 243 (6th Cir. 2011) (expressing "substantial constitutional concerns" related to due process); Hunter v. Hamilton Cnty. Bd. of Elections, 850 F. Supp. 2d 795, 844 (S.D. Ohio 2012).

wrong precinct at that location due to poll worker error.[75] The Sixth Circuit, in agreeing with the district court that due process would not allow this practice, declared that "[t]he Due Process Clause protects against extraordinary voting restrictions that render the voting system 'fundamentally unfair.'"[76] Thus, there are touches of due process considerations in election law jurisprudence that heighten the level of scrutiny.

The Supreme Court, however, has not embraced a due process understanding of voting, at least in recent election law cases.[77] Although the Court once declared that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government,"[78] current Supreme Court jurisprudence has pulled back from this broader notion of voting rights to embrace the more restrictive equality ideal. Under this analysis, the government usually enjoys deferential review of its election regulations. The presumption is in favor of the government's election practice, and a voter-plaintiff has a high burden to challenge the law successfully. The Court should instead revert to its original understanding of voting as supporting the foundation of our democratic structure.[79] In doing so, it will elevate the importance of the right to vote and require heightened scrutiny of election challenges. The government should have the

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75. *Hunter*, 635 F.3d at 243.

76. Ne. Ohio Coal. for the Homeless v. Husted, 696 F.3d 580, 597 (6th Cir. 2012); *see also* Serv. Emps. Int'l Union, Local 1 v. Husted, 887 F. Supp. 2d 761, 794-95 (S.D. Ohio 2012), *aff'd in part, rev'd in part sub nom. Ne. Ohio Coal. for the Homeless*, 696 F.3d 580, *aff'd*, 515 F. App'x 539 (6th Cir. 2013).

77. As Professor Ned Foley has explained, one might read a due process strand within *Bush v. Gore*, 531 U.S. 98 (2000), based on the Court's finding of an "arbitrary denial of the fundamental right to vote," but that even this due process conception has an equal protection component because it "require[s] inequality in the treatment of voters to establish a valid claim." Edward B. Foley, *The Future of* Bush v. Gore*?*, 68 OHIO ST. L.J. 925, 960-61 (2007). Professor Pam Karlan explicitly faulted the Court's analysis in that case for failing to recognize the substantial due process interest in voting. Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 MCGEORGE L. REV. 473, 490 (2002); *see also* Peter M. Shane, *Disappearing Democracy: How* Bush v. Gore *Undermined the Federal Right to Vote for Presidential Electors*, 29 FLA. ST. U. L. REV. 535, 562-64, 574, 578 (2001) (describing the possible due process arguments for the right to vote within *Bush v. Gore*).

78. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

79. *See, e.g.*, Baker v. Carr, 369 U.S. 186, 208 (1962) ("A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution . . . .").

burden of proving that its election regulations are necessary and do not infringe voters' rights too much. That is, because voting is a fundamental right, the presumption should be in favor of the voter instead of the government. This in turn will force the government to make voting as easy as *practically* possible. Put simply, if a plaintiff can show that the government can make voting easier without undue regulatory or economic difficulties, then courts should obligate the government to do so. It should ultimately be the government's burden to justify its voting rules.

This is not to say that states should lose every voting case. Governments have important administrative needs, and not all voting changes are inexpensive. As the Supreme Court has stated, "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[80] States have to maintain the integrity of elections and ward off fraud, and state coffers are not unlimited. But employing heightened scrutiny for infringements on the right to vote does not require the invalidation of every election law, as the government can often demonstrate that its voting regulation is the least intrusive and narrowest means of achieving a fair, smooth, and fraud-free election.

The precise contours of a refined judicial test are beyond the scope of this Response, but it suffices to say that courts should scrutinize state election regulations more carefully to ensure they do not infringe an individual's right to vote without sufficient justification. That is, courts should not simply rubberstamp a government's election law rules through deferential review. If a plaintiff can show that there is a relatively inexpensive and effective way to improve the election process—even if there is no current inequality in voting—then there is no reason not to require the government to update its election administration in this way. Put differently, if the government can run an election in a manner that opens the doors more easily for more voters who would otherwise face some barrier to vote—and if the reform does not impose too great of a burden on the state to enact—then why should our laws not mandate that? This is not to suggest that a court should involve itself in the day-to-day minutia of election administration, especially if a proposed reform will not have much of an impact on the ability to vote. Moreover, states have valid budgetary and administrative limitations in running an election. But if a plaintiff can prove that a government's current election practice impedes the ability of some voters to cast a ballot, and can also offer an alternative that is feasible

80. Storer v. Brown, 415 U.S. 724, 730 (1974).

for the government to adopt, then courts should order that result. This approach best protects an individual's fundamental right to vote.

Focusing primarily on equality in participation allows us to excuse government election practices that do *not* make voting as easy as practicable because it leaves room to infringe the individual right to vote without a good enough reason. It could, for instance, allow states to enact stricter barriers to voting that affect everyone the same. Embracing more fully the foundational status of voting as a fundamental right, by contrast, places a greater obligation on the government. States should not be allowed to skirt by in providing an electoral process that is merely focused on equality. If we are concerned about only equality, then that is all that states will achieve. The equality ideal allows a presumption in favor of the government and against voter challenges. To stay consistent with the foundational importance of voting, not to mention to remain in line with the rest of the world's democracies, we need to switch that presumption. By aspiring to more—while still recognizing that states must regulate elections and that governments have limited resources—we can make the voting process smoother and open it up to more participants.

III. Conclusion

Placing the meaning of participation and voting in the proper theoretical context answers various corollary questions about how courts should construe election challenges and how governments should structure their elections. If the "voting wars" are mainly about equality, then courts will almost always defer to a government's choices about how to run the election, so long as there are no obvious equality concerns. Governments would only have an obligation to administer an election that is "good enough." But this minimizes the significance of voting as a foundational right to our democracy and leaves many voters out of the process. If we more fully embrace the foundational concept of voting, we better adhere to what democracies all over the world recognize: that the democratic structure starts with the right to vote. Moreover, courts should consider more than just the value of equality in voting and should scrutinize the administration of an election more closely to ensure fundamental fairness and easy access to the democratic process. The right to vote has foundational and fundamental importance beyond equality. Courts and legislatures should regulate the election process accordingly.